

AGENDA ITEM SUMMARY

April 18, 2017

City Council

STAFF

Carol Webb, Water Resources/Treatment Opns Mgr
Kevin Gertig, Utilities Executive Director

SUBJECT

Second Reading of Ordinance No. 042, 2017, Amending Chapter 26 of the Code of the City of Fort Collins to Clarify the Acceptance of Water Certificates Issued Pursuant to an Agreement Dated May 10, 1971, (Commonly Known as "Josh Ames Certificates") to Meet Raw Water Requirements.

EXECUTIVE SUMMARY

This Ordinance, unanimously adopted on First Reading on March 21, 2017, amends certain sections of Chapter 26 of the City Code to clarify how Josh Ames Certificates are used to meet the City Code raw water requirements for treated water service. These Code amendments address issues concerning water certificates the City issued under a May 10, 1971, agreement with The Josh Ames Ditch Company (Josh Ames Certificates), which have and will otherwise continue to raise disputes with the holders of such certificates.

The phrase "commonly known as Josh Ames Certificates" has been added to the title of the Ordinance for clarity and ease of future reference.

STAFF RECOMMENDATION

Staff recommends adoption of the Ordinance on Second Reading.

ATTACHMENTS

1. First Reading Agenda Item Summary, March 21, 2017 (w/o attachments) (PDF)

AGENDA ITEM SUMMARY

City Council

March 21, 2017

STAFF

Carol Webb, Water Resources/Treatmnt Opns Mgr
Kevin Gertig, Utilities Executive Director

SUBJECT

Items Relating to the Resolution of Issues Concerning Josh Ames Water Certificates.

EXECUTIVE SUMMARY

- A. Resolution 2017-028 Authorizing the City Manager to Execute Agreements with the Holders of Water Certificates Issued Pursuant to an Agreement Dated May 10, 1971.
- B. First Reading of Ordinance No. 042, 2017, Amending Chapter 26 of the Code of the City of Fort Collins to Clarify the Acceptance of Water Certificates Issued Pursuant to an Agreement Dated May 10, 1971, to Meet Raw Water Requirements.

The purpose of this item is to comprehensively address issues concerning water certificates the City issued under a May 10, 1971, agreement with The Josh Ames Ditch Company (Josh Ames Certificates), which have and will otherwise continue to raise disputes with the holders of such certificates. As set forth in this item, these issues and disputes are to be addressed through two related proposals. The first proposal is a resolution authorizing the City Manager to enter into agreements with the holders of Josh Ames Certificates in order to treat those certificates as being equivalent to three acre-foot rights per Josh Ames Certificate. The second proposal is an ordinance amending certain sections of Chapter 26 of the City Code to clarify how Josh Ames Certificates are used to meet the City Code raw water requirements for treated water service.

STAFF RECOMMENDATION

Staff recommends adoption of the Resolution and Ordinance on First Reading.

BACKGROUND / DISCUSSION

Historical Background

The Josh Ames Irrigating Ditch (Ditch) was constructed in 1867 for irrigation purposes. A water right was decreed to the Ditch (Josh Ames Water Right). The Ditch and the Josh Ames Water Right came under the ownership of the Josh Ames Ditch Company (Josh Ames Company).

In the late 1960s and early 1970s, the City sought to increase its water supply to meet growing demands. The City entered into an agreement, dated February 18, 1971, with the North Poudre Irrigation Company (North Poudre). Pursuant to that agreement, North Poudre conveyed its interests in Joe Wright Reservoir and the Michigan Ditch system to the City, and in exchange, the City agreed to provide North Poudre with the equivalent of 3,355 acre-feet of water per year (or rights equivalent thereto).

