

FLOOD PLAIN PERMIT COMMITTEE MEETING
201 West Gray, Building A, Conference Room D

*Monday, November 7, 2016
3:30 p.m.*

Minutes

PRESENT: Shawn O'Leary, Director of Public Works
Scott Sturtz, City Engineer
Susan Connors, Director of Planning/Community Development
Ken Danner, Subdivision Development Manager
Jane Hudson, Principal Planner
Neil Suneson, Citizen Member
Sherri Stansel, Citizen Member

OTHERS PRESENT: Todd McLellan, Development Engineer
Rachel Warila, Staff
Carrie Evenson, Stormwater Engineer
Chris Serrano, Construction Manager
Jeff Bryant, City Attorney
Leah Messner, Assistant City Attorney II
John Curtis, Sherwood Construction
Kyle Conaway, Sherwood Construction
Alseny Diop, Est, Inc.
Aleisha Karjala, City Council Member
Logan Layden, State Impact OK
Dan Kelly, Total Beverages
Karen Chapman, Citizen
Sereta Wilson, Citizen
Katelyn Polly, Citizen
Thomas Behlem, Citizen
Sandra Gall, Citizen
Elizabeth Nichols, Citizen
Amy Bradshaw, Citizen
Cynthia Rogers, Citizen
Lyntha Wesner, Citizen
Charles Wesner, Citizen
Casey Holcomb, Citizen
Mary Francis, Citizen

The meeting was called to order by O'Leary at 3:30.

Item No. 1, Approval of Minutes:

O’Leary requested a roll call of the committee. Seven members of the committee were present and a quorum was established. O’Leary called for a motion to approve the minutes from the meeting of October 3, 2016. Suneson asked to remove the word “permit” in “floodplain permit” on page 18. Stansel asked for a change on page 23 to change “concrete with bonded asphalt” to “solid asphalt”. Stansel also requested that a comment made by Shawn O’Leary when he mentioned that the floodplain ordinance “was one of the most stringent” and that “they were holding these contractors to a higher standard than most” be added to the minutes. A motion was made to approve the minutes by Ken Danner. Seconded by Scott Sturtz. Approved 7-0.

Item No. 2, Flood Plain Permit Application No. 574:

O’Leary stated this application was for the filling of an existing borrow pit just east of I-35 in the Canadian River floodplain. Todd McLellan, City Development Engineer, introduced the applicant’s representative, Kyle Conaway from Sherwood Construction Company along with John Curtis, President of Sherwood Construction Company and Alseny Diop, Sr. Geotechnical Engineer from Engineering Services and Testing, Inc. (EST). McLellan then presented the Staff Report.

McLellan said that the Floodplain Permit Committee (FPC) considered and approved with conditions Floodplain Permit No. 536, submitted by Sherwood Construction Company on November 18, 2013 by a vote of 7-0 with the condition that the applicant submit a new site plan depicting a site that was less than 5 acres. He said that City Staff received a new site plan

on November 25, 2013, depicting a pond size of 4.9 acres. He stated that the original application requested the excavation of a 9-acre borrow pit, within a 15.8 acre parcel of property privately owned by Landmark Development Group, LLC, represented by Dr. Glenn Foster. McLellan explained that Dr. Foster and Sherwood officials both appeared at that FPC meeting as co-applicants.

McLellan said that the property is adjacent to the Canadian River, generally southeast of the interchange of I-35 and State Highway 9 East.

O'Leary asked McLellan to outline the boundaries of this private parcel of land owned by Sherwood. McLellan presented a slide showing the boundary of the property. O'Leary said that it was not in the river but rather on a private parcel of land. McLellan showed where the floodway/floodplain was located and the location of the pond in the floodplain.

He noted that Sherwood was the prime contractor on a project administered by the Oklahoma Department of Transportation (ODOT) to construct Phase I of the I-35/Highway 9 interchange project. He said that Sherwood proposed to use the soil from the borrow pit on this project and that Sherwood purchased the property from Landmark Development Group, LLC in February, 2014. McLellan added that the borrow pit was completed in Spring, 2014 and the permit was effectively closed by City Staff.

McLellan stated that on May 18, 2016, City Staff was notified by a citizen that the previous borrow pit was being filled with soil and concrete materials. He explained that City Staff

investigated this claim and found that Sherwood had filled approximately 70% of the borrow pit with soil and pavement debris from projects administered by ODOT. He explained that these ODOT projects involved the widening of I-35 from Main Street to the Canadian River Bridge, replacement of the I-35/SH-9 interchange, and replacement of the Lindsey Street interchange. McLellan said that City Staff ordered Sherwood to stop the filling operation immediately to allow staff time to review FP Permit No. 536 and Sherwood complied with that order.

