

Dane County Lakes and Water Commission,  
Land Conservation Committee, and  
Environment, Agriculture & Natural Resources Committee

August 31, 2021

Dear Committee Members:

I am writing on behalf of Stonebrook Estates Homeowners Association, a Homeowner Association in the Town of Middleton. We oppose some portions of the proposed amendments to Chapter 14 of the Dane County Ordinances (DCO) which are on the agenda for your September 1, 2021 meeting, namely those associated with DCO 14.10. The changes unfairly burden our Association and similar landowners – but more importantly, they are bad public policy. Specifically, the amended ordinance:

- allows easement holders to bind landowners to financial penalties and legal restrictions on their land without their consent;
- imposes a potential financial penalty on landowners when a responsible utility or municipal easement holder fails to meet stormwater requirements;
- effectively requires certain utility and municipal stormwater permittees to grant the County an easement over land they don't own; and
- unfairly burdens landowners who have disputes with utility and municipal easement holders by requiring the County to take sides against the landowner. By doing so, it potentially embroils the County in legal disputes.

As explained below, these issues can largely be resolved if the ordinance were to require that in the event of a dispute between an easement holder and landowner over a permit, the County decline to issue the permit until the dispute is resolved. This would still meet the goal of expediting the permitting process, and staff from Land and Water Resources (LWR) have rightfully told us they have no desire to involve the County in the middle of such disputes anyway.

***The current stormwater ordinance appropriately requires a landowner to sign off on stormwater permits.***

The current ordinance requires that when an easement holder such as a utility or municipality applies for a stormwater permit for construction on private property, the property owner must either sign the permit or give written authority for the easement holder to sign the permit. That makes sense because the current ordinance imposes permanent financial and legal obligations on the landowner. Among other things, applying for a permit constitutes express permission by

the landowner for the County to enter the property for inspection, to take action to correct any deficiencies, and then to seek reimbursement from the landowner. These obligations are also recorded. So, requiring someone who could be responsible for these obligations to sign off on the permit application is fair and appropriate.

***The proposed ordinance removes the landowner and allows utilities and municipalities to sign permits while still imposing the permit obligations on the landowner.***

The proposed ordinance, by contrast, allows the utility or municipal easement holder to obtain a stormwater permit on its own, as long as it tells the landowner it is doing so. If the landowner doesn't agree to accept these obligations, or disputes whether the easement holder has a right to do what it proposes to do in the construction permit, it doesn't matter – as long as the application is complete, the County is required to issue the permit. *However, the financial and legal burdens still fall on the landowner. First, this new ordinance expressly requires the landowner to pay a penalty if the easement holder fails to fulfill its stormwater obligations.<sup>1</sup> Second, this new ordinance effectively requires someone who is not the landowner to grant the County an easement over land that person does not own.<sup>2</sup> We don't see how someone else other than the owner can grant an easement over private land. We think there are significant questions about whether this is legal or consistent with the Constitution.*

***The proposed ordinance will require the County to take sides in land disputes, unfairly place the burden to act on landowners, and potentially embroil the County in legal disputes.***

Currently, if the landowner and utility or municipal easement holder don't agree on the construction at issue, the permit can't be issued until they work it out (because it requires the owner to sign). The County stays out of private legal matters. Under the new ordinance, the County is *required* to issue the permit as long as the application is complete – regardless of what the landowner believes.<sup>3</sup> In the case of a dispute this will unfairly put the onus on the small landowner to take legal action to stop a utility or municipality. This is wrong for several reasons. First, the new language effectively means that easement holders can bind landowners to permanent legal and financial obligations without their consent. Second, the County is unfairly siding with powerful utilities or municipalities over its citizens. Third, the County is potentially embroiling itself in legal disputes over the appropriateness of the permit and of saddling landowners with the above legal and financial obligations, because landowners may be forced to bring the permitting process into litigation over these matters.

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<sup>1</sup> Proposed DCO 14.18(3) says “[t]he permittee and landowner further consent to reimburse the authority for the total costs and expenses of the corrective actions. Reimbursement may be collected as a special charge upon the property for current services rendered as provided by law.”

<sup>2</sup> In proposed DCO 14.10(4)(c), one of the conditions of the permit is that the permittee is giving permission to the County to enter the property for inspection or curative action. Proposed DCO 14.10(3)(d) requires that the stormwater obligations be recorded with the Register of Deeds.

<sup>3</sup> Proposed DCO 14.10(3)(a).

### ***Why this Proposed Ordinance Change is Here***

This proposed change was prompted by a dispute between our Association and the Town of Middleton. The Town, which is the holder of a disputed easement, wants to build a stormwater retention pond on property owned by the Association. The majority of our homeowners are willing to allow the Town to do so, as long as the Town accepts responsibility for liability associated with the pond, because the pond is solely for the public purpose of helping the Town meet DNR discharge requirements. However, the Town refuses to fully indemnify the Association. This is a problem for the Association, because if an injury were to occur due to the design, maintenance, or even presence of the pond, the injured would likely sue both the Town and the Association as the landowner. In that case, the Town's liability is limited under state law to a few hundred thousand dollars, whereas the Association's is not. Thus, the Town is shifting liability for a public project to private landowners. The Town believes the Association's fears are unfounded, but the Town is not willing to "put its money where its mouth is" and back up this supposedly unfounded claim by agreeing to indemnify the Association.

When the Town decided to proceed with building the pond anyway, the Association made clear it was not going to sign the stormwater permit application until the issue was resolved. The Association then contacted the County Corporation Counsel and afterwards, the County's lawyers advised LWR not to issue the Stonebrook Estates permit application without the Association's signature. After that incident, LWR sought to make changes to the ordinance that would allow the Town to sign off on the stormwater permit with our involvement.

Our members have spoken with various LWR staff on several occasions and have found them to be helpful and informative. They told us that they don't want to be in the middle of a dispute we have with the Town of Middleton. We understand they proposed this change because they believe if they have to follow the current ordinance and obtain a landowner signature for permits, it will be burdensome for utilities with large projects who hold noncontroversial easements to have to get signatures from a large number of landowners, and this may further cause delays.

***The proposed ordinance should be modified to prohibit the County from issuing permits in disputed projects until the parties work out the dispute.***

Although we think the current ordinance represents the best public policy, we understand LWR's concerns and do not oppose the portion of the ordinance change that allows easement holders to sign off on permits as long as they notify the landowner. In the vast majority of cases that will be the end of the matter. However, DCO 14.10 should be changed so that if the landowner objects, the County should not issue the permit until the parties resolve the matter. This is the way the current ordinance works in practice (because it requires landowner signature) – rightfully so given the burdens imposed on the landowner. There is no basis for slanting the new ordinance to favor one side in a dispute. This is also consistent with LWR's position that they do not want to be involved in individual landowner disputes, and it would

also keep the County from being embroiled in legal actions over the permitting process. Our proposal would also still address LWR's concern about the current ordinance – it would still allow speedy processing of permit applications for large projects because in the vast majority of cases there is no dispute over easement rights.

Finally, we believe the penalty provision discussed above ((14.18(3)) should be modified to apply to easement holders only unless the landowner expressly consents in writing. Traditionally, an easement holder is responsible for the costs of maintaining an easement, so the law should reflect that. Additionally, we believe the provisions that allow someone who is not a landowner to grant an easement over land they do not own should be removed.

Thank you for considering our comments. We remain committed to working with LWR to develop a balanced ordinance that good public policy and helps the Town of Middleton to meet its environmental goals.

STONEBROOK ESTATES HOMEOWNERS ASSOCIATION

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