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MEMORANDUM

TO: Ron Mentzer
FROM: Barry L. Moss
George A. Marchetti
DATE: May 9, 2005
RE: River Oaks Subdivision/Stormwater Detention

Pursuant to the City Council's request, we have reviewed the files on the River Oaks Subdivision, which you had provided to us. In our opinion, the City has no legal responsibility to assist the River Oaks Improvement Association (the "Association") in rebuilding a wood timber retaining wall. The wall supports the eastern edge of the raised backyards of Lots 8 and 9 and is adjacent to an open space drainage and access easement area known as Lot 63. See Plat of Subdivision/Country Ridge Unit 2, recorded as Document No. R86-128179, October 16, 1986.

Background and Analysis

The City approved a Development Agreement with Anden Corporation, by virtue of Ordinance No. 756, on April 1, 1985, with respect to the construction of the Subdivision. Pursuant to the Agreement, the Subdivision was to be developed in accordance with a Site Plan Exhibit, which was attached as Exhibit B to the Development Agreement. Exhibit B shows an Open Space Drainage and Access Easement through the center of the Subdivision.

The Developer agreed to create a Homeowner's Association. See Paragraphs 4.E and 12 of the Development Agreement. The Homeowner's Association would hold title to and maintain the open space and retention areas shown on Exhibit B. The area designated as open space on Exhibit B became the "Lot 63 Open Space Drainage Utility and Access Easement" shown on the Plat of Subdivision.

A Declaration of Covenants, Conditions and Restrictions for River Oaks was recorded on May 1, 1987 as Document No. R87-080358. The "Common Area," which was conveyed to the Association, was Lot 63. See Section 1.05 of the Declaration. The Association owns and maintains Lot 63 as common area for the benefit of its members. See Section 4.06 of the Declaration.

Finally, in Ordinance No. 828, Section 2(8), it was again reiterated that "open space shall be owned and maintained through a homeowner's covenant."

Thus, the City has no legal interest in, or legal obligation with respect to, the open space stormwater drainage area. The City does not have legal title to the area. The City did not agree to maintain the area. Rather, legal title and maintenance obligations have always been the responsibility of the Homeowner's Association under the Development Agreement and the Declaration.

The retaining wall was inspected by a consulting engineer (Russell Henson) on behalf of the Anden Group in 1990 and was determined to be "satisfactorily constructed" and "should continue to well serve their intended function." The City's consulting engineer (Ken Carmignani) agreed with the Henson report. The City has no liability that would arise from inspecting the retaining wall. See 745 ILCS 10/2-105; *Hannon v. Coumihan*, 54 Ill.App.3d 509 369 N.E.2d 917, 12 Ill.Dec. 210 (1977).

Drainage from Off-site Properties

As City consulting engineer Jim Darnell states in his memorandum of May 5, 2005, at page 2, there are three components to stormwater management in the Subdivision. As Mr. Darnell notes:

...Compensatory storage is the volume excavated within the limits of the West Branch DuPage River flood plain in order to compensate for filling in a portion of the flood plain in the rear yards of three of the lots. Compensatory storage for fill in the flood plain was provided along the banks of the DuPage River and would not affect the design of the stormwater detention pond or the retaining walls.

The second component is conveyance in the storm sewer system. The storm sewer pipes through River Oaks are larger than the pipes shown on the approved engineering plans. This change was apparently required by City Engineer Bant during the construction process to provide additional capacity for the stormwater runoff from the shopping center and from the west side of Route 59 passing through the development. This was the path of the runoff before the subdivision was developed and by increasing the size of the storm sewer pipes, the amount of flooding west of Route 59 would be reduced. The increased size of the storm sewers would not affect the design of the stormwater detention pond or the retaining walls. It is likely that the only change to the detention facility would be a larger restrictor to allow for the off-site flow.

