Interdepartmental Memorandum

CITY OF SAINT PAUL

DATE: August 6, 2004

TO: Kevin Nelson
Public Works - Bridge Engineering

FROM: Lisa L. Veith
Assistant City Attorney

RE: 260 Summit Avenue - Stairway Wall and Easement

This opinion comes at your request concerning the allegations of Richard and Nancy Nicholson, through their attorney Michael C. Fleming, that a 1901 resolution and agreement obligate the City to rebuild a stairway wall. As I indicated when we talked, I was inclined to disagree with Fleming's argument, and since then I have done the research to confirm that and am issuing this opinion. The short answer is that, under the terms of the relevant documents and the applicable law, the City does not owe a duty to rebuild the stairway and wall at 260 Summit.

The Attorney's Arguments Mischaracterize Both the Resolution and the Law.

There are two key elements forming the basis of Fleming's arguments. The first is his assertion that:

> Although the improvements were built at the sole cost of the Hill family, maintenance was reserved to the City of Saint Paul. The resolution provides:
>
> ". . . Said Mary T. Hill and James J. Hill shall file in the Office of the City Clerk the written acceptance hereof, to be approved by the Corporation attorney including an agreement upon their part to keep and abide by all of the conditions and requirements herein contained, also including therein the **grant to said City for public use of the right to maintain said stairs on the Easterly 10 feet of said vacated street for foot travel thereon as herein provided. . .**" (emphasis added).

Clearly, Fleming mischaracterized the right to maintain that was granted to the City for public use. The property owners gave the City a right to maintain for that purpose. Conversely, nowhere in the

easement did the owners give up any of their own rights to maintain, so maintenance was not reserved only to the City. The law I reviewed on this subject supports this very critical distinction between a right and a duty.

First, I will address the general principle of law quoted by Fleming. Under property law, the City is the "beneficiary" of the easement, and the Nicholsons are the servient estate. Restatement (Third) of Property (Servitudes), Section 4.13 (2000), which Fleming cites in his argument, states:

> § 4.13 Duties of Repair and Maintenance
>
> Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows:
>
> (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary's control, to the extent necessary to
>
> (a) prevent unreasonable interference with the enjoyment of the servient estate, or
>
> (b) avoid liability of the servient-estate owner to third parties.

What this means is that, unless the document says otherwise, the City's duty extends only as far as (a) and (b), which Fleming omitted from his letter. The documents here (the resolution and agreement) do not state otherwise; there is no language that places additional duties on the City. Therefore, the City's duty to maintain this stairway require the City to do so in a way that (a) does not unreasonably interfere with the Nicholsons' use of their property and (b) avoids liability of the Nicholsons to third parties. The City does have a duty to keep the easement in repair, but the law states that an "easement owner is not bound, however, to repair and maintain the easement for the benefit of the servient owner [here, the Nicholsons] . . ." 25 Am.Jur.2d § 94 (2004).

I did not locate any Minnesota case law directly on point, but cases from several other states support this position. The fact situation in a Florida case, Baya v. Ulrich, 209 So.2d 702 (1968) is quite similar. The defendants were granted a private easement across a road on the plaintiff's land. The plaintiffs sued, claiming defendants had a duty to restore the road, including shoulders and ditches, to its original condition. The court ruled against the plaintiffs, stating that "while defendants, the dominant owner of the easement, have the right to make reasonable repairs to the property, they do not have a duty to repair and maintain it for the benefit of the plaintiffs, the servient owner." 209 So.2d 702, 706. Similarly, a very recent case out of the Supreme Court of Idaho ruled: "It follows, then, that absent a showing that the easement owners' maintenance of the easement created an additional burden on interference with the servient estate, the servient estate [here, the Nicholsons] cannot dictate the standard by which the easement should be maintained, expend funds to maintain it

to the level desired by the servient estate and then seek reimbursement for those expenditures and contribution for future expenditures from the easement owners." Walker v. Boozer, 2004 Westlaw 1557809 (Idaho).

In conclusion, my research shows the Nicholsons' claim to be contradictory to the law, and therefore, the City owes no duty of contribution to the rebuilding of the wall. Let me know if you would like any assistance in telling the Nicholsons the City's position.

LLV:kmd