

WHEN PROFESSIONAL ENGINEERING RECOMMENDATIONS ARE IGNORED, WHO PAYS?

In October of 2001 the Wisconsin Court of Appeals decided a complex case brought by 80 residents of the City of Sheboygan against the City and its insurance carriers. These residents represented 46 properties which sustained substantial damage as a result of flooding. The residents asserted that the City of Sheboygan was responsible for the flooding.

The residents lived in an area of Sheboygan served by a storm sewer system. The City Engineer's Office designed the sewer system. Following abnormally heavy rainstorms in 1986, the City of Sheboygan authorized an engineering study of the sewer system. In 1988 it authorized a second engineering study of the system. These studies recommended implementing improvements in the sewer system to accommodate a 100 year flood. After the studies were completed the City entered into easements with many of the residents, granting the City the right to construct, install, maintain and repair a sewer system and in the easement the following language appeared, "[I]t is understood that the [City of Sheboygan] shall be responsible for any wrongful or negligent act or omission of the [City] or its agents or employees in the course of their employment."

The area served by the sewer system was subjected to unusual and abnormally heavy rain in 1998 resulting in the foundations of homes collapsing inward and in one case, a home collapsed entirely. The residents brought an action against the City in negligence, alleging that the City had failed to design, construct, maintain and operate a storm sewer system with sufficient capacity and was negligent in failing to follow the recommendation of the engineering consultants who recommended a system capable of handling a 100 year flood. The City responded that even if the allegations were true, the City was immune from liability because the acts of designing, planning and implementing a sewer system are legislative acts protected under the Doctrine of Governmental Immunity.

The Court of Appeals reviewed the Doctrine of Governmental Immunity which is found in the Wisconsin Statutes, §893.80(4). Under that Statute a governmental body is immune from suit when the act complained of is discretionary as opposed to merely ministerial. A discretionary act is one performed in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial activity.

In previous decisions, the Court had already concluded that the act of designing, planning and implementing a sewer system was a legislative act stating: "Where, when and how to build sewer systems are legislative determinations imposed upon a governmental body. It is not for the court to be judge or jury to 'second guess' them in these determinations nor define that they are liable for negligence." The Court found these prior decisions to be dispositive and concluded that the City of Sheboygan's decision to implement and maintain a sewer system with a capacity to handle only a one year storm event was protected by the Doctrine of Governmental Immunity. Further, the Court held that the City's refusal to adopt the plans recommended by its consultants was also a legislative determination that immunized the City from liability.

Finally, the Court of Appeals held that the words expressed in the easements did not constitute a waiver of the governmental immunity because it was not clear that the language in the easements contained an express waiver of immunity. The Court held that the easements simply expressed the City's willingness to be liable for negligent acts occurring during the work allowed by the easements, such as negligent trenching, etc., but not for the overall planning and design decisions of the sewer system. Since the residents did not allege any negligent acts with respect to the installation of the sewer system, but only with respect to the original design and the refusal of the City to follow its consultant's advice, the Court concluded that the City's governmental immunity was not waived by the easements.

Finally, the Court held that the City's governmental immunity extended to the City Engineer, holding that the City Engineer had not exercised any independent professional judgment and was protected by the City's governmental immunity.

In summing up its decision, the Court stated: "While the decision to refuse to implement a 100 year storm event system has become increasingly untenable, it is nonetheless an exercise of legislative judgment

and discretion. The remedy for the residents, therefore, lies in their power to vote rather than in the judicial system.”

Clearly, professional engineering decisions of great substance are often ignored, and the remedy for such disregard does not lie with the courts.

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