The third component is stormwater detention. The volume of the detention facility in the open area is dependent on the size of the subdivision and its drainage characteristics. The detention facility is designed to hold enough volume so that the runoff can be discharged to the river at a reduced rate. However, there is no indication in the old files that the stormwater detention facility in the River Oaks Subdivision was increased in size to provide detention for any property outside of River Oaks. The subdivision predates the Countywide Stormwater and Flood Plain Ordinance and detention was required under a local (City of Warrenville) drainage ordinance. There is no provision in the old local ordinance or in State drainage law that would require a development to provide stormwater detention for off-site areas. Since the City had no regulatory authority to require additional detention volume, it is very doubtful that the Developer would have done so of his own accord.

Under Illinois drainage law the owner of the higher of "dominant" land has a "natural easement" in lower or "servient" land to allow water to flow naturally off the dominant estate and onto the servient estate. *Dovins v. Winfield Township*, 164 Ill.App.3d 326, 517 N.E.2d 1119, 115 Ill.Dec. 433 (1987). In *Dovins*, the Court concluded that, in urban and suburban settings, the appropriate legal test requires a determination as to whether an increased flow of water onto the servient estate is "reasonable." Under this test, the damage to the servient estate caused by an increased flow of water must be balanced against the benefit of development of the dominant site. *Id.*, 517 N.E.2d at 1125; accord, *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill.App.3d 560, 818 N.E.2d 873, 288 Ill.Dec. 938 (2004).

Thus, the fact that water may drain naturally from higher ground is part of a "natural easement" enjoyed by dominant estates. Under the *Dovins* test, off-site drainage from a dominant estate is legally permissible unless there is an increased flow from the dominant estate that is an "unreasonable" amount. Moreover, the Plat of Subdivision for River Oaks contains the following "Surface Water Statement":

TO THE BEST OF OUR KNOWLEDGE AND BELIEF, THE DRAINAGE OF SURFACE WATERS WILL NOT BE CHANGED BY THE CONSTRUCTION OF SUCH SUBDIVISION OR ANY PART THEREOF, OR, THAT IF SUCH SURFACE WATER DRAINAGE WILL BE CHANGED, REASONABLE PROVISIONS HAVE BEEN MADE FOR THE COLLECTION AND DISCHARGE OF SURFACE WATERS INTO PUBLIC OR PRIVATE AREAS AND/OR DRAINS WHICH THE SUBDIVIDER HAS A RIGHT TO USE, AND THAT SUCH SURFACE WATERS WILL BE PLANNED FOR IN ACCORDANCE WITH GENERALLY ACCEPTED ENGINEERING PRACTICES SO AS TO REDUCE THE LIKELIHOOD OF SUBSTANTIVE DAMAGE TO THE ADJOINING PROPERTY BECAUSE OF THE CONSTRUCTION OF THE SUBDIVISION.

There is an implicit acknowledgment in this statement that adjoining properties (the dominant estates) do drain into the Subdivision and that the improvements in the Subdivision (the servient estate) would not adversely affect that drainage via the "natural easement."

In short, there is nothing in the records to indicate that any action of the City has served to direct drainage from other properties into the River Oaks open space detention area other than drainage which is legally permissible as part of the "natural easement" enjoyed by dominant estates.

Summary

In our opinion, the City has no legal obligation with respect to the open space drainage area or its retaining walls. Ownership and maintenance of the area lies with the Homeowner's Association. The City's inspection of the retaining walls cannot create a legal liability. Drainage from off-site properties in accordance with the "natural easement" is a benefit enjoyed by all dominant estates in Illinois.

