
ATTORNEY-CLIENT PRIVILEGED MEMORANDUM

TO: Board of Directors, Cherry Hills North Metropolitan District

FROM: Seter & Vander Wall, P.C.

DATE: August 6, 2019

RE: Analysis of Sump Pump Inspection Requirements

This memo discusses whether Cherry Hills North Metropolitan District (“Cherry Hills North”) must inspect homes in its service area for unauthorized sump pump connections.

Overview of Wastewater Service from Hillcrest

Hillcrest Water & Sanitation District (“Hillcrest”) owns an outfall sewer line (“Outfall Line”) that collects wastewater and delivers it to Metro Wastewater Reclamation District (“Metro Wastewater”). Since 1962, various special districts have connected to Hillcrest’s Outfall Line to deliver wastewater to Metro Wastewater.

Cherry Hills North has been connected to the Outfall Line through agreements with Hillcrest since 1985, all of which have been superseded by the Second Amended and Restated Intergovernmental Agreement (“IGA”) between Cherry Hills North, Hillcrest, Mansfield Heights Water & Sanitation District (“Mansfield Heights”), and Devonshire Heights Water & Sanitation District (“Devonshire”) (collectively, the “Districts”), effective January 1, 2011.¹ (IGA, p. 6).

In 2015, about seven homes on the Outfall Line experienced wastewater backups. Hillcrest and Devonshire believe unauthorized sump pump connections exacerbated the backups by introducing stormwater to the Outfall Line. Hillcrest and Devonshire purportedly inspected homes on their individual collection systems to identify and remove unauthorized sump pump connections.² Hillcrest has demanded that the other Districts conduct inspections.

Analysis of IGA’s Requirements

The Districts entered into the IGA for six specific purposes: (1) to amend and restate all of the pre-existing agreements between the Districts; (2) to identify the Outfall Line Maintenance Hillcrest is required to perform; (3) to identify the Maintenance Costs to be jointly funded; (4) to

¹ Cherry Hills Village Sanitation District is listed as a party in the IGA, but did not execute the IGA and still operates pursuant to its Connector’s Agreement dated August 1, 1997.

² Mr. Fullerton (a Hillcrest board member) confirmed that some Hillcrest homeowners objected to an inspection and Hillcrest accepted affidavits from them in lieu of an inspection. (Email to Mr. Roberts dated 11/10/2018). (00408077 2)

establish the initial allocation of the Maintenance Costs; (5) to establish the process for funding the Maintenance Costs; and (6) to resolve certain disputes between Devonshire and Hillcrest. (IGA, pp. 4-5). The purposes do not mention sump pumps.

Hillcrest is responsible for all Outfall Line Maintenance, and the other Districts are responsible for funding that maintenance. (IGA, p. 5). Hillcrest's Outfall Line Maintenance responsibilities include routine operation and maintenance and "inspection and other investigations as deemed necessary to determine the condition of the Outfall Line and identify specific deficiencies that should be addressed . . ." (IGA, p. 20).

Sump pumps are prohibited from discharging water into the sanitary sewer systems that are connected to the Outfall Line. (IGA, p. 12). In addition, the Districts agree to continually evaluate their individual collection systems and taps to prevent underground water infiltration into their systems from residential sump pumps and other sources. (IGA, p. 12). However, the IGA does not specify how such evaluations must be completed, and the Districts arguably retain discretion regarding how to evaluate discharges into their collection systems.

Each District is required to adopt rules and regulations regarding extraneous waters entering the collection systems. (IGA, p. 13). However, the IGA again does not dictate specific rules or regulations, and the Districts arguably retain discretion concerning their particular rules. Cherry Hills North's records do not contain any rules, and Cherry Hills North will need to adopt a new set of rules to comply with the IGA.

Each District agrees to take "appropriate action" if an evaluation of the Outfall Line determines that such District is discharging extraneous waters into the Outfall Line. (IGA, p. 13). The IGA does not define "appropriate action."

Analysis of Demand by Hillcrest

Hillcrest has pressured Cherry Hills North and the other Districts to physically inspect homes for unauthorized sump pump connections.

Under the IGA, Hillcrest is responsible for evaluation and investigation of the Outfall Line. The other Districts are required to take appropriate action if Hillcrest performs an evaluation that shows such Districts are discharging extraneous waters into the Outfall Line. (IGA, pp. 5 and 20).

