

EUGENE A. DI MONTE
CHESTER A. LIZAK
ALAN L. STEFANIAK
LINSKOTT R. HANSON
RICCARDO A. DI MONTE
DAVID T. ARENA
ABRAHAM E. BRUSTEIN
ROBERT S. MINETZ
DENNIS S. NUDO
LEE T. POTERACKI

DI MONTE & LIZAK, LLC
ATTORNEYS AT LAW
216 West Higgins Road
Park Ridge, Illinois 60068-5736
(847) 698-9600
FAX (847) 698-9623

RICHARD W. LAUBENSTEIN
JEFFREY S. MC DONALD
PAUL A. GRECO
MARGHERITA M. ALBARELLO
CHRISTOPHER S. NUDO
JULIA JENSEN SMOLKA
IRA P. GOLDBERG
JEREMY A. DAMITIO
DEREK D. SAMZ
LIZA B. BALISTRERI
ADAM J. POTERACKI*
RYAN R. VAN OSDOL

ROBERT S. CLEMENTI
1925 - 2004

* ALSO LICENSED IN WI
WRITER'S EXT. 216

September 2, 2009

Via E-mail DThompson@cmap.illinois.gov

Ms. Dawn Thompson
Associate Planner
Staff Secretary to the Wastewater Committee
Chicago Metropolitan Agency for Planning
233 South Wacker Drive
Suite 800, Willis Tower
Chicago, Illinois 60606

Re: Grand Prairie Sanitary District

Dear Ms. Thompson:

I represent Kent Shodeen and his various legal entities, who have been involved in the real estate development business for over 45 years and, more specifically, developed the prestigious, award winning, ecologically friendly development known as "Mill Creek" in Kane County, Illinois that is now home to thousands of residents.

The purpose of this letter is to clarify some of the confusion that was evident at the August 12, 2009 meeting before the Waste Water Committee of the Chicago Metropolitan Agency for Planning (CMAP).

I. Analysis of the Facts.

The Grand Prairie Sanitary District has requested an Amendment to (1) change the service area of the existing Mill Creek Water Reclamation District ("MCWRD") by eliminating 1,252 acres that encompass the development known as Settlements of LaFox in Kane County, Illinois from the

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

MCWRD's service area and (2) allow the Grand Prairie Sanitary District to construct a new spray irrigation wastewater treatment facility to serve the proposed Settlements of LaFox and (3) allow a second public entity to make the unprecedented move to operate a brand new waste water treatment plant within another (public) Water Reclamation District's Facility Planning Area ("FPA") while the existing facility is ready, willing and able to serve the subject area.

According to the records of the Kane County Clerk, a referendum to approve the Grand Prairie Sanitary District was approved by the voters on March 19, 2002. Eight ballots were cast. The Grand Prairie Sanitary District then remained dormant until 2008. During this time period, those who resided on the property moved off the property and out of the District.

In accordance with the property owners zoning approvals and agreements with Kane County, the developers of Settlements of LaFox began to work with the MCWRD to add their property to the MCWRD FPA so that they could obtain sanitary sewer service. This was accomplished. Some years later, in late 2008, the developers learn that "free" money might be available from the IEPA through the American Recovery and Reinvestment Act. The developers decided in 2008 to "resurrect" the Grand Prairie Sanitary District and create a new board consisting of the developers as Trustees.

The Grand Prairie Sanitary District Meeting of the Board of Trustees dated December 23, 2008 states:

1. **Installment of Trustees**

Peter Brennan made the following statement:

"The Grand Prairie Sanitary District was established by the voters within the District in the Spring of 2002. Under the Sanitary District Act of 1936, the presiding officer of the county

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

board (with the advice and consent of the county board) was required to appoint a board of trustees for the District within 60 days. This did not occur.

Circumstances have changed since 2002 within the District. Specifically, there are no longer residents within its corporate limits. Although the 1936 Act requires that residents serve on the District's board of trustees, this is currently impossible. Under the Act, as well in judicial decisions of this State, owners of uninhabited property within a sanitary district have individual rights vis-a-vis the sanitary district. In fact, under the current circumstances, the owners of taxable property are the *only* persons who have any meaningful interest in the District. As such, the common law Rule of Necessity and related legal principles makes it incumbent on the owners of taxable property within the District to assume responsibility for the District's affairs until such time as there are qualified residents to serve on the District's Board in accordance with the Act."

Following this statement, property owners Peter Brennan, Richard Guerard, and Michael Ryan were named by the property owners as trustees for the District. Victor Filippini, a notary public in the State of Illinois (Commission No. 667481, expiration date January 22, 2011) thereafter administered the oath of office to Peter Brennan and Richard Guerard.

