MEMORANDUM

From: Chad S. Beckett, Beckett & Webber, P.C.

To: Paul Hendren, Village Board President David Lucas; Village Board of Trustees

Date: September 24, 2012

Introduction

This memorandum is made on behalf of Prairie Rivers Network and several individual residents within and near the Village of Homer ("Village") in opposition to the proposed sale of water by the Village to Sunrise Coal, LLC. The focus of this memorandum is the Village's various legal obstacles to selling water to Sunrise Coal. For the reasons set forth below, Prairie Rivers Network and its partner landowners request that the Village of Homer reject the request of Sunrise Coal to purchase water from its Municipal water system. The opinions and research presented are preliminary in nature and subject to extension and/or clarification.

Assumptions

To provide the requested water Sunrise Coal has requested, the Village must add a minimum of 410,000 gal/day capacity.[1] Added capacity will require construction of additions to the Village waterworks or additional supply from other sources. Additional supply from nearby municipal sources is unlikely.[2] Moreover, the Village will not achieve the necessary additional capacity from drilling new wells on its existing property.[3] Nearby surface water sources, such as

---

[1]Based on Village's stated capacity (264,000 gal/day) and subtracting existing peak Village usage of (130,000 gal/day) and Sunrise Coal request (544,000 gal/day)

[2]Note letter from Village of Ogden to Village of Homer re: water sale to Sunrise Coal dated September 10, 2012.

[3]Bulldog Mine Application Permit No. 429, Attachment III-1, Exhibit shows stated capacity of sand and gravel aquifers near Homer at less than 50,000 gal/day/mile^2. Small pockets have 100,000-150,000 gal/day/mile^2. In the absence of clear scientific proof to the contrary, new

the Salt Fork of the Vermilion River, will not necessarily provide sufficient dependable flow.[4] Therefore, the additional capacity depends on the Village expanding its water works to new locations with additional pumping installations, most (if not all) of which will be located outside the Village's municipal boundaries.

A Referendum May be Needed to Finance the Project

The Village may build additional waterworks under the authority of 65 ILCS 5/11-125-1 or 65 ILCS 5/11-129-1, but if the municipality intends to utilize bonds to finance the project, it could result in a petition being filed, forcing a referendum in which the Village's citizens must approve the decision in a referendum by a 3/4 majority or a simple majority.[5] Such a referendum will involve costs associated with preparing the referendum for a vote, and is subject to challenge for the reasons set forth below.

Right of Village to Use Eminent Domain is Doubtful

While it is clear that the Village does not have the capacity to provide Sunrise Coal with water using its current facilities, it is also clear that the Village has more than adequate capacity to meet its existing needs.[6] As such, the additions to capacity would be solely for the benefit of Sunrise Coal. This impacts the Village's ability to use its power of eminent domain to acquire property to construct the expansion to its waterworks. The Illinois Constitutions limits takings

---

installations will be required to meet the contemplated capacity.

[4]Rights of persons and entities downstream would also be affected, as discussed below.

[5]See, 65 ILCS 5/11-128-3 and 65 ILCS 5/11-129-4; Referenda under 11-129-4 depend on petition by sufficient number of citizens.

[6]Current usage is stated as being between 80,000 - 130,000 gallons per day. Stated capacity is 264,000 gallons per day.

by public entities for public uses only. Ill. Const. Art. 1, § 15. Private property cannot be condemned for a purely private purpose or for a private use which benefits the public only incidentally. *Department of Public Works and Buildings v. Farina*, 29 Ill.2d 474, 477, 194 N.E.2d 209, 211 (1963) The Illinois Supreme Court has specifically found that a coal company's utility requirements constitute a private use that is not subject to eminent domain. *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N.E. 199 (1887) As such, the added capacity, if constructed, will be subject to legal challenge if eminent domain is utilized to acquire the land necessary to construct wells or for easements to connect the resulting supply with the Village system.

The Sale of Water Itself May be Unauthorized Under Illinois Law

The only specific statutes that authorize the sale of water outside a municipality's limits refer to "particular localities" and "specified areas" requesting service.[7] As Village Attorney Paul Hendren referenced in his preliminary memorandum,[8] the Village is not contemplating sales to localities or areas, but instead to a single, non-resident commercial entity. The absence of clear authority to sell water to Sunrise Coal under the circumstances contemplated, even if approved by referendum, still leaves that action open to legal challenge.

