

ORDINANCE NO. 2012-16

AN ORDINANCE of the City of Bainbridge Island, Washington, relating to storm and surface water management; amending Sections 13.24.089 and 13.24.090; and adding two new sections to Chapter 13.24 of the Bainbridge Island Municipal Code (BIMC), adopting storm and surface water management fees for city streets and roads, state highway right-of-way, and private roads, and providing for an effective date in conformance with the Kitsap County Superior Court Order of February 29, 2012 in *Bainbridge Ratepayers Alliance v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 10-2-00638-1.

WHEREAS, Chapter 35.67 RCW provides that cities are authorized to establish storm water (“storm sewer”) utilities; and

WHEREAS, the City of Bainbridge Island (“City”) has had a Storm and Surface Water Management (formerly “Storm Drain”) utility since 1987; and

WHEREAS, in 2007, the City Council adopted Ordinance No. 2007-39 which amended BIMC 13.24.089 to change the fee charged to City-owned right-of-way from 30% to 100% of the fee provided in BIMC 13.24.080, effective January 1, 2008; and

WHEREAS, in 2010, the City Council determined that the fee structure amendment to BIMC 13.24.089 adopted in Ordinance No. 2007-39 was based on erroneous financial information; and

WHEREAS, in response to that determination, the City Council adopted Ordinance No. 2010-34 which changed back the fee charged to City-owned right-of-way in BIMC 13.24.089 from 100% to 30% both prospectively and retroactively; and

WHEREAS, Ordinance No. 2010-34 referenced RCW 90.03.525 as providing that the storm and surface water utility fee charged by the City to state highway right-of-way shall be 30% of the general City rate; and

WHEREAS, Ordinance No. 2010-34 further found that the City, prior to the effective date of Ordinance No. 2007-39, charged the same 30% storm and surface water utility rate to the City roads as to the state highway right-of-way; and

WHEREAS, Ordinance No. 2010-34 also found that both the City roads and the state highways provide infrastructure to convey storm water such that reduced rates are warranted; and

WHEREAS, on March 9, 2011, the Bainbridge Ratepayers Alliance (“Ratepayers Alliance”) filed its first amended complaint in Kitsap County Superior Court, alleging in its twelfth cause of action that in adopting Ordinance No. 2010-34, the City had retroactively enacted storm and surface water management rates for city roads without any supporting

documentation thereby unfairly burdening other rate payers. *Bainbridge Ratepayers Alliance v. City of Bainbridge Island*, Kitsap County Superior Court No. 10-2-00683-1; and

WHEREAS, both the Ratepayers Alliance and the City moved for summary judgment on the issue of the validity of the storm and surface water management rates established by Ordinance No. 2010-34; and

WHEREAS, Presiding Judge Russell Hartmann of Kitsap County Superior Court heard oral argument on cross motions for summary judgment on the issue of storm and surface water management rates on May 27, 2011; and

WHEREAS, the Court issued its oral ruling on July 22, 2011, granting the Ratepayers Alliance motion for summary judgment on the twelfth cause of action, ruling that the retroactive adoption of storm and surface water management rates of 30% in Ordinance No. 2010-34 was arbitrary and capricious because it was based on a statute (RCW 90.03.525) related only to state roads; there was no equivalent evidence reflecting the City's investment in its roads; and

WHEREAS, the Court entered an order formally granting summary judgment to the Ratepayers Alliance on the issue of storm and surface water management fees on September 1, 2011, following which the Ratepayers Alliance filed an additional motion asking the Court to establish a remedy and to order payment of attorney fees to the Ratepayers Alliance; and

WHEREAS, the Court first heard argument on the issue of a remedy and attorney fees on December 9, 2011, after which the Court directed further briefing, and then heard additional argument on February 24, 2012; and

WHEREAS, immediately following oral argument on February 24, 2012, the Court issued its oral ruling that the City has the authority to enact an ordinance setting storm and surface water management fees to City roads retroactive to the effective date of the storm and surface water rates established by Ordinance No. 2007-39, and that the Ratepayers Alliance is not entitled to attorney fees; and