The Sanitary District Act of 1936, 70 ILCS 2805/1 *et. seq.* governs. 70 ILCS 2805/3 Board of Trustees; appointment or election; bond; quorum; conflict of interests; vacancies states, in part:

§3. (a) A board of trustees, consisting of 3 members, for the government, control and management of the affairs and business of each sanitary district organized under this Act shall be created by appointment as provided in paragraph (b) of this Section or by election as provided in Sections 3.1 and 3.2.

(b) Within 60 days after the organization of a sanitary district, the presiding officer of the county board with the advice and consent of the county board shall appoint 3 trustees, all of whom shall be residents of such sanitary district, who shall hold their offices respectively, from the date of their appointment to the first Monday of the June of the first, second and third calendar years, respectively, next after their appointment and until their successors are elected and qualified.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

The “Rule of Necessity” “authorizes a decision to be made by an official who has the legal duty to make it, despite also having some personal interest or stake in the outcome However, where there is anyone else who can act in place of the interested administrative or judicial officer, the rule of necessity will not be applicable.” *Board of Education of Community Consolidated High School District No. 230 v. Illinois Educational Labor Relations Board*, 165 Ill.App.3d 41, 48-49, 518 N.E.2d 713, 717, 116 Ill. Dec. 91, 96 (4th Dist. 1987).

There were at least two problems with the District’s invocation of the Rule of Necessity. First, the county officials have always been available to make the appointments. If the Rule of Necessity was applicable in this situation, it would allow the County officials to appoint non-residents of the District because there are no residents of the District. Second, the legislative requirement that the Trustees of the District be residents of the District should be construed to mean that only Districts with residents who are ready, willing and able to serve as Trustees can legally operate.

Based on its wrongful invocation of the Rule of Necessity, the District then passed the following ordinances:

1. Ordinance No. 2008-01 Annual Appropriations Ordinance for the Fiscal Year May 1, 2008 through April 30, 2009 dated December 23, 2008.
2. Ordinance No. 2008-02 Tax Levy Ordinance For the Fiscal Year May 1, 2008 through April 30, 2009 dated December 23, 2008.
3. Ordinance No. 2009-01 Ordinance Establishing Bonds for Trustees and Treasurer dated March 5, 2009.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

4. Ordinance No. 2009-02 Ordinance Authorizing the Expenditure of District Funds and Establishing Procedures for Payment dated March 5, 2009.
5. Ordinance No. 2009-03 Ordinance Authorizing the Issuance of Tax Anticipation Warrants dated March 5, 2009.
6. Ordinance No. 2009-04 Ordinance Requiring Escrow Deposits From Property Owners Seeking Permits for Development dated March 5, 2009.
7. Ordinance No. 2009-05 Sewer Use Ordinance dated March 5, 2009.
8. Ordinance No. 2009-06 Wastewater Service Charge Ordinance dated March 5, 2009.
9. Ordinance No. 2009-07 Stream and Wetland Protection Ordinance dated March 5, 2009.
10. Ordinance No. 2009-08 Ordinance Adopting Stormwater Drainage and Detention Regulations dated March 5, 2009.
11. Ordinance No. 2009-09 Soil Erosion and Sediment Control Ordinance dated March 5, 2009.
12. Ordinance No. 2009-10 Floodplain Ordinance dated March 5, 2009.
13. Ordinance No. 2009-11 Ordinance Proposing the Establishment of the Grand Prairie Sanitary District Special Service Area dated March 5, 2009.
14. Ordinance No. 2009-12 An Ordinance Authorizing the Grand Prairie Sanitary District, Kane County, Illinois to Borrow Funds from the Water Pollution Control Loan Program dated March 5, 2009.
15. Ordinance No. 2009-13 Ordinance Authorizing Indebtedness and Providing Means for Repaying Indebtedness dated March 5, 2009.
16. Ordinance No. 2004-14 Ordinance Proposing the Establishment of the Grand Prairie Sanitary District Water Supply System Special Service Area dated April 2, 2009.
17. Ordinance No. 2009-15 Water Use Ordinance dated April 2, 2009.
18. Ordinance No. 2009-16 Water Service Charge Ordinance dated April 2, 2009.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

19. Ordinance No. 2009-17 An Ordinance Authorizing Grand Prairie Sanitary District, Kane, County, Illinois to Borrow Funds from the Public Water Supply Loan Program dated April 2, 2009.
20. Ordinance No. 2009-18 Ordinance Authorizing Indebtedness and Providing Means for Repaying Indebtedness for Water Supply Loan Program dated April 2, 2009.

