

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Special Meeting

August 8, 2011
6:00 p.m.

Council Conference Room 1E-113
Bellevue, Washington

PRESENT: Mayor Davidson, Deputy Mayor Lee, and Councilmembers Balducci, Chelminiak, Degginger, Robertson, and Wallace

ABSENT: None.

1. Executive Session

Deputy Mayor Lee opened the meeting at 6:00 p.m., and declared recess to Executive Session for approximately 50 minutes to discuss one item of property acquisition, one item of property disposition, and one item of potential litigation.

The meeting resumed at 7:24 p.m., with Mayor Davidson presiding.

2. Study Session

(a) Council Business and New Initiatives

→ Councilmember Balducci moved to appoint Kris Liljeblad and Trudi Jackson to the Arts Commission, to serve four-year terms concluding on May 31, 2015. Councilmember Degginger seconded the motion.

→ The motion for appointments to the Arts Commission carried by a vote of 7-0.

(b) East Link: Continued discussion of an updated draft 2010 Term Sheet between Bellevue and Sound Transit anticipating an Agreement for a Tunnel Contribution

Resolution No. 8276 authorizing execution of an updated Term Sheet with Sound Transit and establishing certain principles for further negotiation with Sound Transit.

City Manager Steve Sarkozy noted continuing discussions related to updating the non-binding 2010 Term Sheet with Sound Transit, which identifies October 25 as the deadline for establishing the final binding memorandum of understanding (MOU).

Kate Berens, Deputy City Attorney, said that staff is requesting Council direction on the Term Sheet, and on Resolution No. 8276 authorizing execution of the updated Term Sheet with Sound Transit. She explained that staff discussed the Council's input to date with Sound Transit to determine whether the proposed changes are within the existing authority of the Sound Transit Board, as articulated in the Board's decision on July 28, 2011, regarding the preferred alternative. Action on the Term Sheet will allow the two agencies to continue to negotiate toward a tunnel funding agreement and for potential modifications to the Segment B alternative. Ms. Berens said the Term Sheet does not bind the City to reach a final agreement with Sound Transit or to contribute any particular amount of money to the project.

Ms. Berens referred the Council to Section 7 of the Term Sheet, and recalled Council's interest during the previous week's discussion to strike this section on waiver of litigation. Sound Transit has indicated that the Term Sheet must include Section 7. The version of the Term Sheet provided as Attachment 2 in the desk packet reflects proposed revisions to Section 7, including that the Term Sheet is not intended to limit or waive the City's full participation in the Section 106 and Section 4(f) processes. Added language states that the parties waive no rights except as explicitly set forth, and that failure to pursue judicial, administrative or legislative remedies during the effective period of Section 7 shall not be used against a party upon termination of Section 7. Resolution No. 8276 sets the parameters and expectations with respect to future negotiations and the public outreach process.

Mayor Davidson questioned what would happen if someone else is involved in litigation related to the project, and the City is asked by the judge or another party to participate.

Ms. Berens said the City could not seek to join as a formal party to any litigation under Section 7 of the Term Sheet. However, if the City's appearance was compelled, the City would have to comply. She noted that individual Councilmembers, in their own capacity, could participate if desired.

→ Councilmember Robertson moved to approve the draft Term Sheet presented as Attachment 2 in the desk packet. Councilmember Balducci seconded the motion.

Responding to Councilmember Wallace, Ms. Berens suggested that the Council should finalize the Term Sheet before taking action on the accompanying resolution.

→ Councilmember Wallace moved to delete Section 7, Waiver of Litigation, from the Term Sheet. Deputy Mayor Lee seconded the motion.

Councilmember Chelminiak questioned whether there is anything that the City can bring a lawsuit over between now and October 25. Ms. Berens replied no, that there are no new causes of action that come up between now and October 25.

Councilmember Wallace recalled that the Final Environmental Impact Statement (FEIS) for the East Link project was released a few weeks ago, and the 2010 Term Sheet was brought before the Council within the past two weeks. He believes that the City is not in a position to agree to a waiver of litigation at this time. The City is being asked to engage in a non-binding endeavor to determine whether the two parties can come up with a cooperative alignment, mitigation project list, and funding plan. However, waiving the right to litigate is not an appropriate subject of this agreement, especially on such short notice. Mr. Wallace said he hopes that Sound Transit and the public do not take this as an intent to sue Sound Transit. Rather, he believes it is not appropriate to this agreement, and he does not understand why Sound Transit wants to include the provision.