The Village would be Restricted in Recouping Expenses in the Event of Sunrise Coal Declaring Bankruptcy

If the Village proceeds with constructing additional capacity, overcomes the referendum

[7]See 65 ILCS 5/11-129-9 and 65 ILCS 5/11-149-1; Because §5/11-129-9 specifically incorporates §§11-129-1 through 11-129-8, the question of the sale of water itself outside the municipality likely requires a referendum under §5/11-129-4.

[8]Paul Hendren Memorandum, Sept. 10, 2012, page 6, Section V, ¶3-11

requirement and legal challenges to construction, eminent domain and sale, it still runs the risk of catastrophic financial loss in the event that Sunrise Coal declares bankruptcy. If the Village proceeds with sale under the authority of 65 ILCS 5/11-129-9, that statute provides that any bond sale to finance that expansion would be "payable *solely from the revenue derived from the operation of the water-supply system constructed or acquired for that particular locality*, or from the revenue derived from the operation of the improvements and extensions of an existing system." (Emphasis added). Thus, if adequate security to satisfy the cost of construction and operation is not in hand, the bankruptcy of Sunrise Coal would leave the Village with a potentially ruinous debt. This possibility is not just a hypothetical, as is shown by the recent bankruptcy of Patriot Coal Company,[9] and the recent closure of Peabody Energy's Indiana mine,[10] particularly as the coal industry's business model is so exposed to a wide fluctuation on the value of its product.

The Village Must Comply with Champaign County Zoning Ordinances

Notwithstanding a resolution of the issues above, zoning concerns may prevent water sales to Sunrise Coal. Village and village officials have no power or authority to challenge rezoning by county of premises in an unincorporated area contiguous to the village. *Village of Arlington Heights v. Cook County*, 133 Ill.App.2d 673, 273 N.E.2d 706 (1st. Dist. 1971). The Village has already been made aware of at least one County Zoning issue regarding the proposed water sale to Sunrise Coal. As John Hall, Champaign County Zoning Administrator indicated in his letter of April 23, 2012, if a "proposed reservoir or the proposed water line are not in the

[9] http://www.wowktv.com/story/19594251/born-to-fail-patriots-short-road-to-bankruptcy

[10]http://www.marketwatch.com/story/peabody-energy-to-close-indiana-mine-2012-09-05

Village or not on land on which there is a pre-annexation agreement with the Village, then a County Zoning approval will be required."[11] Vermilion County zoning requirements are a separate issue not addressed in this memorandum.

The Village Faces Liability for Dewatering Adjacent Property

The Village does not have the unfettered right to remove all water from land it controls. Such removal, whether from a surface source of by pumping water from an aquifer, must conform to the Illinois Water Use Act of 1983. In a nutshell, the Village's water usage and removal from groundwater or surface sources must be "reasonable"; otherwise, adjacent landowners and municipalities may have the right to sue for the effects this use has on their property. The effect of this Act on the Village's potential water sale to Sunrise Coal merits explanation of this legal precept in detail.

Background

Prior to 1983, no cause of action was available in Illinois for interference with another landowner's groundwater, because Illinois followed the "absolute ownership" doctrine, which held that subsurface water was considered part of the land itself and belonged absolutely to the owner of the land. *See Edwards v. Haeger*, 180 Ill. 99, 54 N.E. 176 (1899); *Lee v. City of Pontiac*, 99 Ill.App.3d 982, 55 Ill.Dec. 325, 426 N.E.2d 300 (4th Dist. 1981). That "absolute ownership" doctrine ended, however, with the passage of the Water Use Act of 1983. 525 ILCS 45/1. As the legislation notes in its text, "The general purpose and intent of this Act is to establish a means of reviewing potential water conflicts before damage to any person is incurred

[11]See letter by John Hall, Champaign County Department of Planing and Zoning, April 23, 2012. Potential zoning issues include Ordinance 971 (General Zoning), Ordinance 209 (Development in Special Flood Hazard) and Ordinance 678 (Development in Flood Hazard).

and to establish a rule for mitigating water shortage conflicts by...[e]stablishing a "reasonable use" rule for groundwater withdrawals."525 ILCS 45/3 (c). The Act goes on to define "reasonable use" as "the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously." 525 ILCS 45/4.