According to the Kane County Clerk's records, The Grand Prairie Sanitary District's formation was approved by the voters on March 19, 2002. According to 70 ILCS/2805/3(b), the presiding officer of the County Board was then required to appoint three trustees, all of whom should have been residents of the District "within 60 days" after the organization of the District. Clearly, this procedure was not followed.

The County had the authority to make the appointments within 60 days after the organization of the District but lost this authority after the expiration of the 60 days. The statute does not give the County or anyone else the authority to extend the 60 day deadline. The minutes of the December 23, 2008 meeting by the Trustees of the District seem to indicate that there were residents of the District in Spring, 2002. The County Clerk's records indicate that there were 11 registered voters and 8 votes were cast. Thus, there could have been appointments in 2002 if residents were willing to serve. However, those residents moved out of the District. Then in mid 2009, the property owners obtained three individuals to move back into the property and become registered voters. These voters were then identified to the County Board for appointment to the Grand Prairie Sanitary District. Accordingly, the purported June 9, 2009 appointment of the District's Trustees by the Kane County Board Chair is of questionable legal validity.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

In order to attempt to correct its previous illegal acts, the new residents and newly appointed Trustees of the Grand Prairie Sanitary District on June 26, 2009 passed a certain “ratification” resolution. There is a serious question about whether the “ratification” procedure is legal. Ratification cannot be used to make legal those things that otherwise would be illegal for a public body. *Bethune v. Larson*, 188 Ill.App.3d 163, 168, 544 N.E.2d 49, 52-53, 135 Ill.Dec. 692, 695 (5th Dist. 1989). The ordinances and all other actions taken by the District’s Board of Trustees that were not properly constituted should be considered null and void.

We understand that counsel for GPSD and the developers behind the District have a different opinion on these legal issues. Accordingly, CMAP may want to obtain its own independent legal opinion and then allow the interested parties to comment.

II. The Chicago Metropolitan Agency for Planning (CMAP) clearly has jurisdiction to vote to either affirm the staff’s recommendation of “no support” or reject the staff’s report and support the application for an amendment.

The Grand Prairie Sanitary District (GPSD) pursuant to applicable Illinois law has proposed an amendment to allow it to construct a waste water treatment facility. CMAP is charged with the duty to review the application in accordance with specific criteria and pass on the wisdom of the proposal. Otherwise, GPSD would not be before CMAP.

While the legal term “jurisdiction” was used at various times during the hearing on August 12, 2009, there really is no jurisdictional issue. CMAP has the jurisdiction to approve or disapprove the staff’s “no support” recommendation concerning the proposed amendment.

CMAP does not have jurisdiction to adjudicate the controversies at issue in Case No. 09 MR 287 filed by Kent W. Shodeen, as Trustee of the Kent W. Shodeen Trust No. 1 against Wyndham

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

Deerpoint, an Illinois partnership, Deerpoint Homes, Inc., an Illinois corporation and Foxford, LLC, an Illinois limited liability company in Kane County, Illinois. However, that lack of jurisdiction does not affect the jurisdiction of CMAP to give its opinion by voting on the proposed amendment.

The decisions in *The Village of Frankfort v. Illinois Environmental Protection Agency*, 366 Ill.App.3d 649, 852 N.E.2d 522, 304 Ill.Dec. 272 (1st Dist. 2006) and *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Commission*, 2009 WL 1698515 (Ill.App.2 Dist.), referenced by Mr. Fillipini, counsel for GPSD, do not support the proposition that CMAP lacks jurisdiction over the requested amendment.

The Appellate Court in *The Village of Frankfort v. Illinois Environmental Protection Agency*, held that the (1) IEPA had no jurisdiction to review the city's application to extend its sewage treatment area, as subject area was within statutory boundaries of the MWRD, and (2) the decision by the IEPA to not review the application did not violate the federal Clean Water Act and the Supremacy Clause. These issues are not now present in this proceeding.

The basis of *The Village of Frankfort v. Illinois Environmental Protection Agency* was Frankfort's contention that municipalities within a District are permitted to construct their own sewers. *See Village of Frankfort*, 366 Ill.App.3d at 655, 852 N.E.2d at 277, 304 Ill.Dec. At 527. Obviously, this issue is not present in the pending disputes. To the extent that *The Village of Frankfort* is applicable to this case, it supports the proposition that once sewer service is provided to an area, the law does not favor another unit of government's attempt to create new service in the existing area.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

The appellate court in *Northern Moraine Wastewater Reclamation District v. Illinois Commerce Commission* involved a situation in which a company purchased an existing utility and petitioned for a permanent certificate of public convenience and necessity to provide wastewater treatment services to properties in a village. The question was whether the certificates were properly granted.

