

APPROVED

MINUTES OF THE METRO COUNCIL

June 9, 1994

Council Chamber

Councilors Present: Presiding Officer Judy Wyers, Deputy Presiding Officer Roger Buchanan, Richard Devlin, Jim Gardner, Mike Gates, Jon Kvistad, Ruth McFarland, Susan McLain, Rod Monroe, Terry Moore and George Van Bergen

Councilors Absent: Roger Buchanan and Sandi Hansen

Also Present: Executive Officer Rena Cusma

Presiding Officer Wyers called the regular meeting to order at 4:06 p.m.

1 INTRODUCTION

None

2 CITIZEN COMMUNICATIONS TO THE COUNCIL ON NON-AGENDA ITEMS

Jack Burns, Central Eastside Industrial Council (CEIC), 516 SE Morrison, Portland, reported on current events related to disposition of the Water Avenue Ramp. He said CEIC had appealed to the Land Use Board of Appeals (LUBA) regarding the Portland City Council's 4-1 vote against constructing the Water Avenue Ramp. He said LUBA denied the appeal and said CEIC then took it to appellate court. He said the court referred the case back to LUBA and instructed it to reverse its decision and determine if the City had complied with its comprehensive plan. He said in light of those recent events, the City might have to comply with its 4-1 vote in 1990 in favor of the Water Avenue Ramp. He said based on these events, CEIC asked the Joint Policy Advisory Committee on Transportation (JPACT) this date to restore funds for the ramp. He said JPACT did not restore the funds, but said it would have to eventually based on the decision(s) CEIC expected to occur. Councilor Van Bergen asked if the City would comply, or if they would continue to appeal. Mr. Burns said when the ruling was final, he believed the City would comply. The Council and Mr. Burns briefly discussed the history of the Water Avenue Ramp. Councilor Monroe said JPACT had stated for the record it supported south-bound access in that area, but had not allocated funds because they were told that the City could continue to legally oppose the project, so JPACT chose not to tie up the funds at this time until the issues were resolved.

3 NON REFERRED RESOLUTIONS

3.1 Consideration of Resolution No. 94-1972, For the Purpose of Ratifying and Approving Contract Amendment No. 4 Between Metro and Oregon Waste Systems, Inc. and Directing Legal Counsel to Issue an Opinion Concerning the Allocation of Power Between the Council and the Executive Officer; and

Resolution No. 94-1973, For the Purpose of Obtaining a Judicial Declaration of the Validity of Amendment No. 4 to the Contract Between Oregon Waste Systems, Inc. and Metro

Presiding Officer Wyers introduced and explained Resolution Nos. 94-1972 and or 94-1973 would do.

Bill Gary, introduced Jim Mountain, both of Harrang Long Gary & Rudnick. Mr. Gary said they were retained to investigate the validity of the Executive Officer's authority to sign contract Amendment No. 4 to Metro's waste disposal contract with Oregon Waste Systems, Inc. (OWS) and to also look at the allocation of powers under the 1992 Metro Charter between the Executive Officer and the Council. He said they were given the following questions to answer: 1) Under the 1992 Metro Charter, what powers and duties are vested in the Metro Council and what powers and duties are vested in the Executive Officer? What authority does the Metro Council have to define and limit the powers and duties of the Executive Officer? What authority does the Executive Officer have to make binding decisions on behalf of Metro in the absence of Metro Council authorization? 2)

METRO COUNCIL

June 9, 1994

page 2

Under the 1992 Metro Charter, what powers and duties has the Metro Council validly assigned to the Executive Officer? 3) Did the Executive Officer have authority to execute Amendment No. 4 to the waste disposal contract with OWS on behalf of Metro? If so, what is the source of that authority? 4) If the Executive Officer did not have the authority to execute Amendment No. 4 to the waste disposal contract with OWS, what is the legal status of the waste disposal contract? What are the rights, responsibilities and remedies of the Metro Council, the Executive Officer and OWS? 5) If the Executive Officer did not have the authority to execute Amendment No. 4, what steps should the Metro Council take to protect the interests of Metro? and 6) If the Executive Officer did have the authority to execute Amendment No. 4, what actions can the Metro Council take to assert more direct oversight over the execution and amendment of Metro contracts?

Mr. Gary said initially, they were asked to examine the first two questions listed above and report back on their preliminary conclusions regarding those questions. He said when they completed work on those two questions, their conclusion with regard to the allocation of authority made the answer to the remaining questions and the specific question about the validity of Amendment No. 4 fairly easy to sort out. He said when they made the initial report to Presiding Officer Wyers, it was determined that there should be an Executive Session for the full Council to decide how to proceed. He said their preliminary conclusion was that Amendment No. 4 was not valid nor was it binding upon Metro and said that led to a series of options/decisions for the Council to make. He said during the Executive Session, they fully explored their legal conclusions, answered the Council's questions, and identified seven options that were available to the Council. He said during discussion at the Executive Session, other options were explored and considered, or combinations thereof, which resulted in the two resolutions for consideration by the Council at this time.

Mr. Gary said whether Amendment No. 4 was valid or not depended on who had ultimate authority under the 1992 Metro Charter, the Executive Officer or the Council. He said once that issue was determined, the next question to ask was what did Metro ordinances say how contracts should be handled. He said based on those issues, they had concluded that Amendment No. 4 was handled without the proper authority. He said the Council's next course of action was to decide what to do.