WHEREAS, the Court entered its formal order establishing a remedy, denying attorney fees and entering a partial final judgment on February 29, 2012, in which the City was granted a period of nine months from that date for the City's legislative authority to enact new storm and surface water fees applicable to City right-of-way, retroactive to the January 1, 2008 effective date of the storm and surface water rates established by Ordinance No. 2007-39; and

WHEREAS, the Court on its own initiative reversed its earlier determination and ordered that its February 29, 2012 order on the storm and surface water issue was a final determination, subject to immediate appeal pursuant to Civil Rule 54(b); and

WHEREAS, neither the Ratepayers Alliance nor the City appealed the Court's order within the 30-day appeal period, so that the Court's February 29, 2012 order became a final determination no longer subject to appeal; and

WHEREAS, following expiration of the 30-day appeal period of the Court's February 29 order, the City on April 3, 2012 issued a request for proposals to provide the City with a study by experts in the field of surface water utilities, utility rates and road design of the relationship between the City street system and its storm and surface water management (SSWM) utility with the objective of developing alternative rate approaches that equitably account for any offsetting contributions of the street system to the SSWM utility; and

WHEREAS, on May 9, 2012, the City Council authorized a contract with FCS Group, in association with Parametrix, to provide the City with consulting services on the issue of appropriate stormwater fees to be charged to City streets and roads; and

WHEREAS, FCS Group had just provided consulting services to the Washington State Legislature's Joint Transportation Commission on the issue of stormwater cost recovery, and was experienced in providing consulting services to a numerous communities in Washington for stormwater utility formation and rate studies, and the associated engineering consulting firm, Parametrix, has had long experience in road design and stormwater engineering; and

WHEREAS, in preparing its storm and surface water management street rate analysis for the City, FCS Group structured its study to encompass three-fold objectives as follows:

1. Assess the relationship between the City's street system and Storm and Surface Water Utility. Analyze value to the SSWM Program of the City's street system and other in-kind services that may reduce the cost of managing stormwater from private and public property.
2. Develop equitable rate alternatives for City streets that reflect the value of the street system's contributions to the SSWM Program. Each alternative is evaluated against the requirements that it be accurate, fair, clear, and supported by a legitimate rationale. The depths of each analysis depended on the availability, accuracy and level of detail of information available from the City.
3. Survey the approaches of other jurisdictions in Western Washington to the same issue. The survey contains results for approximately seventy-five Phase I and Phase II NPDES permit holders. The survey documents the approach each city takes in administering a stormwater charge on their streets.

and;

WHEREAS, FCS Group presented a summary of its conclusions to a joint workshop of the City Council and the City's Utility Advisory Committee in the Special/Regular Meeting of the City Council on Wednesday, August 8, 2012, during which both Council members and Committee members were provided the opportunity to discuss those conclusions and ask questions of the FCS Group and Parametrix study team; and

WHEREAS, FCS Group submitted its written report entitled "City of Bainbridge Island Storm and Surface Water Management Street Rate Policy Analysis Report of Findings" to the City on August 24, 2012; and

WHEREAS, the FCS Group study looked at six alternatives for adopting SSWM rates for the City's roads and the rationale for each, summarized as follows:

1. Alternative: Charge City streets full rate for all impervious surfaces. Rationale: Streets are an impervious surface and should be charged as such.
2. Alternative: Exempt City streets from the stormwater rate because they are a part of the stormwater system. Rationale: Streets are an integral part of the stormwater conveyance system and should be exempt.
3. Alternative: Reduce or exempt City streets from stormwater rate because of past capital investment. Rationale: Street fund capital investment in stormwater infrastructure and facilities may offset some or all SSWM charges to the Street Fund.
4. Alternative: Charge City streets a rate based on proportion of runoff managed from other property. Rationale: Streets provide stormwater conveyance for both streets and other developed properties.
5. Alternative: Charge City streets a rate based on the unallocated value of stormwater maintenance provided by the Street Fund. Rationale: Stormwater system maintenance provided by Street Fund may offset some or all SSWM charges to the Street Fund.
6. Alternative: Consider redefining the chargeable area of City Streets. Rationale: The equivalent residential unit (ERU) value could theoretically be defined to include a portion of the fronting residential street.