Hillcrest has not performed any evaluations that show Cherry Hills North has discharged any extraneous waters into the Outfall Line. Mr. William Klingensmith III, a Mansfield Heights board member, authored a case study regarding the Outfall Line's 2015 sewer system overflow. However, that case study does not contain an evaluation or inspection identifying Cherry Hills North as a contributor of extraneous waters to the Outfall Line. As such, the conditions precedent to Cherry Hills North taking "appropriate action" have not occurred. Cherry Hills North is not required to take "appropriate action" until Hillcrest performs a sufficient evaluation or inspection of the Outfall Line to determine whether Cherry Hills North is emitting extraneous waters to the Outfall Line. In addition, the results of any such evaluation will determine whether

inspection of homes for unauthorized sump pump connections would even constitute an “appropriate action.”

In the event Hillcrest does perform an evaluation or inspection of the Outfall Line and determines that Cherry Hills North is discharging extraneous waters into the Outfall Line, Colorado law places certain restrictions on the actions Cherry Hills North can take to remedy the discharges. Currently, the absence of rules and regulations and an existing fee structure make it untenable for Cherry Hills North to demand inspections of homes for unauthorized sump pump connections, or to penalize residents for refusing such inspections.

Cherry Hills North Lacks Authority to Demand Inspection of Homes

Metropolitan districts are limited purpose governments. They have only those powers granted to them by the Colorado legislature, and such powers necessary, incidental, or implied from the specific powers granted by the legislature. § 32-1-1001(1)(n), C.R.S.

Metropolitan districts have the authority to adopt rules and regulations governing their operations, so long as they don’t conflict with the constitution or state law. § 32-1-1001(1)(m), C.R.S. However, Colorado law does not grant metropolitan districts the authority to demand entry into private homes, even for potential violations of a district’s rules and regulations. Furthermore, demanding such entry is not a necessary, incidental, or implied power possessed by a metropolitan district. This is consistent with the Colorado constitution’s prohibition on unreasonable searches and seizures. Colo. Const. Art. II, § 7.

As such, Cherry Hills North cannot demand entry into homes within its service area, and cannot enact rules and regulations requiring customers to allow entry into their homes.

Risks Surrounding the Imposition of Penalties

Metropolitan districts are authorized to impose fees and penalties. § 32-1-1001(1), C.R.S. However, districts that provide water or sanitation services directly to residents must first hold a public meeting and provide 30-days’ prior notice of the proposed adoption of fees and penalties. § 32-1-1001(2)(a), C.R.S. Any fees and penalties must be rationally related to a legitimate government purpose. See *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 693–94 (Colo. 2001).

While Cherry Hills North cannot demand authorization to inspect private homes, it could adopt rules that establish penalties for homes that refuse sump pump inspections. To do this, it would need to publish proper notice and discuss the proposal at a public meeting. However, this option poses certain risks.

First, there is no evidence that such sump pump inspections would have prevented the 2015 Outfall Line backups or that any unauthorized connections exist today. Indeed, there are various other manners in which extraneous water could enter the Outfall Line, which a sump pump inspection will not identify. Imposing penalties for refusing to allow such inspections creates a small risk that a property owner sues the District for imposing a penalty that is not

rationally related to a legitimate government purpose. While the District likely would have good defenses against such a challenge, the costs to defend a challenge can be extensive.

Second, imposing financial penalties may not result in compliance from all homes.³ Enforcing such penalties must be done on a consistent basis, or it will raise issues under the Equal Protection Clause. The Equal Protection Clause guarantees citizens equal protection under the law. If Cherry Hills North enacts rules and penalties related to sump pump inspections, it must also enforce those rules and penalties in a consistent manner to ensure property owners receive equal protection under the law. Failure to do so could result in a lawsuit against the District.

Consistent enforcement can be difficult. For example, Hillcrest imposed penalties on some property owners that refused to allow an inspection, and accepted affidavits from other property owners who were more recalcitrant with their refusal to allow inspections. It is unclear whether the penalties were uniformly imposed, and whether all property owners were granted the same opportunity to execute an affidavit in lieu of inspection. Failing to impose the same penalties or apply the rules consistently creates a risk of a lawsuit and damages under the Equal Protection Clause.

Therefore, prior to adopting any rules or penalties, the District must determine how it would apply those rules, and how it would consistently enforce the rules in the event a property owner does not comply with them.

Conclusion

The District will need to adopt rules and regulations regarding extraneous waters pursuant to the IGA. However, adopting rules and penalties concerning mandatory inspection of private homes for unauthorized sump pump connections is premature because Hillcrest has not performed an evaluation or inspection of its Outfall Line that shows Cherry Hills North is discharging extraneous waters into the Outfall Line. Furthermore, the authority to demand inspection of homes and impose penalties for refusal is tenuous, and Cherry Hills North would increase its risk of litigation if it adopted and enforced such rules and penalties.

³ As stated above, Hillcrest was unable to achieve 100% compliance despite making demands and imposing penalties.