Mr. Gary displayed a chart which showed the powers granted to the Executive Officer and the Council per state statute and the Metro Charter and referred to his and Mr. Mountain's May 31, 1994, memorandum "Powers and Duties of Metro Council and Metro Executive: Authority to Approve Amendments to Solid Waste Facility Contracts" dated May 31, 1994. Mr. Gary said prior to the 1992 Metro Charter, Metro was organized in a separation of powers model with administrative authority given to the Executive Officer. He said the Charter Committee explored different governmental models for Metro and continued discussion on the separation of powers model. He said in July 1992, the Charter Committee determined the Council was the governing body of Metro and that all power was vested in the Council except where the Charter provided otherwise. He said the Executive Officer's duties were changed quite dramatically, and said that the primary duties of that office was to enforce ordinances and execute the policies of the Council. He said the Executive Officer should also administer Metro, except for the Council and the Auditor. He said the Executive Officer was again given veto powers, but said that power was more limited than under state statutes. He said based upon those changes, and their review of the Charter Committee minutes, he said they concluded the 1992 Metro Charter fundamentally changed Metro's government from a "separation of powers" structure to a "residual power government," or one in which the power resided with the Council unless it was found elsewhere. He said that meant the Council had the power via statute or resolution to require the Executive Officer to bring issues such as Amendment No. 4 to the Council for review and approval. Mr. Gary said those conclusions concluded the first stage of their analysis.

Mr. Gary said the next stage of their analysis was to determine how powers had been allocated under the Charter. He said they researched Metro's ordinances in Metro Code Chapter 5.05 related to flow control and solid waste contracts. He said Metro conducted its business by "designating" solid waste facilities, including Columbia Ridge Landfill. He discussed various Metro Code subsections and specifically cited 5.05.030(c) which provided that an agreement or an amendment to an agreement between Metro and a designated facility shall be subject to approval by the Metro Council prior to execution by the Executive Officer. He noted Executive Officer Cusma did submit Amendment No. 4 to the Council for its consideration, but said prior to conclusion of that consideration, the Executive Officer executed the contract amendment on her own authority and that it was not approved.

METRO COUNCIL

June 9, 1994

page 3

by the Metro Council. He said based on ordinance language, it was their conclusion that Amendment No. 4 was not validly approved by the Executive Officer for want of approval by the Council.

Mr. Gary said that conclusion led to the next step of their analysis with respect to Amendment No. 4. He said under Oregon law, if an agent for an entity appeared to have the authority for what that agent was doing, the person or persons dealing with that agency could rely upon the apparent authority of the agent. He said, however, that the doctrine of apparent authority did not generally apply to public bodies, and under Oregon decisions, if there was an ordinance or statute that specifically made clear the agent did not have the authority to do what the agent purports to do, then a third party contracting with a public body could not rely upon that apparent authority and must be bound by the terms of the ordinance language. He said since they determined there was an ordinance that specifically limited the authority of the Executive Officer to approve Amendment No. 4, they concluded that Amendment No. 4 was not valid and not binding on Metro at this time. He said that conclusion brought them to the third step of their analysis which was ask which direction the Council should go now. He said they had identified nine or ten options at the Executive Session for the Council to pursue and said two of those options were before the Council in resolution form.

He said the Council could ratify Contract Amendment No. 4 at this time and also direct the issuance of an opinion to clarify the authority of the Council with regard to contracting authority. He said the other option was to take no action on Amendment No. 4 at this time, but to ask for a judicial resolution on the question of the validity of that contract which would allow the Council, the Executive Officer and other interested parties to the contract to bring closure to whether or not the amendment was validly executed, but also to which body had ultimate contract authority.

Councilor Devlin asked if Metro did ask for a judicial decision, if that judicial decision would resolve Metro's contracting issues as a whole, or the issues related to Amendment No. 4 only. Mr. Gary said legal counsel would not be in control of the depth of the opinion because lawsuits involved more than one side and said judicial decisions were usually based on what the parties had determined to argue about. He said a judicial decision would clarify who had authority with regard to Amendment No. 4 at least. Councilor Devlin asked if Council adoption of Resolution No. 94-1972 would resolve whether or not Amendment No. 4 was valid. He asked if OWS could petition the court or the Council to relieve themselves of the responsibility of the amendment. Mr. Gary said OWS could do so. He said it would have to be decided how to manage the issue of the contract pending the issuance of the validity of the contract amendment. He said attorneys for both sides would likely try to reach agreement for all parties on how to proceed to maintain the status quo and not compromise any of the parties until a judicial decision was achieved. He said if that was not possible, the court could rule on how matters would be handled while the case was pending.

Motion to Suspend: Councilor Gates moved, seconded by Councilor Moore, to suspend the Council's rules requiring resolutions be referred by committee so that the Council as a whole could consider Resolution Nos. 94-1973 and 94-1974

Vote on Motion to Suspend: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Buchanan and Hansen were absent. The vote was 11/0 in favor and the motion passed.

Councilor McLain asked, since the Council had knowledge of a dispute of opinion on the amendment and its validity, whether both of resolutions presented equally responsible remedies. Mr. Gary said from a legal view point, they did. He said there were obvious policy differences dependent on how the Council chose to proceed, but said they were responsible remedies.