In its opinion, the appellate court in *Northern Moraine Wastewater Reclamation District* explained the “first in the field” doctrine:

“long standing legal precedent mandates that where there is an existing and operating utility in an area adjacent to property requiring service, the [ICC] cannot grant a newly organized and non-operating company a certificate of public convenience and necessity without proof or a specific finding that the District, as the existing and operating adjacent utility and DMA for the FPA is not ready, willing and able to provide the needed services.” *Citizens Valley View*, 28 Ill.2d at 299-303, 192 N.E.2d 392.

Id. at *22. This proposition of law supports the staff’s “no support” recommendation.

If there is a real jurisdictional question, CMAP should obtain a legal opinion from independent counsel and then allow all the interested parties to comment before any further proceedings take place.

III. The statements made by representatives of GPSD and the developers who support GPSD on August 12, 2009 should not lead to the conclusion that the staff recommendation of “no support” should be rejected by the Board.

At the start of the meeting, Ms. Marlo Del Perco, who identified herself as GPSD’s assistant clerk made a series of unwarranted criticisms of the CMAP staff’s report. For some reason, Ms. Del Perco, who is an attorney at Holland and Knight, did not identify herself as an attorney at Holland

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

and Knight. Holland and Knight represents the developers of Settlements of LaFox who support GPSD in this matter and the parties who oppose Shodeen in Case No. 09 MR 287.

During her presentations, she ignored the time limits and submitted written materials to the Board without providing copies to the other parties present at the meeting. At the very least, she could have given copies of her new documents to the representatives of the other parties either before or during the meeting. Ms. Del Perco also should have conceded that the staff made its “no support” recommendation based on its hard work, its review of the relevant documents and its independent analysis of this case. The tactics by Ms. Del Perco support the proposition that the GPSD and the developers who supported the GPSD believe that the GPSD alone has the right to decide who will operate waste water sanitary facilities in the area.

Mr. Phillipini engaged in similar tactics. Moreover, he besmirched the good name of Kent Shodeen and his companies in order to attempt to persuade the Board to adopt his position.

While Mr. Phillipini admitted that money was at the core of the issue (transcript at 72), he ignored the fact that this entire problem was caused by his clients decision to attempt to change all the plans for development of sewer service in the area so his clients could make more money.

On one hand, Mr. Phillipini testified that Lake County has prudently reduced the number of sewer facilities to create a safer and more efficient system. *See* Transcript at 44-45. On the other hand, he now contends that GPSD’s proposed amendment should be approved even though MCWRD is already ready, willing and able to service the area. Apparently, Mr. Phillipini fits his arguments to meet his client’s preferences, not the facts.

Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

Mr. Fillipini also urged CMAP to listen to the voice of the public. However, he admitted that the public consisted of only three residents and that they were relatives of the principals of the developers who support the amendment.

Mr. Fillipini's testimony on August 12, 2009 raised more questions than he answered. Was the purpose of his legal arguments to persuade CMAP that it had no jurisdiction or to persuade CMAP that it was required to approve the amendment despite its clear discretion to not approve it? Why didn't Mr. Fillipini explain the reasons, if any, for the developers failure to ever petition for annexation of the MCWRD? *See* 770 ILCS 2805/32(a). What changed their mind?

In addition, the developers desire to use forgivable, low interest loans from the IEPA to fund the construction of this facility to serve no one. In essence, his clients want approval to profit by using tax payer money for private development.

It is important to remember the testimony of Mr. Donald Manikas, counsel for the MCWRD, on August 12, 2009. He explained that the annexation agreement was not concluded because the developers reneged on their previous promises and made new demands. *See* Transcript at 64-70. *See also* Testimony of Mark Ruby, Transcript at 46-52.

There is also a question of whether the vote taken by the Water Resources Committee to approve the staff recommendation should have been the end of the issue.

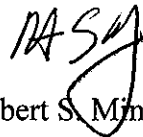
Ms. Dawn Thompson
Chicago Metropolitan Agency for Planning
September 2, 2009

IV. Conclusion.

The Grand Prairie area will be best served if the developers of the Settlements of LaFox proceed with their original plan to utilize the Mill Creek Water Reclamation District facilities to provide sewer services.

Therefore, the Chicago Metropolitan Agency for Planning should recommend to the IEPA that the proposal by the Grand Prairie Sanitary District be rejected. There is no reason to allow the Grand Prairie Sanitary District (3 temporary residents) to proceed with a brand new facility to the detriment of the existing Mill Creek Water Reclamation District and to allow a private developer to profit at the expense of the tax payers and the American Recovery and Reinvestment Act.

Sincerely,



Robert S. Minetz

RSM:nl

Enclosure