

04/19/2010

**Policy Memorandum**

**To: All Summit County Townships**  
**From: Alan Brubaker, County Engineer**  
**Subject: Stormwater Improvement Projects**

Since taking office last year I found that many of our Townships have requested the assistance of the Summit County Engineer with the development of plans, specifications and/or cost estimates for the improvement of off-roadway stormwater pipes and ditches. Among these requests include projects involving the cleaning and/or re-grading of swales along property lines within subdivisions, projects for reconstruction of storm sewers, cleaning and reconstruction of county ditches and construction of new storm drain systems. Some of these requests date back several years resulting in this office having prepared studies, plans and estimates that are now in various stages of completion.

I have also become aware of several pending legal actions against townships and/or the county relative to townships and/or county working to improve stormwater problems on private property.

The pending requests for our services and the legal issues, related to off-roadway stormwater problems, has prompted this office to review how we address township requests for our assistance related to off-roadway stormwater improvement projects. The attached letter from the County Prosecutor's Office is a result of request that the Prosecutor provide us advice on how we should respond to township requests for engineering services related to off-roadway stormwater problems. This letter indicates that the Ohio Revised Code does not provide townships with the ability to perform stormwater improvements that are not directly related to flooding of a township roadway. It is therefore imperative that we address off-roadway stormwater problems in a different way since Ohio law provides townships no legal authority to perform stormwater improvements outside the road right-of-way unless absolutely necessary to protect the road from flooding.

Unfortunately, the past practice of this office and its failure to recognize the limitations of our authority over off-roadway stormwater may have led some of our township's residents to expect that a township stormwater improvement project may be imminent and now we find that the improvement cannot proceed in the manner anticipated. In such cases this office will be available to meet with township officials and affected property owners to explain the limitations on our ability to perform off-highway work and the procedures for implementation that must be followed under the Ohio Revised Code.

Some of the past confusion relative to stormwater responsibilities is likely due to the misunderstanding of Ohio Drainage Laws, as their provisions are complicated. Simply stated in lay terms, upstream property owners may not unreasonably accelerate the flow of water from their properties, downstream property owners may not block or divert the flow of water such that damage is caused to another property owner and roadways must provide for the passage of water such that the flow is not impeded and such that the roadway is protected from flooding. The agency responsible for maintenance of a roadway is responsible for the maintenance of the drainage systems within the roadway right of way and the owners of the property are responsible for the maintenance of drainage across their respective properties.

Additionally, confusion may have resulted from there being certain drainage easements found in our public records. Many older County Ditches are within established easements and many other drainage easements are found in deeds and on recorded subdivision plats. These easements

provide documentation of an encumbrance upon the property for the stormwater ditch or pipe that exists there, meaning that the ditch or pipe cannot be altered from its course without the approval of the County or other plat approval agency and/or holder of the easement rights. The existence of the easement does not, however, relieve the owners of the property upon which the easement exits of their responsibility for maintaining the flow of the stormwater as required by the Ohio Drainage Laws.

This issue can be confusing since the roadside ditches and/or drains are often connected to ditches and/or drains that leave the right-of-way and traverse private property. Additionally, many of these private property drains may have been constructed as a part of the original road improvement (a cost that is permitted to be paid with road funds if necessary to drain the road surface), however the fact is that maintenance of drainage upon private property, natural or improved, falls back to be the responsibility of the property owner after the road improvement is completed, unless there is an agreement otherwise such as a homeowners association agreement for its maintenance or an assessment for County maintenance established through the Ohio Revised Code petitioned ditch process. The street right-of-way line is the magic line for street maintenance of stormwater with highway funds, otherwise where might the roadway responsibility stop, the river or possibly the lake? Agreements for off-roadway drainage including those established by the ditch petition process have specific terminus limits. Without an agreement, the responsibility for roadway maintenance could be boundless.

Currently, within the townships of Summit County, the only off-roadway drainage easements that are eligible for public maintenance are those located in subdivisions where the property owners of the subdivision are being assessed a fee by the County for the maintenance of the stormwater facilities. Some off-roadway stormwater facilities may be maintained by a condominium association or homeowner association, however the maintenance of nearly all of the off-roadway drainage systems in Summit County Townships is the responsibility of the owners of the property through which the stormwaters cross.

Similar to the restrictions upon townships, the County Engineer's authority to implement off-roadway stormwater improvements is also limited in that the County Engineer's funding is primarily roadway tax based and cannot be used for off-roadway stormwater improvements except to the extent the improvement is necessary to relieve roadway flooding. The Ohio Revised Code does provide the County Engineer specific duties related to non-roadway related stormwater improvements through the County Ditch Petition improvement process.

