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STORMWATER RISKS AND LIABILITIES

PREVENTATIVE STEPS TO PROTECT ENGINEERS AND CONTRACTORS FROM A FLOOD OF COMPLAINTS.

By Sam Arden and Irene Vander Els

STORMWATER MANAGEMENT is an essential part of real property development. Unfortunately, certain activities can expose engineers and contractors to potential liability if the site work results in erosion, runoff, or sedimentation that impacts a neighboring property, despite implementation of runoff controls. Therefore, it is important for engineers and contractors to understand risks and liability, and plan appropriately to make sure they stay out of hot water.

Time and again, engineers and contractors are surprised to discover they have exposure for a neighboring landowner's damage claim even though the site design was prepared properly and approved by the local permitting authority. Even more surprising is that potential liability to neighboring property owners can arise after construction is finished and the property has been sold to a third party.

For example, a regional retail developer recently faced a lawsuit related to a shopping center north of Atlanta. The developer purchased acreage in the mid-2000s and developed a 300,000-square-foot retail center, which it then sold within two years. After the sale, the stormwater management system was modified pursuant to plans developed by the original design engineer.

In 2014, downstream property owners sued, alleging defects in the stormwater management system caused or contributed to property damage downstream. Although more than six years had passed since the original design and construction of the stormwater management system, because there had been a modification of the system, and because the neighbors claimed the development resulted in a continuing trespass of stormwater and sediment onto their property, the claims could not be dismissed short of trial or settlement. The matter was settled only after extensive expert discovery on the eve of trial.

Such risks exist in any development that modifies existing stormwater runoff patterns on the property, including redevelopment. In another recent case, a national retailer was sued by adjoining property owners after the redevelopment of a one-acre parcel into a different retail use in central Georgia. A drainage swale, part of the local municipality's stormwater management system, ran between the client's property and adjoining property owners' land and regularly overtopped during storms. The neighbors alleged that, before the redevelopment, both the developer's property and the neighbors' properties were flooded when the swale overtopped.

Although the redevelopment added stormwater management infrastructure that resulted in a net decrease in impervious surface after new landscaping was added, the redevelopment also raised the elevation of the site. The adjoining property owners argued this design caused the overflow from the swale to be directed only to the neighbors' properties, so flooding increased when the overtopping occurred. Again, this matter was settled only after extensive fact-finding and expert discovery.

Often, when stormwater runoff issues like these arise, the cause of the problem may be unclear. When this happens, the developer, contractor, and engineer must work together to resolve the problem. The developer will look to the engineer and contractor, as the team members "on the ground," to identify any potential causes of negative impacts to neighboring property owners, and to make proposals to fix any problems and otherwise resolve the issues.

When stormwater runoff problems arise in development and result in litigation against the developer/owner, the engineer and contractor are often also brought into the lawsuit. This may be because the adjoining landowner who filed the lawsuit has named the developer, engineer, and contractor as parties, or because the developer, once sued, then brings the engineer and contractor into the lawsuit.

In one recent case, neighboring property owners sued the developer, engineer, and contractor in a lawsuit alleging damage to their downstream property because of an upstream development of a previously undeveloped 14-acre parcel into a shopping center and retail shops. The plaintiff argued that the engineering plans for the stormwater management system were flawed and that there were defects in the construction of the system, and was permitted to present those arguments to the jury. That lawsuit resulted in a lengthy jury trial in which a verdict was returned against all three defendants.

Even though engineers and contractors have professional liability insurance that may provide coverage for these types of claims, there are still significant costs associated with litigation. In addition to the hard costs of an insurance deductible, there can be enormous soft costs to the insured, such as the time spent by employees working with defense counsel to respond to the lawsuit, including factual debriefing, site inspections, review and collection of documents, and preparation for and appearance at depositions and trial.

Relative to other types of litigation, stormwater cases have one of the highest likelihoods of ending up in a jury trial. These proceedings can continue for weeks or months, depending on the complexity of the case. Engineers and contractors also can be exposed to punitive damages and claims for the neighbors' attorneys' fees for allowing runoff to continue after they become aware of it, even if they take steps to correct the condition. Such damages create a significant risk. Because the property damage claims that arise from stormwater runoff issues can be time-consuming and costly to litigate, it is important to get out in front of any issues early and aggressively.

Indeed, it is in the best interest of engineers and contractors to exercise due diligence and address complaints on the front end before lawyers become involved. Unlike developers, the engineer and contractor typically exercise more control over the daily conditions of the work site. If a neighbor makes a complaint, it is often up to the engineer or general contractor onsite. It is critical for those responding to complaints to be responsive, attentive, and polite. As issues arise, contractors and engineers must take complaints very seriously to limit exposure to these claims. Luckily, there are steps that can be taken to minimize risk.

First, review your commercial general liability and professional liability coverage. Professional liability insurance for engineers and contractors often has exclusions for pollution-related claims, which may encompass the types of damage at issue in these cases.

Next, review your consultant contracts and make sure that your form agreements require the owner to indemnify and defend you. While these provisions will certainly be subject to negotiation, starting from a provision that is as favorable to you as possible minimizes risk. If the developer insists on your indemnification of them, ask to limit the indemnification obligation to the contract price.

Another way to mitigate risk is to become familiar with neighboring properties during due diligence. Being aware of the uses of properties adjacent to a stormwater retention pond can minimize the exposure to stormwater liability. Look for potential uses that may be particularly sensitive to the impacts of stormwater, erosion, and sediment control, such as ponds and streams, and carefully account for this during site design and construction.

Finally, and perhaps most importantly, establish a protocol for addressing neighbors' complaints during construction. A crucial component in establishing liability for punitive damages and attorneys' fees in stormwater cases involves demonstrating that the party in control of the work site (which could be the developer, engineer, or contractor at different points) ignored or failed to adequately respond to neighbors' complaints about damage to their property. A contractor or engineer's statement, such as, "I thought someone else was responsible," will not be well received by a jury — especially in the context of a lucrative commercial development that is negatively impacting a neighboring residential property.

Make sure that clear lines of responsibility are established for responding to complaints, and that everyone is kept in the loop. This will help determine the best approach for handling a situation. For example, a silt fence blown away by a thunderstorm is easily fixed by the contractor. However, if a temporary silt pond is leaking onto the neighboring property, the engineer should be notified immediately and consulted if the fix is not obvious. Engineers should arrive to the site to inspect a serious situation as quickly as possible and individuals onsite should maintain a record of all conversations.

Issues arising from stormwater runoff can be tricky and can present substantial risk for contractors and engineers. To limit exposure, you must identify and monitor potential impacts on neighboring properties and ensure that your team is responding to issues in a timely and effective manner.

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