



some FDD legal questions

3 messages

Dave Askins <dave.askins@annarborchronicle.com>

Thu, Jan 9, 2014 at 9:21 PM

To: "Elias, Abigail" <AElias@a2gov.org>, "Hutchinson, Nicholas" <NHutchinson@a2gov.org>

Nick, Abigail,

I'm hoping I can include answers to these questions in my writeup of the meeting:

1. The SSO report of June 2001 contains initial recommendations for implementation of FDDs in three geographic areas of the city but for storage and upsizing of sanitary sewers in two other areas. From a legal point of view, would it have been possible to establish an FDD ordinance that applied in just some areas of the city but not in others?
2. It was reiterated at the Jan. 9 meeting that a key difference between the city's FDD program and the set of facts in the Loretto case involves the ownership of the installed equipment. From a legal perspective at what specific point in the transaction does the Ann Arbor homeowner become the owner of the FDD equipment?
3. The Administrative Consent Order with the MDEQ, which was authorized in 2003, requires implementation of an offset mitigation program – but it does not appear necessarily to require a local ordinance to be in place involving FDDs. Is that a fair statement? From a legal point of view (without regard to the practicalities), wouldn't it possible to require developers to mitigate their new sanitary flows by convincing residents through direct financial negotiation to disconnect their footing drains from the sanitary system – without an FDD ordinance in place?

Cheers,

Dave

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Elias, Abigail <AElias@a2gov.org>

Fri, Jan 10, 2014 at 4:55 PM

To: Dave Askins <dave.askins@annarborchronicle.com>, "Hutchinson, Nicholas" <NHutchinson@a2gov.org>

Dave - sorry for the delay. Following are our responses to your questions.

1. It might be possible to require footing drain disconnects in only certain areas of the City if there was a rational basis for defining each of the areas included or excluded. Because of the nature of flow in both sanitary and storm sewer systems, and based on our experience with heavy rains not necessarily repeating where they fall or where the flow has occurred and backed up within the sanitary sewer system, the areas designated for removal might have to expand or change. The City has shifted some areas in terms of priority for disconnect based on experience with certain areas having sanitary sewer backups into basements that did not have them during the 1998 and 2000 heavy rain events.
2. The property owner owns the sump pump and lead lines as soon as they are installed and the property owner accepts the work done by the plumbing contractor with whom the property owner contracted to do the work. Except as inventory for the plumbing contractor, they are never owned by anyone else.
3. From a practical standpoint, if the only issue were to achieve zero (or a modest improvement over zero) impact from new development, then the developer offset mitigation program would serve that purpose - if developers chose to do residential FDDs instead of other possible mitigation measures. However, the overflows that resulted in the ACO were from existing conditions, and it was those existing conditions that needed to be addressed to try to prevent future overflows. Similarly, the sewer backups experienced by property owners in 1998 and 2000 were due to existing conditions and, as with the overflows, it was those existing conditions that needed to be addressed.

Requiring a developer to mitigate beyond mitigation of the new flow their development is contributing (plus 20%) would be inconsistent with the concept of developer offset mitigation. More important, the volume of flow to be removed by the number of FDDs mandated by the ACO within the amount of time mandated by the ACO would have imposed on developers an arguably substantial burden, not necessarily related to their development. The developer offset mitigation program serves to prevent new developments from undermining the removal of flow that is being accomplished by the FDD program. The FDD program operates separately from the Developer Offset Mitigation Program - even though a decision to perform FDDs for residents who agree is an option and commonly used by developers to comply with the mitigation requirements.

While the ACO did not mandate an ordinance, (1) the FDD ordinance was already in place, (2) an FDD ordinance was required to provide the ability for the City to enforce the program requirements, and (3) an ordinance also helps to make sure the FDD program requirements were spelled out clearly so that it is understood, in addition to being managed and applied uniformly and consistently. Adoption of the ordinance also meant it was subject to City Council review and approval through the usual ordinance approval process, including public input at the public hearing on the ordinance in addition to the input from the SSO Task Force.

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A mind once expanded by a new idea never returns to its original dimensions. OLIVER WENDELL HOLMES

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Dave Askins <dave.askins@annarborchronicle.com>

Sat, Jan 11, 2014 at 10:13 PM

To: "Elias, Abigail" <AElias@a2gov.org>, "Hutchinson, Nicholas" <NHutchinson@a2gov.org>

Abigail,

Thanks for your answers to 1 and 3. However response to 3 doesn't appear to provide a direct answer the second question under 3, repeated here for convenience:

From a legal point of view (without regard to the practicalities), wouldn't it possible to require developers to mitigate their new sanitary flows by convincing residents through direct financial negotiation to disconnect their footing drains from the sanitary system – without an FDD ordinance in place?

Otherwise put, isn't it possible for Ann Arbor to have an offset mitigation program – where one of the options is to perform FDDs to mitigate new flow (+ 20%) – without enacting a city ordinance requiring residents to perform FDDs?

From what you've written, I conclude the answer is yes. But that conclusion requires a series of logical steps. So I'm just asking again for confirmation.

Cheers,

Dave

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