and;

WHEREAS, the FCS Group study did not recommend Alternative 5 as a valid rate method because the City already appropriately allocates the cost of stormwater system maintenance provided through the Street Fund to the SSWM utility and follows the state budget and reporting system (BARS) in which all labor, equipment, and materials charges are recorded against their respective fund and activity account; nor did it recommend Alternative 6 as a valid rate method because the City's ERU definition does not include a portion of the fronting street and the City's data does not allow a ready analysis of this alternative; and

WHEREAS, the FCS Group study concluded that Alternative 1 (charging the streets 100% of the impervious surface rate) was a valid rate method because streets, like rooftops or parking lots, affect the runoff pattern that existed prior to development, and charging the streets would be consistent with charges to other developed property; yet the FCS Group study identifies this alternative as the least applicable for the City, because City streets clearly provide an offsetting benefit to the SSWM fund as part of the conveyance system and for the capital investment in the system; and the study also concluded that Alternative 4 (charging streets based on the proportion of the associated drainage infrastructure serving the road itself (31%) versus the proportion serving developed property (69%)) would be a valid rate method because it would

credit streets for the conveyance capacity over and above that which they need for the streets, yet the FCS Group did not recommend this alternative; and

WHEREAS, the FCS Group study, while concluding that Alternatives 1 and 4 were both valid, instead recommended that the City exempt the City streets from the stormwater fee for either of two reasons set forth in Alternative 2 (streets owned or operated by the City are defined by the federal National Pollution Discharge Elimination System (NPDES) permit enforced by the Washington State Department of Ecology to be part of the City's Municipal Separate Storm Sewer System (MS4)), or in Alternative 3 (the City is responsible for at least \$27 million in associated stormwater infrastructure in the streets serving developed property over and above what would be needed for just street run off – valued at the City's undepreciated stormwater assets); and

WHEREAS, the FCS Group study concluded with the recommendation: “. . . Based on the finding that City streets could be exempted from the stormwater rate for either of two reasons in the City of Bainbridge Island – the fact that they are part of the conveyance system and the initial analysis showing that their investment in stormwater facilities in the right-of-way could outweigh their SSWM charges for a significant period of time – we are most comfortable advising the City to exempt its City streets from stormwater rates. This recommendation is further supported by the finding that eighty-five percent of our survey respondents exempt city streets . . .;” and

WHEREAS, FCS Group answered additional written questions dated August 28, 2012 from the Utility Advisory Committee in a follow-up memorandum from FCS Group dated August 31, 2012; and

WHEREAS, at the request of the Utility Advisory Committee, FCS Group and Parametrix representatives made themselves available for a conference call with the Committee in the afternoon of Tuesday, September 4, 2012, and responded to questions and comments from Committee members; and

WHEREAS, the Utility Advisory Committee following that conference call compiled a report of comments on both the FCS Group study and the City process that was submitted to the City Council on September 4, 2012; and

WHEREAS, the chair of the Utility Advisory Committee presented that report and provided additional comments regarding the FCS Group study and the issue of SSWM fees charged to City roads to the City Council at its Regular City Council Study Session meeting of Wednesday, September 5, 2012; and

WHEREAS, other members of the Utility Advisory Committee and members of the public also provided comments to the City Council regarding the FCS Group study and the issue of SSWM fees charged to City roads at the September 5, 2012 Study Session; and

WHEREAS, in response to the FCS Group study report that 85% of the cities surveyed exempted their streets from stormwater charges, the City Council asked that FCS Group be

requested to provide a follow-up survey those jurisdictions to determine, if possible, the rationale employed by each of them to reach that result; and

