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MEMORANDUM

TO: Shawn Hamilton, City Manager
FROM: Howard C. Jablecki
DATE: June 5, 2014
RE: Farmers Insurance Flood Litigation

As you are aware, a lawsuit has been filed on behalf of Farmers Insurance against all Cook County municipalities. Similar lawsuits have been filed in other counties. The Complaint, as currently pled, contains claims for 1) failure to maintain property pursuant to 745 ILCS 10/3-102(a); 2) failure to remedy an unreasonably unsafe condition in its sewer system pursuant to 745 ILCS 10/3-103(a); and takings in violation of Article I, Section 15 of the Illinois Constitution and the Fifth Amendment to the US Constitution. The Complaint seeks certification of a class of plaintiffs, and essentially seeks to recover monies paid out by Farmers to its insured for flood claims relating to an April 17-18, 2013 rain event.

Prior to service on any parties, Leyden Township filed a notice to remove this matter from Cook County Circuit Court to the Federal Court for the Northern District of Illinois. The bases for the removal stem from the federal Constitutional taking claim, and the Class Action Fairness Act, which gives original jurisdiction to the federal courts for class actions claiming in excess of \$5 million where one plaintiff is a citizen of a different state than any defendant (in this case Farmers Insurance Exchange is registered in California).

Most defendants have been served with the Complaint. Although we have strong arguments to serve as the basis for a motion to dismiss the current complaint, Plaintiffs previously indicated they would be filing an amended complaint that would have dramatically changed the actions and issues pled by: 1) removing the class action claim and request for class certification; 2) removing of the federal takings claim (which will eliminate the federal jurisdiction and likely remand the case to state court); and 3) including a single subrogation claim made on behalf of Farmers and their policyholders.

However, on June 3, 2014, instead of seeking leave to file an amended complaint, Farmers filed a voluntary dismissal of the lawsuit. In a newspaper article, Farmers indicated its motivation for the suit was to "encourage cities and counties to do more to reduce the risks of future flooding." Regardless of the intent stated to the press, Farmers still has the opportunity to amend and re-file this action within the one year tolling period provided for voluntary dismissals. We will notify the City should any such refiling occur.

If you have any questions or need any additional information, please let me know.

Cc: Kathie Henn

Insurance firm drops flood suits

Chicago-area towns were accused of lax prevention efforts

BY ROBERT MCCOPPIN
Tribune reporter

An insurance company has dropped its unprecedented lawsuit that claimed nearly 200 Chicago-area communities didn't do enough to prevent last year's widespread flooding.

The class-action lawsuits were filed by Farmers Insurance Group in Cook and the collar counties, ostensibly on behalf of more than 600 property owners affected by flooding, and sought to make the local governments reimburse the insurance company for claims it paid out to those property owners. In a move that took the defendants by surprise, it was withdrawn less than two months after it was filed.

Farmers spokesman Trent Frager issued a statement saying company officials had hoped the suit would encourage cities and counties to do more to reduce the risks of future flooding.

"We believe our lawsuit brought important issues to the attention of the respective cities and counties, and that our policyholders' interests will be protected by the local governments going forward," the statement read. Frager said the company does not intend to refile the suits.

The lawsuits argued that public agencies should have taken more preventive measures to avert the damage caused by record floods of April 17 and 18, 2013, such as emptying reservoirs before the rains hit and employing more sandbags and flood barriers.

Margo Ely, executive director of the Intergovernmental Risk Management Agency, which represented 55 suburbs in the suit, said the action was without merit and noted that some defendants hadn't been served with the documents.

"It's a good legal decision and a good business decision (to drop the suit)," she said. "Any liability was tenuous at best. The impact would have fallen on their own customers as property taxpayers."

Regardless of the suit, Glenview Village Manager Todd Hileman said, municipalities are constantly working to improve storm-water control, noting the Village Board approved a plan last fall to help prevent flooding for 1,500 homes.

"We've spent a lot of time trying to mitigate flooding and take it quite seriously, so it was rather insulting," Hileman said.

State law, recent court decisions and the sheer size and complexity of the suit suggested it would have been difficult to win, legal experts said.

State laws generally protect government agencies from lawsuits under what's known as tort immunity. In addition, the defendants filed a motion in DuPage County to dismiss the lawsuit based on the public duty doctrine, which holds that governments have duties to the public at large rather than individuals.

Past lawsuits sought to blame Chicago and Elmhurst for previous flooding in those cities, but in both cases courts ruled that the municipalities did not have a duty to prevent flooding. In addition, after Hurricane Katrina in New Orleans in 2005, courts ruled that the city had sovereign immunity from lawsuits. The Farmers suit also set forth the novel argument that the municipalities should have planned for more severe flooding due to global warming.

The legal action attracted great interest in the environmental law and insurance industries, said professor Michael Gerrard, director of the Center for Climate Change Law at Columbia Law School in New York.

"It was regarded as bold and ambitious," he said, "and an uphill climb."

The suit was an extreme example of subrogation, in which an insurance company pays out claims, then goes after a third party seeking reimbursement of those claims. The National Association of Subrogation Professionals has reported it's the second-largest revenue source for insurance companies, after premiums.

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