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Thomas R. Borden (Retired)

November 10, 2017

Carol Pundt
Deerwood Township Clerk
20782 State Highway 6
Deerwood, MN 56444

via email

Re: Nelson Drive
Our File No. 30806

Dear Ms. Pundt:

The Deerwood Township Board of Supervisors has asked me to provide an opinion regarding the Town's duties, obligations, and responsibilities regarding the part of Nelson Drive that passes between Shirt Lake and Arbor Lake. My opinion is based upon the facts as recounted in this letter and based upon the documents that you provided to me, a copy of which documents are attached to this letter. If there are additional facts of which I become aware, or if I have erroneously stated the facts, I reserve the right to amend my opinion.

Attached is a satellite photo image I obtained from Google Maps that shows the area in question. Nelson Drive runs very close to Shirt Lake. I have not done any additional title work, and I am assuming that the road right-of-way extends to the ordinary high water mark of Shirt Lake in the area in question. Over the course of many decades, people have accessed Shirt Lake from Nelson Drive. Although I have not seen photos of the specific area, I am told that people have created a sort of boat launching area from Nelson Drive into Shirt Lake. At least one neighboring property owner has complained that vehicles launching their boats into Shirt Lake obstruct some or all of Nelson Drive during the process of boat launching, and that person believes it creates a hazard. I have not been made aware of any accidents that have occurred in the subject area due to vehicles obstructing the roadway while launching boats. There is no "public access" maintained by the DNR on Shirt Lake. It is my understanding that people gain access to Shirt Lake either through landing their boat off of Nelson Drive, or by utilizing private property owners' lots for boat launching.

It is my understanding that Nelson Drive is a paved roadway. It is my understanding that the Township has had to expend funds to add fill material in the area of the informal boat landing due to the erosive action of the landing of boats. There is a concern by at least one of the supervisors that continued boat launching may increase shoulder maintenance, although, I do not have any engineering estimates regarding what those costs might be.

In 2002, the Town asked its Township Attorney at that time, John Erickson, to provide opinions regarding the public's landing of boats off of Nelson Drive into Shirt Lake. The Board appears to have asked Mr. Erickson to draft an ordinance to address the issue. I attach the following correspondence to this letter and incorporate it herein:

- Letter from John H. Erickson to Judy Hamilton dated June 11, 2002;
- Letter from John H. Erickson to Judy Hamilton dated September 1, 2002;
- Letter from John H. Erickson to Judy Hamilton dated October 2, 2002;
- Letter from Kent Sulem, Minnesota Association of Townships Attorney, to Guy Lommen, dated October 30, 2002;
- Letter from John H. Erickson to Judy Hamilton dated November 4, 2002;
- Letter from Steven W. Klein, MSI Insurance, Steve Klein Agency, Inc. to Guy Lommen, dated November 5, 2002;
- Letter from John H. Erickson to Judy Hamilton dated February 11, 2003;
- Letter from John H. Erickson to Duane Swanson dated March 17, 2003;
- Minutes from Deerwood Township Regular Meetings, dated June 12, 2002, July 10, 2002, August 14, 2002, September 11, 2002, September 30, 2002 (Special Meeting), October 9, 2002, November 13, 2002, December 11, 2002, and May 14, 2003;

It appears as if the Township did not enact the ordinance.

More recently, the Township had attorney Jerry Steinke do an opinion regarding the road. I attach and incorporate the following letters by Mr. Steinke.

- Letters by Jerry Steinke to Board of Supervisors dated September 24, 2012 and October 15, 2012 (two letters).

I met with Supervisor James Walth. Supervisor Walth gave me some background information. He also provided me with a list of questions that he would like me to answer. I attach a copy of those questions. This opinion letter does not answer those questions one by one, but addresses them as a whole.

I also met with Supervisor David Gray. Supervisor Gray asked me to answer the following questions: What is the nature of the Township's liability if people use Nelson Drive as a boat landing? Could the Township put "No Parking" signs at the boat landing? What happens if use of the roadbed as a boat landing causes damage to the road?

Through this opinion letter, I hope to provide the Board with the parameters in which it must exercise its discretion. This letter is not intended to give answers to political questions. Instead, I will outline the law which provides the Board a framework in which to weigh a variety of factors as the Board reaches its decision as to what it believes is in the best interest of the Township.

1. Can the Township allow use of a Town Road for a boat landing? Conversely, can the Township prohibit use of a Town Road for a boat landing?