The City used water attributable to the Josh Ames Water Right to meet part of this obligation to North Poudre. The City acquired the Josh Ames Water Right from the Josh Ames Company pursuant to a May 10, 1971 agreement (Josh Ames Agreement). The City then changed the Josh Ames Water Right through a Water Court proceeding so that North Poudre could use it. Specifically, the City changed the Josh Ames Water Right in Water Court Case No. W-1424, in which the Water Court decreed that the Josh Ames Water Right can be used in the North Poudre system, with the ten-year average annual diversions under the Josh Ames Water Right not to exceed 1,757 acre feet. The City then conveyed the Josh Ames Water Right to North Poudre.

Terms of the Josh Ames Agreement

Under the Josh Ames Agreement, the Josh Ames Company agreed to convey the Josh Ames Water Right to the City, and in exchange, the City agreed to deliver to the Josh Ames Company certain "water certificates" (referred to here as "Josh Ames Certificates"). The Josh Ames Agreement provides that the owner of a Josh Ames Certificate is entitled to use it, upon the annexation of land into the City, to fulfill the City's water furnishing requirement for one-eighth acre of land. Specifically, Paragraph 3 of the Josh Ames Agreement states:

Each certificate will entitle the owner, upon annexation of property to The City of Fort Collins, to fulfill any requirement for the furnishing of water imposed by The City of Fort Collins, in the ratio of one-eighth (1/8) acre of land for each certificate surrendered to the City. Each such certificate shall be accepted by the City as fulfilling water requirements for annexation in the ratio of one certificate for each one-eighth (1/8) acre of land annexed, whatever may be the requirements of present or future ordinances effecting such annexation.

Paragraph 5 of the Josh Ames Agreement states:

Each certificate shall be freely transferable by the holder, by endorsement on the certificate itself; it being the intent hereof that the certificate may be used to fulfill water requirements for any lands to be annexed by the City, and not limited to lands now irrigated by the Josh Ames Ditch.

City Code at the Time of the Josh Ames Agreement

Under City Code at the time the Josh Ames Agreement was negotiated and executed, all premises requesting original water service, including but not limited to properties included in all proposed annexations, had to furnish water rights to the City in the amount of two acre-feet of water per acre to be served, or to make a cash payment. Subsequent revisions to City Code in 1971 and 1974 increased the amount of water required to be furnished to the City to four and a half acre-feet of water per acre to be served (net acres) though subdividers also had the option to furnish to the City three acre-feet of water per acre if they calculated the total area of the proposed subdivision, including all street, rights-of-way, common areas, parks and the like (gross acres).

Revisions to City Code After the Josh Ames Agreement

The City enacted Ordinance No. 123, 1983 on October 18, 1983. As stated in this Ordinance, the water furnishing requirements based upon an acre-foot volume of water per acre of land to be served may be insufficient to adequately compensate the City for the actual water usage of a development requiring water service in certain circumstances. The Director of Water Utilities was thus empowered to determine that the acreage-based requirements were inadequate to compensate the City for the actual water usage of a development requiring water service, to determine the volume of raw water necessary to so compensate the City, and to require the furnishing thereof.

The City enacted Ordinance No.012, 1984 on February 7, 1984. Through this Ordinance, the City replaced the previous approach of requiring that applicants furnish water rights to the City based on a certain acre-foot amount of water per acre to be served with a new approach that is still in use today. Under this new approach, applicants for residential water service must furnish water rights to the City based on a formula factoring in the number of dwelling units and the number of net acres. Applicants for nonresidential water service must furnish water rights to the City based on their tap size or the applicant's estimated peak annual use. For applicants for

nonresidential water service, the amount of the water rights furnished to the City also becomes the basis for the annual allotment for the applicant. When a nonresidential customer uses more water than the annual allotment, a raw water surcharge is assessed on the volume of water used in excess of the annual allotment. Neither ordinance expressly addressed Josh Ames Certificates.

Acceptance of Josh Ames Certificates

Josh Ames Certificates are thus based on the acreage of the subject land whereas City Code is not. The issue of how to handle the use of Josh Ames Certificates under the Josh Ames Agreement and City Code to meet City Code's water furnishing requirement, now called the raw water requirement (RWR), has historically been challenging for the City.