Councilor Devlin said the full Council believed it had contracting authority under the 1992 Metro Charter. He said Resolution No. 94-1972 would reiterate that authority by having the Council ratify Amendment No. 4 and help bring closure to the issues.

Main Motion: Councilor Devlin moved, seconded by Councilor McFarland, for adoption of Resolution No. 94-1972

METRO COUNCIL

June 9, 1994

page 4

Motion to Substitute: Councilor Van Bergen moved, seconded by Councilor Gates, to substitute Resolution No. 94-1973 for Resolution No. 94-1972.

Councilor Van Bergen said because of the Charter, Metro business should be conducted differently than it had been in the past. He said he wanted the court to determine who had ultimate contracting authority to resolve the issues now and for the new Executive Officer and Council taking office in January 1995.

Presiding Officer Wyers opened the public hearing.

Doug Coenen, division president, general manager, Oregon Waste Systems, Inc. testified on the issues. (A verbatim transcript of his testimony has been attached to these minutes.)

Presiding Officer Wyers asked if any other persons wished to testify. No other persons appeared to testify and the public hearing was closed.

Councilor Gates spoke for Resolution No. 94-1973 and said it was important to define powers and authority at Metro. He said power struggles had hampered Metro for a long time and cost tax payers money. He said there was no dishonor in any of the actions taken by OWS, the Executive Officer, or the Council and said this situation provided the opportunity to clarify the lines of authority. He said a speedy resolution of the issues should be sought.

Councilor Gardner said he believed for 10 years that the Council should have ultimate contracting authority. He said when Metro adopted the initial contract with OWS, he insisted on the "most-favored nations" clause as a trade-off for the length of the contract and the lack of certainty over how low rates would be in the future. He said that clause ultimately led to the Council's approval of the contract at that time. He said Amendment No. 4 itself represented immediate savings for rate payers as opposed to possible future savings. He said after several months' consideration by the Solid Waste Committee, it was clear that the best decision was based on many unknown factors, and that the only clear issue was that Metro would begin to save money immediately with Amendment No. 4. He did not want to sacrifice the savings realized in Amendment No. 4 to determine who had ultimate contracting authority. He urged the Council to adopt Resolution No. 94-1972 and then amend the Metro Code to show who had contracting authority. He said Amendment No. 4 had become a pawn in the power struggle between the Council and the Executive Officer.

Councilor Monroe asked Councilor Van Bergen, if Resolution No. 94-1973 was adopted, what the legal status of Amendment No. 4 would be pending the court's determination of its validity. Councilor Van Bergen said the court could clarify that until the case was resolved as a whole. Mr. Gary said it was a matter that could be agreed upon during litigation, but said if the parties did not agree, the court would decide and said that decision would depend on the decision the court had been asked to resolve. Councilor Monroe asked, if Resolution No. 94-1972 was adopted, if that would prejudice a court's decision as to which body had the ultimate contracting authority. Mr. Gary said for the court to issue an opinion, there had to be a dispute to consider. He said if the Council ratified Amendment No. 4, there would be no dispute to litigate. He said he was not sure a court would be willing to entertain litigation filed by the Council and/or other parties in the absence of a specific dispute.

Councilor Monroe said the issue of ultimate contracting authority should be determined first. He said he understood the frustration expressed by OWS representatives, but said major judicial decisions had always been made in the context of real cases disputes.

Councilor McFarland said the question of contracting authority should be resolved, but not at the expense of Amendment No. 4. She said the Solid Waste Committee had a resolution before them from OWS. She said three members of the Council met with OWS representatives to work on and achieve resolution on items of dispute. She said the item was brought back to the Solid Waste Committee where it was deferred three times for vote because the committee still could not agree on the issues. She said the item was never put to the vote by the committee for full Council consideration. She said the Committee missed the April 1

METRO COUNCIL

June 9, 1994

Page 5

OWS deadline. She said Executive Officer Cusma believed she had the authority to sign the amendment before the deadline passed. She said Metro was now realizing the savings from that amendment and was treating a business associate badly. She said the decision should have come before the full Council for consideration and not have been suppressed for consideration because three committee members opposed it. She said if a majority of the Council did not support the amendment, that was one issue, but said the fact that the Council as a whole never got to debate it collectively was another.

Presiding Officer Wyers stated for the record she had not appointed three members of the Council to discuss the issues with OWS representatives. She said the Councilors who met with OWS had expressed interest in doing so on their own.

Councilor Gardner said Mr. Gary had stated the court would need a specific dispute with which to render a decision. He said Option No. 3 as offered by Mr. Gary would retroactively approve Amendment No. 4, maintain the status quo with Metro's contract with OWS, make public the Council's the position with regard to Charter authority, and could lead to litigation initiated by OWS or the Executive Officer. He asked, if the Council amended the Code to show that it had ultimate contracting authority and the Executive Officer took exception to that, if that amendment would provide a concrete enough dispute for the court to give a ruling on. Mr. Gary said there were many different possibilities. He said the Executive Officer could say the amendments to the Code were not valid because they interfered with her authority. He said whether the Executive Officer had the authority to take that issue to court, or if the court would even entertain such a lawsuit, was a separate issue. He said the Executive Officer could also decline to follow the ordinance and that could result in a proceeding brought by a citizen or other party. He reiterated that for resolution of the issues, concrete issues had to be presented to the court.

