MEMORANDUM

TO: City Council
FROM: Joel P. Landeen, City Attorney
DATE: 09/5/2019
RE: Sewer Backup Policy Considerations

OVERVIEW:

As you are all aware, 2019 has been a bad year for sanitary sewer back-ups in Rapid City. Even though it has been a relatively bad year, the number of properties which have been flooded is small in comparison to the number of properties connected to the municipal sewer system. While the number of houses flooded is relatively small, for those affected the impact is clearly significant. Legally, the City is not strictly liable for damages caused when the sanitary sewer floods. In order to prevail in a claim for damages, a property owner needs to show that the City acted negligently and as a result of that negligence, the sewer flooded. Several of the homeowners who have experienced flooding this year have asserted the City’s negligence has caused their flooding. However, the claims based on allegations that a sewer main is inadequately sized are based on the theory that the City was negligent in designing the system originally, or in failing to enlarge the system’s capacity in a timely manner. Neither of these theories can be sustained under current laws. Another property owner states that a City jet truck caused their flooding, but an inquiry into the incident discovered that while the jet truck was at the location where it was observed, the crew did not jet the line because it was already flowing at maximum capacity.

While generally the City is not legally responsible for damages caused by sewer back-ups, the City has adopted a policy to help property owners impacted by flooding defray some of the cost of cleaning up the aftermath of one of these events. The current policy authorizes a payment of $3 per square foot based on the floor area affected by flooding to help pay the cost of cleanup. The reimbursement is only available to those who have actually expended money to hire a professional cleaner. If the property owner accepts the cleanup money, they are required to sign a
release and waiver preventing them from making any further claims against the City for any additional cleanup or damages incurred from that incident. A release and waiver is common practice in this situations. Staff has inquired into the policies of other communities in the region and based on this review the Rapid City policy is fairly generous. Bismarck, North Dakota, is the most generous and pays for cleanup costs and property damage. However, this benefit is funded out of a surcharge on the monthly bill of all customers in the amount of $.50 for residential accounts and $1.00 for commercial accounts. Sioux Falls has a very similar policy to Rapid City. Rather than set an amount per square foot, Sioux Falls reimburses the property owner the actual cost of the cleaning work up to a maximum of $5,000. They have interpreted the rule to allow the homeowner to “contract” to do the work themselves. Minot, ND, pays up to $500 in cleanup costs. The cities of Billings, MT, Gillette, WY, Dickinson, ND, and Aberdeen, SD, do not pay any costs related to a back-up unless the city’s negligence caused the flooding.

RECOMMEND CHANGES TO THE EXISTING POLICY:

While the City’s current policy is relatively generous in comparison to what many other cities are doing, staff has reviewed the concerns raised by the impacted property owners and the discussions which have occurred over the course of this year and is in support of making the following changes to the current City policy:

1. Increase the amount to be reimbursed per square foot from $3 to $4 to adjust for inflation since the last time the policy was updated in 2011 (this amount is higher than actual inflation which would result in the reimbursement being approximately $3.48).

2. Remove the requirement that a professional cleaning service be hired to perform the work so people who hire non-professionals or perform the work themselves can be somewhat compensated for the time and energy they have invested in cleaning up their property.

I have attached a draft resolution which amends the policy to implement these changes. One of the issues you will need to address if you agree to amend the policy is whether or not these changes will be applied retroactively. Staff would recommend that the changes be made retroactive to the beginning of this year. Making any changes applicable to claims prior to this year would be difficult to implement practically, and depending on how far back you wanted to go, could cause budgetary issues for the enterprise fund in this budget year.

OTHER CONSIDERATIONS:

*Reimbursement for Property Damage*

The question that has most frequently come up over the last few months is the question of whether the City should reimburse property owners for property damage in addition to cleanup costs. As you can see from staff’s research, only one community in the region reimburses property owner for property damage and imposes a surcharge on all customers in order to do so. I have previously highlighted this issue in a memorandum I provided you in May of this year related to a sewer damage claim made by Mr. Fred Reed. At that time, you did not choose to
pursue the issue. Since the discussion in May, other property owners have come forward and requested to be reimbursed for the damages they suffered due to flooding. Some have filed formal claims, others have not. My sense is that some are waiting to see what you are willing to do with regard to the policy before they decide how to proceed with their claims.

While paying people for property damage may be a legitimate policy choice, it also has certain drawbacks. Staff is comfortable that adjusting the payment for cleanup costs to account for inflation and making it easier to file a claim will not result in such a significant increase in costs that it will require an increase in sewer rates. However, the same is not true if the Council were to decide to reimburse property owners for damages. The current rates being charged do not reflect this expense which is likely to be significant. At this point, we have not done an in-depth analysis, but if you assume $15,000-$20,000 per claim it could be several hundred thousand in a normal year and half a million to million dollars in a bad year. The only City which currently pays for property damage imposes a surcharge to cover this cost, and we would need to do the same. The only way to cover this expense without raising rates or imposing a surcharge would be to slash projects which would ultimately only exacerbate any issues and likely result in us paying even more claims. If you wish to pursue this course of action staff would need time to bring back implementation recommendations. We would need to do an analysis of historic claims and project how much we would need to budget per year to cover this additional expense and then figure out how much we would need to charge per account to raise the necessary revenue to cover the cost of this program.

In addition to the practical issues in paying for damages, there are also some fundamental questions you need to consider. Currently, people can obtain insurance to cover these events, but if the City steps in as an insurer it would not make sense for property owners to continue to purchase and pay for private insurance. Essentially, the City would now be their insurer. Ultimately, a small number of customers each year is affected by flooding and would benefit from this program. However, the 99% of customers who are unlikely to ever have an issue with flooding would need to have their rates raised in order to cover this expense. Raising the rates of all of the system’s customers in order to protect a small number of customers raises questions of fairness. Staff does not support changing the policy to reimburse property owners for property damage and would prefer to follow the current law where we only pay for property damage in instances where the City is clearly negligent.

Remove the Release and Waiver Requirement

Another request being made is to consider removing the requirement for a release and waiver of any claims as a condition for receiving the cleanup reimbursement. The argument for this change is that it would allow property owners to obtain some funds right away to address their losses without requiring them to make a decision about pursuing additional damages claims. Staff cannot support this change. The payment of the cleanup reimbursement is akin to a settlement payment. The benefit of a settlement payment is that it allows the quick payment of a smaller amount of money to avoid the expense of litigation and the risk of being liable for a much larger judgment. The benefit to the person accepting a payment is they ensure they get something, they get it much more quickly than they would have otherwise, and they also avoid the expense and risks inherent in litigation. To change the policy as proposed would allow the property owners to
receive the benefits of a settlement, but completely negate the benefit to the City of making the payment. Please keep in mind that on the vast majority of these claims we are legally responsible to pay $0. We have adopted a policy that allows a payment of something in order to both help out our customers but also to avoid litigation. Litigation is costly and even if we are defended by our insurer it is reflected in our rates and we pay the first $75,000 out of pocket. Staff cannot support continuing to make payments that we are not legally entitled to make if we forgo one of the primary benefits of making the payment in the first place.

NEXT STEPS:

I have my staff working on collecting the information identifying who has experienced back-ups so far this year. Once you have decided how to proceed on the policy, I plan to do the following:

1. Look at issuing checks for people who have already accepted the reimbursement since January 1st (Assuming your decisions are retroactive to the beginning of the year)
2. Notify in writing the people who have filed formal claims the status of their claims and what their options are to proceed.
3. Notify in writing those who have not filed claims, but contacted the City to report a back-up, about any policy changes you have approved and what their options are.