



# CITY OF RAPID CITY

RAPID CITY, SOUTH DAKOTA 57701-2724

## OFFICE OF THE CITY ATTORNEY


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### MEMORANDUM

TO: City Council

FROM: Carla Cushman, Assistant City Attorney 

DATE: November 15, 2016

RE: Appeal of denial of vacation of major drainage easement - Elks Crossing

Property owners on Vinecliff Drive and Duckhorn Street have requested that the City vacate a 20-foot wide major drainage easement that runs along the rear property lines of these parcels. Currently, the drainage meets City specifications and is adequate to handle necessary drainage, and I do not believe the City has any liability as it stands today. However, vacating the drainage easement opens the door to long term consequences and potential City liability. For that reason, I encourage you to deny the appeal and refuse to vacate the major drainage easement.

### CITY DRAINAGE REQUIREMENTS

As part of the subdivision process, the City requires developers to study drainage and accommodate drainage within their development. *See RCMC 16.16.090, Section 4 of Infrastructure Design Criteria Manual.* Through the platting process, City staff review drainage studies, engineering plans of drainage facilities, and other materials provided by the developer to ensure that the plans meet the requirements of City ordinance and regulations, relevant state and federal requirements, and any drainage basin design plans.

As part of providing adequate drainage, developers often dedicate major drainage easements to the City on the plat or by separate document when needed to accommodate drainage from multiple lots. Generally, the easement must be at least 20 feet wide to permit the City to enter the easement with the necessary equipment to repair and/or maintain the drainage in the easement.



EQUAL OPPORTUNITY EMPLOYER

## **HISTORY OF ELKS CROSSING MAJOR DRAINAGE EASEMENT**

In 2013, the developer SSST, LLC worked with the City to plat the property along what is now Vinecliff Drive and Duckhorn Street. Through this process, City staff reviewed drainage information from SSST, LLC and its engineer and approved development engineering plans for drainage and other utilities. City approval was given after staff concluded that the drainage plans met the minimum standards required by City ordinance and the City's drainage regulations within the Infrastructure Design Criteria Manual.

To provide for drainage, the developer SSST, LLC dedicated a 20-foot wide permanent drainage easement to the City across unplatted property. A few months later, the plats were filed which refer to this major drainage easement and split the easement equally between parcels along the rear property lines – 10 feet on each parcel. The easement document states that “The area, which is the subject of this easement, shall be kept free of all obstacles, including fences, shrubs, walls, or other items which obstruct the visibility or usefulness of the easement.” The note on both plats states: “Any major drainage, water main, or sanitary sewer easement shown hereon shall be kept free of all obstructions including but not limited to buildings, walls, fences, hedges, trees, and shrubs.” Both the easement document and the plats state that the City has the right to enter the property to operate, maintain, inspect, etc. the drainage improvements within the easement.

In June, several properties on this street received letters from the City Attorney's Office related to obstructions located within the major drainage easement. Contrary to the easement, several property owners had placed landscaping and sheds in the easement, and others had fenced the property to the rear yard line, obstructing the easement. It appears that these letters may have been the first news of the existence of this easement for some property owners. Those letters ultimately prompted this easement vacation request submitted by the owners of some, but not all, of the properties burdened by the easement.

## **LIABILITY**

When the area was being developed, the developer (SSST, LLC) and its engineer (Dream Design International, Inc.) studied the drainage, determined how to manage the drainage, designated the necessary drainage improvements and easements, and designed their subdivision accordingly. The City did not design the drainage in a way that placed a 10-foot drainage easement across these properties; instead, City staff reviewed the developer's plans and determined that they met the minimum standards in the Infrastructure Design Criteria Manual. There are a multitude of ways to design a subdivision in a way that meets the City's minimum standards. The City does not design the subdivision nor does it require development of the property in any particular way or in the “best” way.

The City requires drainage studies and improvements for a reason – to make sure that development accommodates stormwater events of varying degrees (2 year, 5 year, 10 year, 100 year rain events). A developer's failure to provide adequate drainage endangers the properties

within and adjacent to the development. In this case, the major drainage easement was an important piece of the subdivision's drainage plan. Today, the City has the right to enforce and maintain that drainage easement which the developer and its engineers told us was necessary to handle the drainage in the subdivision. Vacating the drainage easement, in whole or in part, without requiring alternative drainage means that the drainage may not be available when we have a major storm event. Damage to these fences, landscaping, and properties may likely result, maybe not in the next month or year, but at some point. If the damage occurs because the drainage within the easement has been compromised by the City's action, it is likely that the City would be sued and would be forced to defend that suit in court, even if it was ultimately successful in defending the lawsuit.

Some might see a compromise option in granting the vacation request conditional upon the homeowners signing a document releasing the City from future liability. I would strongly advise against this idea. This compromise would address the immediate concern by pushing off the long term consequences of the decision. Even if the release is filed with the Register of Deeds, future homeowners who did not request the vacation are the ones who may be damaged by drainage problems. Regardless of any release, they will come to the City to seek reimbursement. In light of recent conversations about WORPs, I would urge the Council not to address this immediate problem in a way that creates long term issues for future staff and decision-makers.

I believe the property owners may have alternative remedies to address their grievances. The property owners are complaining that they weren't told of the major drainage easement or the impact on their property. The property owners may have a cause of action against their realtors, their builders, and/or the developers with regard to representations made, and not made, about the major drainage easement and the limitations for activities within that easement as part of their real estate transactions. To date, I do not believe that anyone has filed a lawsuit or sought redress from these parties. Instead, they are asking the City to fix a problem that the City did not create, and in a way that creates potential problems for which the City may be liable. If the City grants this request even though engineering reports indicate that the drainage area is needed, the City is potentially assuming the liability of these other parties and opening the City up to legal responsibility for damage from flooding events caused by the City's failure to maintain the easement.

Finally, I would note that not all property owners burdened by the easement are seeking its vacation. As a practical matter, it does not make sense to retain some parts of the easement while vacating other parts. On the other hand, I would caution against vacating the major drainage easement in its entirety, even on the properties which have not consented to the vacation and would, therefore, seem to oppose the vacation request. Doing what these neighbors ask runs the risk that the other neighbors will come to you asking that the drainage easement be reinstated, based upon the fact that it was required in the first place.

If there is any further way I can be of assistance, please call me at 394-4140 or email [carla.cushman@rcgov.org](mailto:carla.cushman@rcgov.org).