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Subject: Update on Failed and Struggling Developments

Executive Summary

This Failed Development update looks at four issues. The proposed changes to the construction security policies, options for how to address completion of the failed development street repairs, status of a potential settlement of the Windermere failed development, and status of a potential settlement of the Stoneybrook Cottages failed development.

Recommendation

The Department of Public Works recommends that the City Council receive the report on failed developments. The Department will begin implementation of the new construction security policy absent any concerns from the governing body. Furthermore, the Department recommends discussion of hypothetical scenarios presented with this report. The Department plans to bring forward in the future individual plans that recommend assessment of property owners located within failed developments to fund remaining public infrastructure, less a 10% City-funded contribution to the remaining cost of the project.

Background

Over the past two years Public Works has been dealing with bankrupt and restructured developments to make sure that public infrastructure and other required improvements are completed. The Attorney's office has joined the effort and has been instrumental in negotiations with financial institutions, insurance companies, restructured developments, and purchased bankrupt developments with the goal of ensuring the completion of public infrastructure improvements through either completion of the construction or payment of the available construction security. Public Works has contacted the Homeowner's Associations of these failed developments and set up meetings with the citizens of these neighborhoods. These meetings were utilized to discuss the history of how the situation arose following the 2008-9 recession, provide general information on the types of construction securities held in pledge from the developer for incomplete work, give an update on process status, and next steps to allow citizens to voice their opinions and

concerns. Through the Engineering Inspections Group of Public Works the critical elements needed to complete these subdivisions have been identified and a cost estimate has been created. These estimates will ultimately be used to generate contracts to complete the work. The status of each failed development is found in the chart at the end of this report.

Issues/Analysis

This Failed Development update looks at four issues:

- A. The proposed changes to the construction security policies
- B. Options available to the City to address completion of the failed development infrastructure
- C. Status of a potential settlement of the Windermere failed development
- D. Status on the potential settlement of the Stoneybrook Estates failed development

Each issue will be taken sequentially in the report.

A. Construction Security Policies

When constructing a new neighborhood, a developer is responsible for installation of all utilities and completion of the street and sidewalk. With all work completed the homes can receive certificates of occupancy. Often it is advantageous for the developer to temporarily leave some work uncompleted. Public Works accommodates this request by allowing the developer to post a construction security rather than complete the work, and then some portion of the certificates of occupancy can be issued. At some point the developer must complete the work and the construction security is returned. If a developer fails to complete the work then the construction security can be collected to complete the missing work. Public Works is proposing changes to the City's construction security policies to ensure appropriate protection of the City, yet be sensitive to the development community. There are separate policies for street completion and completion of stormwater control measures.

For completion of public streets, Developers would have two options:

- Option one is to complete the street at the beginning of the project and provide a two year Warranty Security.
- Option two is to provide a Construction Security at the beginning of the project allowing up to 75% of the certificates of occupancy after which the street must be completed and a two year Warranty Security posted.

Existing projects will have 90 days to update their current Construction Security to the new standard or complete paving of the streets.

There will be three tiers for construction of the stormwater control measures for each phase of developments with large stormwater control measures:

- Tier 1 is the initial start of the project and encompasses the initial stage of construction of the stormwater control measure.
- Tier 2 is a rough graded stormwater control measure.
- Tier 3 is a functionally complete stormwater control measure.

As a developer finishes more of the work required to complete the stormwater control measure, their stormwater control measure will move through the Tiers listed above and construction security amount will be reduced.

A Tier 1 construction security is required for all stormwater facilities in the phase prior to issuance of the first certificates of occupancy. A Tier 1 construction security allows the developer to obtain 75% of the certificates of occupancy. At any point in the development project, once rough grading of the stormwater control measure is completed, a developer can obtain Tier 2 compliance and reduce the security amount that is being held. However, Tier 2 is optional. A developer can choose to move from Tier 1 directly to Tier 3. To move to Tier 3 the stormwater control measure must be functionally complete: completely graded, preliminary certification by the BCE Engineer, and requiring additional stabilization after conversion from erosion and sediment control device. The developer is required to obtain a Tier 3 certification for the stormwater control measure to move beyond 75% of the certificates of occupancy issued for the development. When 85% of the certificates of occupancy have been issued, the stormwater control measures will be required to be completed and certified.

Other unconventional stormwater control measures like bio-retention, sand filters or green roofs will only require a Tier 1 construction security to obtain certificates of occupancy. For commercial developments the City's current policies will remain in effect as no particular problems have arisen. For regional facilities that control multiple (3, 4, 5, etc phases) we will look at on a case by case basis for building permits and certificates of occupancy percentages.

Existing residential developments will have 90 days to update their current Construction Security to the new standard or pave the streets, unless 75% of certificates of occupancy have been issued already. Projects with 75% of the certificates of occupancy issued may need to be handled on a case by case basis.