To address these challenges, staff developed an internal policy, dated October 16, 2006 (Policy) that outlined two methods under which Josh Ames Certificates may be accepted.

The first method under the Policy is identified as the "Area Method." Under the Area Method, the area of a parcel is used to determine the number of Josh Ames Certificates required with each certificate satisfying the RWR for one-eighth acre.

The second method under the Policy is identified as the "Acre-Foot Method." Under the Acre-Foot Method, the value of each Josh Ames Certificate is 0.5625 acre-foot per certificate. The 0.5625 acre-foot per certificate value is based on a RWR of four and half acre-feet per acre of land to be served (net acres) divided by eight Josh Ames Certificates needed per acre (4.5 acre-feet per acre / 8 certificates per acre). The RWR used in this calculation was the largest historical RWR under the acreage-based approach. If the water furnishing requirement of 2 acre-feet per acre in effect at the time of the Josh Ames Agreement were used, each Josh Ames Certificate would only be worth 0.25 acre-feet. A total of 5,768 Josh Ames Certificates were originally issued to shareholders of the Josh Ames Company pursuant to the Josh Ames Agreement. The 0.25 acre-foot value per certificate thus closely aligns with the 1,757 acre-feet original yield of the Josh Ames Water Right.

The Policy was intended to provide clear guidelines to staff on how to apply Josh Ames Certificates to the RWR under City Code. However, application of the Policy has not addressed all challenges, including the application of annual allotments to nonresidential customers utilizing Josh Ames Certificates to satisfy the RWR under the Area Method.

Proposed Agreement

Staff initially proposed amendments to City Code in 2015 (as discussed below) to expressly address the use of Josh Ames Certificates to meet the RWR and related issues. Certain Josh Ames Certificate holders voiced strong opposition to the proposed amendments. City staff engaged in discussions with certain certificate holders over a period of approximately one year to discuss their concerns and potential alternative options. A result of that discussion is a proposed agreement that provides current Josh Ames Certificate holders with up to one year from the date of the below Code changes go into effect to have their Josh Ames Certificates treated as being equivalent to three acre foot rights per Josh Ames Certificate. Josh Ames Certificates that are not made subject to such an agreement within that period would be subject to clarifications outlined in the proposed City Code amendments. Staff notes that the resolution authorizing the City Manager to enter into such agreements with Josh Ames Certificate holders would be contingent upon the proposed Code changes going into effect.

Proposed Code Changes

City Code does not expressly address how the acreage-based Josh Ames Certificates should be accepted to meet the RWR. The proposed Code changes would expressly address this issue.

The proposed Subsection 26-149(g)(1) would expressly set forth how Josh Ames Certificates are to be accepted to meet the RWR and how an annual allotment is to be applied. Pursuant to the terms of the Josh Ames Agreement, this proposed subsection states that the City will continue to meet the RWR upon the

annexation of land into the City, each certificate shall be accepted by the City as fulfilling the RWR in the ratio of one certificate for each one-eighth acre of land annexed. The holders of Josh Ames Certificates thus continue to benefit from the terms of the Josh Ames Agreement and the City continues to meet its obligations under the Josh Ames Agreement.

Under Subsection 26-149(d), an annual allotment must be imposed on all nonresidential applicants applying for water service after March 1, 1984. However, as discussed above, it is not entirely clear how the annual allotment is to be calculated for applicants using Josh Ames Certificates to meet the RWR. Under City Code Subsections 26-149(c)-(d), when an applicant is using a tap that is larger than two inches or has more than one tap, the annual allotment is calculated based on the applicant's estimate of peak annual use, as accepted and approved by the Utilities Executive Director. It is not expressly clear under current City Code how the annual allotment is to be calculated when an applicant has one tap two inches or smaller. The proposed Subsection 26-149(g) applies the rationale of City Code Subsections 26-149(c)-(d) to all applicants using Josh Ames Certificates to meet the RWR and states that an annual allotment must be imposed for applicants requesting nonresidential water service that is equal to the applicant's estimate of peak annual use on the annexed land.