Councilmember Balducci clarified that the language is essentially a standstill agreement, indicating that the two parties will not sue each other while negotiating the final agreement. Realistically, if either party decided to pursue litigation, negotiations would cease. Ms. Balducci said that Section 7 and the overall agreement contain statements of principles under which the parties expect to create a binding memorandum of agreement. She will not support deleting Section 7.

Councilmember Degginger concurred with Ms. Balducci, and observed that standstill agreements are fairly common. It is difficult to negotiate with another party while also pursuing litigation. Section 7 waives the right of litigation for a limited time period only, and he will not support the motion.

Deputy Mayor Lee believes that removing Section 7, Waiver of Litigation, is necessary in terms of positioning for the negotiations, and he does not want the City to give up its strength in this regard. However, it does not mean that the City will not be negotiating in good faith.

Councilmember Chelminiak said the City is not and cannot give up its permitting authority in any agreement with Sound Transit. Ms. Berens confirmed this understanding, and noted that Section 6 explicitly states that the City is not waiving its regulatory authority nor predetermining the project's compliance with applicable codes and regulations. She noted that Sound Transit has not yet applied for any permits.

Councilmember Chelminiak noted concerns about noise associated with the light rail project, and observed that the City would enforce its Noise Code in issuing any permits. Ms. Berens concurred. Responding to Mr. Chelminiak, Ms. Berens said the City could negotiate procedures, such as the project timeline. She said that Section 5 of the Term Sheet anticipates that the City would have discussions with Sound Transit about processes and clarifications to the code, to the extent that there are questions about how it might apply. Responding to Councilmember Chelminiak, Ms. Berens confirmed that Sound Transit is also waiving its right to litigation under the Term Sheet provisions.

Mayor Davidson observed that this is a non-binding agreement in the long-term, but binding for the proposed negotiating period ending October 25. Ms. Berens confirmed this understanding.

Councilmember Robertson followed up on comments by Councilmember Chelminiak regarding enforcement of the City's codes and regulations, noting that the 2010 Term Sheet indicates that the City would not apply transportation concurrency standards to the light rail project. This is one of the reasons she voted against the original Term Sheet. She acknowledged, however, that such language is not included in the updated Term Sheet. She appreciates that Section 6 states that the City retains its regulatory authority.

Regarding the waiver of litigation, Ms. Robertson is not concerned that the City would be suing Sound Transit between now and October 25, or that Sound Transit would be suing the City. Her concern is that the Term Sheet can be extended if the parties do not have adequate information to allow finalizing a binding agreement by October 25, and therefore the waiver of litigation would be extended. She cannot determine at this point whether this is wise or not. She is comfortable with October 25, but not with the potential extension of that without knowing more. Councilmember Robertson will support the motion to strike the waiver of litigation.

Mayor Davidson suggested adding language to the Term Sheet requiring mutual agreement to extend the Term Sheet beyond October 25, if necessary. Ms. Berens said that language could be added; however, the Term Sheet states an ending date of October 25. If both parties agree to an extension at that time, the City could negotiate to remove the waiver of litigation from an extended agreement.

Councilmember Wallace said the City is giving up something important with the waiver of litigation, which is the ability to protect the City's interest through legal action, if necessary. If both sides are negotiating in good faith, and Sound Transit is not doing anything that would cause the City to want to exercise its legal rights, then the City would not do so. If the City decided to sue Sound Transit, it would no longer be acting in the spirit of cooperation. Mr. Wallace said that neither party is being prejudiced by the waiver of litigation provision. This raises the issue of why to include it at all. He questioned the reason for including the waiver.

Mr. Wallace noted the first sentence of Section 7, which states that the parties agree to waive litigation "during the period of negotiating the binding umbrella memorandum of understanding." He expressed concern about what defines the period of negotiating. He believes that there are too many unknown implications, given the limited time available for approving the Term Sheet.

Councilmember Degginger stated his understanding from staff that Section 7 is to be in effect until October 25. Ms. Berens confirmed this understanding. He noted Councilmember Robertson's concern that the Term Sheet could be interpreted as extending beyond October 25, 2011.

