700 West Liberty Street | Louisville, KY 40203-1911
Phone: 502.540.6000 | LouisvilleMSD.org

July 20, 2022

Councilman Piagentini
601 W. Jefferson Street
Louisville, KY 40202
VIA EMAIL

Subject: Proposed Drainage Ordinance Change

Dear Councilman Piagentini:

MSD appreciates the open discussion we have had pertaining to the proposed changes to Louisville Metro Ordinance Section 50.57 (the "proposed drainage ordinance"). We understand the proposed drainage ordinance is intended to remedy the perceptions of a couple Lake Forest Condominium owners who believe they are not charged fairly for drainage because their specific condos more closely physically resemble detached single family residences rather than apartments. As you know, all condos, regardless of specific physical characteristics, are currently billed as Class B properties and receive a drainage charge based upon the amount of the impervious surface in accordance with Louisville/Metro Ordinance Section 50.57 and the 1986 Interlocal Agreement (the "ILA") between MSD and the City and County. The proposed ordinance changes would classify some condos as Class A properties, which are billed 1 equivalent service unit ("ESU"), while other condos would remain as Class B properties. The proposed drainage ordinance further classifies condos based upon whether they are in a high-rise structure akin to apartments. The effect would result in an approximate $11.23/month savings to the condo owners.

MSD commissioned Stantec to evaluate the effect of the proposed drainage ordinance to MSD's operations and revenues as well as to evaluate whether it recommends any other changes to the drainage ordinance. In summary, Stantec does not recommend the proposed drainage ordinance. Ultimately, MSD's Board must make the decision whether to support the proposed drainage ordinance and consequently whether to revise MSD's Rates, Rentals and Charges. However, MSD staff will not recommend the proposed drainage ordinance to the Board for the issues outlined below, which can be categorized as either legal in nature, practical, or as an unintended consequence.

Potential Legal Issues

MSD is concerned that the proposed drainage ordinance may lead to legal challenges because it conflicts with the Kentucky Horizontal Property Act, KRS 381.810(1), (2). The Horizontal Property Act defines "unit" in pertinent part to mean: "an enclosed space as measured from interior unfinished surfaces consisting of one or more rooms *occupying all or part of a floor in a building of one or more floors or stories regardless* of whether it be designed for residence…"(emphasis added). "Condominium" is defined as "the ownership of single units in a single unit or a multiple unit structure or structures with common elements." KRS 381.810 (2). The Horizontal Property Act does not make any distinctions for the physical characteristics of a condo and/or whether the condos are a part of a high-rise structure. Indeed, state law is clear the number of floors or stories is immaterial to this determination.

Pursuant KRS 82.082 (2), Louisville Metro may pass ordinances to the extent that it does not conflict with a state statute that directly addresses that issue. The General Assembly has defined what constitutes a "condominium" without regard to any physical attributes or the number of floors/stories of the condo; thus, an ordinance defining a "condominium" differently appears to be in conflict with state law. *See, City of Louisville v. Michael A. Woods, Inc.*, 883 S.W.2d 881, 883 (Ky. Ct. App. 1993); *Louisville/Jefferson Cnty. Metro Gov't Waste Mgmt. Dist. v. Jefferson Cnty. League of Cities, Inc.,* 626 S.W.3d 623, 628 (Ky. 2021)(holding Louisville/Jefferson County Metro remains a city of the first class). For these reasons, we believe the proposed drainage ordinance may be subject to a legal challenge that MSD, as the administering agency, would have to defend.

Furthermore, the ILA between the City, County and MSD transferring drainage responsibilities to MSD includes the current definitions of Class A and B properties. A copy of the ILA attached for reference. The ILA has a fifty year term expiring in 2036. While I do not believe the ILA restricts Metro Council from passing an ordinance changing the definitions it appears such a change would also conflict with the terms and intent of the ILA.