The language of "natural wants" vs. "artificial wants" goes back to the 1842 Illinois Supreme Court Case of *Evans v. Merriweather*, 4 Ill 492 (1842), a dispute between two mill owners dependant on river flow for power. The Supreme Court found that the upstream mill owner's right to use the river was limited to a "reasonable use", rather than a right to the entire flow. To determine this "reasonable use" the Court found that "it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial." The Court's distinction between "natural" and "artificial" wants is particularly important:

> Natural are such as are absolutely necessary to be supplied, in order to his existence. Artificial, such only as, by supplying them, his comfort and propriety are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish.
>
> The supply of man's artificial wants is not essential to his existence; it is not indispensable; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and can not, therefore, be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but can not be considered absolutely necessary to his existence; nor need the machinery which he employs be set in motion by steam...
>
> <u>If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor.</u> Where the stream is small, and does not supply water more than sufficient to answer the

> natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far, then, as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But where the water is not wanted to supply natural wants and there is not sufficient for each proprietor living on the stream, to carry on his manufacturing purposes, how shall the water be divided? We have seen that, without a contract or grant, neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion.
>
> *Evans v. Merriweather* 4 Ill 492, 1842 WL 3800, 5 (1842) (Emphasis added)

Looking at this issue from the perspective of the 21st century, the Village could be precluded from using the Salt Fork as the source to supply Sunrise Coal if that use prevented the Village of Oakwood from using the river to provide potable water to its citizens; that downstream "natural" want trumps the "artificial" want of supplying water for industrial purposes.

While the Supreme Court settled the law of surface water rights 170 years ago, the Illinois Legislature, by passing the Water Use Act of 1983, made the use of groundwater follow the same rules. Put another way, the Village cannot take all the water available in a particular area of an aquifer any more than they can monopolize the entire flow of the Salt Fork River. Before any attempt to use groundwater – whether by a private citizen digging a well for a single residence or a municipality adding capacity for an entire city – the Village must first analyze the effect this use will have on the natural wants of adjoining landowners and other users of a common groundwater source. It must also consider the possibility that the common law may change on the question of irrigation. At present, it is considered an "artificial want" subject to qualification.

In the future, exigent circumstances (typified by this summer's drought) may transform that use into a "natural want", with far-ranging consequences for water policy and private right of access.

State law claims - common law tort of trespass

Claims against the Village for wrongful water use can take the form of a trespass, where a citizen claims that the act of drilling one or more new wells – and removing upward of 410,000 gallons of water per day at one or more locations – prevents nearby landowners from using their wells at a given level of the water table. That is situation formed the basis of the case of *Bridgman v. Sanitary Dist. of Decatur,* 164 Ill.App.3d 287, 517 N.E.2d 309 (4th Dist. 1987), in which a landowner was found to have stated a claim against a local sanitary district for pumping all water from a sanitary ditch to the detriment of Bridgman's residential well. The *Bridgman* case is attached as an Exhibit to this Memorandum. It should also be noted that nearby municipalities, such as the Village of Ogden, would have the same common law right of trespass in the event excessive water was drawn from the current wells located West of that municipality. The fact that the Village of Ogden has already made Homer authorities aware of its concern regarding the sale of water to Sunrise Coal is an ominous sign of things to come.

State law claims - claim of inverse eminent domain under Illinois Constitution

If the Village draws enough water from an aquifer that the effect is the dewatering of adjacent property, the adjacent landowners can claim that the Village's action constitutes the taking of property without compensation. Ill. Const. Art. 1, § 15. Putting aside the separate claims of trespass, or of whether the Village is actually taking that water for a public use (discussed above, any of which may be brought by a "dewatered" land owner), the failure of the Village to engage in condemnation actions against all land owners affected by the drilling of new

wells would invite litigation from any nearby landowner who owns a well. Illinois courts provide remedies for land owners in such cases, usually known as a "mandamus action", to force the Village to proceed with the protocols of eminent domain and value the damage to property occasioned by the Village's water use.[12] Assuming that Homer's available water supply at its current well sources is confirmed to be between 50,000-150,000 gallons per day per square mile, Homer will have to acquire additional land and drill additional wells. Thus, the potential for interference with adjacent land owners' access to ground water is high, as is the likelihood of litigation over that issue.

