GODFREY
& KAHN sc.
ATTORNEYS AT LAW

MEMORANDUM

TO: William Harbron, Superintendent, Northern Ozaukee School District

FROM: John Haase

DATE: April 21, 2010

RE: Potential Litigation Regarding Storm Water Issues

You have asked us to review issues involved in pursuing an action to recover the District's cost for fixing a drainage problem caused by a neighbor's (and School Board member) diversion of storm water onto the District's property, which created a 3/4 acre pond adjacent to the District's high school. As we understand the facts, Mastercraft's development of subdivisions to the south and west of the District's property increased the amount of storm water flowing across the District's property toward drainage facilities located on the other side of State Highway 57. That flow crossed a portion of the neighbor's property. The neighbor constructed a berm on his property and did some excavation on the District's property in order to stop the flow of water across his property. That berm has created the pond.

If the District chooses to litigate the matter, the dispute will involve legal issues about a land owner's ability to divert water flow across his land. For many years, Wisconsin law considered storm water to be a "common enemy." This meant that a landowner could essentially do anything to limit the flow of surface water onto his or her property, including directing it onto a neighbor's property without liability. Over the course of time, however, the rule in Wisconsin evolved into what is known as the "reasonable use" doctrine. The reasonable use doctrine states that each owner is legally privileged to make a reasonable use of his land, even though the flow of surface water is altered thereby and causes some harm to others, but incurs liability when his harmful interference with the flow of surface water is unreasonable. If the diversion of surface water is intentional and unreasonable, the party diverting the surface water is subject to liability.

Based on the facts known to date, there can be little dispute that the diversion is intentional. Moreover, there would appear to be little dispute that the diversion is unreasonable. Whatever harm may have come to the neighbor's property during a 100 year flood, it seems unreasonable to respond by building a berm which completely halts the flow of storm water to its designed destination. The potential harm from the diversion, including the risk of accidents involving school children, the damage to adjoining wetlands and the potential interference with Mastercraft's approved grading and storm water management plans, would seem to outweigh the benefit to the neighbor's property, especially if the possibility exists for less drastic mitigation.

Also, the Simultaneous Exchange Agreement entered into between the District and Mastercraft required that Mastercraft design its storm water drainage systems from its subdivision so as to not drain upon the property of the District. No detention facilities were to be located on the District's property. The construction of the berm appears to have caused

Mastercraft to be in violation of the Simultaneous Exchange Agreement. Thus, a claim against MasterCraft might be a possibility. However, it was the construction of the berm, which was beyond MasterCraft's control which caused the problem, not MasterCraft's failure to comply with the Exchange Agreement. Thus, a claim against MasterCraft does not seem to be a fruitful approach.

Under Wisconsin law, the party diverting storm water is legally responsible for mitigating its effects. In this case, your neighbor should be responsible for the costs of developing a storm water management plan which appropriately drains storm water from the subdivision.

Even though the District was not responsible for the increase in storm water flow nor for the creation of the pond, it paid the expenses necessary to fix the problem. Although one can never predict the outcome of litigation, the District's case to recover its costs appears fairly strong. However, the expenses of litigating the claim could be quite high relative to the potential recovery, if the neighbor hires counsel and opposes the lawsuit. For example, the following activities would be necessary to bring a lawsuit and litigate it though trial:

- Initial investigation, drafts of demand letters and drafting of complaint,
- Prepare written discovery;
- Conduct/defend depositions;
- Preparation for trial;
- Retain expert witness; and
- Conduct trial.

The costs of these activities could well exceed the $7,800 paid by the District to fix the drainage problem. Indeed, it would not be unusual for the costs to exceed $35,000 depending on the tactics employed by the Defendant(s).

It is, of course, possible that sending demand letters or filing the action might prompt some positive settlement discussions. However, the District should be aware of the potentially high costs of litigation before it moves forward.

Please give me a call to discuss. Thank you.

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