

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

UNITED STATES OF AMERICA, et al.,
Plaintiffs,

vs.

BOARD OF HAMILTON COUNTY
COMMISSIONERS, et al.,
Defendants.

Case No. 1:02-cv-107
Spiegel, J.
Litkovitz, M.J.

**ORDER RE: REQUEST
FOR REVIEW BY
THOMAS R. STAHLHEBER**

This matter is before the Court on the Request for Review of the denial of a Sewer Backup (“SBU”) claim by Thomas R. Stahlheber (Doc. 652), the response of the Metropolitan Sewer District of Greater Cincinnati (“MSD”) (Doc. 671), Mr. Stahlheber’s post-hearing memorandum and evidence (Docs. 688, 689), and MSD’s supplemental brief in opposition (Doc. 692). On March 19, 2014, the Court held a hearing on Mr. Stahlheber’s request for review at which Mr. Stahlheber and Tom Fronk, MSD Engineering Technical Supervisor, testified.

I. Background

Mr. Stahlheber is the owner of property located at 5436 Bonita Drive, Cincinnati, Ohio. On July 1, 2013, Mr. Stahlheber experienced flooding at his property. In October 2013, Mr. Stahlheber submitted a claim to MSD under the SBU claims program requesting \$21,808.60 in damages for property loss. MSD denied Mr. Stahlheber’s claim because it determined that the damage to Mr. Stahlheber’s property was caused by overland flooding and was not due to inadequate capacity in MSD’s sewer system. Mr. Stahlheber then filed his request for review of MSD’s decision in this Court.

Mr. Stahlheber's request for review is filed under the Sewer Backup¹ program (formerly known as the Water-in-Basement [WIB] Claims Process Plan) (Doc. 131, Consent Decree, Exhibit 8). The Plan states in relevant part:

Subject to the requirements of this Plan, occupants who incur damages as a result of the backup of wastewater into buildings due to inadequate capacity in MSD's Sewer System (both the combined and the sanitary portions) can recover those damages. This plan also provides a means for occupants to recover damages arising from backups that are the result of MSD's negligent maintenance, destruction, operation or upkeep of the Sewer System. The Claims Process is not intended to address water in buildings caused by overland flooding not emanating from MSD's Sewer Systems or caused by blockages in occupants' own lateral sewer lines.

(Doc. 131, Consent Decree, Exhibit 8 at 1). In determining the cause of SBU, MSD must exercise its good faith reasonable engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Exhibit 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.* Homeowners who are dissatisfied with MSD's disposition of a claim under the SBU program may request review of the decision by the Magistrate Judge, whose decision is binding and not subject to any further judicial review. (Docs. 154, 190).

¹The "Water-In-Basement" program has been renamed the "Sewer Backup" program to more accurately reflect MSD's responsibility for sewage backups caused by inadequate capacity in MSD's sewer system. *See* Doc. 452 at 4; Doc. 454 at 16.

II. Evidence presented

Mr. Stahlheber alleges that the damage to his property was caused in two ways: directly by sanitary sewer surcharge that entered his basement through the building sewer lateral line, and indirectly by the flooding of Wulff Creek behind his house, which overflowed with both sewage and storm water and entered his basement from the garage. Mr. Stahlheber testified that on July 1, 2013, he entered his basement and observed 2 inches of water on the basement floor. He also observed water bubbling out of the basement floor drain, shower drain, and toilet, with the water from the toilet reaching the height of and spilling over the toilet seat. Mr. Stahlheber stated that both drains and the toilet are on the same sanitary sewer line. He testified that he smelled a “foul” sewer odor. Later, he observed water coming into the basement from the frame of a door leading to the garage. Mr. Stahlheber states that the creek behind his home flooded and water entered his garage, which sits higher than the basement, and then came through a door and into the basement. Mr. Stahlheber states that prior to the water entering his basement through the door, the water in the basement from the floor drain, shower drain, and toilet had reached a depth of 6 inches. The water in the basement eventually rose to a level of 18 inches.

Mr. Stahlheber also alleges that the flood water that entered his basement from the creek behind his house was contaminated with sewer water. He states that a sanitary sewer line runs under the creek behind his house. A manhole serving the sewer is located in the creek at the northeast corner of his property. The manhole lid contains holes and is bolted down to its casing. He states the depth of the floodwater far exceeded the height of the manhole, allowing the storm water in the creek to be infiltrated with sewer water through the open holes of the manhole lid. He alleges this sewage-contaminated floodwater then rose, spilled over the banks of the culvert,

pooled behind the culvert running under Morrvue Drive, and eventually entered Mr. Stahlheber's backyard and basement via the garage. Mr. Stahlheber states his back yard smelled of sewage.