Federal law claims - takings claims under the U.S. Constitution

Even if a State "taking" claim fails, the U.S. Constitution contains its own "takings" language that forbids appropriation of property without just compensation. U.S. Constitution Amendments V and XIV. As such, federal law, particularly 42 U.S.C.A. §1983, serves as a back stop in the event that State claims prove to be inadequate. These claims necessarily require the exhaustion of State-based claims and (usually) final determination by the local authorities of the merits of the case before a federal action can be brought. *See, e.g., Williamson County Regional Planning Com'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108 (1985). However, federal "takings" cases can provide a "second bite at the apple" when claims under state law fail. Of particular note, successful "takings" claimants can seek attorneys fees and costs

[12]*See, e.g., Roe v. Cook County*, 358 Ill. 568, 572-573, 193 N.E. 472, 474 (Ill.1934) ("The Constitution, in prohibiting the taking or damaging of private property for public use without just compensation, recognizes the right of the owner of property damaged by a public work to recover the amount of such damages. This right may be asserted by the owner as a plaintiff in an action at law where none of his property is actually taken, or as a defendant to an eminent domain proceeding for the condemnation of property actually taken.")

as part of the damages.

While there is no known Illinois case with identical facts to those contemplated by the Village's sale to Sunrise Coal, an interesting case in Ohio with similar facts merits discussion. The case of *McNamara v. City of Rittman*, 2010 WL 680956 (N.D.Ohio), 2-3 (N.D.Ohio,2010), involves real property owners in areas of Wayne County outside the municipal corporate boundaries of the City of Rittman, Ohio, with private water wells. In 1980, Rittman began pumping water from three wells drilled in a tract of land located approximately one quarter mile west-southwest of the Village of Sterling in Wayne County. The land owners allege that, as a result of Rittman's pumping of groundwater, they suffer ongoing takings of their property (namely, the groundwater). The land owners seek monetary damages for ongoing violations of their constitutionally protected interest in the groundwater.

The District Court of the Northern District of Ohio Federal Court denied Rittman's motion to dismiss, finding that the land owners had stated a cause of action. The Court's holding is particularly apt to the Village's present situation:

> Plaintiffs claim that they have suffered a taking of their private water at the hands of the city's pumps and wells and demand damages. Thus, they have properly asserted a private taking for a public use. As their action is against a municipality, they have also properly asserted that the alleged taking of a constitutionally protected right was done by a defendant acting under color of state law. Plaintiffs claim, further, that the pumping of groundwater has been ongoing and continuous since 1980 and continues to the present. They have, therefore, plead that the city has inflicted a continuing and accumulating harm. This satisfies the elements that must be plead under the continuing violations doctrine.
>
> *McNamara v. City of Rittman* 2010 WL 680956, 3 (N.D.Ohio,2010)

Another remarkable aspect of the *McNamara* case is that it is really 4 cases, which commenced in 1998 based on municipal actions dating back to 1980, and which remain unresolved as of the

present. This 32-year series of events should give the Village pause about the time horizon of its potential liability on this issue.

Conclusion

This memorandum is a preliminary opinion only. More research is necessary to explore the basic premise of Sunrise Coal's request for water from the Village, and, in any event, there remain too many variables to fully explore the issues at hand. Yet, a recitation of these variables serve as an apt summary of the objections to the Village agreeing to Sunrise Coal's request:

- Under which statute would the Village proceed with construction and/or sale of the requested water and by what authority?
- Would the water be drawn from a groundwater source or from the Salt Fork and how would the Village ensure it would be a sufficient supply?
- How would the Village acquire the land and easement rights it needs to carry out the project without the benefit of eminent domain?
- How would the village ensure that the extension to the waterworks would be paid without injuring the citizens of Homer?
- Would the Village build waterworks all the way to the Vermilion Co. Line or would Sunrise Coal attempt to hook into the Village at its municipal boundary?
- What will the Village do if it is sued by landowner adjacent to a new well, alleging an improper taking as in the *Bridgman* case?
- What if the landowner alleges a state inverse condemnation claim?
- What if, after all else fails, that landowner makes a federal claim for damages?
- What prevents this decision from being an issue 30 years down the road....or longer?

None of the answers to these questions are presently known. As the preliminary report of Village Attorney Paul Hendren makes clear, there are literally dozens of "known unknowns" that must be determined.

And yet, all of these questions are susceptible to a very simple answer: The Village has better things to do than to worry about the repercussions of this non-essential, non-residential use of precious resource outside of its municipal boundaries (and, indeed, outside of its County). The request by Sunrise Coal for more than half a million gallons of water per day can (and should) simply be rejected.