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MEMORANDUM

Date: May 5, 2005

To: Mr. Ron Mentzer
Dir. of Community Development
City of Warrenville

From: James E. Darnell, P.E., CFM
Vice President

Re: Review of Old Files
River Oaks Detention Ponds
Project No. 632.531

As requested, we have reviewed the old River Oaks Subdivision files which you supplied to us. The March 23, 2005 memo from Moss & Bloomberg included the following requests and inquiries:

1. Provide us with copies of the documents submitted by Mr. Sinnott. Copies of these documents are in the files.
 2. Provide us with copies of the subdivision plat. Two copies of the subdivision plat are in the files. The plat contains provisions for Utility Easements but not for the Open Space, Drainage, Utility and Access Easement. Additional provisions were recorded as a separate document.
 3. Provide us with copies of any lawsuits regarding River Oaks, of which you may be aware. The only lawsuit that is mentioned is the one the City brought against the Developer for non-performance in completing the punch list items. It appears that Barry Moss prepared the suit and a copy is in the files.
 4. Provide us with copies of any records relative to when the detention pond was built. The files contain records of correspondence and agreements, but no stormwater design calculations. The stormwater calculations were probably reviewed and approved by City Engineer Bant. If we had a copy of the stormwater calculations, they would have been in our File #380.02 which we delivered to the City in or about 1998 and would have given some indication of when the walls were built. It is our understanding that this file cannot be located. We estimate that the detention pond and retaining walls were constructed around 1985 or 1986. The Larson Engineering report states that the retaining wall behind Lots 8 and 9 was 17 years old in 2004 which places construction of the wall in 1987.
 5. Is there any property owned by the City that drains into the River Oaks pond? The street rights-of-way in River Oaks are public property and drain via storm sewer to the River Oaks detention facility.
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6. Is it correct that the pond is owned by the River Oaks Association and is subject to private covenants? The correspondence and agreements in the files confirm that the open space, including the detention facility, is owned and maintained by the River Oaks Improvement Association.
7. Are there any unusual circumstances that pertain to this detention pond and not to other private detention ponds? The major difference is the rather substantial retaining wall behind Lots 8 and 9.

The February 3, 2005 letter to the City of Warrenville from the River Oaks Improvement Association includes several statements which should be clarified:

1. The Homeowners of River Oaks would like to request assistance from the City of Warrenville for replacement of the retaining wall structure in the River Oaks common area that was built for the stormwater drainage system serving an extended area of northwest Warrenville. There is no indication in the files that the stormwater detention facility in the River Oaks Subdivision was sized to provide detention for any property outside of River Oaks.
2. It was decided by the City that the compensatory water storage handle not only the stormwater drain-off from River Oaks, but also water from other nearby sections of Warrenville, including the Warrenville Commons Shopping Center (where Family Foods and Burger King are located) and from lots on the west side of Rt. 59. There are three components to stormwater management in River Oaks. Compensatory storage is the volume excavated within the limits of the West Branch DuPage River flood plain in order to compensate for filling in a portion of the flood plain in the rear yards of three of the lots. Compensatory storage for fill in the flood plain was provided along the banks of the DuPage River and would not affect the design of the stormwater detention pond or the retaining walls.

The second component is conveyance in the storm sewer system. The storm sewer pipes through River Oaks are larger than the pipes shown on the approved engineering plans. This change was apparently required by City Engineer Bant during the construction process to provide additional capacity for the stormwater runoff from the shopping center and from the west side of Route 59 passing through the development. This was the path of the runoff before the subdivision was developed and by increasing the size of the storm sewer pipes, the amount of flooding west of Route 59 would be reduced. The increased size of the storm sewers would not affect the design of the stormwater detention pond or the retaining walls. It is likely that the only change to the detention facility would be a larger restrictor to allow for the off-site flow.

The third component is stormwater detention. The volume of the detention facility in the open area is dependent on the size of the subdivision and its drainage characteristics. The detention facility is designed to hold enough volume so that the runoff can be discharged to the river at a reduced rate. However, there is no indication in the old files that the stormwater detention facility in the River Oaks Subdivision was increased in size to provide detention for any property outside of River Oaks. The subdivision predates the Countywide Stormwater and Flood Plain Ordinance and detention was

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required under a local (City of Warrenville) drainage ordinance. There is no provision in the old local ordinance or in State drainage law that would require a development to provide stormwater detention for off-site areas. Since the City had no regulatory authority to require additional detention volume, it is very doubtful that the Developer would have done so of his own accord.