The analysis of this situation requires us to first address these two questions. Supervisor Walth specifically requested answers to these questions. The law is well settled regarding the public's ability to access public waters when a road abuts public waters.

Where the grant or dedication to the public [for a road] is for the purpose of passage, and goes to the water, the conclusion - - there being no indication of a contrary intention - - is inevitable that the grant or dedication was intended to enable the public to get to the water for the better enjoyment of the public right of navigation.

Flynn vs. Beisel, 257 Minn. 531, 537, 102 N.W.2d 284, 289 (1960). This rule of law applies whether the road authority acquired the roadway through common law dedication or through a specific dedication in a plat or common law dedication. The scope of the use may be limited if the road was dedicated in a plat, based on the language of the dedication. Additionally, if the road was obtained through common law dedication (use and maintenance), the use of the road to access the water may be limited depending on how the public has used the easement. I attach to this opinion the Flynn vs. Beisel case. The Board must keep in mind that the gist of the Flynn vs. Beisel case was that a private property owner wanted to limit the township's right to allow the public to use a road for public access to the lake. The town, in that case, was asserting its right to allow the public to use the right-of-way. It was not a situation where the town was trying to impose reasonable limits on the public's ability to use the right-of-way.

As stated above, I am assuming that the Township has an unrestricted right in the road right-of-way. The evidence appears to be clear that the public, and to some extent the Town, has used and maintained the roadbed to access Shirt Lake, and therefore, it is very likely that the public has acquired rights to access the lake, either through the township acquiring legal title or via common law dedication (use and maintenance)

However, this does not mean that the public has an absolute right to access public waters from a public road. The State of Minnesota, through statute and Department of Natural Resources rules, has allowed the State, counties and townships to impose reasonable restrictions on the access to public water. For example, Minn. Rule 6218.0110, restricts the use of public water access sites. That rule imposes a variety of restrictions on the public's use of public accesses maintained by the Department of Natural Resources. Under Minn. Stat. §86B.205, the State has given to the Counties the authority to enact water surface use ordinances, including the County's ability to

“regulate and police public beaches, public docks, and other public facilities for access to a body of water. ...” Minn. Stat. §86B.205, subd. 9 also allows a town to ask the Commissioner of the Department of Natural Resources to approve limits or rules on the use of watercraft on local waters.

Additionally, the State has granted towns broad powers to draft ordinances that are for “(6) the promotion of health, safety, order, and convenience and (7) the general welfare.” Minn. Stat. §365.10. This statute also allows towns to expend money for roads, “including the building and maintenance of docks and breakwaters.” Minn. Stat. §365.10, Subd. 4. Under Minn. Stat. §169.06, Subd. 3, local road authorities may place and maintain traffic control devices as they deem necessary to promote the general safety of the public.

Accordingly, while the public, in general, has rights to access public waters where a public road abuts the waters, the State, counties, cities, and towns the authority to impose reasonable regulations that promote the general welfare and protect public safety.

If the Town determines that it must enact an ordinance for the promotion of safety or the general welfare, any ordinance it passes must be reasonable. It is helpful to look at a case that interpreted the reasonableness of an ordinance passed by Crow Wing County pursuant Minn. Stat. §86B.205. In State vs. LaFon, 2008 WL 2726964, Minn. Ct. App. July 15, 2008 (Ct. File No. A07-0708), an unpublished which was litigated by John Erickson, the former town attorney, Mr. LaFon owned real property on Cross Lake and maintained a dock on the edge of his property line. The dock extended at an angle such that it extended in front of his neighbor’s property. Mr. LaFon had the dock in place for many, many years, long before the enactment of the County’s surface water ordinance. The County brought an enforcement action against Mr. LaFon because his neighbor complained that his dock interfered with the neighbors’ use of their property. The County’s ordinance confined a person’s placement of a dock to an area defined as a “riparian zone.” John Erickson represented Mr. LaFon. Mr. LaFon argued to the Court that the ordinance was unconstitutionally unreasonable. The Court of Appeals stated that any ordinance adopted by a public entity must be reasonable. If a person wishes to challenge an ordinance, the challenger “must show that the ordinance has no substantial relationship to public health, safety, morals, or general welfare.” Id. at page 3. An ordinance is presumed constitutional and the burden is on the party attacking the ordinance’s validity to prove that the ordinance is unreasonable or that the requisite public interest is not involved, and consequently that the ordinance does not come within the police power of the public body. Northern States Power Co. vs. City of Oakdale, 588 N.W.2d 534, 541 (Minn. Ct. App. 1999). The Court of Appeals found that Mr. LaFon had not met his burden of showing that the ordinance was unreasonable and that it did not address a public interest.