An applicant using Josh Ames Certificates to meet the RWR will still have to meet all other applicable requirements and pay all other applicable fees for water service, such as water plant investment fees (WPIFs).

The Josh Ames Agreement contains a limitation that the City is only obligated to accept Josh Ames Certificates upon annexation. The proposed Subsection 26-149(g) provides a one hundred day period, which is based on the sum of the 90 day period during which land annexed into the City has to be zoned and the 10 day period after which ordinances typically go into effect. This also provides applicants with a reasonable period of time of over three months to request water service under the Josh Ames Agreement.

The proposed Subsection 26-149(g)(2) would codify the City's historical practice of accepting Josh Ames Certificates when the City was not obligated to do so under the Josh Ames Agreement, such as at times when land was not being annexed into the City. This subsection requires that Josh Ames Certificates be accepted as equaling 0.5625 acre-feet of water, which is consistent with historical practice and conforms to the reasonable expectations of the owners of Josh Ames Certificates. As noted above, the 0.5625 acre-feet of water per certificate is also a significantly larger value than each certificate would be worth using the water furnishing requirement in effect at the time the Agreement was executed.

CITY FINANCIAL IMPACTS

Continuing to accept Josh Ames Certificates utilizing the current processes has a negative financial impact on the City. When Josh Ames Certificates are accepted by the City for new development, the City does not receive cash or water rights to serve future development. Instead, the development must be served by current financial and water resources.

In addition, the current approach does not allow the City to adequately plan for its raw water needs. When Josh Ames Certificates are accepted using the "Area Method," the acre-foot value of each certificate varies significantly, which creates challenges for planning for supplies for future development. The proposed agreement with Josh Ames Certificate holders and concurrently proposed Code amendments are intended to address the current uncertainty regarding the acre-foot value of each certificate and the associated financial impacts articulated above.

BOARD / COMMISSION RECOMMENDATION

The Water Board discussed the proposed Josh Ames City Code amendments in its October 15, 2015 meeting. However, the Water Board did not make a recommendation pending the outcome of future discussions with Josh Ames Certificate holders. Water Board will consider this item at its March 16, 2017, meeting.

PUBLIC OUTREACH

Significant public outreach to known Josh Ames Certificate holders was conducted on this item in 2015, including:

- Direct communication with all known current and past Josh Ames Certificate holders and legal representatives, either via email or phone.
- Direct communication with Key Account Customers who have utilized Josh Ames Certificates with Utilities in the past, via email and phone.
- Public notice in the Coloradoan notifying the public of the proposed Code change. This ran from September 8 through September 17.
- Public open house on September 24, 2015, which included formal presentations explaining the proposed Code change.

Following this outreach and throughout 2016, staff met with certain Josh Ames Certificate holders regarding the City's proposal and some potential options to address their concerns, which resulted in the proposed agreement discussed above. Outreach conducted since that time is similar in nature to that conducted in 2015, with the addition of articulating the agreement option for certificate holders. For instance, a meeting with Josh Ames Certificate holders was held on March 2, 2017. To date, certificate holders who have contacted City staff are amenable to the proposed agreement and associated Code amendments.

COPY

ORDINANCE NO. 042, 2017
OF THE COUNCIL OF THE CITY OF FORT COLLINS
AMENDING CHAPTER 26 OF THE CODE OF THE CITY OF FORT COLLINS
TO CLARIFY THE ACCEPTANCE OF WATER CERTIFICATES ISSUED PURSUANT TO
AN AGREEMENT, DATED MAY 10, 1971, (COMMONLY KNOWN AS “JOSH AMES
CERTIFICATES”) TO MEET RAW WATER REQUIREMENTS

WHEREAS, the City Council is empowered and directed by Article XII, Section 6, of the City Charter to fix, establish, maintain, and provide for the collection of such rates, fees, or charges for utility services furnished by the City as will produce revenues sufficient to pay the costs, expenses, and other obligations of the water utility, as set forth therein; and