3. *This necessitated that the retention area adjacent to the bank of the West Branch of the DuPage River be built with a 250 lineal foot retaining wall as one side of this retention area in order to achieve the required retention capacity.* The required stormwater detention volume could have been provided without construction of a retaining wall. The reason a retaining wall was constructed was so that houses could be constructed on Lots 8 and 9. One presumes that the Developer concluded that reducing the number of lots by two was more costly than the construction cost of the retaining wall and that was why the wall was built.
4. *The wall is now 17 years old and will soon need replacing.* The October 26, 2004 report by Larson Engineering states that they recommend that the wall be removed and replaced with a new concrete segmented wall within five years because they cannot determine the remaining life of the existing wall as they do not know the condition of the wooden tie-backs and deadmen. They recommend periodic survey to determine if the wall is moving. Larson estimates the cost of construction as \$85,000 for removal of the existing wall and \$220,000 for construction of a new wall. We believe substantial repairs could be made for less than \$305,000, and a cost analysis should be performed before recommending any course of action. The Developer chose wood because it was cheaper than other materials even though it had a shorter life span. With the City possibly helping to pay for a new wall, the preferred option is now concrete blocks, which are expensive but last a long time. If the City of Warrenville were to participate in the cost of rehabilitation or replacement, further inspection of the structure and a cost analysis is recommended to determine if replacement is necessary and if it is, is concrete is the most cost-effective material for a new wall.
5. *The City considered the retaining wall a public improvement when the lawsuit against Anden was being formulated, and it is part of the report prepared by the engineering firm for the City of the public improvements in December 1990.* This is not true. The December 4, 1990 memorandum from Consulting Engineer Carmignani to Public Works Director Posluzny summarized the status of the public and required improvements in the River Oaks Subdivision. On Page 2 he discusses how the storm sewers were increased in size during construction by City Engineer Bant to increase conveyance capacity and to alleviate flooding on the west side of Route 59, but makes no mention of any change being made to the stormwater detention facility volume. On Page 10 he mentions that the retaining wall in the detention facility was constructed in accordance with the approved engineering plans and appears to be structurally sound and in good repair. Just because he inspected the retaining wall does not mean that the retaining wall was a public improvement.

The Development Agreement between the Developer and the City was approved by the City as Ordinance No. 756 and clearly states that the homeowners' association shall hold title to and shall maintain the open space and retention areas. City Ordinance No.

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828 states that open space shall be owned and maintained through a homeowners' covenant, and such open space shall not revert to individual ownership.

The bill of sale from the Anden Corporation conveys all sanitary sewer, storm water and potable water pipes, lines connections, pumps and lift stations; manholes and covers; fire hydrants; street lights; curbs, gutters, pavement and sidewalks; located in, on, under or above all public rights-of-way to the City of Warrenville but makes no mention of the detention facility or any retaining walls, which are all located on private property and are not public improvements.

The Declaration of Easements, Covenants, Conditions and Restrictions for River Oaks, recorded May 1, 1987, states that the Common Area (including stormwater retention and detention facilities, and related equipment and drainage pipe, if any) shall be conveyed to the River Oaks Homeowners' Association.

As we stated earlier, the files contain no evidence that the stormwater detention facility was enlarged to provide additional detention volume for areas outside River Oaks. If copies of the approved stormwater calculations can be located, this could be confirmed. We do not find any documents in the files to support the claim that the City is obligated to pay for repair of the retaining walls. We are herewith returning the files to you. We have marked each reference to the stormwater detention facility or open area maintenance responsibilities with a yellow Post-it. Please call if you have any questions or require additional information.

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