McLellan said that in May, 2016, City Staff determined that FP Permit No. 536 did not have a provision for filling the borrow pit in Sherwood's application, or in the action taken by the FPC. He said that rather than removing the fill material from the borrow pit, Sherwood chose to submit FP Permit Application No. 574, which would essentially amend FP Permit Application No. 536 and allow the filling of the borrow pit area with soil and concrete pavement materials to its original surface condition. McLellan mentioned that Sherwood submitted FP Permit Application No. 574 on June 1, 2016.

McLellan said that Floodplain Permit Application No. 574 was originally considered by the FPC on June 20, 2016, where it was denied by a 5-2 vote. He said the applicant appealed that action to the Board of Adjustment (BOA) on August 24, 2016 and requested the BOA reverse the decision of the FPC and grant FP Permit Application No. 574 to fill the borrow pit. He explained that the BOA voted 4-0 to send the permit application back to the FPC and directed the applicant to provide a groundwater monitoring program, a borrow pit closure plan and

other documentation or plans required by the FPC for their reconsideration of Floodplain Permit Application No. 574.

McLellan stated that the application was reconsidered by the FPC on October 3, 2016 and the revised application included a groundwater monitoring plan, borrow pit closure plan, and original surface elevation verification plan, as required by the BOA. He mentioned that at the FPC meeting on October 3, 2016 it became clear that the applicant and those objecting to the application had strong differences of opinion regarding the composition of fill material at the site. He said the FPC felt an independent effort to establish a factual basis for the composition of the actual fill material in place was critical for further consideration of the permit application. McLellan explained that among the additional information requested, the FPC directed the excavation of three test holes and the committee voted 7-0 to postpone Floodplain Permit Application No. 574 to November 7, 2016 to allow time for the applicant to excavate three test holes at three random locations within the borrow pit to determine the actual make-up of the fill material previously placed by Sherwood.

McLellan noted that to assist the FPC in that regard, City Staff chose to hire an independent, third party, professional geotechnical engineering firm to develop the protocol, oversee the test hole operation, and produce a certified report of the findings. He said that the firm chosen was EST, Inc. of Norman and they are one of the 3 firms included in a 3-year on-call engineering services contract approved by the Norman City Council for geotechnical engineering services used on a number of Public Works and Utilities projects. McLellan said that EST, Inc. developed the protocol, but prior to the test hole excavation, City Staff met

with Sherwood to discuss the protocol and reach agreement on how the protocol would be executed.

McLellan said that the test holes were excavated on October 19, 2016 and witnessed by Alseny Diop - EST, Inc., Kyle Conaway - Sherwood Construction, Lucas Reed - ODOT Division 3, Sherri Stansel - City of Norman Floodplain Committee, Neil Suneson - City of Norman Floodplain Committee, and Todd McLellan - City of Norman Public Works Staff.

He said that based on the results of the EST, Inc. report, the fill generally consists of approximately 14 to 53% reinforced concrete boulders and cobbles, 1.5 to 10% asphaltic cement concrete and 37 to 80% alluvium soils. McLellan said that groundwater and/or perched groundwater levels were observed between 9 and 12 feet below existing grades. He added that the certified report, including a location map and test hole logs, has been included in the packets. He then presented photos of the test holes showing the concrete and other debris including the contractors separating the debris into various components for volume calculations.

McLellan explained that the following questions have been asked of City Staff and the FPC over the past few months concerning this floodplain permit application:

- 1. Are any of the concrete, asphalt, or rebar materials in the pit considered to be hazardous materials?*

City of Norman

The City's Flood Hazard Ordinance does not address the type of materials that can be used as fill in the floodplain. The Ordinance is concerned with the volume of fill material, not type of fill material. See Zoning Code 429.1.1- Description and Purpose; Section 429.1.2(v) – Definition of Fill; and Section 429.1.4(b)(1) – General Standards and Uses of Fill in Flood Hazard Districts.

The Sherwood site might be classified as a construction/demolition landfill which is used for soil, concrete and solid asphalt pavement materials. Norman City Ordinances do not regulate construction/demolition landfills, including floodplains.

Oklahoma Water Resource Board (OWRB)

According to Ms. Susan Beth Wilhelm, Floodplain Management Specialist – Planning & Management Division, the OWRB is not opposed to the City Floodplain Permit Committee (FPC) granting a floodplain permit in this case. OWRB Staff caution against placing any type of structure on the fill material in the future unless the material is placed in lifts and properly compacted. City Staff understood this input to be cautionary if at some point in the future the fill site may be considered as a construction site for a permanent structure. It is highly unlikely the FPC will grant a permit for a structure on the borrow pit in the future.

Federal Emergency Management Agency (FEMA) Region VI

According to Mr. Jerry Clark, Civil Engineer, the Code of Federal Regulations 60.3(c), indicates that fill placed in the floodplain requires a floodplain permit. FEMA does not

regulate the type of fill material placed in the floodplain. Therefore, if the City issues a floodplain permit to Sherwood at this time, the site will be in compliance with current FEMA regulations.