Councilor Gardner asked if the issues would ever be finalized. Mr. Gary said Metro was a dynamic organization and said the Charter contemplated a dynamic organization with different Councilors.

Councilor Kvistad said the functions of both branches of government should be clarified for Metro to be effective as a government and said he would support Resolution No. 94-1973.

Councilor McLain said she would support Resolution No. 94-1973 also. She said all interested parties wanted to resolve the issues and get answers. She said OWS and the Executive Officer signed the contract amendment in good faith, but said they knew that both the amendment and who had the authority to execute it were controversial issues. She agreed that contracting authority should be clarified in the Code. She said OWS knew that Metro would treat them fairly while the issues were being defined.

Councilor Washington said he felt references made to not treating partners right were not correct. He said he had asked how much money Metro had saved to-date as a result of Amendment No. 4 and was told that amount was \$9,000. He said he would support Resolution No. 94-1973.

Councilor Devlin said the public expected Metro's elected officials to make decisions. He said the two resolutions represented clear choices. He said Resolution No. 94-1972 was a definite decision and Resolution No. 94-1973 was not as clear. He said the latter resolution would not bring closure to the issues and discussed the various scenarios further.

Councilor Moore said she did not think the Council had distinguished itself in how it had handled the issues. She said she was not confident that the court would solve the issues definitively.

The Council as a whole briefly discussed the two resolutions further.

Vote on Motion to Substitute: Councilors Gates, Kvistad, McLain, Monroe, Van Bergen, Washington and Wyers voted aye. Councilors Devlin, Gardner, McFarland and Moore voted nay. Councilors Buchanan and Hansen were absent. The vote was 7/4 in favor and Resolution No. 94-1973 was before the Council for adoption.

METRO COUNCIL

June 9, 1994

Page 6

Main Motion as Amended: Councilors Gates, Kvistad, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Devlin, Gardner and McFarland voted nay. Councilors Buchanan and Hansen were absent. The vote was 8/3 in favor and Resolution No. 94-1973 was adopted.

4. EXECUTIVE OFFICER COMMUNICATIONS

4.1 Presentation by GTE of Sponsorship Check for Metro Washington Park Zoo Rhythm and Zoo Concert Series

Removed from the agenda, to be rescheduled at a later date.

4.2 Briefing on Contribution to the Oregon Convention Center

Executive Officer Cusma introduced State Senator Bill McCoy who introduced Michael Denty, University of Portland professor of fine arts, who displayed and introduced prototypes of various sculptures of Martin Luther King, Jr., for consideration on the site of the Oregon Convention Center.

The Council, Senator McCoy and Mr. Denty briefly discussed the sculptures and the issues further.

Presiding Officer Wyers recessed the meeting at 6:20 p.m.

The Council reconvened at 6:40 p.m.

CONSENT AGENDA

5.1 Metro Council Workshop Minutes of May 25 and Metro Council Minutes of May 26, 1994

Motion: Councilor McFarland moved, seconded by Councilor Kvistad, for adoption of the Consent Agenda.

Councilor McFarland corrected page 1, paragraph 2 of the May 25, 1994 minutes to read as follows: "Councilor McFarland clarified she held the viewpoint that the funding for Planning should not be placed on the backs of the region's garbage rate payers."

Councilor Monroe corrected page 5, paragraph 4, of the May 26, 1994 minutes to read as follows: "He (Councilor Monroe) said a reduction in the tipping fee was in order, and that one would be proposed within several months."

Vote: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Buchanan and Hansen were absent. The vote was 11/0 in favor and the Consent Agenda was adopted as corrected.

6. ORDINANCES, FIRST READINGS

6.1 Ordinance No. 94-555, An Ordinance Readopting Metro Code 2.06 (Investment Policy); and Declaring an Emergency

The Clerk read the ordinance for a first time by title only

Presiding Officer Wyers referred Ordinance No. 94-555 to the Finance Committee for consideration.

METRO COUNCIL

June 9, 1994

Page 7

6.2 Ordinance No. 94-556, An Ordinance Relating to Taxation, Establishing a Construction Excise Tax Reducing the Metro Excise Tax, Reducing Solid Waste Rates, and Refunding Payments to Local Governments

The Clerk read the ordinance for a first time by title only.

Presiding Officer Wyers referred Ordinance No. 94-556 to the Finance Committee for consideration.

7. RESOLUTIONS

7.1 Resolution No. 94-1968, For the Purpose of Approving an Intergovernmental Agreement between Metro and the Oregon Department of Environmental Quality to Complete the Transportation and Land Use Elements of the Portland Ozone Maintenance Plan

Motion: Councilor Gardner moved, seconded by Councilor Gates, for adoption of Resolution No. 94-1968.

Councilor Gardner gave the Planning Committee's report and recommendations. He said the resolution would approve an intergovernmental agreement (IGA) between Metro and the Oregon Department of Environmental Quality (DEQ) to develop transportation demand strategies to reduce vehicle miles traveled to meet the requirements of the Transportation Planning Rule. He said this work was necessary because the EPA considered the Portland metro area a "marginally non-attainment area" for air ozone. He said to be classified as an attainment area, an air quality maintenance plan had to be developed. He said Metro's role would be to focus on ozone, particularly on transportation and land use activities, or elements of that air quality maintenance plan. He said the funds were approved by the EPA this fiscal year and Metro had to at least start the work FY 1993-94.

