BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, KANSAS

WEDNESDAY, MAY 12, 2010

4:00 p.m. Convene
-Consider approval of a proclamation declaring May 2010 as "Mental Health Month" (David Johnson)
-Recognition for Emily Jackson
-Consider approval of minutes of April 7 and April 21, 2010

CONSENT AGENDA

(1) (a) Consider approval of Commission Orders;
(b) Consider approval for 2010 radio purchases for the Sheriff's Office (Gary Bunting);
(c) Consider approval of right-of-way contracts for 01.30N-05.50E (Michael Kelly);
(d) Consider approval of right-of-way contracts for 01.42N-05.50E (Michael Kelly);
(e) Consider awarding contract for asphalt overlay and paved shoulders Route 1023/458 from Stull to Route 1 Project No. 2010-12 (Keith Browning); and
(f) Consider approval of Notice to the Township Board for cereal Malt Beverage License for Clinton Marina Parking Lot Special Event to be held on June 19, 2010 at 1329 E 800 Rd (Clerk's Office)

REGULAR AGENDA

(2) Consider approval of Emergency Purchasing Task Force (Jackie Waggoner/Gabe Engeland)

(3) Consider approval to access the HGAC contract for equipment for Public Works (Jackie Waggoner)

(4) Introduction of Eileen Horn, Sustainability Coordinator-No backup

(5) Presentation on the principles of No Adverse Impact (NAI) (Tom Morey)

(6) Presentation by KDOT of 3 bridge replacement projects East of Baldwin on Highway 56 in 2012 or 2013 (Earl Bosak)-No backup

(7) Presentation on draft the Environmental Chapter to Horizon 2020 (Amy Brown)-No backup

(8) Consider approval of design engineering services agreement for Project 2010-9 to replace Bridge No. 15-89N-04.50E carrying E 450 Road over a tributary to Deer Creek (Keith Browning)

(9) Executive Session on for (2) items: 1) for the purpose of consultation with staff for the purpose of discussing security matters. The justification is so as to not jeopardize security measures that protect public buildings of Douglas County; and 2) for the purpose of acquisition of right-of-way and consultation with the County Counselor.

(10) Other Business
(a) Consider approval of Accounts Payable (if necessary)
(b) Appointments
(c) Miscellaneous
(d) Public Comment

RECESS UNTIL 6:35 P.M.

6:35 p.m. Reconvene

(11) Consider Fairgrounds CIP (Bill Woods)-No backup

(12) Discuss proposal to transfer Pearson Park to a Blackjack Battlefield Trust (Carol von Tersch)

(13) Consider approval of Planning Commission Appointment

(14) Adjourn

TUESDAY, MAY 18, 2010
-5:00-6:00 p.m. – Joint meeting with Lawrence City Commission and the Douglas County Commission for meeting with KDOT regarding Passenger Rail Service in Kansas at Lawrence City Commission Chamber.
-6:30-8:00 p.m. – Immediately following the meeting, there will be an open house at the Union Pacific Depot.

WEDNESDAY, MAY 19, 2010

WEDNESDAY, MAY 26, 2010
-Consider approval of a Cereal Malt Beverage License for Clinton Marina Parking Lot Special Event for June 19, 2010 held at 1329 E 800 Rd (Clerk's Office)

WEDNESDAY, JUNE 2, 2010

WEDNESDAY, JUNE 9, 2010

WEDNESDAY, JUNE 16, 2010
4:00 p.m.-Proclamation declaring June 14-19 as "Dad's Days" (Anna Jenny)

WEDNESDAY, JUNE 23, 2010

WEDNESDAY, JUNE 30, 2010

***Note**: The Douglas County Commission meets regularly on Wednesdays at 4:00 P.M. for administrative items and 6:35 P.M. for public items at the Douglas County Courthouse. Specific regular meeting dates that are not listed above have not been cancelled unless specifically noted on this schedule.*

MENTAL HEALTH MONTH
2010 Proclamation

WHEREAS: *The U.S. Surgeon General states that mental health is fundamental to health, personal well-being, family, and interpersonal relationships, and contributes to community and society; and*

WHEREAS: *Mental illness affects one in four Americans every year, regardless of age, gender, race, ethnicity, religion, or economic status; and*

WHEREAS: *The U.S. Surgeon General has found that a range of treatments exist for most mental disorders and the efficacy of mental health treatments are well documented; and*

WHEREAS: *Douglas County, Kansas has made a commitment to community-based systems of mental health care for all residents; and*

WHEREAS: *The guiding principles of community mental health care have always been comprehensiveness, cost-efficiency, effective management, and high-quality and consumer-responsive services; and*

WHEREAS: *Mental Health America, the National Council for Community Behavioral Healthcare, and the Bert Nash Community Mental Health Center observe Mental Health Month every May to raise awareness and understanding of mental health and illness;*

NOW, THEREFORE, THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, KANSAS, hereby proclaims the month of May 2010, as

"MENTAL HEALTH MONTH"

in Douglas County and call upon all citizens, government agencies, public and private institutions, businesses, and schools to recommit our community to increasing awareness and understanding of mental illness and the need for appropriate and accessible services for all people with mental illness.

Dated this 12th day of May, 2010.

BOARD OF COUNTY COMMISSIONERS
OF DOUGLAS COUNTY, KANSAS

_____
Nancy Thellman, Chairman

_____
Jim Flory, Vice-Chair

_____
Mike Gaughan, Member

May 4, 2010

To: Craig Weinaug, Douglas County Administrator
From: Ken McGovern, Sheriff

SUBJECT: 2010 RADIO PURCHASES

I request that an initial purchase of 17 Motorola XTS 5000 portable radios, 8 Motorola XTL 5000 mobile radios, and accessories be added to the Douglas County Commission's consent agenda. This transaction will be made with TFM Communications via state contract number 28440 and is expected to cost $87,961.05. The funding for this purchase was previously approved by the Board of County Commissioners and is contained within line item 81410.

This purchase is part of a Project 25 compliance purchase project. Project 25 is a Federal Communications Commission mandate requiring that all public safety radio systems be changed from analog to digital by the year 2018. The Douglas County Commission has agreed to allow the Sheriff's Office to continue to purchase radios in an effort to become compliant with Project 25.

I have included copies of the vendor information and price quotation with this request. If you have any further questions, please feel free to contact me.

Respectfully,

Sheriff Ken McGovern

MOTOROLA

Quote Number: **QU0000107156**
Effective: 26 MAR 2010
Effective To: 25 MAY 2010

Bill-To:
DOUGLAS COUNTY KANSAS
111 E 11TH ST
LAWRENCE, KS 66044
United States

Ship-To:
DOUGLAS COUNTY KANSAS
111 E 11TH ST
LAWRENCE, KS 66044
United States

Ultimate Destination:
DOUGLAS COUNTY KANSAS
111 E 11TH ST
LAWRENCE, KS 66044
United States

Attention:
Name: GARY BUNTING
Phone: 785-841-0007

Sales Contact:
Name: Lisa Rowland
Email: lrowland@tfmcomm.com
Phone: 7852332343

Contract Number: 28440
Freight terms: FOB Destination
Payment terms: Net 30 Due

Item	Quantity	Nomenclature	Description	List price	Your price	Extended Price
1	8	M20URS9PW1AN	XTL 5000 MOBILE 10-35 WATT, 764-870MHZ	$1,497.00	$1,092.81	$8,742.48
1a	8	W22AS	ADD: PALM MICROPHONE	$72.00	$52.56	$420.48
1b	8	G67AA	ADD: REMOTE MOUNT	$297.00	$216.81	$1,734.48
1c	8	G806AT	ENH: SOFTWARE ASTRO DIGITAL CAI OPERATION	$515.00	$375.95	$3,007.60
1d	8	G442AB	ADD: XTL5000 CONTROL HEAD	$432.00	$315.36	$2,522.88
1e	8	G444AA	ADD: CONTROL HEAD SOFTWARE	-	-	-
1f	8	G51AM	ENH: 3600 SMARTZONE OPERATION	$1,500.00	$1,095.00	$8,760.00
1g	8	G361AE	ENH: ASTRO PROJECT 25 TRUNKING SOFTWARE	$300.00	$219.00	$1,752.00
1h	8	G174AA	ADD: ANTENNA 3DB LOW-PROFILE 764-870MHZ	$43.00	$31.39	$251.12
1i	8	B18CL	ADD: AUXILARY SPKR SPECTRA 7.5 WATT	$60.00	$43.80	$350.40
1j	8	G114AE	ENH: ENHANCED DIGITAL ID DISPLAY	$75.00	$54.75	$438.00
2	17	H18UCF9PW6AN	PORTABLE XTS5000 MODEL II 3X2 KEYPAD DISPLAY 1000 CHANNELS 764-870MHZ	$2,158.00	$1,575.34	$26,780.78
2a	17	Q44AC	ADD: RF ANTENNA SWITCH (NTN8327)	$10.00	$7.30	$124.10
2b	17	Q806BA	ADD: SOFTWARE ASTRO DIGITAL CAI OPERATION	$515.00	$375.95	$6,391.15
2c	17	H38BR	ADD: SMARTZONE SYSTEM SOFTWARE	$1,500.00	$1,095.00	$18,615.00
2d	17	Q361AK	ENH: PROJECT 25 9600 BAUD TRUNKING SOFTWARE	$300.00	$219.00	$3,723.00
3	17	HNN9031B	BATT 1525MAH SMART NICD NON-FM	$103.00	$50.00	$850.00
4	17	NTN1873A	CHARGER, IMPRES RAPID RATE, 110V US PLUG	$165.00	$133.65	$2,272.05
5	17	PMMN4051B	REMOTE SPEAKER MIC, RX-JACK	$89.00	$72.09	$1,225.53

Total Quote in USD $87,961.05

THIS QUOTE IS BASED ON THE FOLLOWING:

1 This quotation is provided to you for information purposes only and is not intended to be an offer or a binding proposal.

If you wish to purchase the quoted products, Motorola will be pleased to provide you with our standard terms and conditions of sale (which

will include the capitalized provisions below), or alternatively, receive your purchase order which will be acknowledged.

Thank you for your consideration of Motorola products.

2 Quotes are exclusive of all installation and programming charges (unless expressly stated) and all applicable taxes.
3 Purchaser will be responsible for shipping costs, which will be added to the invoice.
4 Prices quoted are valid for thirty(30) days from the date of this quote.
5 Unless otherwise stated, payment will be due within thirty days after invoice. Invoicing will occur concurrently with shipping.

MOTOROLA DISCLAIMS ALL OTHER WARRANTIES WITH RESPECT TO THE ORDERED PRODUCTS, EXPRESS OR IMPLIED INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

MOTOROLA'S TOTAL LIABILITY ARISING FROM THE ORDERED PRODUCTS WILL BE LIMITED TO THE PURCHASE PRICE OF THE PRODUCTS WITH RESPECT TO WHICH LOSSES OR DAMAGES ARE CLAIMED. IN NO EVENT WILL MOTOROLA BE LIABLE FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES.

MEMORANDUM

To : Board of County Commissioners

From : Keith A. Browning, P.E., Director of Public Works/County Engineer

Date : May 5, 2010

Re : Consider awarding contract for asphalt overlay and paved shoulders
Route 1023/458 from Stull to Route 1
Project No. 2010-12

On May 4, we received bids from three contractors for the referenced project (see attached tabulation). The project includes asphalt overlay work and paving shoulders on Route 1023/458 from Route 442 at Stull to Route 1.

Bettis Asphalt is the low bidder with a total bid of $2,453,699. The Engineer's Estimate was $2,856,607. The CIP includes $3,175,000 for this project.

Work will commence in mid- to late-July after completion of the two bridge rehabilitation projects currently underway. The contract allows 55 working days, or about 3 months, to complete the project. Work will be completed before late-fall cold weather.

We recommend awarding a contract to the low bidder, Bettis Asphalt. We also request authorization to approve change orders totaling up to 5% of the contract amount. The contract bid quantity for asphalt patching may increase depending on pavement condition at the time of the work.