Oklahoma Department of Environmental Quality (ODEQ) – Solid Waste Compliance and Enforcement, Land Protection Division

According to Ms. Amber Edwards, Environmental Programs Manager – Solid Waste Compliance and Enforcement, it is ODEQ’s position that solidified asphalt may be used as fill material. Title 252, Department of Environmental Quality, Chapter 515 entitled “Management of Solid Waste” is the applicable regulation as follows:

252:515-3-2 Permit not required

- (a) The following do not require a solid waste permit and are not subject to the requirements of this Subchapter, but may be subject to other DEQ permits or requirements:
 - a. Rock and dirt fills that receive only uncontaminated rock, dirt, concrete, bricks or solidified asphalt

United States Army Corps of Engineers (USACE), Tulsa District

City Staff has yet to receive a written position from the USACE. However, Mr. Michael Ware, Supervisory Regulatory Project Manager, has stated in telephone conversation with City Staff in recent days that since the project site falls outside the navigable waterway of the United States, the USACE does not have jurisdiction in this case.

2. Can the placement of material in the borrow pit without a floodplain permit be considered illegal dumping?

Placing fill in the floodplain without a permit is a violation of the City's Zoning Ordinance, Zoning Ordinance violations, contained with Chapter 22, Section 22:440.3, carry a penalty of a \$50.00 to \$750.00 fine if the violator is found guilty in the Norman Municipal Court. In addition, each day that a violation exists constitutes a separate and distinct offense.

The City Attorney's Office is prepared to file charges for filling in the floodplain without a permit. However, enforcement actions based on failure to obtain a permit are generally handled in such a way as to encourage remediation of harm caused by the failure to obtain the permit. In this case, the FPC has not finalized its deliberation and has yet to consider the report from EST, Inc., and what impact this independent factual analysis may have on the requested application. Once the FPC has finalized its deliberation, then the City Attorney's office will further consider the appropriateness and the extent to which charges against Sherwood will be pursued.

3. *What liability does the City incur by the fill in the borrow pit possibly altering the water course of the river and affecting property owners on both sides of the river?*

Public Works Staff consulted with the City Attorney's Office in order to respond to this question. The City Attorney's Office advises that the City will not incur any liability as the City is immune, under the Oklahoma Tort Claims Act, 51 O.S. § 155.

4. Does the City of Norman have a current contract with Sherwood Construction Company for construction of the Lindsey Street Bond Project or any other project in Norman?

The City of Norman has no contracts directly with Sherwood Construction. However, Sherwood Construction is under contract with ODOT for the West Lindsey Street project and the I-35/Highway 9 and Lindsey Street interchange replacement project.

McLellan said that after considering the report from EST, Inc., checking with other regulatory agencies on how similar matters are handled, considering the BOA's recommendations, and comments from Sherwood regarding their willingness to address expressed environmental concerns, City Staff recommends approving Floodplain Permit Application No. 574 with the following conditions:

- 1) In recognition that the fact finding effort was necessary due to filling prior to obtaining a prior permit, Sherwood will be required to cover the costs of hiring EST, Inc. to conduct the third party pit testing (previously agreed by EST, Inc. not to exceed \$5,600);

- 2) Sherwood must complete closure and revegetation of the borrow pit, according to their submission to the City and in compliance with ODEQ requirements;
- 3) Sherwood will install five groundwater monitoring wells no later than January 15, 2017, and conduct three tests per well over the next two years in accordance with their submitted plans. Testing will be completed by an independent third party (ITP). The ITP will provide test results and an interpretation of the results following industry protocols to Sherwood and the Chairman of the Floodplain Permit Committee with a copy to the City Attorney's office. ITP testing and test interpretation will be performed at the expense of Sherwood; and
- 4) Sherwood will continue to abide by all applicable state and federal regulations.

O'Leary responded that he would like to add a clarification to the Staff's recommendation that it is the FPC's presumption that after the 3 years of water monitoring if contamination or pollution is identified, it would be their expectation that Sherwood Construction would remediate at their expense. He stated that he would like Sherwood to speak to that in this meeting when they provide their comments. He added that the notion of the City Attorney's office filing charges for the violation in relation to the floodplain ordinance and lack of a permit, that even if a permit is granted they expect charges to be filed against Sherwood for that period between May 18th when the violation was discovered and June 1st when the permit application was submitted. He mentioned that the violation could carry a fine of \$50 to \$750 a day.

Suneson asked what project the fill material came from. O'Leary said that he would let the applicant speak to that but that there were two different contracts and Phase I came from the I-35/Hwy 9 project, which focused more on the Highway 9 side of that corridor and Phase II which was the entire corridor including the widening of I-35 and the Lindsey Street interchange.