Councilor Van Bergen objected to the use of the term "marginal." He said the region's air quality had been quite good and expressed objections to the selling of clean air credits as well as charging businesses per car per employee. Councilor Gardner said "marginal" came from Planning Department staff's original report, but said Councilor Van Bergen was correct with regard to Portland's clean air record. He said, however, that the metro area had to have three consecutive years with zero days of non-attainment to qualify for EPA reclassification. He said the air quality maintenance plan authorized via this resolution would help the Portland metropolitan area to achieve that.

Councilor Devlin said that with Metro's planning and forecasting abilities, studies done now would relate to future events. He said Metro might find itself in non-attainment much more often if it did not take action now.

Vote: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Buchanan and Hansen were absent. The vote was 11:0 in favor and Resolution No. 94-1968 was adopted.

7.2 Resolution No. 94-1967, To Authorize General Counsel Appearance in Beaverton/Portland Urban Service Boundary Cases

Motion: Councilor Moore moved, seconded by Councilor Gates, for adoption of Resolution No. 94-1967.

Councilor Moore gave the Planning Committee's report and recommendations. She explained the resolution would allow Metro's legal counsel to file an amicus brief with regard to Washington County v. LUBA in the Court of Appeals.

Councilor Van Bergen said he had opposed Metro's intervention in this case from the beginning and said it would be impossible for Metro to be neutral. Councilor Moore said Legal Counsel had already explained via memorandum that Metro wished to be able to defend itself, its interests and its potential role in the area. Councilor Van Bergen said he had heard the arguments and was not sure that the Council and Legal Counsel would present or share the same issues in court. Councilor Moore said Legal

METRO COUNCIL

June 9, 1994

page 8

Counsel would brief the Planning Committee and the Council at each juncture. She said Metro could withdraw its interest in the case later.

Vote: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Washington and Wyers voted aye. Councilor Van Bergen voted nay. Councilors Buchanan and Hansen were absent. The vote was 10/1 in favor and Resolution No. 94-1967 was adopted.

ADDITIONAL/NEW ITEM; NON-REFERRED RESOLUTION

Motion to Suspend: Councilor Gates moved, seconded by Councilor Washington, to suspend the Council's rules requiring resolutions be referred by committee so that the Council as a whole could consider Resolution No. 94-1995.

Vote on Motion to Suspend: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Buchanan and Hansen were absent. The vote was 11/0 in favor and the motion passed.

Councilor Van Bergen read Resolution No. 94-1995, For the Purpose of Expressing Appreciation to Kay Rich for Services Rendered to Metro and the Citizens of the Region, for the record.

The Council as a whole discussed the resolution and extended their best wishes to Kay Rich, Assistant Zoo Director, on his retirement after 33 years of public service with Metro and other governmental/public institutions.

Main Motion: Councilor Van Bergen moved, seconded by Councilor Washington, for adoption of Resolution No. 94-1995

Vote on Main Motion: Councilors Devlin, Gardner, Gates, Kvistad, McFarland, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilors Buchanan and Hansen were absent. The vote was 11/0 in favor of Resolution No. 94-1995

8. COUNCILOR COMMUNICATIONS AND COMMITTEE REPORTS

Motion: Councilor McFarland moved, seconded by Councilor Devlin, to remove Ordinance No. 94-542, For the Purpose of Repealing Ordinance No. 94-531 Due to Metro Waste Disposal Services Contract Amendment No. 4 Which Will allow Reduction of Metro's Solid Waste Disposal Rate by Separate Ordinance, and Declaring an Emergency, and Ordinance No. 94-543, For the Purpose of Amending Metro Code Chapter 5.02 to Reduce and Otherwise Adjust Disposal Fees Charged At Metro Solid Waste Facilities, Provide for Special Exemptions from Fees and Establish Covered Load Rebates, Effective September 1, 1994 from the Finance Committee and send them directly to the June 23, 1994 Council meeting for consideration

The Council discussed the motion. Councilor Monroe said he resisted the motion because the Finance Committee was working on a package to reduce the tipping fee and the excise tax and provide long-term funding for Metro's planning functions. He said because of pending litigation over Amendment No. 4, it was unknown what savings would be accrued and it was also unknown if there was enough funding to reduce the tipping fee at this time. He said Finance and Management Information staff told him that if the excise tax stayed at 7.5 percent this year and dropped to 7 percent in subsequent years, the tipping fee could only stay at \$75 per ton for three years and would have to be increased after that. He said when local governmental dues were gone, Metro would probably need a higher excise tax and said the tipping fee would not drop then. He said to consider the two ordinances now would not be timely. He invited the full Council to attend the Finance Committee meeting on June 22 to discuss Ordinance No. 94-556 and asked the Council to do that rather than vote to introduce Ordinance Nos. 94-542 and 543 at this time.