Mr. Stahlheber also states that his two neighbors to the north and southwest on Morrvue Drive whose properties also abut Wulff Creek experienced flooding and reported sewer backups. The neighbor at 404 Morrvue Drive was reimbursed by MSD for the SBU damage to their property on or about July 2, 2013. (Doc. 707, Pl. Ex. 2). The neighbor at 397 Morrvue Drive has had multiple capacity related SBUs and is currently in the design phase of the Sewer Backup Prevention Program.² (Doc. 671 at 3). Subsequent to the hearing in this matter, Mr. Stahlheber presented evidence that his next door neighbor at 5438 Bonita Drive experienced "a water in basement back-up" the same weekend, although she was not at home at the time, and several other backups on prior occasions. (Doc. 689, Affidavit of Stephanie Petrocelli).

In addition, Mr. Stahlheber presents evidence that the MSD sanitary lines on Bonita Drive, along Morrvue, and in the County's storm culvert behind Mr. Stahlheber's home, all converge into the same sanitary line approximately 50 feet from the Stahlheber property line (Doc. 707, Ex. 1, Cagis drawing) and are all part of the Rapid Run, Wulff Run sewer system scheduled for repair under the Consent Decree. Mr. Stahlheber has also submitted photographs of the damaged property and videos he made of the July 1, 2013 flood. (Doc. 707, Exs. 1, 5, 6, 7).

On July 3, 2013, Mr. Stahlheber reported the water in his basement to MSD. MSD responded with a crew that same day. The MSD crew checked both the upstream and

²These "pumping systems" are installed to break the direct connection between a property's private sewer line and the public mainline sewer. Instead, wastewater from the property is redirected to a holding tank and is then pumped into the mainline sewer by means of a motorized pump. (Doc. 131, Consent Decree, Exhibit 6 at 4).

downstream public mainline sewers and determined that the “mainline is open and running signs of surcharge water came up in floor drain about 3 inches to house advised customer cleaning crew will be calling. Advised customer line had surcharge house needed to be cleaned. . . .” (Doc. 671, Ex. A). The “Service Report” given to Mr. Stahlheber by the MSD crew on July 3, 2013, stated a finding of “[i]nsufficient *wet weather capacity* in the main public sewer may have caused your backup” and that MSD would provide cleaning services to the property. (Doc. 652 at 7) (emphasis in the original).

MSD presents evidence that Mr. Stahlheber’s property is adjacent to Wulff Creek, which runs across the rear of the property and then into a culvert beneath Morrvue Drive, and that the capacity of the culvert has long been a concern of residents on Morrvue and Bonita Drives. (Doc. 671, Ex. B). MSD states that the culvert is owned by and is the responsibility of Delhi Township. MSD states that there were no other reported backups on Bonita Drive on July 1, 2013, including the neighboring property next door at 5438 Bonita Drive, which is at the same elevation as Mr. Stahlheber’s home and tied into the same sewer segment. MSD presents evidence that the only two other reported SBUs in the area were at 397 Morrvue and 404 Morrvue – Mr. Stahlheber’s neighbors whose properties abut the creek – neither of which are tied into the same sewer segment as Mr. Stahlheber’s property. The property at 397 Morrvue is tapped into a lower downstream sewer segment and sits about 6 feet lower in elevation than Mr. Stahlheber’s property at 5436 Bonita. The property at 404 Morrvue is tapped into a separate sewer segment on Morrvue Drive and is approximately 1 foot lower than 5436 Bonita Drive. MSD asserts that although there was evidence of a sewer surcharge at 404 Morrvue, it is also likely that the property experienced overland flooding on July 1, 2013, because the rear yard of

the property sits directly opposite Mr. Stahlheber's home, separated by Wulff Creek, and has a similar layout with a low driveway near the creek. (Doc. 671, Exs. C, D). MSD contends that the photographs submitted by Mr. Stahlheber with his claim further substantiate the conclusion that the damages were caused by overland flooding. (Doc. 671, Ex. E).

Mr. Fronk testified that he did not believe the manhole in the creek contributed to the flooding of Mr. Stahlheber's property because the public sewer that lies next to the creek does not tie into Mr. Stahlheber's building sewer lateral. Mr. Fronk also testified that the neighboring property at 5438 Bonita Drive was at a similar elevation as Mr. Stahlheber's home (5436 Bonita Drive), but did not report a SBU. Mr. Fronk testified that the only difference between the two houses -- one that reported a SBU (Mr. Stahlheber's) and one that did not -- was the placement of the garages: the next door neighbor's garage faced the front of the house while Mr. Stahlheber's garage faced the creek at the back of the house making it more susceptible to overland flooding. Mr. Fronk concluded from this information that overland flooding was the more likely cause of the water in Mr. Stahlheber's basement. Mr. Fronk also testified that the house at 404 Morrvue was the first house upstream and therefore was the house most likely to back up, and because 5438 Bonita Drive -- the house located directly between Mr. Stahlheber's and 404 Morrvue -- did not report a backup, overland flooding and not SBU was more likely the cause of the damage. However, Mr. Fronk admitted that he did not know whether or not Mr. Stahlheber's next door neighbor had a backup; he only knew that the homeowner at 5438 Bonita Drive did not call MSD to report a backup. Mr. Fronk submitted a declaration after the hearing stating that there were no reported sewer backups at the property of the next door neighbor in MSD's records.