Suneson said he was one of the committee members that went out to visit the site and that he did not see the digging of the first test hole but he witnessed the digging of the other two test holes and presented presentation slides depicting rubble and debris including rebar, asphalt, an old railroad tie, plastic netting, large concrete slabs, plastic trash bags and an unearthed tire fragment. He said he was concerned about the debris and whether or not it would decompose over time. He explained that even though McLellan stated in the Staff Report that many agencies did not feel it was not too much of a concern, there were very large pieces of concrete with rebar sticking out in the pit, as well as buried in the fill material and he wanted to know if all of this free rebar would need to be excavated and cut off flush with the concrete and if there were more tire fragments buried in the fill material.

John Curtis responded that they acknowledge that they made a mistake by dumping the debris without a proper permit and since they had learned of their mistake, they have been trying to rectify it. Kyle Conaway explained that as far as the presentation slides, Sherwood is down at the site cleaning up debris on a weekly basis and if they leave an open pit down there then he believes illegal dumping will continually happen. O'Leary asked McLellan if the pit was filled to about 70% capacity and he responded that this was generally accurate. Sturtz asked if

the debris that is being dumped is not material that was placed into the pit by Sherwood and Conaway responded that it was not and that this material is being dumped by other parties on the weekends. O'Leary asked what the plan was for the remaining 30% of open pit and Conaway responded that they intended to fill it to capacity with concrete and soil materials. Curtis said they were experiencing a similar situation in Tulsa County and it was very difficult for them to control the illegal waste dumping and the only way they could stop it was by installing barrier walls around the pit.

O'Leary asked Sherwood in relation to the monitoring wells, what was their expectation if there is any evidence of contamination in the testing process. Curtis said that if they found a delta between the upstream and the downstream then it would be incumbent for them to figure out why and fix the issue. He said that this might be a legal question that would require additional parameters but if a delta was found then more testing would be necessary to determine the cause and then rectify it.

Stansel asked McLellan to repeat one of the presentation slides that showed the protruding rebar in the pit. She asked why the committee had been told numerous times that the rebar would be cut off flush with the concrete, when it clearly shows in the photos that it is not. She mentioned that in the floodplain minutes from June 20th a comment was made by O'Leary and Sturtz that the rebar would need to be cut off to the face of the concrete and that it was a safety hazard more than it was a pollution hazard. She stated that O'Leary had also said "since it was a known fact that rivers move" that there was concern that in the future the chunks of concrete could become exposed. Stansel added that the river channel was only about 50 yards

from the pit and the committee is aware that the river could change course, especially if it runs into a barrier that it has to go around.

Stansel said that in the BOA minutes, it states that the reinforced steel and concrete may become exposed, which is a violation of the floodplain regulations and it was stated that they “certainly want to make sure that all that exposed steel was removed for safety reasons, if nothing else”. She said that in the floodplain minutes it was said that “there are a limited number of construction dumping sites in the state and they would be required to be located outside of the floodplain”. Stansel remarked that Conaway had maintained the position in previous meetings that the rebar was being cut off flush with the concrete before it is being placed in the pit but evidence from the test pits shows that this was not done and if they move forward with this permit application, there is 25 to 30% of the pit currently unfilled and she questioned what would happen to the protruding rebar? O’Leary responded that the remarks he had made in the previous meetings were in reference to the U.S. Army Corps of Engineers standard and they require that all rebar be cut off flush with the concrete within their jurisdictional boundaries but since that meeting, the committee has learned that they do not have jurisdiction in this case.

Suneson said that in the previous meeting on October 3rd, on page 13 it was stated by McLellan that the fill would consist of mostly earthen and concrete materials and any protruding rebar would be cut off flush with the concrete and the fill material topped with topsoil and fine graded. He said that on page 15, Conaway stated that rebar is being cut off slabs before it is being placed in the pit and that slabs shown by McLellan showing protruding

rebar were taken previously and that they had since cut off the rebar. Suneson added that according to the EST reports, 58% of the material already buried is silt and sand, 42% asphalt and concrete and he is concerned when there is a flood it will be a big safety concern.

Stansel asked Curtis about the similar issue they were dealing with in Del City and what the results were from the pit that they dug there? Curtis responded that the permit for that project was for excavation and construction debris backfill including earthen and pavement materials from construction activities located around the Oklahoma City area. Stansel responded that she had reason to believe that this was not the case and that she wanted to know if the City of Del City provided any information regarding that pit? O'Leary said that he had reviewed that case and he believes what Curtis is saying is accurate and that it was a similar highway project with a borrow pit. The City of Del City issued a floodplain permit for borrow and fill similar to the permit they are requesting in Norman and during an inspection by the City of Del City they had discovered some foreign materials and notified Sherwood to remove those materials. Curtis said there was some illegal dumping by other parties in that area. The City of Del City required them to remove the material by issuing a stop work order, then they certified the clean-up and issued the permit. Conaway responded that this was accurate.