Therefore, when a public entity exercises its “police powers” and enacts an ordinance, it must act in a manner that is reasonable, that addresses the public interest, and that accomplishes the purpose which the public body set out to accomplish. While the public does have the right to access Shirt Lake from Nelson Drive, the Town Board has the authority to analyze and determine

whether this use affects the public's welfare and safety such that a reasonable ordinance ought to be adopted.

2. What factors must the Town Board consider when deciding whether or not to enact an ordinance to address the situation on Nelson Drive at Shirt Lake so as to minimize its liability exposure?

As the Town Board decides whether to enact any reasonable ordinances regarding Nelson Drive and Shirt Lake, the Town should keep in mind the law on municipal immunity, found in Minn. Stat. Ch. 466. Towns and municipalities are immune from liability for "any claim based upon a performance or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused." Minn. Stat. §466.03, Subd. 6. While almost all governmental acts require some discretion, statutory immunity only protects actions involving the balancing of policy objectives such as social, economic, and political factors. Christensen v. Mower Co., 587 N.W.2d 305, 307 (Minn. Ct. App. 1998). Statutory immunity does not extend to operational-level decisions, also called ministerial acts, which involve day-to-day operations of government, the application of scientific and technical skills, or the exercise of professional judgment. Schroeder v. St. Louis Co., 708 N.W.2d 497, 504 (Minn. 2006). In determining whether a governmental act was made on the planning level and thus subject to immunity, "[t]he critical inquiry is whether the conduct involved a balancing of policy objectives" Fear v. Indep. School Dist. 911, 634 N.W.2d 204, 209 (Minn. Ct. App. 2001).

Of concern to some of the Supervisors on the Town Board is that the launching boats from Nelson Drive into Shirt Lake may create a hazard to the public. Because the Town Board has been "put on notice" of this alleged "hazard," some of the Supervisors are concerned that the Town may face liability if someone were to be injured because of the boat launching. A town does not incur liability just because it knows about a hazard and takes no steps. In addressing a known hazard, the town may exercise its discretion by balancing the social, economic, safety, and legal issues to determine the best course of action for that situation. See Christensen, 587 N.W.2d at 307. Whether the town places signs that warn of a hazard can be a discretionary decision if the town balances and weighs those factors in reaching its decision. The Town could also balance and weigh those considerations and make a decision not to take any action at this location. That discretionary decision making process will likely be subject to immunity.

What if the Town enacts an ordinance or places signs in the area, but does nothing to enforce that ordinance or the signage? In Shultz v. Frank, 2000 WL 1052156, Minn. Ct. App. Aug. 1, 2000 (Ct. File No. C1-00-285), an unpublished case, motorists who were involved in an accident sued the township for failing to mow the town road right of way, which caused a car accident. In Schultz, the Court applied the discretionary act versus ministerial act analysis. The town had enacted an ordinance that required property owners to remove vegetation from the ditches by their property. The ordinance allowed the town to assess property owners for the town's cost of removing vegetation, but did not include any other enforcement mechanism. The motorists claimed the town lost its immunity because it failed to enforce its ordinance. They argued that enforcement was an operational level decision, or ministerial act. The Court of Appeals held,

however, that the town's decision not to enforce these charge back provisions was a discretionary one because it involved a balancing of social, economic, safety, and legal considerations that entitled the town to immunity.

If the Township enacts an ordinance to regulate the access from Nelson Drive to Shirt Lake, it could be argued that it has taken on duties to enforce that ordinance. If Deerwood Township fails to enforce the ordinance, it may result in a loss of immunity. The Township's failure to enforce may be considered a ministerial duty, not a discretionary one, unless it exercises its discretion, weighing and balancing policy factors, when it decides whether to take enforcement action. Of course, the Township does not maintain prosecutorial powers; those are delegated to the County Attorney's office. The County Attorney would likely exercise his discretion in determining whether to prosecute people for violating the ordinance. That discretionary decision would likely be immune from liability.

The issue of whether or not the Town maintains immunity or has waived immunity is an extremely fact-intensive analysis. However, the more the Town Board balances and weighs those public considerations when coming up with a policy, the more likely it will be immune from liability. Of course, no one can prevent the Town from being sued; however, the Town should take reasonable steps to avoid being exposed to liability.