Action Required: Approve a contract with Bettis Asphalt in the amount of $2,453,699.00 for Project No. 2010-12, asphalt overlay and paved shoulders on Route 1023/458 from Stull to Route 1. Also, authorize Public Works Director to approve change orders totaling up to 5% of the total contract amount.

PROJECT NO. 2010-12 BID NO. 10-F-0011 - MILLING, HMA OVERLAY, HMA SHOULDER CONSTR. & PATCHING ON RTE'S. 1023 & 458

BID TAB

SPEC NO.	BIDDING ITEM	APPROX. QTY.		ENGINEER'S ESTIMATE UNIT PRICE	ENGINEER'S ESTIMATE EXT.	Bettis Asphalt & Const., Inc. UNIT PRICE	Bettis Asphalt & Const., Inc. EXT.	Hamm Inc. & Subsidiaries UNIT PRICE	Hamm Inc. & Subsidiaries EXT.	Koss Construction Co. UNIT PRICE	Koss Construction Co. EXT.		
801	Mobilization	1	L.S.	$125,000.00	$125,000.00	$50,500.00	$50,500.00	$26,000.00	$26,000.00	$181,000.00	$181,000.00		
611/Sp. Prov.	HMA-Commercial Grade (Class A) (Surface)	33,995	Tons	$50.00	$1,699,750.00	$47.50	$1,614,762.50	$55.62	$1,890,801.90	$66.00	$2,243,670.00		
611/Sp. Prov.	HMA-Commercial Grade (Class A) (Base)	10,075	Tons	$50.00	$503,750.00	$49.00	$493,675.00	$49.28	$496,496.00	$70.00	$705,250.00		
833/611 Sp. Prov.	HMA-Commercial Grade (Class A) (Patching)	2,500	Tons	$125.00	$312,500.00	$61.75	$154,375.00	$90.00	$225,000.00	$79.00	$197,500.00		
612/Plans	Milling	22,450	S.Y.	$1.25	$28,062.50	$1.00	$22,450.00	$0.90	$20,205.00	$2.55	$57,247.50		
Plans	Combined Material (AB-3)	351	Tons	$20.00	$7,020.00	$18.00	$6,318.00	$25.00	$8,775.00	$35.00	$12,285.00		
Sp. Prov.	Shoulder Preparation (HMA Wdening)	531	Sta.	$100.00	$53,100.00	$55.30	$29,364.30	$67.85	$36,028.35	$185.00	$98,235.00		
Sp. Prov.	Pavement Edge Wedge	542	Sta.	$25.00	$13,550.00	$29.65	$16,070.30	$16.00	$8,672.00	$100.00	$54,200.00		
Sp. Prov.	Stockpile Existing Shoulder Material	678	C.Y.	$5.00	$3,390.00	$13.05	$8,847.90	$14.25	$9,661.50	$9.00	$6,102.00		
Sp. Prov.	Stockpiled Shoulder Material (Reuse)	85	C.Y.	$15.00	$1,275.00	$31.60	$2,686.00	$44.50	$3,782.50	$71.00	$6,035.00		
Plans	Monument Box	9	Ea.	$1,500.00	$13,500.00	$400.00	$3,600.00	$350.00	$3,150.00	$1,250.00	$11,250.00		
805	Traffic Control (Initial Set Up)	1	L.S.	$7,500.00	$7,500.00	$3,900.00	$3,900.00	$3,900.00	$3,900.00	$3,900.00	$3,900.00		
805/Plans	Traffic Control - Two Lane W/One Lane Closed	1	L.S.	$75,000.00	$75,000.00	$38,460.00	$38,460.00	$43,000.00	$43,000.00	$1,500.00	$1,500.00		
805/Plans	Flagger (Set Price)	1	Hour	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00	$25.00
805	Construction Sign (0 to 9.25 Sq. Ft.)	3,696	Ea. Day	$0.50	$1,848.00	$0.50	$1,848.00	$0.50	$1,848.00	$0.50	$1,848.00		
805	Construction Sign (9.26 to 16.25 Sq. Ft.)	3,157	Ea. Day	$0.60	$1,894.20	$0.50	$1,578.50	$0.50	$1,578.50	$0.50	$1,578.50		
805	Type III Barricade (4-8 Ft.)	154	Ea. Day	$0.75	$115.50	$1.50	$231.00	$1.50	$231.00	$1.50	$231.00		
805	Type "A" Warning Light	1,386	Ea. Day	$0.20	$277.20	$0.25	$346.50	$0.25	$346.50	$0.25	$346.50		
805	Timeline Channelizer	7,700	Ea. Day	$0.60	$4,620.00	$0.03	$231.00	$0.03	$231.00	$0.03	$231.00		
804/Sp. Prov.	Maintenance & Restoration of Haul Roads (Set)	1	L.S.	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00	$4,000.00
847/Sp. Prov.	Mailbox Installation (Set Price)	4	Ea.	$100.00	$400.00	$100.00	$400.00	$100.00	$400.00	$100.00	$400.00	$100.00	$400.00
805/Sp. Prov.	Water for Earthwork Compaction (Set)	1	Mgal.	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00	$30.00
	GRAND TOTAL				$2,856,607.40		$2,453,699.00		$2,784,162.25		$3,586,864.50		

Keith Browning, Director of Public Works — Jamie Shew, County Clerk — Dated: 5/4/2010

By: Keith Browning — By: Marni Penrod, Deputy

NOTICE TO THE TOWNSHIP BOARD

STATE OF KANSAS DOUGLAS COUNTY, ss

TO THE TOWNSHIP CLERK, CLINTON TOWNSHIP

This is to notify the members of your Township Board that application has been filed with the Douglas County Commission for **Clinton Marina Parking lot Special Event** to sell Cereal Malt Beverages at retail for consumption on the premises: **1329 E 800 Road** on **June 19, 2010**.

The Township Board may within (10) days file an advisory recommendation as to the granting of such a license and such advisory recommendation shall be considered by the Board of County Commissioners before such license is issued KSA 41-2702.

Done by the Board of County Commissioners this **12th day of May 2010**

_____
CHAIRMAN

_____
COUNTY CLERK

(SEAL)

The board of county commissions in any county shall not issue a license without giving the clerk of the township board in the township where the applicant desires to locate, written notice by registered mail, of the filing of the application.

Sales Tax ID: 48-0901171
Renewal: Special Event June 19th 2010 Only

48-0901171

(This form prepared by the Attorney General's Office)

(Corporate Application Form)

APPLICATION FOR LICENSE TO SELL RETAIL CEREAL MALT BEVERAGES

_____, DOUGLAS COUNTY, KANSAS _____, _____

TO THE GOVERNING BODY OF THE CITY OF _____, KANSAS
or
THE BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, KANSAS

On behalf of the CLINTON MARINA

corporation whose principal place of business is 1329 E 800 RD

_____ and under authority of the resolution of the Board of Directors of said corporation, I hereby apply for a license to sell retail cereal malt beverages in conformity with the laws of the State of Kansas and the rules and regulations prescribed and hereafter to be prescribed by you relating to the sale or distribution of cereal malt beverages on behalf of said corporation; for the purpose of securing such license, I make the following statement under oath:

1. The proposed licensee is CLINTON MARINA corporation with principal place of business at 1329 E 800RD. The resident agent is MEGAN HIEBERT 785 766 2314 C.
with offices at SAME 785 749-3222 MARINA
Said corporation was incorporated on 1980 in the state of KS.
If incorporated in Kansas, a copy of the Articles of Incorporation is on file with the Secretary of State.
Yes (✓) No ( ).

2. The following is the full and complete list of officers, directors and stockholders owning in the aggregate more than 25 percent of corporate stock, together with their positions and addresses, ages and dates of birth.
MEGAN S. HIEBERT DOB 3/5/67 WICHITA KS
1711 E 1000 RD LAWRENCE KS 66049

3. The premises for which the license is desired are located at ABOVE

(a) The legal description of the premises is 7-13-9 CLINTON TOWNSHIP

(b) The street number is 1329 E 800 RD

(c) The building is described as MARINA

(d) The corporate business under the license will be conducted in the name of the corporation or in the following name:
CLINTON MARINA INC.

4. The name(s) and address(es) of the owner or owners of the premises upon which the place of business is located is/are
STATE OF KANSAS
CLINTON MARINA

5. I hereby certify with regard to each of the persons named in number 2 above the following statements are true:

(a) None of them has within the last two years from this date been convicted of
(1) A felony
(2) A crime involving moral turpitude
(3) Drunkenness
(4) Driving a motor vehicle while under the influence of intoxicating liquor
(5) Violation of any state or federal intoxicating liquor law
If any of the above have been convicted of any of the above, specified offenses, the details are set out hereinafter.

(b) No manager, officer or director or any stockholder owning in the aggregate more than 25% of the stock of the corporation has been an officer, manager or director, or a stockholder owning in the aggregate more than 25% of the stock of a corporation which:

(1) has had a retailer's license revoked under K.S.A. 41-2708 and amendments thereto; or
(2) has been convicted of a violation of The Drinking Establishment Act or the Cereal Malt Beverage Laws of the State.

6. The place of business will be conducted by the following manager(s):

Name MEGAN HIEBERT

Residence Address 1329 E 800 RD LAWRENCE KS 66046

Date of birth 3/5/67

I hereby certify that with regard to this above-named manager the statement contained in number 5 above is in every respect true. If not, the details are set out hereinafter.

7. This application is for a license to sell retail cereal malt beverage for consumption on the premises ( ). For a license to sell retail cereal malt beverages in original and unopened containers and not by consumption on the premises ( ).

(X) SPECIAL EVENT JUNE 19, 2010

A license fee of $ 125.00 is enclosed herewith.

(This form prepared by the Attorney General's Office)

(Corporate Application Form)

APPLICATION FOR LICENSE TO SELL RETAIL CEREAL MALT BEVERAGES

_____, _____ COUNTY, KANSAS _____, _____

TO THE GOVERNING BODY OF THE CITY OF _____, KANSAS

or

THE BOARD OF COUNTY COMMISSIONERS OF _____ COUNTY, KANSAS

On behalf of the _____

corporation whose principal place of business is _____

_____ and under authority of the resolution of the Board of Directors of said corporation, I hereby apply for a license to sell retail cereal malt beverages in conformity with the laws of the State of

I, MEGAN HIEBERT, PRESIDENT
(Name and position with corporation)

on behalf of the above-named applicant, hereby agree to comply with all laws of the State of Kansas, and all rules and regulations prescribed, and hereafter to be prescribed by you, relating to the sale and distribution of cereal malt beverages, and do hereby agree to purchase all cereal malt beverages from a wholesaler, licensed and bonded under the laws of the State of Kansas, do hereby further consent to the immediate revocation of the cereal malt beverage license issued pursuant to this application by the proper officials for the violation of any such laws, rules or regulations.

(Corporate Seal)

CLINTON MARINA INC
(Corporation)

By _____
(Signature and position of individual making application on behalf of corporation)

Attest: _____
(Secretary of Corporation)

STATE OF KANSAS, COUNTY OF DOUGLAS, ss.

I, MEGAN HIEBERT, PRESIDENT, of the
(Signature and official position)

CLINTON MARINA, do
(Name of corporation)

solemnly swear that I have read the contents of this application, and that all information and answers herein contained are complete and true. So help me God.

_____
(Signature and official position)

SUBSCRIBED AND SWORN TO before me this _____ day of _____, _____

_____
(Character of official administering oath)

My commission expires on the _____ day of _____, _____

APPLICATION APPROVED this _____ day of _____, _____

By _____
(Official position)

of _____, Kansas
(City or county)

NOTE: A PHOTOCOPY OF THE COMPLETED FORM, TOGETHER WITH THE APPLICATION FEE REQUIRED BY K.S.A. 41-2702(e), MUST BE SUBMITTED TO THE **DIVISION OF ALCOHOLIC BEVERAGE CONTROL BUREAU, KANSAS DEPARTMENT OF REVENUE.**

Rvd 10/2002, 1/2009

Kansas Department of Wildlife & Parks

SPECIAL EVENT PERMIT & FACILITY RESERVATION APPLICATION/PERMIT

Return this form, with the required payment $ _____(checks only) to: (Department office)

Attach additional pages as necessary.
(Fees are non-refundable after permit issuance.)

