MEMORANDUM

TO: Mayor & City Council
FROM: Joel Landeen, City Attorney
SUBJECT: Request by Yasmeen Dream for reimbursement of one half of the cost of a sanitary sewer improvement for North Valley Park in the amount of $110,445.05
DATE: May 16, 2019

At the May 6 Council meeting, the Council considered a request by KTM Design Solutions on behalf of Yasmeen Dream, LLC for reimbursement for repayment of one-half of construction cost for sanitary sewer improvements for North Valley Park in the amount of $110,445.05 (Item 70). During the Council’s discussion, the property owner alleged that this request was identical to similar items on the agenda that were approved and that this amounted to differential or discriminatory treatment. The Council and the Mayor requested additional information from staff to understand the similarities and differences between Yasmeen Dream’s request and other items on the agenda.

**Yasmeen Dream’s request:**

Yasmeen Dream is seeking reimbursement for its costs to extend a 10” sewer main from Eglin Street through existing Creek Drive right of way to serve its North Valley Park subdivision. The extension of the sewer main was triggered by the subdivision of the property and is necessary to serve the development. Construction of the sanitary sewer main has begun, and Yasmeen Dream anticipates that it will cost of $220,890.10. It is asking that the City reimburse it for half of the total cost of the sewer main in the amount of $110,445.05.¹ This request was referred to as an

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¹ Other numbers and explanations for the $110,445.05 amount have been proposed to staff, the Public Works Committee, and Council. However, I am relying on the representation of Kyle Treloar at the May 14, 2019 Public
oversize request in Yasmeen Dream’s materials and at the Council meeting. It appears that it is the developer’s position that any sewer construction costs in excess of the cost to construct an 8” main (The minimum size of a sewer main under City regulations) is the City’s responsibility. However, staff disagrees with this interpretation of oversize costs. Reimbursement for infrastructure oversize costs is when the City asks a developer to install a larger main than the size needed solely for the proposed development, and the City pays the difference in cost. The developer’s engineer has provided a report which concluded that a 10” sewer main is needed to properly serve the developer’s project. The City did not ask the developer to install a 10” main to serve a larger area, the developer needed to install the 10” main to serve his own project. Since the 10” main is needed to serve the developer’s project, this would not be considered an oversize request. Even if the difference in cost between an 8” and a 10” main was considered oversize, the cost difference is significantly less than the amount the developer has requested. Based on a recent quote from a pipe supplier, the actual difference in cost between the two sizes is closer to $2.78. At that price, the difference in cost between the 8” and 10” main would be $6,121.56. The project’s prorated share of that cost would be $1,961.93, making the total reimbursable cost to the developer $4,159.63. Ultimately, the oversize cost would be based on the actual cost differences, but would be much less than $110,000.

While the developer’s request has been characterized as an oversize reimbursement, in reality the developer is primarily asking that the City reimburse him for the proportionate cost of the main that would potentially be the responsibility of the properties which could connect to the sewer main in the future. One of those properties is already developed and is served by a septic system, another is owned by the State of South Dakota and a third is owned by Menards. It is unclear when or if any of these properties will actually connect to the sewer main. Yasmeen Dream is claiming that it is unfair that properties which benefit from the new sewer main can hook onto the City’s sewer without any cost to themselves, and that Yasmeen Dream must pay all of those costs. While it may seem unfair, City policy generally requires that a developer who is platting beyond the current limits of the City’s utility system needs to extend the utilities to their development at their own cost. Off the top of my head I can only think of one time in recent memory where the City has agreed to pay the base cost of a public improvement rather than an oversize component. 2 The decision I am referring to is the Mayor and Council’s decision in 2016 to pay half the cost of constructing Elm Street to the south of its current terminus. The basis for the decision to pay for the street was that the original developer on the west side of the street was granted a variance to avoid constructing the street in the mid 2000’s and signed a document that would have allowed the City to assess that cost to the home owners who bought lots in the subdivision. Each property owner’s share of the street cost would have been approximately $11,000. The subsequent developer of the property on the east side of the road argued it would be unfair to make them pay the entire cost of the street when the first developer received a variance. The Mayor and

2 City staff did not conduct a search to determine if this has ever been done. It is possible that at some point in the past, a previous Planning or Public Works Director may have negotiated a payment, or a previous Mayor or Council may have approved such a reimbursement. A search to determine if, or how many times, this has ever been done would be very time consuming.
Council decided not to pass along the cost of the west half of the street to the 2nd developer or the home owners who purchased lots in the subdivision. In hindsight, if the original developer had not been granted the variance and required to construct the street, we would not have been in this situation.