3. Is the Town responsible for making repairs to the roadway should boat launching cause the shoulder or roadway to deteriorate?

The Town could be liable for injuries that are caused by defects in the road shoulder if it fails to address a known danger. However, if the Town enacts a policy regarding how it will address such road deterioration, and it does so by balancing the social, political and economic considerations, it may be able to preserve its immunity. This discussion applies the same factors as in the discussion in Paragraph 2.

Whether a governmental agency had warned the public of known hazards is not relevant in determining whether the conduct involved discretionary decision making. Minder v. Anoka Co., 677 N.W.2d 479, 486 (Minn. Ct. App. 2004). The question is not whether the government's conduct resulted in a condition posing an unreasonable risk of harm; it is whether the conduct consisted of planning or policy making decisions (which are protected) or operational level decisions (which are not protected). Id. In other words "[w]arning of hazards by placing signs is not inherently either discretionary or operational; classification depends upon the factors considered in making the decision." Id. Therefore, adopting or forming a policy on sign usage is discretionary if it involves balancing policy factors. But, exercising solely professional judgment as to traffic flow or similar non-policy factors is not discretionary. Id. Further, in order for statutory immunity to protect a government's warning sign decision, an actual decision has to have been made in light of a protected policy. Id. In Christensen v. Mower Co., the Court found that the County did not balance factors to the level that it was making a policy when it decided not to place warning signs for gravel when the County was seal coating. 827 N.W.2d at 309.

Supervisor Gray asked if individuals could be held liable for damaging the roadway. I did not find any specific authority other than the Township's general ability to sue people for damage to public property. I believe the bigger issue would be whether the Town can adequately determine whether one vehicle operator or another were the cause of any particular damage.

4. What is the Town's authority regarding a parking ordinance?

Supervisor Walth asked if the Township could enact an ordinance regarding parking and what is the definition of parking. Under Minn. Stat. §169.04, the Town has the authority to regulate streets by placing street signs regarding the standing or parking of vehicles. Parking on a public street is a privilege, not a fundamental right. State v. Hyland, 431 N.W.2d 870 (Minn. Ct. App. 1988). Unless the sign or an ordinance defines parking, the law would give the words "no parking" their ordinary and plain meaning. *Black's Law Dictionary* states: "The term 'park' as used in statutes or ordinances regulating parking, does not comprehend or include merely temporary or momentary stoppage but rather connotes a stoppage with intent of permitting vehicle to remain standing for an appreciable length of time." *Black's Law Dictionary*, 6th ed. (1990), citing Ford v. Stevens, 280 Minn. 16, 157 N.W.2d 510, 513 (1968).

Parking can be defined narrowly or broadly depending on the situation. If the Town wants to prevent use of Nelson Drive for a boat landing, I would recommend "No Stopping" or "No Boat Landing" signs in the area, in addition to "No Parking" signs.

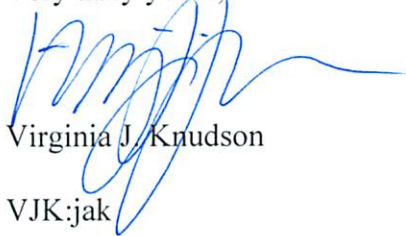
5. Does Minn. Stat. §103G.235 apply to this situation?

Regarding the applicability of Minn. Stat. §103G.235, this statute deals with wetlands. The statute allows the Township to restrict the public's access to public waters which would impact wetlands. I have no information that a wetland is impacted by this situation. Therefore, this statute does not apply.

In summary, while the public can access Shirt Lake from Nelson Drive, the Town has the authority to enact reasonable ordinances to protect the health, safety, and welfare of the public. In deciding whether to enact such regulations, the Town Board should exercise its discretion by weighing the social, political, and economic impacts of any particular course of action, whether that decision is to take no action or the determination is to take action. Once the Town decides to take action, it again must either make a policy regarding how that action will be implemented and it must again exercise its discretion by weighing various policy considerations. If the acts to be taken are more ministerial in nature, meaning day-to-day implementation of policy, those ministerial actions may cause the Town to waive immunity and be subject to liability if those ministerial acts are carried out in a negligent fashion.

Carol Pundt
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Very truly yours,



Virginia J. Knudson

VJK:jak

Enclosures