Councilmember Degginger suggested resolving the issue by amending Section 7 as follows (adding the underlined portion): "The parties agree that during the period of negotiating the binding umbrella memorandum of understanding referenced above, through October 25, 2011, neither party will take or join in any judicial, administrative, or legislative forum to challenge actions of the other with regard to SEPA and the project alignment decision." This explicitly

states the deadline, and clarifies that extending the Term Sheet must be by mutual agreement. Mr. Degginger noted that he does still not support the motion, however.

Mayor Davidson said he is strongly committed to entering into negotiations with Sound Transit. He will not support the motion to delete Section 7 regarding waiver of litigation.

- The motion to delete Section 7 regarding waiver of litigation from the Term Sheet failed by a vote of 3-4, with Deputy Mayor Lee and Councilmembers Robertson and Wallace in favor.
- Councilmember Degginger moved to add the phrase “through October 25, 2011” to the first sentence of Section 7, as described in his most recent comments. Councilmember Robertson seconded the motion.
- The motion carried by a vote of 7-0.

Councilmember Chelminiak questioned whether items under Section 4 of the Term Sheet related to project modifications are binding. Ms. Berens said these elements are not binding, but they are items to be negotiated with Sound Transit.

Councilmember Chelminiak noted concerns by some citizens about the potential for grade separation for a portion of the 112th Avenue alignment. He clarified that this proposed modification is in response to concerns expressed by citizens in the past about an at-grade configuration. Mr. Chelminiak observed that the City and Sound Transit will continue to study the optimal crossing of 112th Avenue, as well as other proposed modifications listed in Section 4 of the Term Sheet.

Responding to Mr. Chelminiak, Ms. Berens said that Sound Transit will have to provide the mitigation identified in the FEIS for the East Link project. This applies to the segment between the South Bellevue Park and Ride lot and I-90. However, additional mitigation measures are not binding at this point.

In further response to Mr. Chelminiak, Diane Carlson, Director of Intergovernmental Relations, said current plans anticipate that the City would fund the proposed southbound lane on Bellevue Way between the Park and Ride lot and the Y at 112th Avenue SE. The City is not bound to this plan, however, at this point. Ms. Carlson confirmed that the items listed in Section 4 are included in the Term Sheet at the City’s request.

Councilmember Balducci summarized her understanding of the process, which is to agree on the Term Sheet and to adopt Resolution No. 8276, which authorizes the City Manager to take certain actions related to the Term Sheet and negotiations. Referring to Section 4 of the Term Sheet, Ms. Balducci observed that the items for consideration are potentially contradictory to each other. Responding to Ms. Balducci, Ms. Berens confirmed that these are items for further analysis and discussion with Sound Transit. The process will include the opportunity for the Council and the public to review and provide input on possible modifications.

Councilmember Balducci noted that while the Council has been interested in a grade-separated alignment, there is not general support for the modification presented most recently by Sound Transit for a flyover crossing of 112th Avenue. She observed that project modifications will be considered within the broader context of tradeoffs and the continued analysis of costs and benefits.

Deputy Mayor Lee said he is confused about what is binding and non-binding in terms of the project and the Term Sheet. He noted that the Term Sheet includes the word “binding” in several instances. He sees two separate issues, the tunnel and Segment B modifications. Mr. Lee noted that there has been an ongoing consensus among Councilmembers for a Downtown Tunnel. However, the Term Sheet combines a number of issues and elements. He proposed striking all instances of the word “binding” from the Term Sheet. He suggested that the Term Sheet focus only on the Downtown Tunnel, and not include negotiations about Segment B.

Deputy Mayor Lee moved to strike the word “binding” from the Term Sheet and to strike references to specific alignment modifications and mitigation. The motion was not seconded.

Mayor Davidson observed that the word “binding” refers only to the umbrella MOU to be established in the future. Ms. Berens confirmed that the usage of “binding” in the Term Sheet refers to the goal of establishing the binding MOU by October 25.

Mr. Lee said he continues to be concerned that the City will have to take a certain direction and follow certain parameters spelled out in the Term Sheet, in coming to agreement on the final binding MOU. He would be able to approve a Term Sheet that does not list specific parameters.

Deputy Mayor Lee moved that the Term Sheet be limited to referencing the Sound Transit preferred project and the C9T tunnel funding as the topics of negotiation. There was no second to the motion.