Exhibit 7

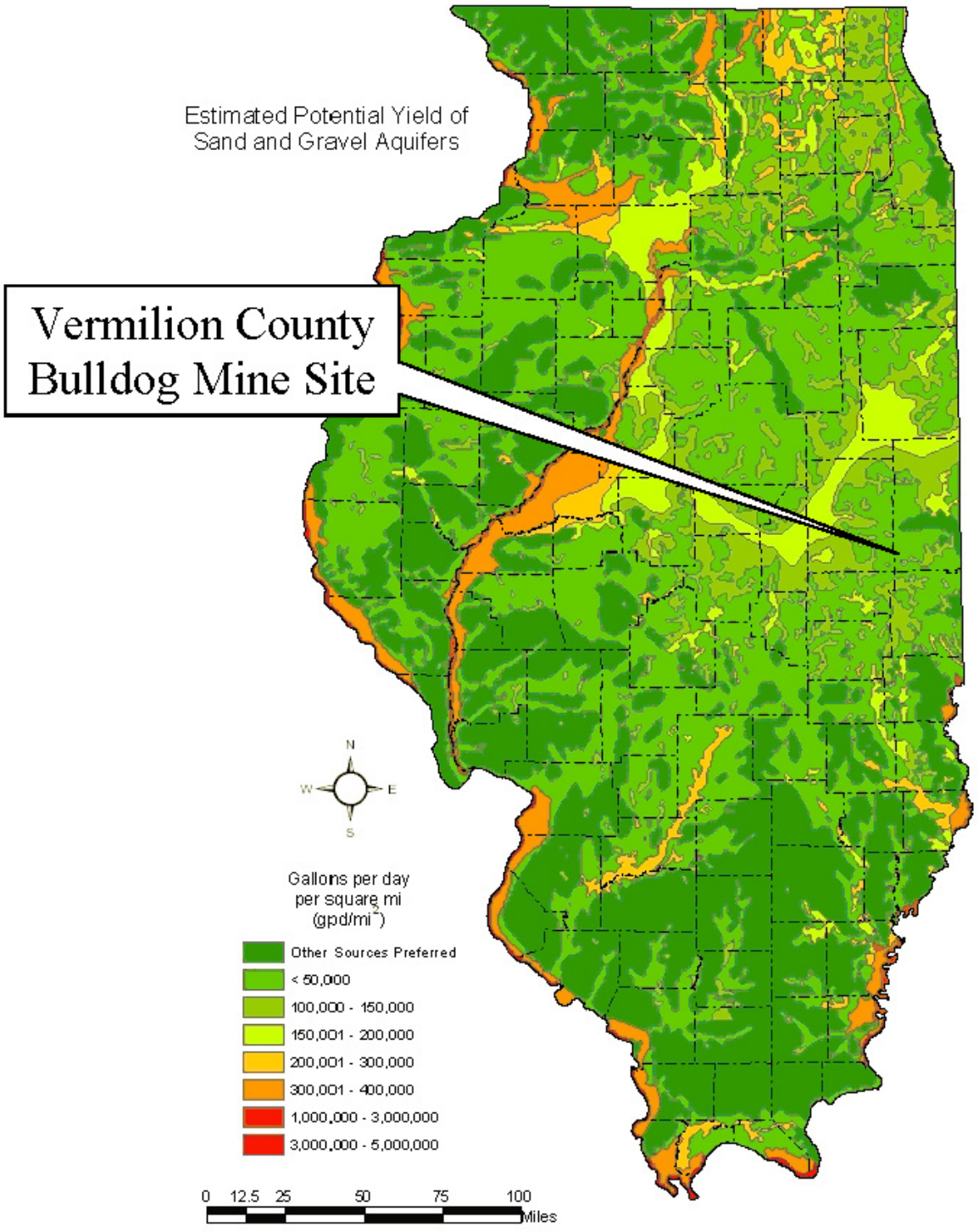

Exhibit 7. Estimated potential yield of sand and gravel aquifers in Illinois.

Appellate Court of Illinois,
Fourth District.

Eleanor J. BRIDGMAN, Plaintiff-Appellant,
v.
The SANITARY DISTRICT OF DECATUR, Bainbridge, Gee, Milanski & Assoc., Inc., Defendants-Appellees (Wiegand & Storrer, Inc., Defendants).

No. 4-87-0316.
Dec. 17, 1987.