Additionally, we believe the proposed drainage ordinance may not fully address the perceptions identified by some of the residents in the Lake Forest Condominiums. If these owners believe their condos are more like single-family residences the proposed drainage ordinance will likely not address their issues. The one ESU charged to single family residences includes all impervious surfaces on the property without regard to the amount of the impervious surface, i.e. the one ESU includes all sidewalks, driveways, parking areas on the property. Unlike a single family residence, condo owners only own their unit—not the sidewalks, driveways, parking areas etc., on the lot; these are common space areas for which the HOA pays the drainage charge. We believe condo owners or their respective HOAs will argue the HOAs are being double or overbilled because as a Class A property that one ESU should include those shared common space areas like single-family residences. We are concerned MSD will again be left defending this issue and any possible legal actions arising from it.

Practical Issues

The proposed drainage ordinance creates several practical challenges for MSD:

- Stantec determined that the proposed drainage ordinance will result in an estimated $328,000.00 annually in lost revenue to MSD. A slide deck further explaining the financial impacts of the proposed drainage ordinance is attached;
- Customers across the drainage service area frequently ask MSD for drainage improvements to remedy standing water and structural flooding—if MSD continues to lose revenue MSD's ability to provide these important and requested services will be limited;
- MSD has already completed its FY23 budget based on revenue assumptions provided by its Board approved Rates, Rentals, and Charges, which do not include the estimated $328,000.00 in lost revenue. If the proposed ordinance is passed by Metro Council, MSD would request that it not be effective until its next budget year, August 1, 2023. This will allow MSD to sufficiently budget for this loss in revenue and enact the changes to its Rates, Rentals and Charges;
- In addition to the above, MSD believes 55 condo properties representative of nearly 2,500 condo owners who may be affected by the proposed drainage ordinance. However, MSD does not currently possess the data in its GIS system to determine specifically which condos would be included as a Class A property under the proposed drainage ordinance—this requires staff to evaluate each individual condo association to assess its inclusion as a Class A property. MSD would need time conduct these case-by-case determinations before it could administer the proposed drainage ordinance; and
- Condo owners may not realize the approximately $11.23/month savings. Most drainage fees are paid by the condo HOAs. MSD cannot control whether these HOAs pass the savings on to their customers/condo owners; however, MSD anticipates it will receive inquiries from condo owners when the savings is not passed on.

Unintended Consequences

MSD, in cooperation with the Louisville Water Company, offers several rate assistance programs for senior customers or those struggling to pay their water, sewage and drainage bills. The proposed drainage ordinance seeks to provide an approximate $11.23/month savings to condo customers in patio-style homes, but not those customers with condos in high-rise structures. MSD records support that customers in high-rise condos are more likely to be on a rate assistance program while those in patio-style condos are not (and the latter is traditionally found in more affluent areas of Louisville Metro). MSD staff are not in favor of conferring a savings to a specific classification of customer-- if a savings is to be conferred to a specific classification of customer MSD believes it should benefit those already struggling to afford basic necessities or at the very least the status quo should be maintained and a holistic change to the drainage structure should evaluated. We believe MSD's Board will support our position.

Even though MSD staff will not recommend the proposed drainage ordinance to its Board I am including a redline with suggested revisions I believe ameliorate the potential challenges I have outlined. I recommend any changes be focused on whether the condo structure is a single unit or does not include any more than four (4) residential units—the height of the structure is immaterial from MSD's perspective. I have also simplified several of the "whereas" clauses and removed those that otherwise conflict with the Ordinance, specifically, that single unit condo structures have lower drainage and water runoff than multiple unit structures. *See,* Louisville/Metro Ordinance 50.59(E)("… Large residential lots generally have a lower overall intensity of development than small residential lots because a lesser percentage of larger lots is covered with hard surfaced area…"). It is MSD's experience and evaluation that these patio-style condos are on smaller residential lots but have larger amounts of development and hard surfaces meaning there is more impervious surface on a smaller lot resulting in more runoff.

As we have mentioned during our discussions, MSD remains committed to evaluating a holistic change to its rate structure including tiers, which we and Stantec believe will more fairly address the drainage charges rather than a piecemeal approach. Again, we thank you for the continued and open discussions that we have had regarding the proposed drainage ordinance and we hope we are able to work with you on a tiered structure for drainage charges once our additional analysis is complete.

Sincerely,

Anne E. Trout

Anne E. Trout
Senior Assistant General Counsel

cc: Tony Parrott
Brad Good
Wes Sydnor
Jeff Derouen

Enclosures