KDWP Use Only
Date received: 4/19/10
Fee received $ — — —
Performance deposit: $
Local approval:
Yes No N/A
By:
Regional PL approval:
Yes No N/A
By:
Other notification:
LE: Fed:

Complete for all events

PLEASE PRINT OR TYPE
Organization name and address: CLINTON MARINA / VAN GO

Department property and specific area to be utilized: MARINA PARKING LOT Will this site be reserved for exclusive use? 1/2 WILL
Type of activity to be conducted: FUNDRAISER FOR VAN GO

Event date(s): (day) 6/19/10 (time) 9AM to (day) 6/19/10 (time) 10PM Number of participants expected: 400
Anticipated parking needs:
Special equipment or facility needs (picnic tables, trash bins, boat ramp, etc.) TRASH BARRELS / BARRICADES

Will food, merchandise, or services be offered for sale? YES If yes, please specify: ARTWORK VAN GO HAS MADE
Will entrance fees be collected or tickets sold? TICKETS SOLD If yes, please specify price(s):
Will any sound amplification system be used? YES If yes, please specify: SMALL STAGE AND BAND / AUCTIONEER
Will any cereal malt beverage be served? YES If yes, please specify estimated amount to be present: 4 KEGS
Will any firearms or fireworks be discharged? NO If yes, for what purpose?
Will fish or wildlife be tagged or otherwise marked in conjunction with the event? NO If yes, please specify species, number and release site(s):

Complete for boating events

NOTE: APPLICATIONS FOR BOAT RACES, REGATTAS AND MARINE PARADES MUST BE SUBMITTED AT LEAST 30 DAYS BEFORE THE EVENT DATE.
Estimated number of boats participating: _____ Specific description of the event:
Full description of safety measures to be utilized:
Boat launching site(s): _____ Specific area and size of water to be utilized:

Complete for field trials

NOTE: APPLICATIONS FOR BIRD DOG FIELD TRIALS MUST BE SUBMITTED AT LEAST 60 DAYS BEFORE THE EVENT DATE; 15 DAYS FOR COYOTE DOG TRIALS. AKC OR NKC SANCTION IS REQUIRED. A $100 PERFORMANCE DEPOSIT IS REQUIRED FOR BIRD DOG TRIALS.
Estimated number of entrants: _____ Legal description of total event area (provide 1/4 " per mile scale map):
County _____ Section _____ Township _____ Range _____
Specific directions to registration point:
Will pen-raised birds be shot? _____ If yes, give legal description of quarter section (maximum) where this will occur:
County _____ Section _____ Township _____ Range _____

Complete for all events

As an authorized representative of the organization listed above, I do hold blameless, protect and indemnify the Kansas Department of Wildlife and Parks for damage or loss of property and injury or loss of life resulting from this event. I certify that the event described above and on all attachments will be executed in accordance with conditions specified herein and in statutes and regulations of the State of Kansas. I accept full responsibility for any damage to the facilities, grounds and natural features of the event area, including litter, vandalism and reckless damage resulting from the event. I further certify that all the above information is true and correct, to the best of my knowledge, and that I have read the Special Events General Regulations Summary.

Name, addresses and daytime telephones of two authorized organization representatives:

MEGAN HIEBERT
1329 E 800 RD
LAWRENCE, KS 66046
Telephone: 785 749 3227
Rep. 1 signature: [signature] Date: 4/14/10

Telephone:
Rep. 2 signature: Date:

KDWP Use Only

Special conditions/comments (scientific data collection required, boating safety requirements, maps, etc.):

This certifies that the event is permitted as specified above. Additional agreements - are - are not - required (must be completed and attached to this permit).

Authorized KDWP Representative Title/ Position Date Issued

Boating events may need to complete the Tournament Catch Record on reverse.

DOUGLAS COUNTY ADMINISTRATIVE SERVICES
Division of Purchasing
1100 Massachusetts Street
Lawrence, KS 66044-3064
(785) 832-5286 Fax (785) 838-2480
www.douglas-county.com

MEMO TO: The Board of County Commissioners
Craig Weinaug, County Administrator

FROM: Gabriel Engeland, Administrative Intern
Jackie Waggoner, Purchasing Director JW

SUBJECT: Consider Adopting Emergency Purchasing Taskforce

DATE: April 25, 2010

In December 2009, we began exploring the development of a Multi-Jurisdictional Emergency Purchasing Taskforce that would be sponsored by our regional purchasing chapter, MACPP (Mid America Council of Public Purchasing). Initially managers and/or directors from our membership were invited to a meeting to determine the value of establishing this taskforce. Purchasing is one of the areas where professional response is most critical but has been often overlooked in emergency planning.

The Department of Homeland Security states many problems occur during incident response because personnel and volunteers are assigned to tasks that they don't perform on a daily basis or during an emergency. Poor planning for both Hurricane Katrina and the tornado that destroyed Greensburg resulted in major problems which prevented an effective and efficient response. These problems can create duplicate efforts, purchases made in haste or error without proper authorization and often without receipt or documentation, lack of spending controls, little accountability, and almost no transparency.

The taskforce has worked cooperatively to develop Standard Operating Procedures. Each participating entity will be asked to formally adopt the Emergency Purchasing Taskforce, and to include the SOP in their entity's emergency response plan.

The principal objective of the taskforce is to provide qualified personnel and assistance from various taskforce entities to the affected jurisdictions(s). This will enhance the efficiency of an emergency response, standardize processes, reduce redundancy, and increase efficiency by quickly disseminating critical resources and expert personnel. The taskforce has developed a standardized electronic procurement form that addresses acquisitions, donations (temporary/permanent), and approval processes.

Responders would be paid by their own entity for the first day of assistance. If the requested response is more than one day, the entity requesting the responder will be required to provide hourly pay at a rate determined by the NIGP (National Institute of Governmental Purchasing) Compensation Study. The current average rate is $28.82/hour, but will be adjusted up or down according to each NIGP Compensation Study Report.

Upon adoption of the taskforce, each entity would be asked to pay a yearly sponsorship of $200. The funds would be used to ensure members of the response team are adequately trained, reimbursed for mileage, and reimbursed for hotel and meal expenses (when applicable a per diem will be established).

RECOMMENDATION: The Board of County Commissioners consider adoption of the Emergency Purchasing Taskforce, along with the $200 annual sponsorship fee, and commit to allowing Douglas County purchasing staff be available for training and incident response.

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MEMO TO: The Board of County Commissioners
Craig Weinaug, County Administrator

FROM: Jackie Waggoner, Purchasing Director
Division of Purchasing

SUBJECT: Consider Recommendation to Purchase Equipment for Public Works

DATE: April 30, 2010

Public Works has funds allocated in equipment reserve to purchase a boom mower. The equipment is used to mow areas that can't be mowed with conventional mowers (e.g. behind guardrails, around box culverts, roadsides adjacent to wetlands, and on steep banks/slopes).

The boom mower will replace a 1994 Ford Mower Tractor with 4,515 hours equipped with a 10' pull behind mower deck. The tractor has internal brake and drive train issues, transmission is causing the tractor to jump out of gear, mower deck is worn out, and the main gear box has seal and bearing problems. The contractor, Sellers Equipment, has provided a trade-in offer of $6,300. This offer seems to be in line with the condition of the equipment, and would likely not bring as much through our online auction.

The Houston-Galveston Area Council's (HGAC) cooperative buying program has established an inter-local agreement with Mid-America Regional Council (MARC) which extends cooperative contract pricing to governments and non-profit agencies. This approach has proven to provide considerable cost savings, and allows us opportunities to go through authorized dealers in Kansas. The table below summarizes the cost from Seller Equipment Inc.:

DESCRIPTION	COST
2010 Kubota 4WD Tractor w/ Cab	$49,738.80
2010 Tiger Mower	$50,508.00
Warranty	Tractor – 2 years; Mower 1 year (parts & labor)
Trade-in Allowance	($ 6,300.00)
Total Cost	**$93,946.80**

Mike Perkins and I will be available at the meeting to answer any questions you may have.

RECOMMENDATION: The Board of County Commissioners approves the purchase of a 2010 tractor and mower and accepts the trade-in offer for a total cost of $93,946.80

Property Rights and Community Liability
The Legal Framework for Managing Watershed Development

The "prevention of harm" principle is the foundation of the No Adverse Impact approach to floodplain management. The goal of this NAI Legal Fact Sheet is to help local officials and others understand how to use the tools of NAI Floodplain Management to confidently protect people and property in a fair and effective way, while avoiding lawsuits – even those alleging takings.

Managing our Nation's floodplains and watersheds is a challenging task that is sometimes erroneously thought to create a direct conflict between the duty of local government to protect people and property vs. property rights. Most local officials wish to reduce the harm and costs associated with coastal and riverine storm damage, and recognize that unwise development can increase these negative impacts. Unfortunately, as our society has grown more litigious, it may appear to be more difficult for local and state officials to prevent or condition projects, even when there is good evidence that these projects may create problems for others. A No Adverse Impact (NAI) approach to land use management is a legally defensible way to address this problem.

Why NAI is legally sound?
NAI does not take away property rights – it protects them. NAI prevents one person from harming another's property. NAI is not an arbitrary or inflexible "no" to construction. It is a performance based standard. Courts consistently favor public entities performing their fundamental function of protecting people. The NAI approach can help communities create balanced and legally strong regulations.

While nothing can prevent all legal challenges, following the NAI approach to floodplain and watershed management can help to: 1) reduce the number of lawsuits filed against local governments and **2) greatly increase the chances that local governments will win legal challenges arising from their floodplain management practices.** The legal system has long recognized that when a community acts to prevent harm, it is not just "doing its job"; it is fulfilling a critical duty. The rights of governments to protect people and property are well recognized by the legal system since ancient times. Courts throughout the nation, including, the U.S. Supreme Court have consistently shown great deference to governments acting to prevent loss of life or property, even when protective measures restrict the use of private property.

Remember:

1. **Communities have the legal power to manage coastal and inland floodplains**
   and
2. **Courts may find that communities have the legal responsibility to do so.**

How NAI can help your community avoid lawsuits

The best way to avoid losing in court is to stay out of court. One of the strengths of the NAI approach is that its performance-based nature fosters and encourages cooperation between landowners and regulators as they work together to try to find solutions to the problems associated with proposed projects. This approach is less confrontational than traditional regulatory systems that dictate (without discussion) when development is and is not allowed. Under the NAI approach both landowners and regulators have the chance to resolve their concerns.

When avoiding court isn't possible, following the NAI approach can greatly increase the chances that local governments will win in lawsuits arising from their floodplain management practices. The most common and historically problematical challenge that local officials face while trying to regulate use of private property is a "constitutional taking."

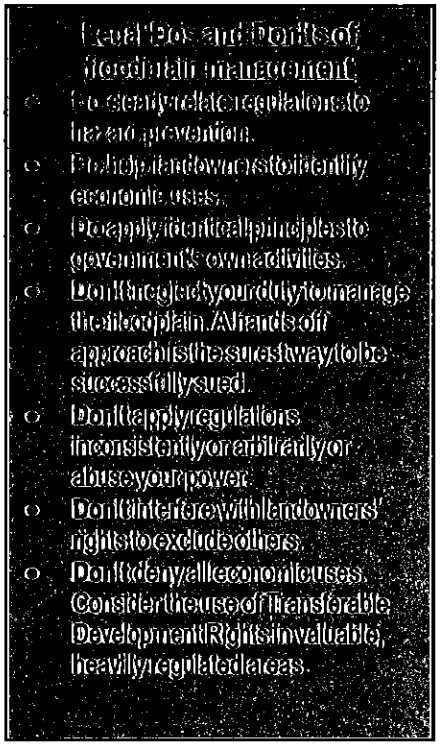
Takings background: Property owners file takings cases when they believe regulations violate their constitutional property rights. The legal basis for these arguments can be found in the Fifth Amendment of the U.S. Constitution, which prohibits the government from taking private property for public use without compensation. The interpretation of the courts through the years has clarified that the Fifth Amendment encompasses more than an outright physical appropriation of land. Under some circumstances, the courts have found that regulations may be so onerous that they effectively make the land useless to the property owner, and that this total deprivation of all beneficial uses is equivalent to physically taking the land. In such a situation, courts may require the governing body to either compensate the landowner or repeal the regulation.