Landowner brought action against sanitary district, engineering firm which designed plans for sewer project, and contractor, alleging damage to subsurface water on her property. Defendants moved to dismiss. The Circuit Court, Macon County, John L. David, J., granted dismissal motions, and appeal was taken. The Appellate Court, Spitz, J., held that: (1) allegations that sanitary district constructed ditch adjacent to plaintiff's property causing property to become completely dewatered and devaluing property stated claim under Water Use Act; (2) allegations that actions of sanitary district contaminated plaintiff's well stated cause of action; and (3) allegations that engineering firm employed to design plans for sewer project did so negligently stated claim against engineering firm.

Affirmed in part, reversed in part and remanded.

West Headnotes

[1] Water Law 405 1094

405 Water Law
405IV Groundwater: Subterranean and Percolating Waters
405k1093 Rights in Owner of Overlying Lands, in General
405k1094 k. In general. Most Cited Cases
(Formerly 405k101)

Illinois Water Use Act modified Illinois law by rejecting "absolute ownership" doctrine in connection with subsurface water and replacing it with reasonable use doctrine based upon riparian doctrine followed with regard to surface water. S.H.A. ch. 5, ¶¶ 1601 et seq., 1603, 1604, 1606.

[2] Water Law 405 1144

405 Water Law
405IV Groundwater: Subterranean and Percolating Waters
405k1139 Judicial Intervention, Actions, and Review
405k1144 k. Pleading. Most Cited Cases
(Formerly 405k107(3))

Landowner's complaint alleging that sanitary district constructed ditch adjacent to her property which caused her property to be completely dewatered, that ditch caused waste of subsurface water, that she could not obtain water for her domestic needs from her property, and that actions of sanitary district devalued her property stated claim under Water Use Act. S.H.A. ch. 5, ¶¶ 1601 et seq., 1603, 1604, 1606.

[3] Pretrial Procedure 307A 690

307A Pretrial Procedure
307AIII Dismissal
307AIII(B) Involuntary Dismissal
307AIII(B)6 Proceedings and Effect
307Ak690 k. Dismissal with or without prejudice. Most Cited Cases

Although allegation that actions of sanitary district in constructing ditch adjacent to landowner's property contaminated her well with impurities should not have been included in count of complaint alleging that construction of ditch caused property to be completely dewatered, that ditch caused waste of subsurface water, that property owner could not obtain water for her domestic needs from her property, and that actions of sanit-

ary district devalued her property, dismissal with prejudice was not appropriate remedy; minor defect could have been easily remedied. S.H.A. ch. 110, ¶ 2-612(b).

[4] Water Law 405 ⚿1370

405 Water Law
405VI Riparian and Littoral Rights
405VI(C) Injuries to Riparian Rights in General
405VI(C)3 Injury to Riparian Rights by Pollution or Deposits
405k1363 Judicial Intervention, Actions, and Review
405k1370 k. Pleading. Most Cited Cases
(Formerly 405k77)

Allegation that actions of sanitary district in constructing ditch adjacent to landowner's property caused contamination of property owner's well with impurities stated cause of action.

[5] Health 198H ⚿369

198H Health
198HII Public Health
198Hk369 k. Sanitary districts, boards, officers, and employees. Most Cited Cases
(Formerly 199k18 Health and Environment)

Section of Local Governmental and Governmental Employees Tort Immunity Act providing immunity for injuries resulting from the adoption of a plan or design for improvements to property provided no basis for dismissal of landowner's complaint that action of sanitary district in constructing ditch adjacent to her property caused her property to be completely dewatered, that ditch caused waste of subsurface water, that she could not obtain water for her domestic needs from her property, and that actions of sewer district devalued her property. S.H.A. ch. 85, ¶ 3-103(a).

[6] Negligence 272 ⚿1205(5)

272 Negligence
272XVII Premises Liability
272XVII(G) Liabilities Relating to Construction, Demolition and Repair
272k1205 Liabilities of Particular Persons Other Than Owners
272k1205(5) k. Engineers. Most Cited Cases
(Formerly 272k111(1))

Allegations that engineering firm was employed to design plans for sewer project, that plans called for use of granular fill, that use of granular fill on plants and specifications was negligent design, and that as result of negligent design, undersurface water was permanently removed from property owner's land adjacent to ditch and that value of her property was reduced stated claim against engineering firm.

****310 ***108 *288** Brinkoetter & Barnes, P.C., Decatur, for plaintiff-appellant.

Hull, Campbell & Robinson, Decatur, for Bainbridge, Gee and Milanski.