WHEREAS, counsel for the Ratepayers Alliance wrote to the City Council on September 10, 2012, stating that the Ratepayers Alliance favors Alternative 1 (charging 100% of the impervious rate) of the alternatives identified by FCS Group; and

WHEREAS, on September 12, 2012, FCS Group submitted a follow-up survey of the rationale relied on by those 85% of jurisdictions that exempt city streets from stormwater charges, to the extent that that could be determined by FCS Group; and

WHEREAS, FCS Group reported that some of the jurisdictions, including Arlington, Burlington, Kirkland, and Mill Creek, reported informally that they exempted their streets from stormwater charges because those streets are a part of their respective stormwater systems; and

WHEREAS, FCS Group also determined that a number of jurisdictions had set forth the rationale for exempting city streets in their municipal codes, including, for example, the City of Battle Ground Municipal Code, Section 13.125.050, which provides in part: “The following special categories of property are exempt from service charges and system development charges: City street rights-of-way, all of which are a part of the system pursuant to the plan;” and

WHEREAS, the City of Burien Municipal Code, Section 13.10.340(9), provides: “The city roads and state highway programs provide substantial annual programs for the construction and maintenance of drainage facilities, and the road systems and their associated drainage facilities serve as an integral part of the surface and storm water management system. City and state road drainage systems, unlike the drainage systems on other properties, are continually being upgraded to increase both conveyance capacity and control. City roads and state highways shall not be charged a rate in recognition of the benefit to the surface and storm water management services provided by the drainage facilities associated with the city roads and state highway programs; provided, that those drainage facilities are constructed, operated, and maintained in accordance with this chapter.”; and

WHEREAS, the City of Covington Municipal Code, Section 13.30.050(9), which exempts city streets, provides in part: “The City roads and State highway programs provided substantial annual programs for the construction and maintenance of drainage facilities, and the roads systems and their associated drainage facilities serve as an integral part of the surface and stormwater management system.”; and

WHEREAS, the City of Federal Way Municipal Code, Section 11.40.100, which exempts city streets, provides in part: “. . . the city and county roads and state highway programs provide substantial annual programs for the construction and maintenance of storm drainage control facilities, and the roads systems and their associated storm drainage facilities serve as an integral part of the surface and stormwater management system. . . .”; and

WHEREAS, the City of Kenmore Municipal Code, Section 13.40.050(J), provides in part: “. . . both the city streets and state highway programs provide substantial annual programs

for the construction and maintenance of drainage facilities, and the streets systems and their associated drainage facilities serve as an integral part of the surface and stormwater management system. . . .”; and

WHEREAS, the City of Lake Forest Park Municipal Code Section 13.16.050(J) states in part: “. . . the city and county roads and state highway programs provide substantial annual programs for the construction and maintenance of storm drainage control facilities, and the roads systems and their associated storm drainage facilities serve as an integral part of the surface and stormwater management system. . . .”; and

WHEREAS, the follow-up survey from FCS Group was transmitted to the City Council and to the Utility Advisory Committee that day in advance of the discussion of SSWM fees to City roads scheduled for the Regular City Council Business Meeting of September 12, 2012; and

WHEREAS, during the Regular City Council Business Meeting of September 12, 2012, at which FCS Group and Parametrix representatives were present to answer any additional questions, the City Council discussed and debated the issue of the appropriate SSWM charges to be charged to City roads in accord with the Kitsap County Superior Court order of February 29, 2012; and

WHEREAS, the Council considered that FCS Group in its Report of Findings concluded that any one of four of the six rate alternatives identified (Alternatives 1-4) could be adopted as accurate, fair, clear, and supported by a legitimate rationale; and

WHEREAS, the Council also considered that FCS Group in its Report of Findings concluded with a recommendation that the City exempt City roads from stormwater charges based on either the rationale of Alternative 2 (streets are defined to be part of the stormwater system) or Alternative 3 (the City has made a substantial capital investment in the stormwater system serving property development over and above the runoff from the City streets themselves); and