"Not all the uses an owner may make of his property are legitimate. When regulation prohibits wrongful uses, no compensation is required."

– The Cato Institute

Needless to say, with local budgets strapped and land values in most floodplain and coastal areas skyrocketing, it is rarely economically feasible for local governments to compensate landowners for public safety regulations when, for example, they prohibit a house on a solid foundation in an area known to flood or prohibit the construction of a seawall to protect a home on an eroding bluff, NAI options should be explored.

NAI to the Rescue: It's critical that management decisions respect property rights, and follow the law, (See, sidebar) but courts have made it very clear that property rights have limits. For example, both State and federal law acknowledge that property owners never have the right to be a nuisance, to violate the property rights of others (for example, by increasing flooding or erosion on other properties), to trespass, to be negligent, to violate reasonable surface water use or riparian laws, or to violate the public trust. The courts have made it very clear that preventing projects that could harm others cannot constitute a taking, since the alleged right being violated never existed.



The best way to understand how the NAI approach helps to prevent takings challenges is to look specifically at what the courts have decided may constitute a regulatory taking. In 2005, the U.S. Supreme Court ruled on a precedent-setting case (*Lingle v. Chevron*) that clearly established regulatory taking guidelines. In a unanimous decision, the Court determined that there are only four ways for a regulation to be a taking. **Each is briefly discussed below, with a layperson's explanation of how they apply to NAI-based regulations. For a detailed legal explanation of these cases, see,** *No Adverse Impact Floodplain Management and the Courts,* published by the Association of State Floodplain Managers at http://www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf.

1. **A physical intrusion.** Governments may not, without compensation, place anything on a piece of private property against the wishes of the owner. The case discussed (*Loretto v. Teleprompter Manhattan*) involved a New York City requirement that residential buildings owners allow the cable company to install a small cable box and cables on every residential building. **If a community's NAI plan involves the placement of structures (culverts, for example) on private property, this ruling makes it clear that the community may well be required to compensate the landowner. Generally, this prohibition will not apply to NAI type regulations.**

2. **A total or near total regulatory taking.** The Court clarified that if a regulation restricts property rights to such a degree that it eliminates all or nearly all economically viable uses of a piece of property, that this may constitute a taking. The case reviewed (*Lucas v. South Carolina*

Coastal Council) was filed by a landowner who was prohibited from building a home on a barrier beach. **In their opinion the Court clearly states that regulations aimed at preventing nuisance don't constitute takings. South Carolina might find that, under the background principles of State law that the proposed use was a nuisance. However the Court also indicated that if the proposed use were to be considered a nuisance, then the State would need to demonstrate what it planned to do with any existing similarly situated nuisances. Using a NAI approach can help your community to articulate how proposed projects may cause harm. Preventing nuisance like behavior or other harm can and should be prohibited without any issue of a taking. In situations where a regulation eviscerates a property's market price, transferable development rights may be considered.**

3. **A significant, but not nearly total regulatory taking.** Courts determining whether or not a regulation is a taking are instructed to consider: a) the magnitude of the economic impact, b) how severely the regulation affects "investment-backed expectations," and c) character of the government in action. The central case discussed (*Penn Central v. City of New York*) was a denied expansion of Grand Central Station in New York City. **The regulation reviewed in this case (an historic preservation restriction on an addition to a building) doesn't aim to prevent harm to individuals or property; rather it seeks to preserve the quality of life – two very different things in the eyes of the law. The U.S. legal system requires governments to compensate landowners when regulations interfere with property rights. However, nobody ever has the right to use or develop land in a way that harms others, *even if that use maximizes the economic potential of a particular site in question.* There is no constitutional or legal right to a good return on investments. Unfortunately, some people may invest in land with erroneous ideas about what they may legally do with it, and when they are forbidden to do as they wish, may argue that regulations have devalued their property. The courts have made it clear, though, that regulations designed to prevent harm do not decrease the *true* value of a piece of land, and hence NAI-based regulations cannot trigger a taking.**

4. **Insufficient relationship between the requirement and the articulated government interest.** The Court clarified that the requirements of the regulation must be related to the goals of the regulation. In the two cases discussed (*Nollan v. the California Coastal Commission and Dolan v. Tigard*), the landowners were required to provide a public right-of-way as a permit condition, even though the proposed developments did not reduce public access.

With the NAI approach, regulations are tightly correlated with the specific goals of preventing harm, so this type of taking won't apply. This legal theory was recently tested and proven to be true in the Commonwealth by the Massachusetts Supreme Judicial Court's ruling on *Gove v. Zoning Board of Appeals of Chatham*. In this case, the town successfully prevented the construction of a new home in a flood-hazard area by clearly establishing that allowing the construction would put both the homeowners and rescue workers at unnecessary risk.

With these and other decisions, the U.S. Supreme Court and other courts, have made it clear that governments may regulate land without compensation if they do so with the intent of preventing harm. When appropriately applied:

No Adverse Impact Regulations make the "Taking Issue" a non-issue.

It's worth noting that even property interest groups agree with this assessment. The Cato Institute, which seeks to broaden the parameters of public policy debate to allow consideration of the traditional American principles of limited government, individual liberty, free markets and peace, notes:

> *Owners may not use their property in ways that will injure their neighbors. Here the Court has gotten it right when it has carved out the so-called nuisance exception to the Constitution's compensation requirement. Thus, even in those cases in which regulation removes all value from the property, the owner will not receive compensation if the regulation prohibits an injurious use.*
>
> ➢ **Roger Pilon**, Senior Fellow and Director, Cato Institute
> Addressing the U.S. House of Representatives, February 10, 1995

Why you must manage your floodplains

Protecting people and property is one of the fundamental duties of all levels of government. One of the most effective ways that local governments protect people and property is through the permitting process. Here, local officials should reduce the likelihood that the development or use of property will harm other people or property. Communities should be aware that if a governing body approves a project or activity that causes damage to other properties (for example, development that increases stormwater runoff onto surrounding properties), the affected property owners can sue the

Examples of projects communities may be sued for improperly permitting:

- Development interfering with natural processes.
- Pave surfaces that cause increases in stormflow velocity.
- Construction that channelizes stormflow and increases scour of surrounding properties.
- Roads blocking drainage.
- Stormwater systems that increase flow.
- Structures blocking watercourses.
- Bridges built without adequate openings.
- Flood control structures that increase flooding.

permitting authority, claiming that the agency/board was negligent in its duties when it permitted the action that caused the damage. Courts regularly favor the plaintiff in these cases. A community may be a hundred times more likely to lose a lawsuit for *allowing* improper development than for *prohibiting* it. One can infer from numerous court cases that the surest way for a local government to get into legal trouble is to take a "hands-off" (possibly considered negligent) approach to managing its floodplain.

The take-home lesson: *As a local official, you have been given the responsibility and the legal rights to manage coastal and inland floodplains. If you do so in a way that expressly seeks to prevent harm, the courts will support you. If you fail to regulate, you may be sued.*

For more information . . .

To answer specific legal questions ***please see an attorney licensed in your jurisdiction.*** To learn more about the general legal framework of NAI-based floodplain management see:

- *No Adverse Impact Floodplain Management and the Courts* for an excellent overview of the case history of NAI. While this document is designed for Attorneys, it is useful for everybody working in floodplain management (http://www.floods.org/NoAdverseImpact/NAI_Legal_Paper_102805.pdf).
- *The Coastal NAI Handbook* at http://www.floods.org
- The NAI section at the Association of State Floodplain Managers website at http://www.floods.org.
- The American Planning Association's 1995 *Policy Guide on Takings* at http://www.planning.org/policyguides/takings.html.

Published by the Association of State Floodplain Managers

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May 2007

Note: This publication is based on a draft provided by Wes Shaw, a NOAA Fellow at the Massachusetts Office of Coastal Zone Management, in cooperation with an Attorney licensed in Massachusetts, Edward A. Thomas Esq. LLC. However, land use law is a complex mixture of local, state, and federal laws, coupled with the specific peculiarities of the site in question. This publication is not and cannot be legal advice.

For legal advice, see an attorney licensed your jurisdiction.

Acknowledgements

This summary was prepared for the Association of State Floodplain Managers (ASFPM) by Jon Kusler, Esq., Associate Director of the Association of State Wetland Managers. Preparation involved a review of the legal literature on floodplain regulations as well as the last 15 years of federal and state case law concerning floodplain regulations. Detailed reviews of cases from the period 1960–1990 were prepared by Kusler in an earlier document.

Edward A. Thomas, Esq. provided extensive review of this document. Funding was provided by The McKnight Foundation and the ASFPM Foundation. Opinions expressed in the document are those of the authors and do not necessarily reflect the view of the sponsoring organizations.

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COMMON LEGAL QUESTIONS ABOUT FLOODPLAIN REGULATIONS IN THE COURTS

Prepared by Jon A. Kusler, Esq.
for the
Association of State Floodplain Managers

COMMON LEGAL QUESTIONS

Have courts continued to uphold the overall constitutionality of state and local floodplain regulations?
Yes. Courts at all levels, including the U.S. Supreme Court, have broadly and repeatedly upheld the general validity of floodplain regulations in the last 15 years. They have, however, held regulations as unconstitutional "takings" of private property in several cases where certain regulations, not clearly based on principles of hazard prevention or "no adverse impact," denied all economic use of lands, *Lucas* v. *South Carolina Coastal Council,* 505 U.S. 1003 (1992) or permitted the public to enter private property, *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

Does general validity mean that regulations are valid for all properties?
No. A landowner may attack the constitutionality of regulations as applied to his or her property even where regulations in general are valid. Regulatory agencies need to be able to support the validity of the regulations as applied to particular properties. However, the overall presumption of validity for regulations and a presumption of correctness for regulatory agency information gathering and regulatory decisions help the agency meet its burden of proof. Courts have broadly supported state and local floodplain regulations as applied to particular properties. A court decision that regulations are unconstitutional as applied to specific property will not necessarily determine site-specific constitutionality or unconstitutionality as applied to other properties.

Has judicial support for floodplain regulations weakened in recent years?
No. Quite the contrary. The U.S. Supreme Court has recently issued a series of opinions strongly endorsing planning to prevent damage from hazardous development. State courts continue to strongly uphold floodplain regulations in the more than 125 appellate cases over the last decade, including many challenges to regulations as "takings" of private property. See, for example:

- *Beverly Bank v. Illinois Department of Transportation*, 579 N.E.2d 815 (Ill. 1991), in which the court held that the Illinois legislature had the authority to prohibit the construction of new residences in the 100-year floodway and that a taking claim was premature
- *State of Wisconsin v. Outagamie County Board of Adjustment*, 532 N.W.2d 147 (Wis. App., 1995), in which a variance for a replacement fishing cottage in the floodway of the Wolf River was barred by the county's shoreland zoning ordinance
- *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, et al.*, 94 N.Y. 2d 96 (N.Y., 1999), in which the court rejected the claim that the rezoning of a 150-acre golf course property important for flood storage from "residential" to "solely recreational use" was a taking of private property
- *Wyer v. Board of Environmental Protection*, 747 A.2d 192 (Me., 2000), in which the denial of a variance to sand dune laws was held not to be a taking because the property could be used for parking, picnics, barbecues, and other recreational uses.

At the same time there is a national movement, referred to by some commentators as the "property rights movement," which supports landowners who challenge regulations. Courts are examining floodplain regulations with greater care than they did a decade ago.