METRO COUNCIL

June 9, 1994

Page 9

Councilor McFarland explained it was timely to consider the ordinances now because July 1 was the beginning of the new fiscal year. She said the funds were available for the \$1 per ton reduction. She said that reduction did not hinge on the excise tax levied or any other tax. She said Metro could receive financial relief from the proposed construction tax, but said the reduction in the tipping fee was a separate issue and was from rates that rate payers had already paid. She said it was not responsible to put vast amounts of money into various appropriations and contingency funds and then use it for other functions such as planning. She said the money was there and the rate payers were entitled to a reduction in the tipping fee. She wanted both ordinances before the full Council for discussion and debate. She said both the Rate Review and Solid Waste Policy Advisory Committees both voted unanimously that both ordinances go forward, as did the Council Solid Waste Committee. She said the ordinances then went to the Finance Committee and had not gone onto the full Council from there. She said she wanted both ordinances to have a hearing before July 1, 1994.

Councilor Gates asked Councilor Monroe if he would object to placing the two ordinances on the June 22 Finance Committee agenda. Councilor Monroe said that could be done, but said the Finance Committee already had a vehicle in Ordinance No. 94-556 which asked for a reduction in the tipping fee also. Councilor McFarland said that ordinance had nothing to do with the fact that the tipping fee could be reduced by \$1 with existing funds.

The Council discussed further whether or not the Council should consider Ordinance Nos. 94-542 and 543 at the June 23 meeting. Councilor Devlin said Councilor McFarland was following proper procedure per the Code by asking that the ordinances be heard by the full Council. He said any Councilor could introduce an item if a particular committee chair did not wish to forward an item from committee. He said this instance reflected a genuine philosophical difference over how the tipping fee should be reduced. He said if Metro was receiving more revenue than was required, then the tipping fee should probably be reduced. Councilor Gates said Councilor McFarland could move to substitute one or both of the ordinances in place of other legislation as had been done at this meeting under Agenda Item No. 3.1. Councilor Monroe said any action could be taken by any member of the Finance Committee when it met. He distributed a table provided by FMI staff and stated that if the tipping fee was reduced, but not the excise tax, was not reduced, Metro would have to raise the tipping fee again in approximately one year. He said FMI staff expressed concern also about the future stability of the Solid Waste Department budget. Councilor Gardner said he empathized with Councilor McFarland's concerns, but said the Council could reduce the tipping fee at any time during the fiscal year. Councilor McFarland said she did not wish to substitute either one of the ordinances for another ordinance, but wanted to debate the ordinances on their own merits. She noted Councilor Gardner had said the tipping fee could be reduced even further and that the Rate Review Committee felt a \$1 reduction was very conservative. She said the only way the ordinances could be heard was if the Finance Committee chair scheduled them for committee consideration or if the Council voted to hear them during a Council meeting. The Council as a whole discussed the issues further.

Vote: Councilors Devlin, McFarland and McLain voted aye. Councilors Gardner, Gates, Kvistad, Monroe, Moore, Van Bergen, Washington and Wyers voted nay. Councilors Buchanan and Hansen were absent. The vote was 8:3 against and the motion failed to pass.

Councilor Monroe noted JPACT meetings scheduled to consider the light rail funding package on June 21; one at the Portland Conference Center three other public hearings in various parts of the region on the same date. He noted the Finance Committee would hold public hearings on Ordinance No. 94-556 beginning June 22. Councilor Devlin said the Council should hold its own public hearings after JPACT conducted theirs.

Councilor McLain discussed Metro's Youth Involvement Project held at Metro Regional Center the date of this meeting and said 600 students, parents and teachers had been invited to come and participate. She thanked Lisa Creel, Associate Public Affairs Specialist, and Sherry Oeser, Senior Public Involvement Specialist, for their work which she said was instrumental to the success of the event.

Councilor Moore discussed the bond measure as proposed for the arterial program. She said she attended the Washington County Transportation Coordinating Community Policy Group meeting on June 20 and said it was proposed there as a gas tax measure.

METRO COUNCIL

June 9, 1994

page 10

but said the Planning Committee had not yet discussed that or other options. Councilor McLain said the proposal was at the beginning stage and was not a final product yet. Councilor Devlin said there could be discomfort about the issue because it had been presented in a variety of options. He said most of the Council learned of a proposed \$600 million bond measure only after it was printed in The Oregonian in an article by reporter Gordon Oliver. The Council as a whole discussed the variety of proposals and various bond amounts discussed and agreed they would have to be more thoroughly briefed as a whole by JPACT. Councilor Monroe said there would likely be a general obligation bond on the November ballot for South/North light rail and related arterial components. Councilor Kvistad said the issues had only been generally discussed for approximately one month and had only recently developed in to a general obligation bond proposal. He said the public should be fully informed about the proposal and input should be gathered from the community. He said the Planning Committee would have full discussions on the issues.

Councilor Washington said funds from the Metro/Riedel Compost Facility Community Enhancement Committee had been used to fund a community garden via the Cully Neighborhood Association.

Councilor Gates noted Gerry Uba, Senior Management Analyst, would hold an informational meeting on Nigeria, his country of origin, on June 22 for interested Metro staff and invited Metro Councilors to attend.

Councilor Van Bergen asked what the Council's next action would be now that it had adopted Resolution No. 94-1973. Presiding Officer Wyers said Mr. Gary planned to meet with Jake Tanzer, Executive Officer Cusma's attorney, and the attorney for OWS, immediately. She said he asked her what action the Council preferred to do next. She said Mr. Gary said the contract and or contract Amendment No. 4 with OWS should remain standing until final action took place in court or was agreed upon by the parties involved.