The Home Builders Association of Durham, Orange and Chatham have provided their support for the new construction security policies. Public Works plans to implement the new Construction Security policy absent any concerns from the City Council.

B. Completing Public Infrastructure in Failed Developments

Public Works is proposing three possible scenarios to complete the public infrastructure in failed developments. Options included in the scenarios include assessment of the property owners to fund the street work. All scenarios assume insufficient construction securities were in place and funds are short of what is needed to complete the work. These scenarios

would be implemented in cases when there are no other parties to seek out to complete the work. Public Works is considering the following hypothetical scenarios for completing the failed developments:

Development Scenario 1

In this scenario the streets of the failed development require repairs and installation of the final layer of asphalt. A construction security was collected after the original developer left the project unfinished, but it is less than the estimated cost for completing the streets. The estimated cost of unfunded repairs is approximately \$20,000. The cost of repair is relatively small and the number of lots is large so the cost-per-lot assessment is relatively low. Public Works proposes the following options for completing the streets of this failed development:

1. Option 1: The City contracts to repair and pave the streets and assesses the homeowners the cost. The assessment per lot is estimated to be approximately \$300. The City would choose to fund 10% (\$2000) of the cost of the project which would lower the amount of money assessed to the property owners to approximately \$270. This is the recommended option.
2. Option 2: The City contracts to repair and pave the streets without assessing the homeowners. The work would be fully funded by the City. This is not recommended since it would reduce available funds to maintain city streets overall.

Development Scenario 2

In this scenario the streets of the failed development require major structural repairs and installation of the final layer of asphalt. A construction security was collected after the original developer left the project unfinished, but it is less than the estimated cost for completing the streets. The estimated cost of unfunded repairs is approximately \$75,000. The cost of repair is relatively high when compared to the small number of lots, so the cost-per-lot assessment is relatively high. Public Works proposes the following options for completing the streets of this failed development:

1. Option 1: The City contracts to make *major structural repairs* and pave the streets and assesses the homeowners the cost. The assessment per lot is estimated to be approximately \$1,100. The City would choose to fund 10% (\$7500) of the cost of the project and lower the amount of money assessed to the property owners to around \$990. This is the recommended option.
2. Option 2: The City contracts to make *major structural repairs* and pave the streets without assessing the homeowners. The work would be fully funded by the City. This is not recommended since it would reduce available funds to maintain city streets overall.
3. Option 3: The City contracts to make *minor repairs* and pave the streets and assesses the homeowners the cost. The assessment per lot is estimated to be approximately

\$360. The City would monitor the condition of the street with the annual pavement rating and make more permanent repairs to the structure of the street as part of a future project. This is not recommended since the street will potentially be of an inferior quality.

4. Option 4: The City contracts to make *minor repairs* and pave the streets without assessing the homeowners. The work would be fully funded by the City. The City would monitor the condition of the street with the annual pavement rating and make more permanent repairs to the structure of the street as part of a future project. This is not recommended since it would reduce available funds to maintain city streets overall.

Development Scenario 3

In this scenario the street of the failed development requires repairs and installation of the final layer of asphalt. The estimated cost of repairs is approximately \$20,000. The construction security expired prior to collection of the funds. Even though cost of repair is relatively low, there are no collected funds to use and the number of lots is small so the cost per lot assessment is relatively high. Public Works proposes the following options for funding the completion of the street of this failed development:

1. Option 1: The City contracts to repair and pave the streets and assesses the homeowners the cost. The assessment per lot is estimated to be approximately \$1,500. The City would choose to fund 10% (\$2,000) of the cost of the project and lower the amount of money assessed to the property owners to around \$1,385. This is the recommended option.
2. Option 2: The City contracts to repair and pave the streets without assessing the homeowners. The work would be fully funded by the City. This is not recommended since it would reduce available funds to maintain city streets overall.
3. Option 3: Public Works crews can lower the manholes and valves in the street to the level of the initial asphalt layer and not install the final layer of asphalt. To ensure the pavement holds up over time, Public Works can monitor the pavement by annually rating the street. This is not recommended since the street will potentially be of an inferior quality.

Public Works recommends that the property owners be assessed to fund the work. If the City agrees to fund the work without assessing the homeowners, it would set a precedent and future failed developments would expect to be completed by the City as well. The City would provide project management and staff support and 10% of the cost of the project. Public Works will present specific neighborhood plans for the completion of the work in upcoming reports.

C. Windermere Ridge Townhomes Update

Letters of Credit securing both the streets and stormwater control measure for the Windermere Ridge Townhomes failed development were redeemed by the City. A notice of default was issued to the developers for noncompliance with the recorded Stormwater Facility Agreement. After the City indicated it would seek appropriate legal remedies against the developer property owner, City Staff and the City Attorney's Office negotiated an agreement with the developer to redesign and complete the required stormwater control measure and the streets in accordance with City standards such that the Letters of Credit money collected by the City would cover the engineering and construction expenses. The City and developer have entered into a preliminary agreement to initiate the re-design of the stormwater control measure to be followed by a construction agreement (for both the stormwater control measure and streets), which will also require recording a new stormwater agreement. It is anticipated the work will be completed by spring of 2012. As these infrastructure completion agreements are negotiated with developers, the Department will seek specific authority from City Council to allow the City Manager to modify and release and/or cancel recorded Stormwater Facility Agreements to negotiate satisfactory resolutions for failed and struggling subdivisions.