III. Resolution

There is no question that flood water from Wulff Creek overflowed the banks of the culvert and entered Mr. Stahlheber's basement. While there is a question whether sanitary effluent discharged from the sewer manhole in the creek, thereby creating a combination of sewer and storm water flow, the Court need not resolve this issue; rather, the preponderance of the evidence establishes that Mr. Stahlheber's basement was damaged by a surcharge from the public sewer which is compensable under the Consent Decree.

The evidence shows a surcharge from the sanitary sewer line entered the basement prior to the overland flooding that entered through the garage door. Mr. Stahlheber observed water entering his basement from the floor drain, shower drain, and basement toilet, which rose to a level of 6 inches, before he observed water entering the basement via the garage door. The fact that the water was 6 inches deep and covered the entire basement before the overland flooding entered the basement strongly suggests that the amount of water that entered the basement from the floor drain, shower drain, and toilet was not a backup from normal household use such as may occur from an internal plumbing issue or obstruction in the homeowner's lateral. In addition, Mr. Stahlheber testified he detected that the water entering his basement had a "foul" sewer smell. Perhaps the strongest evidence that the public sewer surcharged is the contemporaneous investigation by the MSD crew who responded to the property on July 3, 2013. The MSD crew found evidence of a sewer surcharge and reported this on the field form. MSD argues that the Court should not rely on the "initial investigation" performed by the MSD crew who responded to the Stahlheber home on July 3 and that further investigation of the cause was contemplated by both the crew and under the Consent Decree. The Court notes, however, that

MSD routinely relies on these initial investigations as exculpatory evidence where the field form documents “no surcharge” or no main sewer trouble. *See, e.g.*, Docs. 489, 520, 541, 637, 648, 668. The Court does not disagree with MSD’s argument that the Consent Decree contemplates a further investigation or with MSD’s position that the fact clean-up services are provided to a homeowner does not necessarily mean MSD is responsible for the backup. However, the Court discounts the opinion of Mr. Fronk, whose further investigation consisted of examining the relative elevations of the affected properties and assessing the lack of a reported SBU by 5438 Bonita Drive. Mr. Fronk admitted he did not know if Mr. Stahlheber’s next door neighbor was at home during the incident or whether she actually experienced a backup without reporting it to MSD. Mr. Stahlheber’s next door neighbor subsequently confirmed there was a “water in basement backup” the weekend of July 1, 2013 and on several prior occasions. Thus, although not conclusive evidence that the backup was a capacity- related problem, the fact that the field form twice recounts the presence of a “surcharge,” coupled with Mr. Stahlheber’s observations and all the other evidence, leads the Court to conclude that Mr. Fronk’s testimony is entitled to less weight and that a surcharge of the public sewer was a cause of the property damage to Mr. Stahlheber’s home.

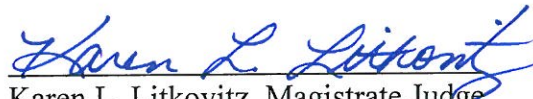
In this case, it is impossible to know how much of the damage to Mr. Stahlheber’s basement was caused by overland flooding and how much was caused by the surcharge of the public sewer. In the past, Magistrate Judge Hogan, the undersigned’s predecessor in these cases, determined that where there was evidence of damage from both SBU and overland flooding not emanating from MSD’s Sewer System, MSD was responsible for the entirety of the damage. *See* Docs. 474, 475, 476, 477. In addition, MSD has previously paid claims where both overland

flooding and surcharging of the main sewer line during a rain event caused property damages. *See* Doc. 543. In accordance with this precedent, MSD is responsible for the damages sustained by Mr. Stahlheber. Mr. Stahlheber's appeal is therefore sustained.

In view of this finding, MSD is granted leave to supplement the record with evidence of the fair market value of the items for which Mr. Stahlheber seeks compensation.³ MSD should attempt to settle the damages claim with Mr. Stahlheber. If the parties are unable to settle the claim for damages, MSD must notify the Court within 60 days, at which time the Court will rule on the damages claim.

IT IS SO ORDERED.

Date: 5/5/14


Karen L. Litkovitz, Magistrate Judge
United States District Court

³At the hearing of this matter, MSD requested leave to address the amount of property damage claimed by Mr. Stahlheber in the event MSD was found liable for the damages.