



CITY OF MANITOWOC

WISCONSIN, USA

www.manitowoc.org

November 11, 2022

TO: Public Infrastructure Committee
Greg Minikel; P.E., Engineering Division Manager

FROM: Eric Nycz, Assistant City Attorney

RE: Obligations and Potential Liability for Airport Drainage Channel

Questions Presented

Does the City of Manitowoc (“City”) have a legal obligation to maintain the Airport Drainage Channel (“Channel”); what is the City’s potential liability for not maintaining the Channel?

Analysis

The Channel is located west of the Manitowoc County Airport and north of Menasha Avenue. Since 1978, private developers have constructed a total of nine (9) subdivisions that have storm sewers draining into the Channel. The Channel, however, is not located on property owned by the City; the City maintains an easement for a small portion of the Channel where the City has dredged once before. The aforementioned subdivision developments predate a post-construction statutory stormwater mandate that went into effect in 2004. As a result, no detention/retention ponds were built for these developments. State law (for eg., Wis. Stat. 62.234 et seq) and subsequent City Municipal Code adoption (See Chapter 28) provide authority for stormwater management. The City’s Code, however, is prospective and does not place additional burdens on the City for developments that occurred prior to its enactment and adoption. There are no statutory requirements that the City remove suspended solids from, or otherwise maintain, the Channel. Similarly, guidance from Chapter 15 (see, for eg, 15.490, 15.670) if even applicable, discusses what is permissible, not what is required, with respect to drainage systems in the City.

Absent statutory requirements, the City’s potential for liability is tied to the City’s negligence with respect to the Channel, and, as an extension, whether any claims of this type would be barred by governmental immunity (see Wis. Stat. 893.80(4)). In this instance, the City does not own the land, nor has it taken steps to dredge or otherwise maintain the vast majority of the Channel. If the City decides to do nothing, an injured citizen could, in theory, claim that the decision to do nothing was negligent. However, Courts generally see policy decisions made by deliberative bodies as part of the



democratic process and defer judgment to elected officials; it is all but impossible for policy decisions to be found negligent. Operational decisions (the method by which policy decisions are carried out) are another matter, and can be found negligent using a far less deferential standard. This concern would only arise if the City decides to act, of course.

In an unpublished opinion from 2010, the Wisconsin Court of Appeals faced a similar issue. (*Glaum v. City of Hayward*, 2010 Wisc. App. LEXIS 39). In *Glaum*, the petitioners suffered damages due to alleged runoff and flooding on their property due to Hayward's road enlargement and storm sewer work. The case was dismissed on summary judgment and the Court of Appeals affirmed, holding that Hayward performed discretionary acts, which are the result of exercises in judgment, to which immunity applies. It is only where there is a ministerial duty, and a showing of a failure of that duty, that a city could be found negligent for the acts alleged. Keep in mind, even though the municipality owned the land and owed a general duty in *Glaum*, the decisions related to the road enlargement and storm sewer work were covered by governmental immunity. And, like *Glaum*, the City of Manitowoc has no ministerial duty to maintain the Channel, which is located on private property.

None of this is meant to provide guidance as to whether the City should take steps to dredge or otherwise maintain the Channel, only to inform the Committee that it does not have a statutory obligation to do so, and that the liability exposure for doing nothing is vanishingly small. Should the City choose to act and maintain the Channel in some manner, compliance with DNR regulations and obtaining several easements would be required.

Summary

The City of Manitowoc has no duty to dredge or otherwise maintain the Airport Drainage Channel. If the City does nothing, it has, for all practical purposes, no exposure to any potential liability regarding the issue.

If you have any further questions regarding this issue, please contact the City Attorney's Office.