What have been the most common challenges to regulations in the last 15 years?
The most common challenges to regulations have been claims that regulators permitted construction that later caused harm. There are dozens of cases that allege damage caused by development that caused problems. On the other hand, there are very few cases that allege unconstitutional over-regulation of property. Those few include: 1) challenges to floodway regulations and floodway restrictions; 2) coastal dune and high hazard area restrictions, and buffer and setback requirements; and 3) variances and regulations for nonconforming uses. Generally speaking, courts have broadly upheld these hazard prevention restrictions against claims that they take private property without payment of just compensation, have been adopted to serve invalid goals, are unreasonable (lack adequate nexus to goals) or discriminate.

May local governments regulate floodplains without express statutory authority to do so?
Yes. Courts have upheld local floodplain zoning regulations adopted as part of broader zoning. Courts have also, in some cases, upheld local floodplain ordinances adopted pursuant to "home rule" powers. But this is rarely an issue since states have broadly authorized local governments to adopt floodplain regulations.

May a local government adopt floodplain regulations that exceed state or federal (National Flood Insurance Program) minimum standards?
Yes. Local government regulations may exceed both state and federal regulations. There is no preemption issue. The National Flood Insurance Program regulations specifically encourage state and local regulations that exceed federal standards (see 44 *CFR* §60.1(d)).

May states and local governments regulate some floodplains and not others?
Yes. Typically states and local governments only regulate mapped floodplains.

Are the factual determinations of federal, state, or local floodplain regulatory agencies (e.g., mapping of floodways and flood fringe boundaries) presumed to be correct?
Yes. The burden is on landowners to prove their incorrectness. Courts overturn agency fact-finding only if they find that such fact-finding lacks "substantial evidence." Courts are particularly likely to uphold factual determinations of federal and state "expert" agencies. However, courts look more closely at the adequacy of the information-gathering in instances where regulations have severe economic impact on specific properties.

How closely must regulatory standards (including conditions) be tailored to regulatory goals?
Courts have broadly upheld floodplain and other resource protection regulations against challenges that they lack reasonable nexus to regulatory goals. But, as indicated above, courts have required a stronger showing of nexus where regulations have essentially extinguished all value in the property. They also increasingly require a showing that conditions attached to regulatory permits are "roughly proportional" to the impacts posed by the proposed activity if dedication of lands is involved, see *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987); *Dolan v. City of Tigard,* 512 U.S. 374 (1994).

Must a regulatory agency accept one mapping or other flood analysis method over another?
No. Not unless state or local regulations require the use of a particular method. Courts have afforded regulatory agencies considerable discretion in deciding which scientific or engineering approach to accept in fact-finding as long as the final decision is supported by "substantial" evidence. Also, courts have held that regulatory agencies do not need to eliminate all uncertainties in fact-finding.

Does an agency need to follow the mapping, floodway delineation or other technical requirements set forth in its enabling statute or regulations?
Yes. Agencies must comply with statutory, administrative, regulatory and ordinance procedural requirements. They must also apply the permitting criteria contained in statutes and regulations.

Are floodplain and floodway maps invalid if they contain some inaccuracies?
No. Courts have upheld maps with some inaccuracies, particularly if there are regulatory procedures available for refining map information on a case-by-case basis.

Can landowners be required to carry out floodplain delineations on impacts of proposed activities on flood elevations or provide various types of floodplain assessment data?
Yes. Courts have held that regulatory agencies can shift a considerable portion of the assessment burden to landowners and that the amount of information required from a landowner may vary depending upon the issues and severity of impact posed by a specific permit. And, agencies can charge reasonable fees for permitting. But the burdens must be reasonable and courts may consider the costs of such data gathering to be relevant to the overall reasonableness of regulations and whether a taking has occurred.

May a regulatory agency be liable for issuing a regulatory permit for an activity that damages other private property?
Yes, quite possibly. In fact a careful analysis of hundreds of cases in which the lawsuit involved permitting indicates that a municipality is vastly more likely to be sued for issuing a permit for development that causes harm than for denying a permit based on hazard prevention or "no adverse impact" regulations. The likelihood of a successful lawsuit against a municipality for issuing a permit increases if the permitted activity results in substantial flood, erosion or other physical damage to other private property owners. However, some states specifically exempt state agencies and local governments from liability for issuing permits.

Do local governments need to adopt comprehensive land use plans before adopting floodplain regulations?
Statutes authorizing local adoption of floodplain ordinances and bylaws do not require prior comprehensive planning. However, many local zoning enabling acts require that zoning regulations be in accord with a comprehensive plan. Traditionally courts have not strictly enforced this requirement and have often found a "comprehensive plan" within the zoning regulations.

Courts have also endorsed comprehensive planning and regulatory approaches as improving the rationality of regulations although they have also upheld regulations not preceded by such planning in many instances.

Under what circumstances is a court most likely to hold that floodplain regulations "take" private property?
Courts are likely to find a "taking" in circumstances where: 1) the regulation is not clearly based on hazard prevention or "no adverse impact;" 2) regulations deny all "reasonable" economic uses of entire properties, that is, the value of the property is reduced to zero or very near zero; or 3) proposed activities will not have offsite "nuisance" impacts. Landowners are also more likely to succeed if the property owner purchased the land before adoption of the regulations.

Are highly restrictive floodplain regulations, including buffers and large lot sizes, valid?
Courts have upheld highly restrictive floodplain regulations in many contexts, particularly where a proposed activity may have nuisance impacts on other properties. However, courts have also held floodplain regulations to be a "taking" without payment of compensation in a few cases (mostly older) where the regulations denied all economic use of entire parcels of land and there was no showing of adverse impact on other properties.

Would a no adverse impact performance standard incorporated in local or state regulations be sustained by courts?
Yes. Courts are very likely to support this standard if it is reasonably and fairly applied and if government agencies take measures to avoid successful "takings" challenges where regulations deny all economic, non-nuisance-like uses for entire properties.

How can a local government avoid successful "takings" challenges?
Local governments can help avoid successful "takings" challenges in a variety of ways:

- Apply a no adverse impact floodplain management performance standard fairly and uniformly to all properties.
- In local regulations, include special exception and variance provisions that allow the regulatory agency to issue a permit in instances where denial will deprive a landowner of all economic use of his or her entire parcel **and** the proposed activity will not have nuisance impacts.
- For floodplain areas, adopt large-lot zoning, which permits some economic use (e.g., residential use) on the upland portion of each lot.
- Allow for the transfer of development rights from floodplain to non-floodplain parcels.
- Fairly tax and levee assessments based on what development will actually be allowed.

Acknowledgements

This question and answer summary concerning legal issues associated with no adverse impact floodplain management was prepared for the Association of State Floodplain Managers (ASFPM) by Jon Kusler, Esq., Associate Director of the Association of State Wetland Managers. It is based upon a larger paper with extensive case law citations, also prepared by Jon Kusler for the Association: No Adverse Impact Floodplain Management and the Courts. The summary and the larger paper are based upon review of the legal literature as well as Federal and state case law concerning floodplain regulations.

Edward A. Thomas, Esq. provided extensive review to this document. Funding was provided by the McKnight Foundation and the ASFPM Foundation. Opinions expressed in the document are those of the authors and do not necessarily reflect the view of the sponsoring organizations.

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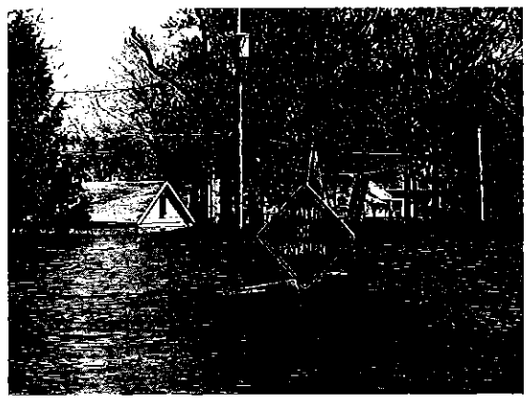
LEGAL QUESTIONS: GOVERNMENT LIABILITY and NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT



Prepared by Jon A. Kusler, Esq.
for the
Association of State Floodplain Managers

Introduction

What is no adverse impact floodplain management?

In 2000, the Association of State Floodplain Managers recommended a "no adverse impact" approach or goal for Local, State, and Federal floodplain management to help control spiraling flood and erosion losses from development, which increases flood risks and additional flood losses. The "no adverse impact" goal could also potentially be applied to other kinds of impacts, if a community chooses to do so. The "no adverse impact" goal is not intended as a rigid rule of conduct. Rather, it has been suggested as a general guide for landowner and community actions in the watersheds and the floodplains, which may adversely impact other properties or communities. It also could be incorporated as an overall performance standard into community and State floodplain regulations.

COMMON LEGAL QUESTIONS For No Adverse Impact Floodplain Management

What major legal issues are raised by no adverse impact floodplain management?

Two major sets of legal issues arise with no adverse impact floodplain management.

1) Can no adverse impact floodplain management reduce community liability for flooding and erosion problems?
2) Will a community that is adopting floodplain regulations incorporating a no adverse impact standard be subject to liability for taking private property or be subject to other successful legal challenges?

These questions will be discussed individually in the following pages.

1) CAN NO ADVERSE IMPACT FLOODPLAIN MANAGEMENT REDUCE COMMUNITY LIABILTY FOR FLOODING AND EROSION?

Legally, no adverse impact floodplain management can reduce community liability for flood and erosion losses. More specific issues pertaining to this overall conclusion include the following:

Are successful suits against local governments for increasing flooding and erosion growing more common?

When individuals are damaged by flooding or erosion, they often file law suits against governments or other individuals, claiming that the governments have caused the damages, contributed to the damages or, in some instances, failed to prevent or provide adequate warnings of natural hazards. Successful liability suits based upon natural hazards have become increasingly expensive to governments, not only because of the increasing damage awards but because of the attorney and expert witness fees which may exceed the damage award.

Successful liability suits of all types have increased in the last two decades for several reasons:

- A growing propensity to sue on the part of individuals damaged by flooding or erosion (historically, members of society were more willing to accept losses from a broad range of causes).
- Large damage awards and the willingness of lawyers to initiate suits on a contingent fee basis.
- Propensity of juries to view governments as having "deep pockets".
- Expanded concepts of liability.
- Abrogation or modification of sovereign immunity in most jurisdictions.
- Uncertainties with regard to the legal rules of liability and defenses (e.g., "Act of God") due to the evolving nature of the body of law and the site-specific nature of many tort actions.
- Limitation of the "Act of God" defense because most hazards are now foreseeable.
- Hazards are now, to a greater or lesser extent, "foreseeable" and failing to take such hazards into account may constitute negligence. See, e.g., Barr v. Game, Fish, and Parks Commission, 497 P.2d 340 (Col., 1972.)

- Advances in hazard loss reduction measures (e.g., warning systems, elevating structures) create an increasingly high standard of care for reasonable conduct.
- Advances in natural hazard computer modeling techniques, which can be used to establish causation.
- Reduction in the defenses of contributory negligence and assumption of risk.

All levels of government, Federal, State and local, may now be sued for negligence, nuisance, breach of contract or the "taking" of private property without payment of just compensation under certain circumstances, although vulnerability to suit varies.

In what situations are governmental units liable for increasing flood or erosion damages on private lands?
Courts have commonly held governments liable for increasing flood and erosion damages on private property by blocking natural drainage through grading, fill, culverts, bridges or structures; increasing the location and amount of runoff through channelization or drainage works; or constructing flood control works such as levees and dams. Courts have often held governmental units liable for inadequately maintaining or operating culverts, bridge crossings, channelization projects, and dams. Some courts have also held local governments liable for issuing permits and approving subdivisions which increase flood damages on other lands and for inadequate inspections. Courts have held governmental units liable under a variety of legal theories including riparian rights, nuisance, trespass, negligence, strict liability and "taking" private property without payment of just compensation.

Can a governmental unit protect itself from liability by arguing "sovereign immunity"?
The sovereign immunity defense has been dramatically reduced by the courts and legislatures in most states. In addition, sovereign immunity is not a defense to a "takings" claim.