Motion: Councilor Gates moved, seconded by Councilor Washington, to continue to retain William Gary and James Mountain, attorneys at law, through the firm of Harrang Long Gary Rudnick, P.C.

Councilor Gardner said the Council could not decide to do so on its own, but should ask OWS if it wished to keep Amendment No. 4 in effect during this period. Presiding Officer Wyers agreed with Councilor Gardner. Councilor Gardner asked if Metro should solicit competitive bids for the legal services currently provided by Harrang Long Gary & Rudnick. Presiding Officer Wyers said the Council Department had received a bill and projected costs and said she asked Mr. Gary to keep the case as focussed and simple as possible. She believed it was in the best interests of all parties to keep the issues focussed and resolve the situation as soon as possible. She said Mr. Gary said he would request a declaratory judgment which would involve OWS, and then let the Executive Officer intervene if she wished.

Councilor Monroe said there was a resolution before the Finance Committee related to the payment of Harrang Long Gary & Rudnick. He said he had expressed concern to Mr. Gary that past actions by the Council might prejudice the Council's case, particularly because the Council amended the FY 1994-95 Budget to reflect savings resulting from Amendment No. 4. He said Mr. Gary would attempt to submit a resolution for Council consideration at the June 23 meeting to reflect an interim agreement with OWS and Mr. Tanzer and holding harmless the Council's action to amend the budget so that Metro could continue with Amendment No. 4 until the court made its final decision. Councilor Monroe said Mr. Gary was certain such a resolution could be obtained within the next two weeks, but said if such an agreement was not obtainable, the Council would probably want to amend the FY 1994-95 Budget back to the way it was before Amendment No. 4 was signed.

Councilor Devlin said the issues were much more complex than they appeared. He said not only would Metro make decisions with long-term impacts based on Amendment No. 4, but that OWS would also. He said the status of the amendment now and in the future would affect how OWS bid on waste disposal contracts for Columbia Ridge Landfill. He asked how Metro could prepare for challenges on any one of the 500 contracts Metro currently had with other vendors during this interim period. Councilor McLain said she asked Dan Cooper, General Counsel, the same question. She said the contracting code should be amended and said she had requested Mr. Cooper to prepare an amendment to Metro Code Chapter 2.04. Councilor Devlin said

METRO COUNCIL

June 9, 1994

pg 11

amending the Code did not resolve potential problems for other Metro contracts. He said there would still be questions about who had the authority to approve contracts. Councilor McLain concurred with Councilor Devlin with regard to his concerns about contracts overall, but said that was no reason not to revise the contracting code. Councilor Devlin said he wanted legal advice on how to act in the interim. Presiding Officer Wyers directed Councilor McLain to ask Mr. Gary if it was appropriate to amend the Code at this time. She said the Council should get a list of all the contracts adopted since the 1992 Charter became effective in January 1994 for review when possible. The Council briefly discussed the issues further.

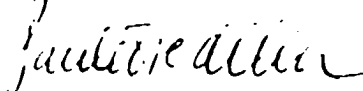
John Houser, Senior Council Analyst, asked if the Council wished to have documents prepared to show what the FY 1994-95 Budget would appear without the savings expected from Amendment No. 4. Presiding Officer Wyers said that information would only be necessary if OWS was unwilling to maintain the status quo of Amendment No. 4 at this time.

Vote: Councilors Devlin, Gates, Kvistad, McLain, Monroe, Moore, Van Bergen, Washington and Wyers voted aye. Councilor Gardner voted nay. Councilors Buchanan, Hansen and McFarland were absent. The vote was 9/1 in favor and the motion passed.

Presiding Officer Wyers noted Berit Stevenson, Principal Management Analyst, had informed her that the Portland Advertising Museum was a candidate for tenancy in some of Metro's vacant storefront space.

All business having been attended to, Presiding Officer Wyers adjourned the regular meeting at 8:35 p.m.

Respectfully submitted,



Paulette Allen
Clerk of the Council
MCMIN94.160

**TRANSCRIPT OF DOUG COENEN'S TESTIMONY AT METRO COUNCIL MEETING
JUNE 9, 1994**

BEGINNING OF TRANSCRIPT:

Doug Coenen: Good afternoon, Madame Chair, members of the Council. Thank you very much for the opportunity to testify this afternoon. My name is Doug Coenen, and I'm the division president and general manager of Oregon Waste Systems and as you know, we operate the Columbia Ridge Landfill. We are Metro's primary mixed waste disposal contractor. Back in 1987 we competitively bid, and were awarded, this contract and we began receiving Metro's waste at our site in January 1990.