Councilmember Robertson said she is comfortable with the proposed Term Sheet, as provided by Attachment 2, because it is not binding. It gets the City working with Sound Transit on the tunnel and on cooperative alignment modifications and mitigation. Ms. Robertson noted that Resolution No. 8276 directs staff to conduct a public outreach process related to the Term Sheet and MOU. She would have liked to allow public comment at tonight’s meeting, but that is not allowed in a special meeting. Ms. Robertson noted that the Term Sheet is a starting point, and she encouraged taking action on the motion.

Mayor Davidson stated that the motion on the table is to approve the draft Term Sheet provided by Attachment 2, as amended to add a reference to October 25, 2011 in Section 7.

→ Councilmember Wallace moved to amend Section 3 of the draft Term Sheet to change “\$160 million (\$2010)” to “\$150 million (\$2007).” Councilmember Robertson seconded the proposed amendment.

Councilmember Wallace reasoned that the metric for the rate of inflation is still not understood, and the April 2010 Term Sheet reflected \$150 million in 2007 dollars. His recent understanding is that this translates to \$158 million in 2010 dollars. The \$2 million difference equates to approximately \$40 per Bellevue household. He said it is necessary to determine the rate of inflation to be applied to the project.

Responding to Councilmember Chelminiak, Ms. Berens said the dollar amounts cited in Section 3 of the Term Sheet are not binding.

Mr. Chelminiak observed that it will be important to know specific dollar amounts as negotiations move forward. However, it is not necessary at this point for the purpose of approving the Term Sheet.

Councilmember Balducci agreed that a realistic dollar amount must be defined before signing the binding MOU. While she does not see any harm in changing the dollar amounts back to 2007 dollars, she believes it is not critical in terms of approving the Term Sheet.

Councilmember Robertson will support Mr. Wallace's amendment because it carries through the dollar amounts from the 2010 Term Sheet. She prefers leaving those dollar amounts as they are until the figures are updated for the MOU.

Responding to Councilmember Degginger regarding the City's discussions with Sound Transit, Ms. Berens explained that Sound Transit staff was concerned about using 2007 dollars. Mr. Degginger noted that the \$160 million amount (2010 dollars) is preceded by "up to." The next paragraph refers to a process for quantifying and sharing project cost-benefits and risks, and for baselining the project cost estimate. He prefers to leave the language as presented in Attachment 2, knowing that the parties will be updating the cost estimates jointly. Mr. Degginger believes that the proposed change is not necessary.

- The motion to amend Section 3 of the draft Term Sheet to change "\$160 million (\$2010)" to "\$150 million (\$2007)" carried by a vote of 4-3, with Councilmembers Balducci, Chelminiak, and Degginger opposed.
- The motion to adopt the Term Sheet presented in the desk packet as Attachment 2, as amended on the floor, carried by a vote of 6-1, with Deputy Mayor Lee dissenting.
- Councilmember Robertson moved to approve Resolution No. 8276, as presented by Attachment 3 in the desk packet. Councilmember Wallace seconded the motion.

Councilmember Robertson believes that there are many unknowns that need to be fleshed out before reaching a final agreement with Sound Transit. She was pleased to see the Mayor work with staff to come up with the original resolution to authorize the City Manager to sign the Term Sheet, and to give clear direction in terms of policy and process related to identifying a cooperative alignment and funding the Downtown Tunnel. She strongly supports Resolution No. 8276, as amended in desk packet Attachment 3. One item that she added to the resolution is to

have a specific public process, and to have it early enough for the public to understand the alignment adjustment before entering into the binding MOU. Ms. Robertson said it is important for the Council and the public to fully understand the financial implications and budget impacts associated with a binding agreement with Sound Transit.

Deputy Mayor Lee expressed concern about the third paragraph on the third page of the resolution: “Whereas, Sound Transit will be required to receive permits and approvals from the City...”

→ Councilmember Robertson agreed, as a friendly amendment, to changing “receive” to “obtain.”

Councilmember Balducci said she has received comments from citizens, including the Surrey Downs East Link Committee, that the resolution meets a number of their requests, including references to applicable codes and to traffic mitigation. She suggested adding a reference to the Winters House. Even though it is covered by Section 106 and the Section 4(f) analysis, Ms. Balducci believes it is worthy of a mention, which she suggests adding language regarding park property and the Winters House to Section 3 on the fourth page of the resolution.

Ms. Balducci believes that the City should involve residents and homeowner associations in the consideration of alternatives as well. She encouraged holding a public hearing in September to gather input for the next phase of negotiations.