Can a governmental unit protect itself from liability by arguing an "Act of God"?
Increasingly, no. To successfully establish an "Act of God" defense, a governmental unit must prove that a hazard event is both large and unpredictable. This is increasingly difficult because hazard events are at least partially foreseeable.

Will a governmental unit be protected from liability by following regulatory guidelines or using "standard" engineering approaches for flood and erosion control?
Not necessarily. A court may hold that a "standard" approach is not reasonable in the circumstances as technologies improve and the standard of care in floodplain management increases.

May a governmental unit be held liable for failing to reasonably operate and maintain flood loss reduction measures such as channels, levees, dikes and warning systems?
Yes. Courts often hold governmental units liable for inadequate operation or maintenance.

May a governmental unit be held liable for issuing permits for development or approving a subdivision which increases flood or erosion damages on other lands?
Yes, in some but not all states.

May a governmental unit be held liable for failing to remedy a natural hazard on public lands which damages adjacent private lands?
Perhaps. Courts have, with only a few exceptions, not held governmental units and private individuals responsible for naturally occurring hazards on public lands such as stream flooding or bank erosion that damage adjacent lands (e.g., erosion, flooding). However, they are liable if they increase the hazards. In addition, a small number of courts have held that government entities may need to remedy hazards on public lands which threaten adjacent lands.

Do governmental units have discretion in determining the degree of flood and erosion protection provided by flood and erosion reduction works?
Yes. Courts have held that the degree of protection provided by hazard reduction measures is discretionary and not subject to liability. However, courts have held governmental units responsible for lack of care in implementing hazard reduction measures once a decision has been made to provide a provide a particular degree of protection.

2) WILL FLOODPLAIN REGULATIONS INCORPORATING A NO ADVERSE IMPACT STANDARD BE SUSCEPTIBLE TO A "TAKINGS" OR OTHER CONSITUTIONAL CHALLENGE?

No. Courts are likely to provide strong support for a no adverse impact regulatory performance standard approach. However, no adverse impact regulations are subject to the same overall U.S. Constitution requirements as other regulations. These include the requirements that regulations be adopted to serve valid goals, be reasonable, not discriminate and not take private property without payment of just compensation. No adverse impact regulations are particularly likely to be supported because they apply a regulatory goal which is well established in common law and in regulatory programs.

Will courts support a no adverse impact goal?
Yes. Courts have broadly endorsed floodplain management goals and no adverse impact is an extension of such goals. No adverse impact codifies the maxim, which has been broadly endorsed by courts, "Sic utere tuo ut alienum non laedas," or "so use your own property that you do not injure another's property." See Keystone Bituminous Coal Association v. DeBenedictis, 107 S. Ct. 1232 (1987) and many cases cited therein. See, for example, Hagge v. Kansas City S. Ry Co., 104 F. 391 (W.D. Mo., 1900) (Court held that damage done to land by occasional overflow of a stream caused by a railroad was a nuisance.)

Will courts support the reasonableness of no adverse impact standards?
Yes. Courts have already supported a variety of more specific standards such as increased freeboard requirements and no rise floodways.

May a local government adopt floodplain regulations which exceed State or Federal (FEMA) minimum standards.?
Yes. Local governments regulations may exceed both State and Federal regulations. There is no preemption issue. In fact, the FEMA program encourages State and local regulations to exceed Federal standards through the Community Rating System.

May governmental units be held liable for uncompensated "takings" if they require that private development be elevated or floodproofed?
No. Courts have broadly and universally supported floodplain regulations against "takings" challenges. Courts have broadly held that regulations may substantially reduce property values without "taking" private property.

May governmental units be held liable for refusing to issue permits in floodway or high risk erosion areas because proposed activities will damage other lands?
No. In general, landowners have no right to make a "nuisance" of themselves. Courts have broadly and consistently upheld regulations which prevent one landowner from causing a nuisance or threatening public safety.

What can governments do to reduce the possibility of a successful "takings" challenge to regulations?
Local governments can help avoid successful taking challenges in a variety of ways:

- Apply a no adverse impact floodplain management performance standard fairly and uniformly to all properties.
- Include special exception and variance provisions in regulations which allow the regulatory agency to issue a permit where denial will deny a landowner all economic use of his or her entire parcel and the proposed activity will not have nuisance impacts.
- Adopt large lot zoning for floodplain areas which permits some economic use (e.g., residential use) on the upland portion of each lot.
- Allow for the transfer of development rights from floodplain to non-floodplain parcels.
- Reduce property taxes and sewer and water levees on regulated floodplains.

MEMORANDUM

To : Board of County Commissioners

From : Keith A. Browning, P.E., Director of Public Works/County Engineer

Date : April 29, 2010

Re : Consider approval of design engineering services agreement
Project No. 2010-9
Bridge No. 15.89-04.50E

The referenced bridge replacement project is in Douglas County's CIP with construction scheduled for 2011. The project entails replacing the existing bridge carrying E 450 Road over a tributary to Deer Creek. The existing bridge is situated approximately 0.11 miles south of Route 442, and was constructed in 1920. It is a 28'-span steel beam span with a drainage area of approximately 2.4 square miles. The bridge is classified "structurally deficient", and is posted for a 5-ton maximum load. E 450 Road is a dead-end road that terminates in federally owned property on the north side of Clinton Lake. There is one residence located south of the bridge.

Our selection committee selected Delich Roth & Goodwillie, P.A. Engineers (DRG) as the top ranked firm for this project. DRG is located in Bonner Springs. DRG has submitted their cost proposal for engineering services (attached). Assuming a precast concrete structure can be used at this location, their cost proposal has a not-to-exceed cost of $49,886.58. If study reveals a prestressed beam or cast-in-place span structure is required, the not-to-exceed cost is $71,794.64. We believe a 30'-span precast concrete structure will work at this location. The not-to-exceed fees include survey work provided by All Points Surveying, LLP, a Lawrence firm, and geotechnical study provided by Terracon.

The CIP includes $290,000 for this project. We believe this cost estimate is still valid.

It is recommended the BOCC approve the proposed engineering services agreement. The Chair should sign two original copies of the agreement.

Action Required: Authorize the BOCC Chair to sign the attached agreement (two original copies) with Delich Roth & Goodwillie, P.A. Engineers for engineering services to replace Bridge No. 15.89N-04.50E carrying E 450 Road over a tributary to Deer Creek.

ENGINEERING SERVICES AGREEMENT

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THIS Engineering Services Agreement is entered into by and between Douglas County, Kansas ("County") and Delich Roth & Goodwillie, P.A. ("Engineer"), as of the _____ day of _____ 20____ (the "Effective Date").

RECITALS

WHEREAS, County desires to employ Engineer to provide professional engineering services in the design of certain road(s) and/or bridge(s) in Douglas County, Kansas, in connection with Douglas County Project No. _____ (the "Project"); and

WHEREAS, Engineer agrees to provide such services.

TERMS OF AGREEMENT

NOW THEREFORE, in consideration of the promises contained in this Agreement, County employs Engineer and Engineer agrees to provide professional engineering services as follows:

I. DEFINITIONS

In addition to other terms defined in the body of this Agreement, the following terms shall have the meanings ascribed herein unless otherwise stated or reasonably required by this Agreement, and other forms of any defined words shall have a consistent meaning:

"Additional Services" means any services requested by County which are not covered by Exhibit A.

"Agreement" means this contract and includes change orders issued in writing.

"County Engineer" means the person employed by County with the title of County Engineer, who is licensed to practice engineering in the State of Kansas.

"Engineer" means the company or individual identified in the preamble of this Agreement. Engineer shall employ for the services rendered engineers, architects, landscape architects, and surveyors licensed, as applicable, by the Kansas State Board of Technical Professions.

"Contract Documents" means those documents identified in the Contract for Construction of the Project, including Engineering Documents. All terms defined in the General Conditions of the Contract for Construction shall have the same meaning when used in this Agreement unless otherwise specifically stated, or in the case of a conflict, in which case the definition used in this Agreement shall prevail in the interpretation of this Agreement.

"Engineering Documents" means all plans, specifications, reports, drawings, tracings, designs, calculations, computer models, sketches, notes, memorandums and correspondence related to the Engineering Services.

"Engineering Services" and "Services" mean the professional services~~, labor, materials, supplies, testing~~ and other acts or duties required of Engineer under this Agreement, together with Additional Services as County may request and as evidenced by a supplemental agreement pursuant to the terms of this Agreement.

"Project" means the Douglas County project identified above in the Recitals.
"Subsurface Borings and Testing" means borings, probings and subsurface explorations, laboratory tests and inspections of samples, materials and equipment, and appropriate professional interpretations of all of the foregoing.

Comment [k1]: We don't fully understand the need for this revision, but OK.

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II. COMPENSATION

Engineer's compensation and related matters are as follows:

A. MAXIMUM TOTAL FEE AND EXPENSE

Engineer's fee shall be based on the actual hours expended on the Project at the rates indicated in the attached Fee Schedule (attached hereto as Exhibit B and incorporated herein by reference) and the actual reimbursable expenses permitted under this Agreement and incurred on this Project, with the fee and reimbursable expenses not to exceed $ 49,886.58 ("Total Maximum Fee"), assuming a precast, 3-sided, concrete structure (Option A) is utilized. If a prestressed or cast-in-place span structure (Option B) is utilized, the Total Maximum Fee shall not exceed $ 71,794.64. The Total Maximum Fee is based on the scope of Services outlined in Exhibit A, attached hereto and incorporated herein by reference, which Services shall be completed on or before December 31, 2010. Engineer's fees and expenses shall not exceed the amounts for each phase as detailed in Exhibit B. Additional or alternative methods of compensation shall be paid only with written approval of the County Engineer.

B. HOURLY RATE

Any Additional Services which are not set forth in this Agreement will be charged on the basis of the hourly rate schedule in Exhibit B and reimbursable expenses not contemplated in this Agreement will be charged at actual cost. No Additional Services or costs shall be incurred without written approval by County.

C. REIMBURSABLE EXPENSES

Reimbursable expenses shall be included in the Total Maximum Fee and shall be reimbursed at Engineer's actual cost, without mark-up. Reimbursable expenses must be authorized by County and include expenses of transportation in connection with the Project, expenses in connection with authorized out-of-town travel, long-distance communications, expenses of printing and reproductions, postage and facsimile transmissions, expenses of renderings and models requested by County, and other costs as authorized by County. Reimbursable expenses will not include overhead costs or additional insurance premiums, which are included in the hourly rate structure. Unit rates for reimbursable expenses are included in Exhibit B. Records documenting reimbursable expenses shall be made available to County if requested in writing. Production of these documents shall be made at Engineer's office during normal business hours within a reasonable time of request, at a date and time mutually convenient to both parties.

D. SALES TAX EXCLUDED

Compensation as provided for herein is exclusive of any sales, use or similar tax imposed by taxing jurisdictions on the amount of compensation, fees or services. Should such taxes be legally imposed, County shall reimburse Engineer for such taxes in addition to the contractual amounts provided. Engineer, however, shall use County's sales tax exemption where applicable, and County need not reimburse Engineer for sales or use taxes Engineer pays in transactions legally exempt from such tax.

E. BILLING

Engineer shall bill County monthly for all its fees and reimbursable expenses. Monthly pay requests must generally be received by the 5th day of the month. The bill submitted by Engineer shall itemize the Services and reimbursable expenses for which payment is requested, and shall be deemed to include a representation by Engineer to County that the Services have proceeded to the point stated in the bill and that amounts requested in the bill are due and owing pursuant to this Agreement. County agrees to pay Engineer within 10 days after approval by the governing body or 30 days after the invoice is received, whichever is later.

F. COUNTY'S RIGHT TO WITHOLD PAYMENT

In the event County becomes credibly informed that any representations of Engineer provided in its monthly billing are wholly or partially inaccurate, County may withhold payment of disputed sums then, or in the future, otherwise due Engineer until the inaccuracy and the cause thereof is corrected to County's reasonable satisfaction. In the event County questions some element of an invoice, that fact shall be made known to Engineer as soon as reasonably possible. Engineer will assist in resolution of the matter and transmit a revised invoice if necessary. County shall pay the undisputed portion of any invoice as provided in Paragraph E above.