When making a decision in a specific situation it is important that we do not forget, or ignore, the larger policy issues or the future consequences of those decisions. Developers often buy land that is beyond the current limit of City utilities because it is cheaper than infill land or land that already has utilities. The lower purchase price is offset by the fact the utility costs to develop the property will be higher. If the City starts paying to extend the utilities to these parcels it could potentially cause several problems. Developers could start taking advantage of this and it may encourage leap frog development. Also, the City does not have a dedicated fund to pay for these projects so the money will likely need to come at the expense of other projects. Ultimately, it is up to the developer to determine if the cost of extending the utilities to a development justifies proceeding with the project. This situation highlights the larger issue of who should be responsible for paying for “off-site” improvements. While it may seem unfair to some to make the developer pay for them, the City has no dedicated revenue or fund with which to finance these costs and chasing infrastructure improvements based on who has submitted a plat does not seem like the best way to manage our CIP Fund.

**May 6 Agenda Items for Oversize Costs:**

What follows are descriptions of the other items on the May 6 agenda which were identified as similar to Yasmeen Dream’s request.

*Item 24 Oversize Agreement for Sanitary Sewer Main with Black Hills Power:*

It could be argued that this request is probably the most similar to Yasmeen Dream’s request. Black Hills Power intends to construct an 8” public sewer main to its property on Deadwood Avenue, which is currently not adjacent to the City’s sewer system. This construction requires BHP to make off-site improvements to extend the current sewer main a significant length through other properties to its project. BHP is paying 100% of the cost of extending the main to its project, including the cost of installing the main on neighboring properties. Since the sewer main is not located in a public ROW and is not being triggered by BHP platting property, the City had no legal basis to require them to extend the sewer main through its property. The City asked BHP to extend the sewer main past where it was needed for BHP’s project to its northernmost property line – an increased length (oversize) of 1072 linear feet. BHP has obtained the easements across neighboring properties and is dedicating easements on its own property at no cost to the City. The properties to the north of the BHP property are currently on older septic systems some of which are failing. The City requested this extension to avoid creating a gap in the main and ensure the properties north of the BHP property that are not currently adjacent to City sewer service could access the City’s sewer utility in the future. BHP agreed to extend the sewer main the additional length if the City paid for those oversize costs. The City’s oversize payment will not exceed $135,572.92 and will be recouped once the sewer...
main is constructed by the City's imposition of construction fees on benefiting properties that can access the sewer main thanks to BHP's extension. I view this request as similar because the City is essentially up fronting the cost of extending the sewer main for the benefit of properties outside the project and collecting the cost from the benefiting properties sometime in the future. While similar to Yasmeen Dream's request there are also significant differences. Since BHP was not platting, the City could not require that the sewer main be extended to the northern limits of its property. Yasmeen Dream was not asked to extend the sewer main it constructed further than what was needed to serve its development. Comparing the project costs and the areas/properties benefited from the sewer main extensions also demonstrates the differences between the requests. The sewer main constructed by Yasmeen Dream will at most serve three additional properties at a cost of approximately $110,000, while the extension of the sewer main by BHP will potentially serve around 15 properties for approximately $135,000.

Item 27 Construction Fee Resolution for Fifth Street Water Main Oversize

The Resolution approved by Council imposes a construction fee to recoup the oversize money paid to Lazy P6 Land Company, Inc. to install a 16" water main in Fifth Street. The Resolution follows a 2013 oversize agreement between the City and the developer, which was entered into after significant negotiation about the oversize costs as well as several other development issues and the settlement of a lawsuit. Although the developer initially wanted the City to pay its base costs to install the utilities, the City refused to do so, agreeing to oversize payments only. Significantly, for purposes of this discussion, the developer agreed to pay the base costs of a 12" water main and a 12" sewer main that were required to serve his development demonstrating the City does not as a rule reimburse a developer for any costs for constructing a main over 8". The City requested that the developer install a 16" water main, and a 15" sewer main to serve an area larger than that owned by the developer and agreed to pay the difference between the 12" mains and the larger ones requested by the City. The oversize agreement was negotiated and approved prior to any construction.

Once the agreement was approved, the Developer installed the improvements in Fifth Street and sought reimbursement for the oversize costs per the terms of the agreement. The Developer was paid $42,929 for the water oversize, and the City will now (thanks to the Resolution) collect construction fees of $2,060.92 per acre on the areas benefited by the 16" water main. This fee includes properties that are owned by the developer (both developed and undeveloped) as well as properties owned by other entities. Staff are working to bring forward a similar construction fee resolution for the sewer main oversize payment and anticipate that the construction fees will be dispersed over a benefitting area of more than 600 acres.