Edward Booth, Greanias & Booth, Decatur, for Decatur Sanitary Dist.

Justice SPITZ delivered the opinion of the court:

The present case was initiated by the plaintiff acting *pro se.* She filed a one-count complaint alleging damages against five separate defendants. Each of the defendants filed a motion to dismiss the initial complaint and subsequently plaintiff retained counsel. The motions***289** to dismiss were allowed and two defendants were omitted from further proceedings.

Plaintiff subsequently filed her first-amended complaint in the present cause, and this complaint was framed in four separate counts. The first count pertained to the Sanitary District of Decatur (sanitary district). Plaintiff alleged in count I of her first-amended complaint that she was the owner of 2375 Mesa Drive in Decatur, Illinois, where she

maintained her personal residence. She alleged that her water was supplied by a well located on the premises, that this well was supplied by subsurface waters consisting of the water table below her property, and that this water was used for drinking, bathing, washing, and other domestic needs. The complaint further alleged that the Decatur sanitary district constructed a ditch on the property which adjoined her property and that this ditch caused her property to be completely dewatered. It alleged that the Decatur sanitary district used a granular fill within the ditch and that the granular fill caused water to be removed from her premises and diverted so as to cause a waste of subsurface water and interfere with her right to have reasonable use of the subsurface water for domestic purposes. The complaint further alleged that the removal of the subsurface water caused her well to become contaminated with the impurities from other sources and the plaintiff was thereafter unable to obtain sufficient water by digging a deeper well. She alleged that as a result of the removal of her source of water that her property had been devalued and that she had been deprived of any available source of water for use for her domestic needs.

Count II of the amended complaint, directed at Bainbridge, Gee, Milanski and ****311 ***109** Associates, Inc. (Bainbridge), alleged that the Decatur sanitary district had employed Bainbridge to design the specifications, plans, and designs and that the specifications, plans, and designs called for the use of a granular fill. Plaintiff alleged in count II that the use of the granular fill in the plans and specifications was a negligent design and that as a result of this negligence that the subsurface water was permanently removed from the plaintiff's land and that she was therefore without any water source and her property value was reduced.

Count III and count IV were both directed against Wiegand and Storrer, Inc. (Wiegand). Count III alleged that Wiegand was employed by the Decatur sanitary district as a contractor for the purpose of constructing the sanitary sewer and that Wiegand knew or should have known that the construction of the sewer in accordance with the plans and specifications would permanently dewater plaintiff's land ***290** and alter the water table that existed. The complaint further alleged that Wiegand negligently failed to act on its knowledge or imputed knowledge to take steps to prevent damage to plaintiff's well and water table when it should have known that a modification of the plans was necessary to prevent the injury complained of. The complaint further alleged in count III that the diversion of the subsurface waters deprive the plaintiff of her right to have reasonable use of her subsurface water for domestic purposes.

Count IV alleged in addition to the previous matters that Wiegand had failed to restore the land to its original surface dimensions and provide adequate drainage for surface water. The complaint alleged that as a result of the failure to restore the land to its original dimensions that the surface water now collects and stands on the plaintiff's land to her damage. As a result of the standing water on the plaintiff's land, plaintiff's property is alleged to have been substantially diminished in value.

Defendant Decatur sanitary district filed a motion to dismiss count I of the complaint alleging three reasons for granting the motion. The first reason was that section 3-103 of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev.Stat.1985, ch. 85, par. 3-103) barred the plaintiff from any action against the Decatur sanitary district. The second basis for the motion was that the complaint lacked any allegation of notice as required by section 8-102 of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev.Stat.1985, ch. 85, par. 8-102). It alleged that since no notice was given that the civil action was barred. The third reason alleged in the motion to dismiss was that the law of Illinois prohibits the plaintiff from bringing a cause of action for interference with subsurface waters.

Defendant Bainbridge filed a motion for judgment on the pleadings. The motion for judgment on

the pleadings alleged that count II should be dismissed since no cause of action lies for interference with subsurface waters under Illinois law.