G. PROGRESS REPORTS WITH PAY APPLICATIONS

A written progress report, as set out in Exhibit C (attached hereto and incorporated herein by reference) must be submitted with each monthly bill, indicating the percentage completion of each specific design task and those tasks that will be performed the following month. This report will serve as support for payment to Engineer.

H. CHANGES IN SCOPE

For substantial modifications in authorized Project scope and/or substantial modifications of drawings and/or specifications previously accepted by County, when requested by County and through no fault of Engineer, Engineer shall be compensated for the time required to incorporate such modifications at Engineer's standard hourly rates per Exhibit B. An increase in Total Maximum Fee or contract time, however, must be requested by Engineer and must be approved through a written supplemental agreement prior to performing such Services. Engineer shall correct or revise any errors or deficiencies in its designs, drawings or specifications without additional compensation when due to Engineer's negligence, error, or omission.

I. ADDITIONAL SERVICES

Engineer shall provide services in addition to those described in this Agreement, including Exhibit A, when such services are requested in writing by County. Prior to providing any such Additional Services, Engineer shall submit a proposal outlining the Additional Services and an estimation of total hours and a maximum fee, based upon the Fee Schedule in Exhibit B. Payment to Engineer, as compensation for these Additional Services, shall be in accordance with the Fee Schedule in Exhibit B. Reimbursable expenses incurred in conjunction with Additional Services shall be paid at actual cost. Reimbursable expenses will not include overhead costs or additional insurance premiums, which are included in the hourly rate structure. Unit rates for reimbursable expenses are included in Exhibit B. Records of reimbursable expenses pertaining to Additional Services shall be made available to County if requested in writing. Production of these documents shall be made at Engineer's office during normal business hours within a reasonable time of request, at a date and time mutually convenient to both parties.

III. RESPONSIBILITIES OF ENGINEER

Engineer shall furnish and perform the Engineering Services in all phases of the Project, as specifically provided in Exhibit A and which are required for the completion of the Project, according to the Project Schedule set forth in Exhibit D, attached hereto and incorporated herein. Such services shall include the following services during the following Project phases:

A. PRELIMINARY DESIGN PHASE

Engineer shall do the following during the preliminary design phase:

1. Services: Engineer shall provide the services during this phase as described in Exhibit A.

2. Preliminary Design Documents: Engineer shall furnish County with 3 copies of the preliminary design documents for review as set out in Exhibit A.

3. Probable Cost: Engineer shall furnish County an opinion of probable Project cost based on Engineer's experience and qualifications. If the probable cost exceeds the amount budgeted for the Project, County may terminate this Agreement at the completion of this phase. If directed by County, Engineer shall modify the drawings and specifications as necessary to achieve compliance with the budgeted construction cost, and be compensated as Additional Services.

B. FINAL DESIGN PHASE

Engineer shall do the following during the final design phase:

1. Services: Engineer shall provide the services during this phase as described in Exhibit A.

2. Final Design Documents: Engineer shall furnish County with raster files and hard copies of the final plans in an accepted format as specified in Exhibit A. The raster files, as well as the hard copies, shall contain all required signatures from County and the signature and seal of the design engineer.

3. Contract Documents: County standard Contract Documents shall be used and Engineer shall furnish all details and specifications that are unique for the Project.

C. BIDDING PHASE

Engineer shall do the following during the bidding phase:

1. Services: Engineer shall provide the Services during this phase as described in Exhibit A.

2. Bids Exceeding Cost Estimate: If bids exceed the estimated probable Project cost, County may discuss with Engineer and the lowest responsible bidder ways to reduce the cost, and Engineer shall provide suggestions for reducing the Project costs. This discussion will be accomplished at no additional cost to County.

D. CONSTRUCTION PHASE

Engineer shall do the following during the construction phase:

1. Services: Provide the Services during this phase as described in Exhibit A.

2. Administration: County will provide in-house administration of the construction contract; however, Engineer shall consult with and advise County and act as County's representative when requested. If County requests, Engineer shall provide contract for construction administration and observation services as Additional Services.

3. Contract Interpretation: When requested by County, Engineer shall visit the site and issue necessary interpretations and clarifications of the Contract Documents. Engineer shall provide such services at no additional cost to County.

4. Additional Drawings: If, during construction, situations arise which require additional drawings or details, or revision of the plan drawings or details, Engineer agrees to provide such additional drawings or revisions at no additional cost to County when such changes are required to correct Engineer's errors or omissions in the original design and preparation of construction drawings. If additional drawings or details are required through no fault of Engineer, or are beyond its control, both parties agree to negotiate an equitable payment to Engineer for its services rendered, which shall be accomplished through a supplemental agreement.

5. Shop Drawings: Engineer shall review and take appropriate action on each contractor's shop drawings and samples, and the results of tests and inspections

and other data which each contractor is required to submit for the limited purposes of checking for compliance with the design concept and ~~conformance with the requirements of~~information shown in the Contract Documents. Such review shall not extend to means, methods, sequences, techniques, quantities, fabrication processes, or procedures of construction, coordination of the work with other trades, or to safety precautions and programs incident thereto, all of which are the sole responsibility of the contractor, unless an obvious defect or deficiency exists, in which case Engineer shall advise County of such defect or deficiency so the same can be prevented.

Comment [k2]: I didn't include "dimensions, weights or gauges" because I think those ARE things you would review as part of shop drawing review.

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E. GENERAL DUTIES AND RESPONSIBILITIES

Engineer shall have the following general duties and responsibilities:

1. Personnel: Engineer shall assign only qualified personnel to perform the Engineering Services. At the time of execution of this Agreement, the parties anticipate that the following individual will perform as the principal on this Project: ~~_____~~Dr. Carl B. Reed, P.E.~~_____~~("Project Principal").
The Project Principal shall be the primary contact with County and shall have authority to bind Engineer. So long as the Project Principal remains actively employed or retained by Engineer, this individual shall continue to serve as the Project Principal.

2. Independent Contractor: Engineer is an independent contractor and as such is not an employee of County.

3. Special Services: Engineer may be called upon to serve as a witness in any litigation, arbitration, legal or administrative proceeding arising out of the Project. If Engineer is requested in writing by County to appear as a witness, Engineer will be paid its hourly fee as reflected on the Fee Schedule in Exhibit B; provided, however, that Engineer shall not be paid its hourly fee if the appearance is to defend Engineer's Engineering Services.

4. Subsurface Borings and Testing: If County requests subsurface boring or other tests for design, in addition to those described in Exhibit A, Engineer shall prepare specifications for the taking of the additional testing. Such testing may be provided by Engineer through other contractors. Payment to Engineer will be negotiated in writing.

5. Service by and Payment to Others: Any work authorized in writing by County and performed by a party other than Engineer or its approved subcontractors shall be contracted for and paid for by County directly to the third party. Fees for such work shall be subject to negotiation between County and the third party and shall be approved by County prior to the performance of any such work.

6. Subcontracting or Assignment of Services: Engineer shall not subcontract or assign any of the Engineering Services to be performed under this Agreement without first

obtaining the written consent of County regarding the Services to be subcontracted or assigned and the firm or person proposed to perform the Services. Unless otherwise stated in County's written consent to a subcontract or assignment, no subcontract or assignment will release or discharge Engineer from any obligation under this Agreement.

7. Endorsement: Engineer shall sign and seal all final plans, specifications, estimates and engineering data furnished by Engineer. Any review or approval by County of any documents prepared by Engineer, including, but not limited to, the plans and specifications, shall be solely for the purpose of determining whether such documents are consistent with County's construction program and intent. No review of such documents shall relieve Engineer of its responsibility for their accuracy. It is Engineer's responsibility to verify the existence of any and all rights-of-way and easements, including temporary construction easements, that are necessary for the Project. Rights-of-way and easements shown on the plans shall have proper legal verification to prove their existence.

8. Professional Responsibility: Engineer will exercise reasonable skill, care and diligence in the performance of the Engineering Services as is ordinarily possessed and exercised by a licensed professional engineer performing the same services under similar circumstances. Engineer represents to County that Engineer is professionally qualified to provide such services and is licensed to practice engineering by all public entities having jurisdiction over Engineer and the Project.

9. Inspection of Documents: Engineer shall maintain all Project records for inspection by County during the term of this Agreement and for 3 years following the completion of the Project.

IV. RESPONSIBILITIES OF COUNTY

A. GENERAL DUTIES AND RESPONSIBILITIES

County shall have the following general duties and responsibilities:

1. Communication: County shall provide to Engineer information and criteria regarding County's requirements for the Project, examine and timely respond to Engineer's submissions, and give notice to Engineer whenever County observes or otherwise becomes aware of any defect in the Engineering Services.

2. Access: County shall procure and provide access agreements for Engineer to enter public and private property when necessary.

3. Program and Budget: County shall provide full information stating County's objectives, schedule, budget with reasonable contingencies, and necessary design criteria.

4. Other Engineers: County may contract with "specialty" engineers when such services are requested by Engineer.

5. Testing: County shall furnish any tests required to supplement the scope of services or tests required by law.

6. Bond Forms: County shall furnish all bond forms required for the Project.

7. Project Representative: County Engineer, or County Engineer's designee, shall represent County in coordinating the Project with Engineer, with authority to transmit instructions and define policies and decisions of County.

8. Payment: Pay Engineer its fees and reimbursable expenses in accordance with this Agreement.

V. PROJECT SCHEDULE; ~~TIME IS OF THE ESSENSE~~

The Project Schedule is set forth in Exhibit D, attached hereto and incorporated by reference. ~~Time is of the essence and~~ Engineer shall perform the Engineering Services in a timely manner; provided, however, if, during its performance, for reasons beyond the control of Engineer, protracted delays occur, Engineer shall promptly provide written notice to County describing the circumstances preventing continued performance and Engineer's efforts to resume performance.

VI. SUSPENSION OR TERMINATION OF THE CONTRACT

A. SUSPENSION BY ENGINEER

Engineer may suspend performance of the Services under this Agreement if County consistently fails to fulfill County's material obligations under this Agreement, including County's failure to pay Engineer its fees and costs, within 15 days of Engineer's delivery to County of written notice of such default; provided, however, that Engineer may not suspend performance of Services based upon non-payment of fees or costs that is subject to a bona fide dispute, for which this Agreement authorizes County to withhold payment. Any such suspension shall serve to extend the contract time on a day for day basis.

B. TERMINATION BY ENGINEER

Engineer may terminate this Agreement upon 15 days written notice to County if (i) County suspends performance of the Services for its convenience for a period of 60 consecutive days through no act or fault of Engineer or a subcontractor or their agents or employees or any other persons or entities performing portions of the Engineering Services under direct or indirect contract with Engineer, or (ii) Engineer has suspended the performance of its Services for a period of 60 consecutive days pursuant to Section VI.A. above; and, during said 15 day written notice period, County has failed to cure its default. If Engineer terminates this Agreement, County shall pay Engineer such amounts as if County terminated this Agreement for its convenience pursuant to Section VI.E.

C. TERMINATION BY COUNTY FOR CAUSE

County may terminate this Agreement for cause upon 7 days written notice to Engineer: (i) persistently or repeatedly refuses or fails to supply enough qualified workers or proper materials; (ii) assigns or subcontracts any part of the Engineering Services without County's prior written consent; or (iii) otherwise is guilty of substantial breach of this Agreement; and, during said 7 day written notice period, Engineer fails to cure its default.

If County terminates this Agreement for cause, Engineer shall immediately transfer to County digital and mylar copies of all Engineering Documents completed or partially completed at the date of termination. In addition, County may without prejudice to any other rights or remedies of County, finish the Engineering Services for the Project by whatever reasonable method County may deem expedient, including through contract with an alternate engineer, and bill Engineer for the sum of the amounts County pays Engineer pursuant to this Agreement, plus the costs County incurs in completing the Engineering Services, reduced by the Total Maximum Fee. Upon request of Engineer, County shall furnish Engineer a detailed accounting of the costs incurred by County in completing the Engineering Services. If County terminates this Agreement for cause Engineer shall not be entitled to receive further payment until the Engineering Services are completed.