The County Ditch improvement process provides that the County may assume the responsibility of individual property owners for improving and maintaining drainage through private property when a petition has been filed with the County for property owners to be assessed for the cost of a specific improvement. An assessment petition can be submitted by an individual property owner, a group of property owners or by a township where there is a benefit to the township. Upon such filing and approval of the County Council, the County Engineer will study the situation, prepare plans, specifications and cost estimates, administer the project, inspect the work and upon completion perpetually maintain the improvement. Property owners benefiting from the improvement pay the cost of improvement and perpetual maintenance through an assessment levied upon their properties by the County. This process does not relieve private property owners from their obligation for the drainage that crosses their property but it does provide for County management of such obligations and it provides a fair and equitable method for distribution of the costs to the property owners.

This is the process currently used by the County for assuming the maintenance responsibility for the stormwater improvements in all new subdivisions. The County Ditch Petition process has been used by Summit County to establish a mechanism for funding the maintenance of off-roadway stormwater systems within new subdivisions since the early 1990's. The County Subdivision Regulations include provisions requiring subdivision property owner participation in the assessment through provisions of ownership recorded upon the subdivision plat.

The same law as used for subdivision stormwater assessments is used for new stormwater improvement projects. The differences are that for new projects there is no prior agreement with the property owners for payment of assessments, so an interested benefited agency (township) or a property owner(s) within the improvement district must file a petition for a drainage improvement with the County and the County must hold a public hearing to hear and resolve objections and, since the improvements must be both constructed and then later maintained, there will be two components to the assessed costs, first a component for the cost of the initial construction work and then second, a cost for the perpetual maintenance of the improvement.

This office recommends that anyone considering the filing of petition for the improvement of off-roadway drainage first contact the County Engineer's office for assistance in the preparation of the petition. Our office will attempt to insure that the petition adequately describes the nature, course and termini of the proposed project and we will consult with the County Prosecutor to see that the petition addresses the legal requirements of the Ohio Revised Code. Obtaining our review will help ensure that the petition document will be adequate and that all affected property owners are informed of the process.

The County Engineer's Office can also provide assistance in the preparation of grant applications for stormwater improvement projects. An alternate funding source can reduce the initial cost of the construction and thereby reduce the amount of the property owner's construction component of the property assessment. Generally, grant assistance such as funding from the CDBG program and from the OPWC program will require a local match; therefore the ditch assessment process would still be a required component of any off-roadway improvement project. Because such grants usually have short time periods for spending the funds and because the ditch petition process can consume a year or two for implementation of the process, grant applications will need careful planning to be timed to match the timing of the ditch petition process which requires time for the preparation of plans, cost estimates, assessment/benefit schedules, public notifications, hearings and equalization board meetings.

Over the past 40 years, County Council has provided the County Engineer with a limited allocation of money from the County General Fund for administering stormwater issues and for providing a limited amount of off-roadway ditch cleaning of critical channels; however General Fund revenue has been inadequate to cover the immense cost of managing off-roadway stormwater issues. There were no funds available for this purpose in 2009 and only \$200,000 has been provided for 2010.

County officials have discussed the establishment of a countywide stormwater management district wherein all property owners would be assessed a fee commensurate with their benefit for the purpose of addressing stormwater and flooding issues. Should such a district be established, the process for funding stormwater improvements may be different, however the Ditch Petition process is the only process we currently have available to implement new stormwater improvements.

In conclusion, except where roadway flooding is an issue, a funding source must be secured in order for an off-roadway project to move forward. Townships do not have the authority granted to them under the Ohio Revised Code to pay for off-roadway stormwater improvements. The County Engineer's highway funding cannot be used and the County's General fund cannot support the funding of stormwater improvements.

This County Engineer will continue to provide Townships advice on all stormwater matters but we will be unable to move an off-roadway stormwater improvement project into the design phase until a source of funding is made available to pay for the construction and maintenance costs. Townships and/or property owners wishing to move an off-roadway drainage project forward should consider utilizing the Ditch Petition process.

As stated, the staff of the County Engineer is available to assist Townships and individual property owners with the implementation of the Ditch Petition process, however it is important that public officials and property owners understand that this process involves a continuing cost to all property owners within the affected drainage basin in the form of a property tax assessment. The assessment is based upon the cost of the improvement and the benefits derived. The availability of Grant funding for stormwater improvements is very limited, thereby making it very likely that 100% of the cost of the improvement will be paid for by the benefited property owners through a property assessment tax being levied upon their properties. Such assessments generally prorate the cost of the improvement over a 10 year or longer time period with a continuing perpetual assessment thereafter in an amount adequate to provide for the perpetual maintenance of the improvement.

A list of township stormwater projects that are currently active in the County Engineer's office is attached. A brief description and status report relative to this policy memorandum is provided for each project.

Please do not hesitate to contact this office if you are aware of a project that we failed to list of if you require any additional information. We will be pleased to meet with you individually to discuss specific projects, funding sources and implementation of the petition process.

Attachments: Township Stormwater Project Status Report dated 04/12/2010  
County Prosecutor Letter dated 03/01/2010 w/ attachments

cc: Sherri Bevan Walsh, Summit County Prosecutor  
Russell Pry, County Executive  
Summit County Council  
Summit County Engineer Staff