3 In fact, Yasmeen Dream received an administrative exception from Public Works' staff excusing it from the requirement to extend the sewer main to the southern boundary of its property because the cost would exceed the benefit. Yasmeen Dream did request an exception in August of 2018 to relocate the sewer main outside of the ROW and run it across its property. Even though this routing was longer, the developer's representative stated that it would cost $30,000 less than the approved route in Creek Drive. The Public Works Committee recommended denying the exception and Yasmeen Dream withdrew its request at the City Council meeting on September 4th.
**Item 28 Construction Fee Resolution for Krebs Drive Water Main Oversize**

Like the previous item, this resolution is intended to recoup money the City paid Greg Whalen for constructing a 10” water main pursuant to an oversize agreement. The oversize agreement entered into in 2018 provided that while an 8” water main was required to meet Mr. Whalen’s needs, he agreed to install a 10” water main if the City paid the increased cost for the 10” main, anticipated to cost $14,305. Mr. Whalen also entered into an infill agreement with the City concerning the extent of his improvements, which were off-site. After the oversize agreement was finalized, Mr. Whalen installed approximately 768 linear feet of 10” water main past three properties to reach his property. While three properties can immediately connect, the extension of the water main will benefit a much larger area in the future. The Resolution in item 28 imposed a construction fee upon benefitting properties over 29+ acres in an amount of $489.90 per acre to connect to the City’s water utility.

**Item 29 Construction Fee Resolution for Haines Avenue Water Main Oversize**

The City entered into an oversize agreement with Doeck LLC in July of 2017. The developer needed an 8” water main to serve its development and the City requested a 12” main be installed to serve additional areas outside the development. Similar to items 27 and 28, this Resolution imposes a construction fee upon a benefitting area of 26+ acres to recoup oversize costs of $23,933.31 the City paid the developer for the cost difference between the 8” and 12” water main.

**Additional Oversize Agreements on May 6 agenda**

In addition to the above items, the Council at the same meeting approved several oversize agreements with entities that are owned, at least in part, by the same developer that owns Yasmeen Dream.

Item 25 was an oversize agreement with Buffalo East, LLC (for a 12” water main in Addison Avenue. While the Developer’s engineer determined that an 8” water main was the minimum size required to meet the needs of the development, the City requested a 12” water main to meet the needs of the City and the developer agreed to install the larger diameter pipe. The anticipated oversize costs the City will pay per this agreement will not exceed $27,255.00.

Item 38 on the agenda was an oversize agreement between the City and Yasmeen Dream LLC for drainage improvements in the North Valley Park subdivision. In that agreement, the City and Developer agreed that Developer would increase the size of the stormwater detention pond capacity to provide a regional benefit, and the City agreed to pay Yasmeen Dream LLC oversize costs in the amount of $184,775.

**Funding for Oversize**

Generally, oversize agreements are negotiated early in the development process which gives staff time to budget for specific projects. For example, the BHP oversize
agreement was entered into this year, but the payment will be budgeted for next year. The 5th Street extension oversize took significant time to negotiate and was budgeted out of the .16 Fund before that fund was joined with the CIP Fund. The other two oversize agreements were also identified early and either budgeted in the utility funds or will be budgeted for next year when the payment will likely become due. Even the two oversize agreements from the developer which were approved on the May 6th agenda demonstrate how the process works. The Addison Ave. oversize will be paid and budgeted in 2020. In the case of the drainage oversize (Item 38), since the amount was so large there was enough in the budget to pay half this year and the developer agreed to receive payment on the balance next year so Public Works could budget the expense. Since the sewer main for North Park was not considered oversize, no money was budgeted for the cost in 2019. There is approximately $25,000 left in the oversize fund for the rest of this year. If the City were to pay the developer the $110,445.05 he has requested in 2019, there would be no way to do so without reallocating money from another project.

Compliance with State Bid Law

In addition to the general policy implications, I also have some concerns about the applicability of state bid law to Yasmeen Dream’s request. When the City enters into a contract to use taxpayer dollars to pay for public improvements, then state bid laws requiring public bidding apply. While oversize costs are an exception to the bidding requirement, no such exception applies to other infrastructure costs of developers which the City may pay. SDCL 5-18C-4. Bid law would require that a developer publicly bid the contract, open the bidding to all interested parties, award to the lowest bid, and otherwise meet all obligations of state bid law in its actions to build the infrastructure. This is similar to the procedure used by developers who are reimbursed by a TIF – to be reimbursed with the tax dollars collected through the TIF, the improvements must all be publicly bid. Therefore, any agreement to use taxpayer dollars to reimburse Yasmeen Dream for its sewer main costs should require full compliance with state bid law. Of course, this project is already under construction and staff are not aware if Yasmeen Dream publicly bid the project.