Comment [k3]: This language needs to remain as is. If County terminates for cause, Engineer needs to transfer documents immediately.

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If the Engineer for any reason is not allowed to complete all the Services called for by this Agreement, the Engineer shall not be held responsible for the accuracy, completeness or constructability of the construction documents prepared by the Engineer if changed or completed by the County or by another party. Accordingly, the County agrees, to the fullest extent permitted by law, to waive and release the Engineer, its officers, directors, employees and subconsultants from any damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from such change or completion by any other party of any construction documents prepared by the Engineer.

Comment [k4]: We agree to add your proposed language as modified by our county counselor.

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D. SUSPENSION BY COUNTY FOR CONVENIENCE

County may, without cause, order Engineer in writing to suspend, delay or interrupt the Engineering Services in whole or in part for such period of time as County may determine.

The Total Maximum Fee and contract time shall be adjusted for increases in the cost and time caused by suspension, delay or interruption.

E. TERMINATION BY COUNTY FOR CONVENIENCE

County may, at any time, terminate this Agreement for County's convenience and without cause. Upon receipt of written notice from County of such termination for County's convenience, Engineer shall: (i) except for Engineering Services directed to be performed prior to the effective date of termination as stated in the notice, cease operations under this Agreement; and (ii) take actions necessary or that County may direct, for the protection and preservation of the Engineering Services and Engineering Documents.

If County terminates this Agreement for its convenience, Engineer shall immediately transfer to County digital and mylar copies of all Engineering Documents completed or partially completed at the date of termination. County shall compensate Engineer for all Services completed prior to receipt of the termination notice or performed pursuant to the termination notice. County need

not pay, and Engineer waives, compensation for Engineering Services not actually provided, anticipatory profit or consequential damages.

VII. GENERAL PROVISIONS

A. DISPUTE RESOLUTION

County and Engineer agree that disputes relative to the Project should first be addressed by direct negotiations between the parties. If direct negotiations fail to resolve the dispute, the party initiating the claim that is the basis for the dispute shall be free to take such steps as it deems necessary to protect its interests; provided, however, that notwithstanding any such dispute and assuming County has not terminated this Agreement, Engineer shall proceed with the Services in accordance with this Agreement as if no dispute existed.

B. OWNERSHIP OF ENGINEERING DOCUMENTS

After final payment is received by Engineer of all monies due, d~~D~~ocuments, drawings, and specifications prepared by Engineer as part of the Engineering Services shall be a work for hire and become the sole property of County; provided any use other than with respect to the Project shall be at County's sole risk and without liability to the Engineer. In the event County is adjudged to have failed hereunder to pay Engineer for such documents, drawings, and specifications, ownership thereof, and all rights therein, shall revert to Engineer to the extent not paid; provided, however, that Engineer shall have an unrestricted right to their use.

C. INSURANCE

Engineer shall maintain throughout the term of this Agreement the following insurance coverage:

1. Professional Liability: Professional Liability Insurance in an amount not less than $1,000,000 per claim and in the annual aggregate, which insurance shall be maintained not only during the term of this Agreement but also for a period of 3 years after completion of the Project.

2. Commercial General Liability: Commercial General Liability Insurance in an amount not less than $1,000,000 per occurrence and $2,000,000 in the general aggregate. The policy shall include personal injury, products/completed operations~~/~~, contractual liability~~, and independent contractors~~.

3. Worker's Compensation: Worker's Compensation Insurance in accordance with statutory requirements.

4. Employer's Liability: Employer's Liability Insurance in amounts not less than the following:

   Bodily Injury by Accident $100,000 (each accident)
   Bodily Injury by Disease $500,000 (policy limit)
   Bodily Injury by Disease $100,000 (each employee)

5. Automobile Insurance: Automobile Liability Insurance in an amount not less than $1,000,000 per accident to protect against claims for bodily injury and/or property damage arising out of the ownership or use of any owned, hired and/or non-owned vehicle.

6. Subcontractor's Insurance: If a part of this Agreement is subcontracted, Engineer shall either:

   a) Cover all ~~subcontractors~~ subconsultants in its insurance policies; or
   b) Require each ~~subcontractor~~ subconsultant not so covered to secure insurance which will protect against all applicable hazards or risks of loss in the amounts applicable to Engineer.

7. Valuable Papers Insurance. Valuable papers insurance to assure the restoration of any plats, drawings, notes or other similar data relating to the Engineering Services in the event of their loss or destruction.

8. Industry Ratings: Unless mutually agreed upon by County and Engineer to vary the requirements, Engineer shall provide County with evidence to substantiate that any insurance carrier providing insurance required under this Agreement satisfies the following requirements:

   a) Is licensed to do business in the State of Kansas;
   b) Carries a Best's Policyholder rating of A or better; and
   c) Carries at least a Class X financial rating.

All general and automobile liability insurance shall be written on an occurrence basis. County shall be shown as an additional insured on all required insurance policies except professional liability, automobile, and worker's compensation. Each required insurance policy shall contain a provision by which County must be given 30 days notice prior to any insurance policy cancellation. Engineer shall provide County with acceptable certificates of such insurance evidencing the required insurance coverage before County issues its Notice to Proceed, at County's reasonable request, from time to time during the term of this Agreement.

D. INDEMNITY

Engineer hereby agrees to indemnify and hold harmless County and its departments, divisions, ~~agencies,~~ officers, employees and elected officials from all loss, damage, cost and expenses, including reasonable attorneys' fees and expenses ~~of litigation~~, incurred by or on behalf of any of the foregoing arising out of or related to ~~claims, suits and actions of every kind and description, including but not limited to,~~ personal or bodily injury or property damage, ~~which~~ that to the extent arise from or related to the ~~alleged~~ wrongful acts or ~~alleged~~ negligent acts, errors or omissions of Engineer or its employees, agents or ~~subcontractors~~subconsultants. The provisions of this section shall survive the termination of this Agreement.

E. ENTIRE AGREEMENT; NO VERBAL AMENDMENTS

Comment [k5]: We didn't see the need to remove paragraph a) since the Engineer has the option of a) or b).

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This Agreement constitutes the entire agreement between the parties and supersedes all prior agreements, whether oral or written, covering the same subject matter. This Agreement, including the Maximum Fee and contract time and other terms and conditions, may be amended only by a written supplemental agreement signed by County and Engineer, except in the case of an emergency situation, in which case County Engineer may give verbal and facsimile approval to be followed by a written and signed supplemental agreement. If notice of any change affecting the general scope of the Engineering Services or provisions of this Agreement, including, but not limited to, Maximum Fee and contract time, is a requirement of any insurance policy held by Engineer as a requirement of this Agreement, the provision of such notice shall be Engineer's responsibility.

F. APPLICABLE LAW

This Agreement shall be governed by, and is to be construed and enforceable in accordance with, the laws of the State of Kansas and the codes and established policies of County.

G. ASSIGNMENT OF AGREEMENT

This Agreement shall not be assigned or transferred by either party without the written consent of the other party.

H. NO THIRD PARTY BENEFICIARIES

Nothing contained herein shall create a contractual relationship with, or any rights in favor of, any third party.

I. FEDERAL LOBBYING ACTIVITIES (Only applies to projects receiving federal funds via County)

31 U.S.C. Section 1352 requires all subgrantees, contractors, and engineers who receive federal funds via County to certify that they will not use federal funds to pay any person for influencing or attempting to influence a federal agency or Congress in connection with the awarding of any federal contract, grant, loan or cooperative agreement. In addition, contract applicants, recipients and subrecipients must file a form disclosing any expenditures they make for lobbying out of non-federal funds during the contract period. Engineer shall obtain the necessary forms from County, execute such forms, and return such forms to County. Engineer shall also obtain executed forms from any of its subcontractors who fall within the provisions of the statute and provide such forms to County.

J. COVENANT AGAINST CONTINGENT FEES

Engineer warrants that it has not employed or retained any company or person, other than a bona fide employee working for Engineer, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, County may terminate this Agreement without liability or may, in its discretion, deduct from the contract price or otherwise recover the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

K. COMPLIANCE WITH LAWS

Engineer shall abide by ~~all~~ applicable federal, state and local laws, ordinances and regulations applicable to this Project that are in effect as of the date of Services rendered until the Engineering Services required by this Agreement are complete. Engineer shall secure all occupational and professional licenses, permits, etc. from public and private sources necessary for the fulfillment of its obligations under this Agreement.

L. NOTICES

Any notice or other communication required or permitted by this Agreement shall be made in writing to the address specified below:

Engineer: _____
_____
_____
_____

County: Keith A. Browning, P.E.
Douglas County, Kansas
1242 Massachusetts
Lawrence, KS 66044

Nothing contained in this Section, however, shall be construed to restrict the transmission of routine communications between Engineer and County.

M. TITLES AND SUBHEADINGS

Titles and subheadings as used herein are provided only as a matter of convenience and shall have no legal bearing on the interpretation of any provision of the Agreement.

N. SEVERABILITY CLAUSE

Should any provision of this Agreement be determined to be void, invalid, unenforceable or illegal for any reason, such provision shall be null and void; provided, however, that the remaining provisions of this Agreement shall be unaffected thereby and shall continue to be valid and enforceable.

O. NON-DISCRIMINATION

Engineer agrees: (a) to comply with the Kansas Act Against Discrimination (K.S.A. 44-1001 et seq.) and the Kansas Age Discrimination in Employment Act (K.S.A. 44-1111 et seq.) and the applicable provisions of the Americans With Disabilities Act (42 U.S.C. 12101 et seq.) (ADA) and to not discriminate against any person because of race, religion, color, sex, disability, national origin or ancestry, or age in the admission or access to, or treatment or employment in, its programs or activities; (b) to include in all solicitations or advertisements for employees, the phrase "equal opportunity employer"; (c) to comply with the reporting requirements set out at K.S.A. 44-1031 and

K.S.A. 44-1116; (d) to include those provisions in every subcontract or purchase order so that they are binding upon such subcontractor or vendor; (e) that a failure to comply with the reporting requirements of (c) above or if Engineer is found guilty of any violation of such acts by the Kansas Human Rights Commission, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by County; and (f) if it is determined that Engineer has violated applicable provisions of ADA, such violation shall constitute a breach of contract and the contract may be cancelled, terminated or suspended, in whole or in part, by County.

P. WAIVER

A waiver by either County or Engineer of any breach of this Agreement shall be in writing. Such a wavier shall not affect the waiving party's rights with respect to any other or further breach.

Q. SUCCESSORS AND ASSIGNS

This Agreement shall be binding upon the directors, officers, partners, successors, executors, administrators, assigns, and legal representatives of the parties.

R. RELATIONSHIP OF PARTIES

Nothing contained herein shall be construed to make County a partner, joint venturer, or associate of Engineer, nor shall either party be deemed the agent of the other.

S. AUTHORITY TO SIGN

The individual signing this Agreement on behalf of Engineer represents that such person is duly authorized by Engineer to execute this Agreement on behalf of Engineer and, in doing so, that Engineer becomes bound by the provisions hereof.

IN WITNESS WHEREOF, the parties have executed this Agreement, effective as of the Effective Date.

ENGINEER:

Delich Roth & Goodwillie, P.A.

(Name of Engineering Firm)

By: _____
Engineer's Authorized Signatory

_____
Printed Name

_____

Title

COUNTY:

DOUGLAS COUNTY, KANSAS by the BOARD OF DOUGLAS COUNTY, KANSAS COMMISSIONERS

By: _____

Nancy Thellman_____
Printed Name
Title: Chair

ATTEST:

_____
Douglas County, Clerk

Exhibits:

A. Scope of Services
B. Fee Schedule
C. Form of Progress Reports
D. Project Schedule
E. CAD Requirements (if referenced in Exhibit A)