WHEREAS, the City entered into an Agreement with the Josh Ames Ditch Company, dated May 10, 1971, pursuant to which certain water certificates (the “Josh Ames Certificates”) were created and pursuant to which the owners of such water certificates are entitled to use them, upon the annexation of land into the City, to fulfill the City’s water furnishing requirement for one-eighth acre of land; and

WHEREAS, in Ordinance No. 123, 1983, and Ordinance No. 012, 1984, the City Code was amended to base the requirements for furnishing raw water for City water service on factors other than the acreage of the subject land; and

WHEREAS, there has since been a lack of clarity regarding how the Josh Ames Certificates are to be used to meet City’s raw water furnishing requirements under City Code; and

WHEREAS, it is to the benefit of the City and to Utilities ratepayers to clarify City Code regarding this matter in a manner consistent with the Agreement dated May 10, 1971; and

WHEREAS, the City Manager and City staff have recommended to the City Council that the following changes be made.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF FORT COLLINS as follows:

Section 1. That the City Council hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That Section 26-149 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 26-149. Raw water requirement; nonresidential service.

...

(g) Notwithstanding any other provisions of this Division, water certificates issued by the City under the Agreement, dated May 10, 1971, between the City and the Josh Ames Ditch Company, shall be subject to the following:

(1) If such certificates are used to meet the RWR upon the annexation of land into the City, each certificate shall be accepted by the City as fulfilling the RWR in the ratio of one certificate for each one-eighth (1/8) acre of land annexed, and if nonresidential service to the annexed land is requested, an annual allotment shall be imposed that is equal to the applicant's estimate of peak annual use on the annexed land, provided that such estimate does not exceed the amount of water, as determined by the Utilities Executive Director, that can reasonably be delivered through the number and size of taps in the water service permit issued for the annexed land, that such estimate is based on the applicant's documented intended use(s) of the annexed land, and that such estimate is first approved and accepted by the Utilities Executive Director. For the purposes of this subsection, "upon the annexation of land into the City" refers to the one hundred (100) day period beginning on the day the ordinance of annexation is approved by Council on second reading.

(2) If such certificates are used for purposes related to water service from Utilities under this Section 26 at any time other than upon the annexation of land into the City pursuant to the foregoing subsection, each certificate shall be accepted by the City and calculated as equaling nine-sixteenths (9/16) acre foot of water, and an annual allotment shall be imposed pursuant to this Section.

(h) Applicants seeking a temporary water connection under Subsection 26-120(e)(1) shall meet the RWR and shall be assigned an annual allotment as set forth in this Subsection. The RWR for such applicants shall be three times the maximum estimated amount of water that would be applied to the subject native vegetation during one irrigation season, as determined by the Utilities Executive Director. The annual allotment shall for such applicants shall be the maximum estimated amount of water that would be applied to the subject native vegetation during one irrigation season, as determined by the Utilities Executive Director.

Section 3. That Section 26-150 of the Code of the City of Fort Collins is hereby amended to read as follows:

Sec. 26-150. Raw water requirements; satisfaction.

(a) The RWR imposed pursuant to this Division may be satisfied by one (1) or more of the following methods:

(1) Water rights acceptable to the City may be transferred to the City. The Water Board determines which water rights are acceptable to the City and determines the appropriate conversion factors to be used in determining the yield

from each of the acceptable sources. The determinations of the board are final and conclusive.

(2) Water certificates issued by the City may be submitted in satisfaction of the RWR. The value of each certificate shall be as stated on the face of the certificate and pursuant to § 26-149(g), if and to the extent applicable.

...

Introduced, considered favorably on first reading, and ordered published this 21st day of March, A.D. 2017, and to be presented for final passage on the 18th day of April, A.D. 2017.

Mayor

ATTEST:

City Clerk

Passed and adopted on final reading on the 18th day of April, A.D. 2017.

Mayor

ATTEST:

City Clerk