O'Leary then commented that he would like to request that Sherwood speak to the issue of the reinforced steel. Curtis responded that there is not an environmental issue with it because it becomes iron oxide when it rusts and the safety issue is with protruding rebar that is protruding above ground, so when it is buried 4 to 5 feet below the surface it is not protruding any longer. Conaway said that he believes that this is the stance that the USACE will also take

on the matter. Stansel asked Sherwood why they had stated in previous meetings that they would cut the rebar off? Curtis said that if that was correct, then they said that inappropriately and should not have said that. Conaway said what he meant when he was discussing this with Suneson was cutting off rebar that was exposed and left on the site to be buried and they would not dig up and cut off and rebury rebar.

O'Leary then opened the discussion for public comment. Mary Francis stated various DEQ regulations concerning solid waste landfills. Sturtz responded that this project does not require a solid waste permit and that she was referring to permitted solid waste landfills and since this project does not have one, the regulations that she quoted do not apply. McLellan added that Sherwood had submitted an environmental report from CC Environmental that addressed all of the environmental impacts as part of the previous floodplain permit application submittal. Conaway said that it was submitted for the original permit. O'Leary responded to Francis that the important distinction is that this project is not a landfill in the formal definition of those terms by state and environmental regulatory agencies.

Casey Holcomb said that if you look at the Material Data Safety Sheets (MSDS) for manufacturers of asphalt it is not recommended that it be disposed of near any water body; rather it is recommended that it be disposed of in a Class II or Class III landfill that is appropriate for hazardous materials and asphalt is considered hazardous in many cases. He inquired as to which manufacturer produced this asphalt and also as to what circumstances is fill allowed in the floodplain because when he reads the ordinance it seems like there are no circumstances in which filling is permitted in the floodplain. O'Leary responded that we have

a “no fill” floodplain which was part of the rewrite of the floodplain ordinance in 2007 and is pretty rare among cities to prohibit most filling in the floodplain, although the committee is here twice a month to consider that very thing. He said that on occasion there needs to be a balance of cutting and filling, which is what happened with this project where Sherwood dug a hole then filled it back up again, which is not filling in his interpretation of the ordinance.

Sturtz asked what the MSDS sheets said because Holcomb’s question could mean many things. Holcomb said they were various MSDS sheets from various manufacturers. Curtis remarked that liquefied asphalt is considered hazardous waste but solid asphalt is not, under Resource Conservation and Recovery Act (RCRA) rules. Sturtz said that according to the ODEQ, solid asphalt is not hazardous waste and does not require a special permit for disposal. O’Leary said that he believes Holcomb is speaking about the constituency of pavement which is certainly petroleum based but in a solidified form it appears that our agencies do allow it as a fill material.

Dan Kelly with Total Beverage Services said that he would like to discuss the original permit because he has a water well he is using that is very close to the pit and he was told by the FPC and Sherwood that nothing would be dumped in this area and there would be state supervisors on site to ensure that this did not occur. He also said that it is a known aquifer that holds millions of gallons of water and someday the City of Norman is going to need that water and asked the committee if they thought it was worth it at this time to potentially contaminate the water? He added that he felt a two year testing period was ridiculous and inquired as to what the standard usually is for a project such as this because he thinks it should be a 10 to 15 year

test period. He said he had several million dollars invested at his site and contamination of his water well may cause his business to shut down and that his well is not even the only well nearby the project site. He said that the ODEQ states that you need a permit to do this kind of project. O'Leary responded that was the reason for the meeting today. Kelly responded that this was true but Sherwood needed to get the permit before starting the project and needed to line the pit with clay and ODEQ would not even issue a permit to put waste material into an aquifer. He asked what the FPC was going to tell Norman citizens when they do not have water and they need to use this water but they cannot because it is contaminated? He said that when he tells someone that he is going to do something then he does it and he expects the same from the FPC and if they go back and reference the floodplain minutes, it states that fill would be taken out of the pit and nothing would be put back in and supervisors would be on site to ensure that this happens. O'Leary said that he agreed but it did not happen this way and that the City of Norman did not fill the pit, the applicant did. Kelly responded that the City allowed them to do this. O'Leary said this was not true that they regulated floodplain permit #536, Sherwood did exactly what they had stated they would do, the permit was then effectively closed the following Spring and the City was not aware that Sherwood was filling the borrow pit until May of 2016 and as soon as this was discovered, a stop work order was issued and the City is now being asked for a retroactive permit to fill the pit. Kelly responded that he thought the FPC should step up and make it right at this point and O'Leary responded that this is what they are wrestling with now and he understands that Sherwood has made some mistakes and they have been on record to state that very clearly. Curtis said it was an error on their part to fill the pit without a proper permit.

Sereta Wilson stated that the citizens of Norman are being tasked with cleaning stormwater in the future, which is kind of a theme as to what has been discussed for most of 2016 and likely into 2017, so she would like the FPC to consider this when presenting information towards citizens in the future when they failed to follow the example in this case and tell citizens that they will act differently in the future. She added that she did not feel a two year testing period was a sufficient length of time to identify contamination levels from leaching, effective movement of the river and gross debris that is unsightly and dangerous. She said that she had spoken with other construction groups that do this kind of work and it is a well known fact that Norman has standards to prevent this.

