



CITY OF RAPID CITY

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MEMORANDUM

TO: City Council

FROM: Joel P. Landeen, City Attorney

DATE: 05/10/2019

RE: Fred Reed Sewer Backup Damage Claim

Mr. Reed is claiming damages for a sewer backup which occurred at his home May 18th of 2018. City staff, and the City's insurer, have reviewed his claim and denied liability. Under current city policies and South Dakota law, cities are not responsible for damages caused by backups unless city negligence or city action actually caused the backup. The City has adopted a policy to help with cleanup costs from sewer backups, but this policy specifically excludes payment for damages to property. It is unknown what caused the sewer to backup into Mr. Reed's property. Public Works' staff have been attempting to find the cause, but have not yet been able to do so. At this point, our best guess is that the system is being overwhelmed by heavy rain and home owners who are illegally connecting sump pumps to the sanitary sewer in the area.

In order to successfully sue the City for damages Mr. Reed would have to show either that 1) the City's negligence in the operation of its sewer system caused his damages; or 2) that his damages were caused by the actions of the City and the fact that his property could be damaged was foreseeable. Mr. Reed's latest submittal includes documents related to inverse condemnation. This is a cause of action available to landowners whose property is taken or damaged for a public use without being paid just compensation. One of the attachments discusses the South Dakota Supreme Court decision in *Long v. State*. The article primarily focuses on the idea of sovereign immunity. The second attachment looks like a magazine article discussing inverse condemnation under California law. Mr. Reed has highlighted a sentence in the article saying that under California law a property owner does not have to show negligence or that the injury is foreseeable. While this statement may be accurate under California law, it is not accurate in South Dakota. In the *Long* case the South Dakota Supreme Court agreed that a duty to show that the actions of a public entity were the actual and proximate cause of the injury in an inverse condemnation claim. In addition, while the majority and the dissent in the *Long* case disagreed

whether the injury to the plaintiff was foreseeable, they both acknowledged that it was a factor to be considered. Based on my review of the law and the relevant cases, it is my opinion that Mr. Reed cannot successfully pursue an inverse condemnation claim.

Finally, I believe Mr. Reed's claim merits a discussion of a broad policy issue. Currently, the City made a policy decision to deny damage claims for private property caused by water main breaks and sewer backups unless they were the result of a negligent action by the City. If the City Council wants to reconsider this policy you have the ability to do so. You could chose to adopt a policy that essentially creates strict liability for damages caused by the City's sewer and water utilities. This would mean that the City would pay for damage to private property caused by a sewer backup or water main break without regard to liability. As I stated in my email to Mr. Reed and Alderman Modrick, it is a perfectly legitimate philosophy to determine that the damages caused by a leak or a backup are inherent in operating a municipal utility and the cost of those types of events should be spread among all of the users of the system, rather than be bourn solely by those damaged. Before adopting such a policy you would also need to examine water and sewer rates. Paying for damages caused by the water and sewer systems is not currently a component of the existing rates. If you decide that paying claims for water line breaks and sewer backups is going to be a cost of doing business going forward, that cost will need to be determined and the rates of all of the system users will need to be raised to cover the additional expense of paying damages in these situations.