D. Stoneybrook Cottages Update

A Notice of default was provided to the developer pursuant to the Stormwater Facility Agreements. The developer responded positively to the notice of default, and the response resulted in a meeting between City staff and the developer. At this meeting the developer stated that it did not have the resources to complete the incomplete stormwater facilities and streets, but that it would cooperate with the City in assisting, as necessary, in the use of the available surety money to complete the required infrastructure. The developer and City have agreed on the required scope of work, and City staff and the City Attorney's Office are in the process of preparing an initial draft of an agreement between the developer and the City regarding the process to complete the unfinished infrastructure. Based upon City staff's estimates, it appears that sufficient bond funds exist to pay for the completion of the unfinished infrastructure. It is anticipated that the agreement will be in place in time to permit the completion of this work in the spring of 2012.

Alternatives

The following are alternatives for discussion to fund the remaining cost for completion of 4 hypothetical failed developments once all other potential funding sources are exhausted. Number 2 is the recommended alternative and was recommended to the City Council when the first briefing on this matter was provided several months ago. Confirming the recommended approach will assist the Department in moving forward with neighborhood specific plans that will follow with future updates.

1. Property owners are assessed the full remaining cost of construction of the streets.
2. A 10% contribution of City funds is provided and property owners are assessed after the 10% contribution. This is the recommended alternative.
3. The City may choose a higher percent for the City's contribution.
4. The remaining cost is paid fully by the City.

5. Property owners are assessed the remaining cost of construction of the streets up to an established amount or “cap”, such as \$1,000. The City would fund any remaining cost if the assessment amount required is higher than the established cap amount for assessments.

Public Works recommends that the property owners be assessed to fund the work and that the City provides assistance by funding 10% of the remaining cost of the project.

Financial Impact

Financial Impact section is not applicable for this update.

SDBE Summary

The SDBE Summary is not applicable for this update.

Figure 1-1 Progress Table

Project	HOA Meeting	Money Available	Punchlist Created	Cost Estimate	Repairs Marked	City Work Scheduled	City Work Complete	EMP	Project Manual	Request Bids	Bids Received	Contract Awarded	Contract Complete	Streets Accepted	Project Closed
Dunwoody	6/8/2011	Bond expired													
Lynn Hollow	5/24/2011														
Stoneybrook Cottages	6/18/2011														
Riverside on the Eno	6/22/2011														
Green Gardens	5/31/2011														
Bay Pointe	5/23/2011														
Windermere Ridge	6/1/2011														
Pearl Knoll	6/9/2011														
Ravenstone	5/31/2011														
Stonehill Estates	5/28/2011														
Key		Complete		In Progress		Litigation		Not possible							
HOA Meeting	Engineering Development Review must schedule a meeting with Homeowner Association to inform homeowners of their development's status and what actions the City might take.														
Money Available	Engineering Development Review and City Attorneys must collect the available money into a City account and determine how the money can be spent.														
Punchlist Created	Engineering Inspections must determine what repairs or installations need to be completed before the City can accept the infrastructure.														
Cost Estimate	Engineering Development Review must use current pricing information from Engineering Contracting to determine the cost of completing the punch list created by Engineering Inspection														
Repairs Marked	Engineering Inspections must paint or otherwise indicate in the field where the repairs and installations to be completed.														
City Work Scheduled	Work that the City of Durham can perform with its own forces must be coordinated with Street Maintenance and scheduled.														
City Work Complete	Street Maintenance must complete the work that the City elects to perform with its own forces														
EMP	Engineering Development review must develop an Engineering Modification Plan for the work that remains to be completed after City forces have completed their work.														
Project Manual	Engineering Development Review and Engineering Contracting must create a Project Manual for the purposes of bidding the remaining work out to contractor:														
Request Bids	Engineering Contracting must advertise and/or otherwise request bids for the work indicated in the Project Manual.														
Bids Received	Contractors must submit their bids by the deadline indicated in the Request for Bids.														
Contract Awarded	Engineering Contracting must award the contract to the contractor providing the winning bid														
Contract Complete	The contractor must complete the work as indicated in the Project Manual and contract terms.														
Streets Accepted	Engineering Inspections must verify that the punchlist is complete, that no new issues have been created, and that the infrastructure is acceptable, then formally accept the infrastructure.														
Project Closed	Once all Departments have completed the infrastructure acceptance procedures, the project will be considered complete.														