Francis discussed other ODEQ ordinances and explained that she believes they absolutely do not allow this type of activity in the floodplain. O'Leary explained that if this project was a solid waste landfill then he would agree but this is not.

Cindy Rogers said that she understood the part of the project involving digging a pit and then refilling it but the borrow pit was closed and it was a finalized deal, so what is now being requested in a new application is to add fill. She said she did not think this situation was a balancing act because allowing the pit was the balancing act that was approved two years ago and it was not really filling a hole because the applicant had a permit, Sherwood dug the hole and then the FPC closed it out so this is actually a new item to add to the surface of the hole that they dug and in that case it is not really allowable under the City Ordinance and it does count as fill material. She added that in terms of solid waste she would like to see a copy of the letter from the ODEQ to find out who actually wrote it. Sturtz responded that it was

Amber Edwards and it is in the Staff Report that was presented today. Rogers asked if it was not a formal ODEQ statement but rather one statement from one person. O'Leary stated that this was correct but that Edwards is the Environmental Programs Manager for the Solid Waste Compliance and Enforcement Center. Rogers said she would encourage the committee to get a formal statement from ODEQ that is not just from one individual staff member because construction demolition waste does count as solid waste under state law. She added that demolition rubbish is considered hazardous waste under city code and this appears to be a solid waste disposal site that this floodplain committee is not authorized to permit and she doesn't believe we should have any site such as this without a special use permit. O'Leary said that this is not a solid waste disposal site and that Rogers made a good point about whether or not this project should be considered a permit to fill and it is up to the committee to review and he does not believe that it should be reviewed exclusive of the first permit because this was a borrow/fill operation just the same as what was done in Del City and other locations across the country in and outside of floodplains.

Lyntha Wessner asked for a better explanation about the 2 year monitoring plan for groundwater monitoring. Curtis responded that they started off with a premise that all materials placed in the pit are not going to cause any groundwater issues and they did not want to test forever but they might modify the two year period depending on the test results. O'Leary remarked that Staff had contacted some groundwater specialists and there were various attitudes and opinions in regard to this particular case and heard everything from 2 years to 10 years, so he was not sure if they got the correct answer but that they were just

bringing forward to the committee what Sherwood had presented and they would be responsible for any contaminants that were discovered.

Francis stated that the ODEQ also has a few things to say about general groundwater requirements for sampling and analysis. O'Leary said that the condition that the committee was considering today is well testing that would be completed by an independent third party who will provide test results and an interpretation of those results following industry protocols to Sherwood, the FPC and the City Attorney's Office and they will be performed at the expense of Sherwood. He added that the FPC was not charged with control of pollution control or groundwater management. He said that this committee might have requested this information that was offered from Sherwood but this is getting out of the purview of the FPC.

Francis asked what the industry standard was. Curtis responded that the independent third party contractor knows what it is and they have a set of guidelines that they adhere to. O'Leary replied that many of the standards that they go by are established by the ODEQ and the OWRB who are the water quality professionals in the State of Oklahoma so Sherwood would be complying with their conditions and protocols and if they found anything in the groundwater samples to be concerned with, it would be shared with these agencies who would be the ones responsible for regulating the concern, not the City of Norman. O'Leary stated that the FPC is the conduit for those results. McLellan responded that Sherwood did submit a thorough and detailed groundwater monitoring plan with their last submittal which is in the Staff Report packet.

Rogers asked if Sherwood had come to the City two years ago requesting to fill a borrow pit with construction waste debris would the FPC have let this happen because O'Leary had said "it would be rare but not impossible for that to be allowed". She then asked what could Sherwood have done at that time to make it allowable for them to fill the pit because the FPC had approved the first permit and thought the water in the pit would be useful in controlling the channel for flood control, so she wanted to know under what conditions would the FPC have thought that leaving it a pit instead of filling it would have been a good idea. She then asked if she had construction debris and needed a landfill site to dump it in, where in town could she do that. O'Leary responded to the first borrow and fill question that he believes he would have voted for the permit for borrow and fill provided that he knew what kind of materials were going back into the pit, that there was a pit closure plan, staff inspection during that process and possibly a groundwater monitoring plan. He said his reasoning for this was that they would be digging a hole and then filling it back up, which in his mind is not changing the floodplain in any way in terms of regulatory authority in floodplain management. Susan Connors responded to the second question in saying that the only district that landfills would be allowed in is I-2, which would require I-2 zoning and that she is sure the State of Oklahoma has a special permit that is required. Rogers asked if the floodplain had I-2 zoning and Connors replied that there is not much I-2 zoning property anywhere in the City of Norman but it could be requested on private property close to the river. Rogers asked for this to follow regulations should it not be zoned appropriately. O'Leary said this is true if it was a landfill but they have determined it is not.