My purpose in testifying today is to revisit some of the key background considerations and some of the events that ultimately led to Amendment No. 4 to our contract with Metro. It is my sincere hope that each of you will find these comments helpful as you consider the resolutions before you. Back in mid-1992, Metro began consideration of its current designated facilities ordinance. Prior to this, and during the course of the Solid Waste Committee's and the Council's discussions on that ordinance, we expressed concern over Metro's compliance with certain terms of the disposal contract. These, and the potentially harmful effect that some of the notions being contemplated in the designated facilities ordinance at that time may have understanding the contract. We didn't raise these issues in a threatening way. Quite to the contrary, we ultimately chose not to fight the ordinance despite our stated concerns in part because of threats by some of our competitors of litigation against Metro. We felt it would be more helpful and productive to continue discussions and dialogues towards long-term mutually beneficial improvements to our disposal contract with Metro. Shortly after conclusion of the designated facilities discussion, we were asked by the Executive Officer and the Solid Waste Department to discuss opportunities for enhancing the disposal contract and for reducing Metro's solid waste disposal fees. We responded to this request in the belief that our customer had a problem and was seeking our help to find a solution. We met with the Executive Officer and her Solid Waste staff many times during a ten-month period. We closely examined the landfill contract and exchanged numerous ideas for modifying the agreement in order to help Metro reduce disposal costs, as well as to try to clarify certain terms of the disposal agreement. The results of these discussions, which were tough and fair, are the basis for the provisions of what ultimately became Amendment No. 4. For your information, this amendment provides an estimated savings of \$30 to \$60 millions for Metro's rate payers over the next 15 to 16 years.

After the ten months of discussions with staff, Amendment No. 4 was taken up by the Council Solid Waste Committee for examination. We willingly chose to participate in this process, despite assurances from our own legal counsel that the Executive Officer maintained contract amendment authority. The Committee's legislative format and the private interests of our company's competitors made meaningful discussions in this forum somewhat difficult, if not impossible. After five meetings of the Committee over the course of close to three months, Presiding Officer Wyers thought it might be productive for three Councilors to meet with me and try to resolve some specific issues raised by various Councilors in the course of these discussions in the Committee. Again, we chose to participate in good faith, despite the

TRANSCRIPT OF DOUG COENEN TESTIMONY

Metro Council Meeting of

June 9, 1994

Page 2

fact that we had grown somewhat frustrated by the process. We met twice with Councilors McFarland, Kvistad and Monroe and worked with them to satisfy the concerns that were identified as needing resolution. We gained assurance that Amendment No. 4, with the enhancements agreed to by these Councilors, was acceptable. Next, we learned at a meeting of the Solid Waste Committee held shortly thereafter that yet more was expected. At this point after having negotiated in good faith with Metro's Executive Officer and her staff, the Solid Waste Committee as well as other Councilors designated by the Presiding Officer, we reached the conclusion that there would be no further benefit served for my company to continue discussions. We found that it was not possible to continue a productive dialogue. We also concluded that it was not possible, in this forum, to protect and defend our company's reputation and integrity from the unfair attacks by self-serving interests during the Committee's public discussions. After this particular meeting of the Solid Waste Committee, I was asked by Executive Officer Cusma to meet with her for the purposes of signing Amendment No. 4. We signed the amendment, and we started immediately to operate under the terms of Amendment No. 4. And we did this with the assurance of both our legal counsel and Metro's own counsel, but more importantly, we did this in good faith as Metro's contractor, trusting in the integrity of our business partner and living up to the spirit and the promises we made in the amendment. Effective April 1, we reduced Metro's disposal fee increase in accordance with the new provisions of Amendment 4, which will ultimately save Metro's rate payers million of dollars on annual cost adjustments. We redirected solid waste from a non, from non, from various non-Metro sources to Columbia Ridge thus further reducing Metro's disposal fees. And we stand prepared to provide significant additional savings to Metro if it chooses to direct waste from Forest Grove to Columbia Ridge. In addition, we are making other business decisions based on the terms and conditions of Amendment No. 4. Decisions effecting the timing and development of the Adams County Washington landfill and the pricing we use in bidding disposal services at our landfill in Gilliam County are just a few examples of the business decisions that we have been making, and will continue to make based in part, on Amendment 4. In like manner, Metro has made one of it's major business decisions based on the provisions of Amendment No. 4. It is my understanding that the Council recently approved Metro's budget for fiscal year 94-95 showing Solid Waste Department revenues and expenditures based on the savings provided by Amendment No. 4. Furthermore, there been a great deal of discussion by various Councilors before approval of the proposed budgets, of the proposed budget, regarding funding the substantial cost for new land use planning requirements by using excess solid waste revenues that became available as a result of Amendment No. 4. At present we seem to find ourselves, and we seem to find Amendment 4, being used as somewhat of a pawn for the purpose of resolving what is an internal issue that has existed between the Council and the Executive Officer position since Metro was created in 1978. If my study of American history has taught me any lessons, it has shown me that the struggle to define authority between the executive branch and the legislative branch has been ongoing in this country for more than 200 years. These debates are often necessary, but should not be undertaken

TRANSCRIPT OF DOUG COENEN TESTIMONY

Metro Council Meeting of

June 9, 1994

Page 3

within the context of a, political issues tied to a single narrow issue. Accordingly I believe that the only way to resolve this broader matter, in good faith, is to set aside discussion on Amendment No. 4 recognizing that the budget process just concluded reflects the Council's acceptance of the amendment. It is unfair to us, and wrong for Metro's rate payers, for our company to be used or involved in any way in this debate.

In closing, I'm very pleased that we're able to help Metro find real solutions for reducing the disposal fees for this region's solid waste rate payer. Oregon Waste Systems looks forward to continue to honor and fulfill our contractual requirements to Metro. Thank you very much for your attention.

Presiding Officer Wyers: Are there questions of Mr. Coenen?

Doug Coenen: Thank you.

Presiding Officer Wyers: Thank you very much.

END OF TRANSCRIPT

/pa