



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan
County Executive

Charles W. Thompson, Jr.
County Attorney

MEMORANDUM

November 2, 1999

TO: Ellen Scavia
Department of Environmental Protection

VIA: Marc Hansen, Chief *Marc Hansen*
Division of General Counsel

FROM: Walter E. Wilson *W. E. Wilson*
Assistant County Attorney

RE: Payment of claim for storm water facility repairs

QUESTION

You have requested an opinion from this office concerning whether the Department of Environmental Protection (the "Department" or "DEP") may pay a claim for reimbursement submitted by The Management Group Associates, Inc. ("Management Associates") on behalf of the Dumont Oaks Community Association ("Dumont Oaks") for expenses related to the repair and maintenance of that community's on-site storm water management facilities.

SHORT ANSWER

County procurement law generally prohibits County agencies from reimbursing private claimants who have performed County services at their own expense outside of an appropriately encumbered County contract unless the claimant involved is without fault and was acting in good faith at the direction of a county employee. Because Dumont Oaks failed to follow County instructions, Dumont Oaks' claim cannot be approved under the County's procurement law. But the County Attorney and the Chief Administrator could agree to settle Dumont Oaks' claim through the County Attorney's Office if they deem it proper and advisable to do so.

BACKGROUND

Management Associates, the property management group for Dumont Oaks, has requested a reimbursement of \$19,630 from Montgomery County. The reason for this claim is

Ellen Scavia
November 2, 1999
Page 2

that Dumont Oaks paid a contractor to perform a significant amount of work involving the repair and maintenance of storm water collection ponds located in the Dumont Oaks community. Such work is supposed to be the responsibility of Montgomery County according to a 16 year-old maintenance agreement between Dumont Oaks and the County. That agreement, expressed in the form of covenants and easements and recorded in the Montgomery County land records, obligates the County to ensure that the community's storm water management facilities remain in proper working condition in accordance with County-approved design standards. Dumont Oaks' maintenance responsibilities, on the other hand, are limited to aesthetic types of upkeep such as trash removal, grass cutting and other landscaping functions. Dumont Oaks is one of nearly 30 common ownership communities with whom Montgomery County has entered into such agreements through DEP. The Department of Permitting Services ("DPS"), which issues erosion and sediment control permits for private maintenance of storm water collection ponds, is also aware of these maintenance agreements between the County and individual homeowners associations.

Despite the existence of the 1983 maintenance agreement, DEP mistakenly sent to Dumont Oaks the same letter that it mailed to several other common ownership communities in October 1997 informing them of their responsibility to routinely inspect, maintain and, where necessary, repair their on-site storm water facilities. The correspondence included instructions for hiring a contractor to inspect the facilities and advised the communities that if any maintenance needs were identified in the course of the inspection, sediment control permits might be required before any repair work could begin. The letter also directed any community whose storm water facilities would require repairs to contact DPS to apply for any needed permits. Additionally, each recipient was instructed to notify DEP at least 48 hours before beginning any maintenance work on a storm water facility if DPS determined that a permit would not be required. Finally, the letter provided County telephone numbers that recipients of the correspondence could call with questions regarding any of the aforementioned requirements.

Dumont Oaks made the repairs recommended by its hired inspector without ever notifying DEP or applying for sediment control permits through DPS. Dumont Oaks now seeks reimbursement on the ground that it has provided a service to the County by paying a contractor to perform work that DEP was obligated to perform under the maintenance agreement.

DISCUSSION

You have indicated that DEP proposes to respond to Management Associates' request by requiring them to submit a detailed invoice that would allow DEP officials to separate out those items for which the County would ordinarily be responsible under the maintenance agreement and reimbursing Dumont Oaks for those items only. The amount of reimbursement would be based on DEP's unit rate schedule or at-cost, whichever is less, and be paid through the capital improvement funds that DEP normally uses to pay for the repair of storm water facilities that

Ellen Scavia
November 2, 1999
Page 3

have been turned over to the County for regular maintenance. You have also indicated that such a response might be justifiable in light of your belief that Dumont Oaks would not have hired a contractor to perform the work but for the fact that it received DEP's October 6, 1997 letter in error and that the County's costs would be no greater than they would have been if Dumont Oaks had asked the County to inspect and repair its storm water facilities in accordance with the maintenance agreement.

The delivery of payable goods and services to Montgomery County is governed by the procedures delineated in Chapter 11B (Contracts, Procurement Matters And Public Ethics) of the Montgomery County Code and Executive Regulation 15-94AM (Procurement Regulations). The County is not required to pay for purchases of goods or services that occur outside of the procedures established under County procurement law. Montgomery County, Md., Code § 11B-25. At the same time, Section 11B-25 of the County Code allows any noncompliant provider of goods or services to the County to be compensated if that provider was acting in good faith at the direction of a County employee. However, for the County to pay the claim, the event that necessitated the claim must have occurred through no fault of the claimant. Id.

While DEP's proposed justification for reimbursing Dumont Oaks seems reasonable and fiscally sound, County procurement law requires a different outcome under the circumstances that led to this claim. Even if Dumont Oaks should never have received the letter directing it to have its on-site storm water facilities inspected and repaired, acting "in good faith...at the direction of a County employee" would have meant following DEP's written instructions by applying for a sediment control permit from DPS or notifying DEP at least 48 hours before repair work began. That approach would have provided DPS or DEP an opportunity to discover the error and take corrective action ahead of time. Dumont Oaks' failure to put the County on notice about the repairs that it was preparing to undertake by simply following instructions precludes any assertion that Dumont Oaks was completely without fault in this matter.

CONCLUSION

Based on the foregoing analysis, it is our opinion that the Department of Environmental Protection may not pay the claim that the Department received from The Management Group Associates requesting reimbursement on behalf of the Dumont Oaks Community Association without violating County procurement law under Section 11B-25 of the Montgomery County Code.

There is another option available, however. The Department may request that the County Attorney's Office invoke its authority to settle claims on behalf of any County agency under Section 20-2 of the Code. The County Attorney's Office may settle any claim against the County for up to \$5,000 whenever the County Attorney deems it proper and advisable to do so. The County Attorney's Office can also settle claims exceeding \$5,000 with the approval of the County Executive if both the County Attorney and the County Executive determine that such a

Ellen Scavia
November 2, 1999
Page 4

settlement would be proper and advisable in that the County's best interests would be served. Montgomery County, Md., Code § 20-2. The County Executive's authority to approve larger settlements has been delegated to the Chief Administrative Officer as the County Executive's designee. If DEP chooses this option, then DEP's Director, James Caldwell, will need to submit a decision memorandum to Charles Thompson requesting the County Attorney's intervention to settle the Dumont Oaks claim and explaining why DEP would consider such a course of action to be appropriate.

I trust that this memorandum has fully addressed your concerns. Please let us know if we might be of any further assistance concerning this matter.