WHEREAS, the Council considered that, in the one other case apart from *Bainbridge Ratepayers Alliance v. City of Bainbridge Island*, where plaintiffs had challenged a city’s stormwater rates to city roads, the Superior Court and the Court of Appeals had upheld the validity of the City of Tacoma Municipal Code Section (TMC 12.08.530) that exempts city streets from stormwater charges based on a combination of the rationale that city streets are part of Tacoma’s stormwater system and that Tacoma had made substantial capital investments in the stormwater infrastructure serving developed property. *Post v. City of Tacoma*, (unpublished opinion) 139 Wn. App. 1074 (2007); and

WHEREAS, the Council considered that where plaintiffs in a parallel challenge to a city’s inclusion of capital investment in its water system for purposes of calculating a water user’s equitable share of system costs – where the city had obtained at least part of that infrastructure through federal or state grants or from infrastructure investment of developers – the Washington Supreme Court held that the inclusion of outside funding in its asset base was

valid, as the Legislature had not explicitly prohibited such inclusion for cities. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561 (1999); and

WHEREAS, the Council further considered that the emphasis by the Kitsap County Superior Court's oral ruling of July 22, 2011 and by the letter sent on behalf of the Ratepayers Alliance of September 10, 2012, on the equal treatment of stormwater charges for the equivalent category of private and public property required by RCW 35.67.025 and RCW 35.92.021 compels a renewed review of the City's Municipal Code to determine if private roads are being charged the same stormwater rates as City and state roads; and

WHEREAS, it appears that at least from the January 1, 2008 effective date of storm and surface water rates established by Ordinance No. 2007-39, the numerous private roads serving various groups of properties on Bainbridge Island have been exempt from any stormwater charges, as there is no subsection in the code establishing any SSWM fees for private roads, much less fees equivalent to BIMC 13.24.089 setting stormwater fees for city-owned right-of-way or BIMC 13.24.090 setting stormwater fees for state highway right-of-way; and

WHEREAS, on the other hand, either a publicly or privately owned road that is an adjunct to a commercial development is charged an equal commercial stormwater fee under BIMC 13.24.080, as such a road is considered to be the equivalent of a driveway into the commercial development; and

WHEREAS, an example of such a publicly owned road that is an adjunct to a public commercial development and charged a commercial stormwater fee under BIMC 13.24.080 is NE Henshaw Place adjacent to the Bainbridge Island City Hall development, and an example of such a privately owned road that is an adjunct to a private commercial development and charged a commercial stormwater fee under BIMC 13.24.080 is Madrone Lane associated with the Roberts LLC development on Winslow Way; and

WHEREAS, while BIMC 13.24.090 purports to require charges to state highway right-of-way at a rate of 30% of the fee provided in BIMC 13.24.080, the City has never collected any such stormwater charges from the state due to the statutory barriers to collection embedded in RCW 90.03.525(2); and

WHEREAS, the Council also considered that private roads, since at least 1997, have been required to conform to the same design requirements as public streets (Section 7.01 of the City of Bainbridge Island Design and Construction Standards and Specifications, adopted by Ordinance No. 1997-23), and therefore in effect, private roads now provide the same complement of stormwater benefits as City roads; and

WHEREAS, at the end of the City Council discussion and debate regarding the appropriate SSWM rates to charge City roads the Council voted 4-1 (2 members having excused absences) to adopt the recommendations of the FCS Group study and the rationale of Alternative 2 and Alternative 3 in that study and exempt City roads from stormwater charges retroactive to the January 1, 2008 effective date of Ordinance No. 2007-39, in conformance with the Kitsap

County Superior Court Order of February 29, 2012 in *Bainbridge Ratepayers Alliance v. City of Bainbridge Island*; and

WHEREAS, being cognizant of the requirement in RCW 35.67.025 and RCW 35.92.021 for the same stormwater charges to be charged to the same category of both private and public property, the City Council also voted to apply the same exemption to private roads;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BAINBRIDGE ISLAND, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. The above recitals shall be considered to be adopted by and included as part of this Ordinance.

