

THOMAS R. SCHULTZ
tschultz@rsjalaw.com

27555 Executive Drive, Suite 250
Farmington Hills, Michigan 48331
P 248.489.4100 | F 248.489.1726
rsjalaw.com



ROSATI | SCHULTZ
JOPPICH | AMTSBUECHLER

December 6, 2023

**CONFIDENTIAL CORRESPONDENCE
ATTORNEY-CLIENT PRIVILEGE**

Mayor Fischer and City Council
City of Novi
45175 Ten Mile Road
Novi, MI 48375

RE: Wixom Road Sewer Backup (December 2023)

Dear Mayor Fischer and Council Members:

City Council Members may have heard about the incident involving the Wixom Road sewer replacement project last Saturday (December 2, 2023). Bypass pumps had been installed to allow the City to work on existing sanitary sewer infrastructure in the area of Wixom Road, Kelsey Bay Drive, Reeds Pointe Drive, and Delmont Drive. The bypass pumps were installed by the City's contractor, Pamar, and are supposed to be monitored by Pamar. At some point they became clogged with rags and other debris that somehow got into the sanitary system and caused somewhere between 27 and 37 basements to back up with sanitary sewer flow (mostly around Kelsey Bay Drive), with varying amounts of damage.

While the pumps were equipped with an alarm monitoring system that was supposed to let Pamar know if there was a failure, the on-call employee from Pamar apparently passed away during the day on Friday and therefore didn't respond. Upon notification of the issue, the contractor sent another employee and City staff and that employee to respond, were able to get one of the pumps working before the contractor arrived to alleviate further backups.

One purpose of this letter is to let you know the general process for addressing homeowner complaints. There may be some aspects that change "on the fly" as we learn more and as we discuss options with Pamar, but generally the City will provide claim forms to the affected homeowners; the homeowners will file those claims with the City; then the City will assemble those and provide those to the City's insurer. In all likelihood, the City's insurer will deny the claims, at which point the City will then likely present the claim to Pamar to present to its insurer. (Obviously, the City has already told Pamar that it expects Pamar to be responsible for any damage claims that might be made against the City, and preliminary indications are that Pamar will step up and address the issue.) That process will obviously take some time to play out, and we will keep the City posted as that happens.

In the meantime, the **other** purpose of this letter is to give the City Council a bit of background on what the City's liability generally is in the event of a sanitary sewer backup that affects someone's home. The short answer is almost always unsatisfactory to the homeowner: there's a good chance that the City is not liable for any damages here.

Until relatively recently, cities and other local governments that operated sanitary sewer systems had essentially no liability for those backups, because of the concept of governmental immunity. Without getting into too much technical detail, the concept of governmental immunity is that immunity from suit is the general rule, and there are only a handful of exceptions to the rule that apply to make local governmental entities responsible for tort/damage claims—the most common of those historically included highway/roadway/sidewalk defects, dangerous public buildings, public vehicles, and actions by local governmental entities that are proprietary or “profit-making” as opposed to public in nature. *Individual* public employees can be sued outside of that limited range of exceptions, but only in the event of “gross negligence,” or essentially willful and wanton misconduct. (Again, exact citations to the laws on these issues are not particularly needed for this letter.)

In 2001, however, the Michigan Legislature added another way for plaintiffs to get around the general rule of governmental immunity, relating to sewer backups (both sanitary sewer and storm sewer). But that added liability is still quite limited. In order to establish the City's liability, a property owner must establish that (1) the sewage disposal system (i.e., the public system) had a defect; (2) that the City knew, or in the exercise of reasonable diligence should have known, about the defect; (3) that the City, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, remedy the defect; and (4) that the defect was a substantial proximate cause of the event and the property damage or physical injury. See MCL 691.1417(3).

While the blockage here probably could be considered a “defect” in the temporary part of the system, a plaintiff might very well have trouble under these circumstances in proving. We're sending this letter in recognition that there will likely be homeowners (or others) that might likely assume that the City has some liability merely by virtue of the backup. That is definitely not true, and the City will need to keep that in mind as this matter proceeds forward.

Novi is fortunate that it does not often experience sanitary sewer backups like this (or storm sewer backups)—in large part because of a vigilant Public Works Department. But it also true that plenty of other communities do not enjoy such good fortune. A strict liability rule for such sewer events would make the costs of providing sanitary and stormwater services simply prohibitive in many communities. While the Legislature did relax the complete immunity somewhat in 2001, it was a very limited relaxation, and this situation may well not be one where the City can be sued by the homeowners.

Our hope is that the contractor's insurer will end up “stepping forward” to address these damage claims should any be filed. But while this plays out, the City Council needs to be careful about what it says in public, at meetings or elsewhere, about the **City's** ultimate liability in this situation, which might be fairly limited; there may well be some litigation stemming from this and it would be best if there was no public discussion of it that could affect how that plays out.

Very truly yours,

ROSATI SCHULTZ JOPPICH
& AMTSBUECHLER PC

A handwritten signature in black ink, appearing to read "Th R Schultz", with a stylized flourish at the end.

Thomas R. Schultz

TRS/jah

cc: