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Stormwater Management Facilities

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The purpose of this memorandum is to address how our community association clients that own stormwater management facilities (i.e., a wet or dry pond) can take action to reduce their liability exposure in connection with these facilities.

The first step for any Board of Directors is to determine ownership of the facilities. In many instances, our clients believe that the local municipality owns the facilities. But, in many instances, this is not true. The facilities are often platted within the common area of the community and are owned by the community association.

In most cases, the local municipality does not want ownership or responsibility for the facility any more than the community association does. But government has the power to do something about it. In almost all instances, if a stormwater management facility is located on the common area of a community association, it is because the local municipality required the developer to build the facility and make it part of the community association.

In general, once the developer finishes the development, the community association becomes responsible for the maintenance and repairs associated with the facility if the facility is owned by the community. This is true, regardless of whether a local public works department might have the right to enter the property, inspect the facilities, and make repairs at its own expense and discretion.

This is why the situation can be so confusing and bewildering to a Board of Directors. If, from time to time, Board members or community residents witness personnel from their local jurisdiction working on their stormwater facilities, why should the Board concern itself with the facility? Isn't the "County taking care of it"?

In many cases, the answer is no. The fine print of the legal documents that apply to these facilities do not make the County responsible for the facilities. They only provide the County with the right to enter the facility and perform work.

In general, the “system” works; however, unfortunate accidents occasionally occur, and when accidents occur, lawsuits often follow, and when lawsuits are filed, everyone involved then reads the fine print of the legal documents that no one read before. This is the type of situation where a community association can get into trouble.

In one recent and well-publicized case filed in the Fairfax County Circuit Court, a multi-million dollar lawsuit against a local community association was brought. In that case, the association was sued because they owned a stormwater facility that was the site of a tragic accident involving a young child.

Until legislation is enacted that expressly limits a community association’s liability exposure for claims arising from the storm water management facilities located on the association’s common areas, we suggest that community associations adopt a risk management program that includes the steps outlined below:

1. For a large property, review all site plans to identify and inventory all stormwater management facilities owned by the community. If necessary, employ an engineer in order to prepare the inventory. As part of the inventory, obtain all legal documentation associated with each facility.
2. Establish and execute a procedure for periodic inspection of these stormwater management facilities to confirm their proper operation and maintain current records of inspections and actions taken as a result of those inspections. Coordinate these inspections and maintenance actions with the County’s efforts.
3. Investigate the installation of screening guards on the stormwater culverts and drains to guard against blockage. Discuss these issues with the County and document these

discussions. Make written requests for financial assistance from the County. Even if they say no, the requests show due diligence.

4. Promptly remove any observed obstructions of drains and maintain records of those actions.
5. Periodically publish requests made to the residents of the community to promptly report any significant ponding or problems with the stormwater facilities that they observe during and after rain falls; after reports are received, investigate the situation, as appropriate.
6. Examine the relationship between other facilities owned by the community, such as recreational trails or tot lots with the design boundaries of all stormwater dry ponds, and, if possible and cost-feasible, relocate any facilities that “draw” children towards the stormwater facilities. In most cases, nothing can be done to move facilities; however, in some instances, some action may be possible to mitigate liability exposure, such as the installation of fencing, moving nearby tot lots to other areas, or installing warning signs.

With respect to the installation of signage, there is no one magic bullet. Furthermore, the effect of signage is limited in that the law will presume that children of 7 years or under cannot read or appreciate the warnings on signs. In addition, the precise verbiage that would be appropriate for a sign may vary from facility to facility. Nonetheless, the following verbiage would be generally applicable for many dry pond facilities:

STORMWATER MANAGEMENT AREA

DO NOT ENTER WITHOUT AUTHORIZATION

DANGEROUS WHEN FLOODED

7. Re-examine insurance coverages with the insurance agent who works with the Board.

Unless some sort of statutory shield against liability is provided by the General Assemblies of Maryland and Virginia and the City Council in the District of Columbia to community associations, liability exposure for these stormwater facilities, while rare, can be significant, particularly for wet ponds.

As always, if you would like additional information on the issues raised in this memorandum, please contact any of our community association attorneys.