Section 2. A new section is added to the Bainbridge Island Municipal Code to read as follows:

13.24.088 Methodology for street and road charges

- A. City roads and municipal streets are defined by the city's NPDES Phase II permit to be a part of the city's Municipal Separate Storm Sewer System and, in addition, the city is responsible for at least \$27 million in undepreciated stormwater infrastructure in the city streets serving developed property over and above what would be needed for just street runoff. City streets and roads therefore should be exempt from stormwater fees.
- B. RCW 90.03.525 prohibits a city from charging a state highway right-of-way more than 30 percent of the comparable property rate, but also prohibits a city from charging more than the fees the city charges to its own city streets. Accordingly, since city streets are exempt from stormwater fees, RCW 90.03.525 requires that the same exemption apply to state highway right-of-way.
- C. RCW 35.67.025 and RCW 35.92.021 both require that a city charge the same stormwater fee to public property as the rates charged to private property of the same category. Accordingly, since city streets are exempt from stormwater fees, RCW 35.67.025 and RCW 35.92.021 both require that the same exemption apply to private roads.

Section 3. Section 13.24.089 of the Bainbridge Island Municipal Code is hereby amended to read as follows:

13.24.089 City Sstreets and roads charge.

~~The monthly fee for city owned right of way shall be 30 percent of the fee provided in BIMC 13.24.080.~~ City-owned right-of-way shall be exempt from stormwater fees.

This exemption, however, does not apply to a city-owned road that is an adjunct to a city commercial/multi development, such as NE Henshaw Place adjacent to City Hall, and which is therefore charged a stormwater fee pursuant to BIMC 13.24.080 as part of a commercial/multi development.

Section 4. Section 13.24.090 of the Bainbridge Island Municipal Code is hereby amended to read as follows:

13.24.090 State highway charge.

~~Pursuant to RCW 90.03.525 the monthly fee for state highway right-of-way shall be 30 percent of the fee provided in BIMC 13.24.080, unless the city and state agree to a different rate, or unless a court of competent jurisdiction holds otherwise.~~ State highway right-of-way shall be exempt from stormwater fees.

Section 5. A new section is added to the Bainbridge Island Municipal Code to read as follows:

13.24.091 Private roads charge.

Private roads (a private “Way-of-travel,” as defined in BIMC 12.16.020(P), that is owned by either private persons or public entities) shall be exempt from stormwater fees.

This exemption, however, does not apply to a private road that is an adjunct to a commercial/multi development, such as Madrone Lane adjacent to the Roberts LLC property on Winslow Way, and which is therefore charged a stormwater fee pursuant to BIMC 13.24.080 as part of a commercial/multi development.

Section 6. In conformance with the Kitsap County Superior Court Order of February 29, 2012 in *Bainbridge Ratepayers Alliance v. City of Bainbridge Island*, Kitsap County Superior Court Cause No. 10-2-00638-1, the charges established by this ordinance, amending BIMC 13.24.089 and BIMC 13.24.090 and adding a new section BIMC 13.24.091 related to private roads, shall be retroactive to January 1, 2008 – the effective date of storm and surface water charges established by Ordinance No. 2007-39.

Section 7. This ordinance shall take effect and be in force five (5) days from its passage, approval, and publication as required by law.

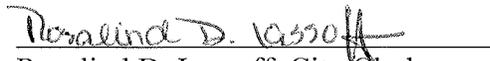
PASSED BY THE CITY COUNCIL this 10th day of October, 2012.

APPROVED BY THE MAYOR this 10th day of October, 2012.



Debbi Lester, Mayor

ATTEST/AUTHENTICATE:



Rosalind D. Lassoff, City Clerk

FILED WITH THE CITY CLERK:	September 21, 2012
PASSED BY THE CITY COUNCIL:	October 10, 2012
PUBLISHED:	October 12, 2012
EFFECTIVE DATE:	October 17, 2012
ORDINANCE NUMBER:	2012-16