Wilson said that she was confused about the purpose of digging a hole and then refilling it and not making a change to the waterway, but Sherwood is digging up natural soil and putting back into the hole rebar, asphalt and concrete that are not natural materials and if the river wants to move and change she does not think that two years of ground water monitoring is going to change that. O'Leary said that he would speak on behalf of the floodplain ordinance that the mission of the FPC is to protect the floodplains and there is very clear direction in how to do that in the ordinance language and part of it relates to fill material. He said that it is not common to add fill material into the floodplains and Norman probably does regulate it to a much higher degree than most cities so this is a challenging case in deciding whether or not this is a fill operation or if Sherwood is just filling back a hole that they dug. Wilson asked if O'Leary was stating that sand, gravel and other materials were treated the same as big boulders, concrete, rebar and guardrails. O'Leary said this was the reason the meeting was postponed until today to do the test hole analyses, which determined the content as being 59% alluvium soils, 33-42% reinforced concrete boulders and about 5% solidified asphalt. Wilson asked for confirmation that about 40% of the debris was concrete boulders and O'Leary confirmed that it was 40% concrete boulders and cobbles.

Thomas Behlem said that he was confused on how the committee does not see this as a solid waste pit when it clearly states that demolition waste, industrial waste and pieces of iron and other metals or similar materials are regarded as rubbish. O'Leary said it was because he was reading from a list that was inclusive of all of the things that go into a landfill, but if the only materials placed in the pit are soil, concrete and solidified asphalt then it is not a conventional landfill that is going to be filled with rubbish, trash, and dead animals. He said the state and

federal agencies with authority over landfills have determined that this is a solid waste landfill.

Kelly said that since only 3 test holes were dug that they really do not know what is in the rest of the pit except for parts of tires that contain arsenic and other hazardous materials that are illegal to place in any landfill. O'Leary said for clarification that they did not find any tires in the test pits that they dug. Kelly said that on the presentation slide there were tire pieces shown. O'Leary said that photo was not taken from the test pit investigation. Suneson clarified that the tire fragment did come out of the test pit. Conaway asked if EST, Inc. could respond if they found any tire fragments in the test pits. Alseny Diop responded that they did not find any tires in the test pits but he would not necessarily rule out that they existed because they were excavating test pits and they were random. O'Leary asked Diop if the certified report from EST, Inc. indicates if any tires were found in the test holes? Diop said there were no tires found in the visual inspection. Amy Bradshaw asked how long solidified asphalt would remain solidified. O'Leary said he could only reference that solidified asphalt is acceptable material for this application as stated by ODEQ.

O'Leary brought the discussion back to the FPC. Suneson stated that he felt that 5 test wells was very inefficient to determine the groundwater data and groundwater flow and monitoring for 2 years is an inadequate length of time. He asked when the monitoring would be done such as after a flood and at what elevations during events such as a drought. He said he felt the groundwater monitoring plan provided to the committee is insufficient and that a more detailed plan should be provided to the committee.

Suneson stated that as far as the tire fragment, he had looked through some of the debris from the test pit when he found it and that Stansel witnessed him doing so. He then asked if Sherwood had originally put in their first application as a cut and fill operation to only fill with sand and silt, would the committee have approved it at that time?

Stansel said that after reviewing the statement from ODEQ, she said there was nothing that referred to the floodplain. O'Leary said that the ODEQ does not regulate floodplains but rather solid waste landfills and that FEMA is the organization that regulates floodplains. Stansel replied that she thought it was an unfortunate oversight by the City because this is the largest bridge construction project in history and there have been instances in the past where property owners requested this type of debris be placed on their property and to see that there are no Norman City Ordinances that regulate construction waste and debris needs to be addressed; she stated that the committee needs to stop putting off making changes to the floodplain ordinance and get them finalized. She mentioned there was a gentleman at 48th Avenue N.W. and Franklin Road that has a large pit filled with water who might decide he no longer wants the water there and instead would like a prairie, so the committee needs to make these ordinance changes and stop putting them off. O'Leary remarked that he wished private land owners would stop doing this and that the committee gets requests like these about once or twice a year. He said that it takes three parties to accomplish this: developers and others trying to get rid of the material which has often times been the University of Oklahoma and ODOT, a trucking company to pick up the material and move it, and a landowner to allow

them to dump it. He added that none of those parties are the City of Norman and most instances of dumping in the floodplain have been done by the University of Oklahoma.

O'Leary said that every company makes mistakes but that the FPC tries to work with each one individually to mitigate the damage, and staff has been very consistent in doing so and the same standards have been applied in this case. He added that he was deeply frustrated, disappointed and concerned with Sherwood Construction for making serious mistakes and that he has shared his concerns with them; however at the end of the day when this application comes back to him he views it as the applicant digging a hole and then filling it back in without any impact on the floodplain. He said if the FPC previously had the borrow pit closure plan, the groundwater monitoring plan, (which is really not a requirement of this committee), and met all of the other conditions, then he has a hard time thinking that he would not have voted for the initial permit application 3 years ago. He said the conditions presented to the committee were conditions he believes he would have had along with some oversight and that is one thing that is missing from this case and they cannot go backwards. He added that this was a very difficult case, probably the most difficult case that the FPC has had in the ten years that he has been on the committee and thinks staff has done what they could to present this information.