Ms. Robertson said she would like to have a public hearing after more information on the cooperative alignment and funding is developed during negotiations. However, she would be open to having two public hearings, one earlier and one later in the process. She would like the second public hearing to occur at least two weeks before Council action on the final MOU.

Councilmember Balducci suggested that, at this point, the City could present information to the public about the range of potential dollar contributions, the types of potential dollar or value contributions, and anticipated impacts to the Capital Investment Program (CIP).

Responding to Ms. Balducci, Ms. Robertson confirmed that her intent for the second public hearing would be to solicit public comment on the tentative MOU agreement with Sound Transit. Councilmember Robertson wants the public to have the opportunity to comment on the MOU, financial impacts, and the cooperative alignment.

Mayor Davidson observed that the resolution directs staff to develop a public outreach plan. He suggested allowing staff to develop a plan, which can be discussed later by the Council.

Councilmember Balducci said she wants to ensure that there is early public input to drive the negotiations.

Mayor Davidson noted that meeting the October 25 deadline will be a logistical challenge.

Councilmember Degginger said the Council has heard a great deal about what citizens do not want, and it is important to find out what they do want. He believes that early public input will help to achieve this objective.

Mr. Degginger proposed changing Section 5 (last page of resolution) to specify a public hearing in September.

Mayor Davidson expressed support for two public hearings, noting the significant budget implications.

Councilmember Chelminiak believes there should be early public input on the possible design modifications under consideration, for example, the items listed in Section 4 of the Term Sheet. His understanding is that, by law, a public hearing must be scheduled with 10-14 days advance notice. He suggested not using the term “public hearing” but instead taking public comment, and waiving the usual rule that limits three speakers on either side of an issue. This would provide the flexibility for soliciting public comment as soon as information is ready for release to the public, instead of having to accommodate the requirement for advanced noticing.

Councilmember Degginger suggested amending Section 5 of Resolution No. 8276 [Attachment 3 in desk packet] to delete the last sentence of that paragraph. Councilmember Chelminiak concurred.

Councilmember Degginger said this change will allow staff to develop a public process schedule.

City Manager Sarkozy agreed that everyone benefits from early public outreach. He suggested moving quickly to first engage the citizens and property owners most directly affected by the project, and to then proceed from that point.

Councilmember Wallace supports the suggested amendment. He concurred with the importance of public participation, and noted that extensive public engagement has occurred to date. While moving forward with negotiations and a formal public process, citizens are always able to submit comments and input to the Council and City staff.

→ Councilmember Robertson accepted, as a friendly amendment, Mr. Degginger’s suggestion to delete the last sentence of Section 5 of Resolution No. 8276.

Ms. Robertson prefers the public hearing format of not limiting the number of speakers representing any particular position.

→ Councilmember Chelminiak moved to remove the word “hearing” from Section 5 of Resolution No. 8276, and Councilmember Wallace seconded the motion.

Councilmember Chelminiak reiterated his interest in providing greater flexibility within the public process and for taking public comment.

Councilmember Robertson said she will not support the proposed amendment. She believes it is important to have the formality and noticing protocol reflected in the rules for a public hearing.

Mayor Davidson concurred with Ms. Robertson.

→ The motion to remove the word “hearing” from Section 5 of Resolution No. 8276 failed by a vote of 2-5, with Councilmembers Chelminiak and Degginger in favor.

Councilmember Chelminiak observed that the motion on the Term Sheet already authorized the City Manager to proceed toward signing the Term Sheet. He suggested that a vote against the Term Sheet precludes voting in favor of Resolution No. 8276.

Ms. Robertson disagreed with Mr. Chelminiak’s characterization of the motion on the Term Sheet.

Mr. Chelminiak restated that the Council approved the Term Sheet, which will be signed by the City Manager.

Deputy Mayor Lee said that, despite his vote on the Term Sheet, he will support Resolution No. 8276 because it articulates certain principles. He acknowledged his ongoing confusion regarding the Term Sheet, which he feels is not meaningful because it is a non-binding agreement. However, he believes that Resolution No. 8276 lays out some specific concerns of the City as a basis for substantive discussions with Sound Transit.

→ The motion to approve Resolution No. 8276 [Attachment 3 in the desk packet], as amended on the floor, carried by a vote of 7-0.

At 8:56 p.m., Mayor Davidson declared the meeting adjourned.

Myrna L. Basich, MMC
City Clerk

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