Hudson asked that if the pit is uncovered in 5 years from the river moving what is the FPC's ability to mitigate the problem, or the new property owner to clean it up or cover it up? O'Leary responded that he would leave it up to them since they are the zoning and planning officials and this is a private piece of property in the floodplain, not the river and this is a

misconception because this is no different than the Trails Golf Course or the City of Norman sewer reclamation plant. He said there are private properties up and down the Canadian River, so if the water moves and any of those properties were washed out he is not sure that he has the answer to that question. Connors stated that if it was a public nuisance the City's Planning Department would ask the property owner to remediate it and if they failed to do it then they would be charged for the remediation and/or possibly have a lien placed on the property, but if it wasn't a nuisance it would be a private matter whether or not the citizen would want to move the material. O'Leary said this is what he had previously thought and that it might be a public nuisance if the water moved and washed out this property. Connors responded that it puzzles her that the State of Oklahoma does not have more effective regulations about hazardous waste.

Sturtz replied that he has also struggled with this permit application for a lot of reasons that had been brought up in this meeting but on the research that he has done on asphalt and millings, which has finer particles with more contact that theoretically would cause more contamination in the sampling done in other states they are getting to residual contamination from the solidified asphalt and that it seems a lot of the discussion has revolved around groundwater and river contamination. He added that many states have allowed asphalt millings to be used as fill material in any condition and based on the research that he has done and the statements from ODEQ and other agencies he does not think that the solidified asphalt being dumped in the pit is an issue because it is composed of inert materials and it will not have a negative effect in the future. He said that he is also struggling with this idea that fill is being placed in the floodplain because fill in our floodplain is any natural or man-made

material originating from on site and or off site that is placed on the ground and is a permanent alteration of the surface of the floodplain. He said that the question revolved around whether or not the floodplain was reestablished or not and speaking from a regulatory standpoint the floodplain was never reestablished so Sherwood will be going back to the existing condition by refilling the pit and not changing the original surface condition of the floodplain. He stated that there are some other concerns including whether or not the committee is satisfied with the groundwater sampling plan, which is a decision open for further discussion but this is something that the FPC will need to decide.

Suneson said in regard to the asphalt most of the studies do not address the asphalt in a floodplain that is alternatively wet and dry from flooding and drought occurrences such as those that typically affect this particular floodplain. He said that he thinks it is a relatively easy decision because if someone gets caught doing something they have to pay a fine. O'Leary responded that if he believes the committee moves to approve the permit with these conditions, the City Attorney's office is going to take action for violation of the zoning ordinance.

O'Leary then asked if there was a motion from the committee. Suneson moved to deny permit #574 for Sherwood Construction. Stansel seconded the motion. Sturtz asked for a clarification of what the vote to deny means. O'Leary replied that it takes 5 committee member votes to pass a motion whether it was to deny or approve a permit application. Suneson asked if his motion does not pass does it mean that the application is accepted.

O'Leary responded that no it does not because a favorable motion and vote are needed for it to pass. Motion denied 5-2.

Sturtz made a motion to approve the application with the conditions specified in the Staff Report. Seconded by Ken Danner. Connors brought up Condition #3 regarding who pays the cost and said she would like to make a motion that the FPC adds this to the condition. O'Leary said at the end of Section 3 that specifies the testing be done at the expense of Sherwood and all remediation will be at their expense as a friendly amendment to the motion. O'Leary stated that this would include the 5 monitoring wells installed no later than January 2017 and 3 tests per well will be conducted over the next 2 years, which was submitted in the groundwater monitoring plan. He added that Sherwood would also be required to have a pit closure and revegetation plan and they will conduct a groundwater monitoring program with the friendly amendment for remediation and all other state and federal regulations. Stansel asked if the permit is approved will it be retroactive to the date of filing which is June 1, 2016 so there is still a period where filling occurred which would not be covered under this permit. O'Leary replied that to clarify the City Attorney's comment that if the committee votes to approve this application, then they are approving the application submitted on June 1st, 2016 so there is a period of time from May 18th when the illegal filling was discovered and June 1st that Sherwood will be subject to further charges filed with the Municipal Court. He asked if there was any further discussion on the motion and there was none. Motion to approve application #574 was approved 5-2.

Item No. 3, Miscellaneous Discussion:

1. There were no pending applications for the November 21, 2016 meeting.

2. There was one pending application for the December 5, 2016 meeting.

O'Leary asked if there was anything else from the committee and there was not, O'Leary called for a motion to adjourn. Sturtz motioned to adjourn, seconded by Danner. Motion was approved 7-0. Meeting adjourned at 5:30 p.m.