Defendant Wiegand filed a motion for judgment on the pleadings and to strike and dismiss. Three reasons were stated in the motion for dismissal of count III. The first reason was that an independent contractor owes no duty to third persons to judge the plans, specifications, or instructions which he is merely contracted to follow. The second reason cited for dismissal of count III was that the plaintiff has no remedy under Illinois law for a diversion of subsurface waters. The third reason cited was that the plaintiff cannot recover damages for the injuries alleged to have been sustained in count III, those being ***291** the costs of obtaining alternative water, the lack of availability of an alternate water supply, and the diminution of value to plaintiff's real estate.

Wiegand addressed count IV in its motion to dismiss and repeated the contention that a contractor cannot be sued where it follows the specifications given by the owner, and that the economic loss is not recoverable under a negligence theory. In addition, defendant Wiegand alleged it had no duty to the plaintiff to avoid diversion of the natural flow of water and that any cause of action, if it existed, would lie ****312 ***110** against the owner of the land upon which the cause of the diversion rests.

The court heard arguments on the motions and as to each motion, the court granted the relief prayed and dismissed the plaintiff's cause of action with prejudice against each defendant.

Plaintiff filed a timely notice of appeal. The present appeal addresses the propriety of the court's dismissal of all counts of plaintiff's complaint with prejudice.

[1] The resolution of this appeal first requires an interpretation of certain provisions of the Water Use Act of 1983 (Act). (Ill.Rev.Stat.1985, ch. 5, par. 1601 *et seq.*) No reported Illinois decisions have heretofore interpreted any of the provisions of this Act. Plaintiff concedes that prior to the effective date of the Act, no cause of action was available in Illinois for interference with subsurface water, because Illinois followed the "absolute ownership" doctrine, pursuant to which subsurface water was considered part of the land itself and belonged absolutely to the owner of the land. (See *Edwards v. Haeger* (1899), 180 Ill. 99, 54 N.E. 176; *Lee v. City of Pontiac* (1981), 99 Ill.App.3d 982, 55 Ill.Dec. 325, 426 N.E.2d 300.) Plaintiff contends that the Act significantly modified Illinois law by rejecting the "absolute ownership" doctrine and replacing it with a "reasonable use" doctrine which is based upon the riparian doctrine followed in Illinois with regard to surface water.

The provisions of the Act which support plaintiff's position are sections 3, 4, and 6. Section 3 provides in part:

> "The general purpose and intent of this Act is to establish a means of reviewing potential water conflicts before damage to any person is incurred and to establish a rule for mitigating water shortage conflicts by:
>
> (b) Establishing a 'reasonable use' rule for groundwater withdrawals." (Ill.Rev.Stat.1985, ch. 5, par. 1603(b).)

Section 4 provides in pertinent part:

> "As used in this Act, unless the context otherwise requires
>
> ***292** (b) 'Groundwater' means percolating water found below the surface of the earth.
>
> (f) 'Reasonable use' means the use of water to meet natural wants and a fair share for artificial wants. It does not include water used wastefully or maliciously." (Ill.Rev.Stat.1985, ch. 5, par. 1604(b), (f).)

Section 6 provides:

"The rule of 'reasonable use' shall apply to groundwater withdrawals in the State." Ill.Rev.Stat.1985, ch. 5, par. 1606.

We note that the definition of reasonable use, as contained in section 4(f) of the Act, incorporates the language used in *Evans v. Merriweather* (1842), 4 Ill. 492, wherein the doctrine of reasonable use as it applies to surface water was set forth.

In *Merriweather,* the Illinois Supreme Court stated the law regarding riparian water rights as follows:

"Each riparian proprietor is bound to make such a use of running water, as to do as little injury to those below him, as is consistent with a valuable benefit to himself. The use must be a reasonable one. Now the question fairly arises, is that a reasonable use of running water by the upper proprietor, by which the fluid itself is entirely consumed? To answer this question satisfactorily, it is proper to consider the wants of man in regard to the element of water. These wants are either natural or artificial. Natural are such as are absolutely necessary to be supplied, in order to his existence. Artificial, such only, as by supplying them, his comfort and prosperity are increased. To quench thirst, and for household purposes, water is absolutely indispensable. In civilized life, water for cattle is also necessary. These wants must be supplied, or both man and beast will perish.

The supply of man's artificial wants is not essential to his existence; it is not ****313 ***111** indispensable; he could live if water was not employed in irrigating lands, or in propelling his machinery. In countries differently situated from ours, with a hot and arid climate, water doubtless is absolutely indispensable to the cultivation of the soil, and in them, water for irrigation would be a natural want. Here it might increase the products of the soil, but it is by no means essential, and cannot therefore be considered a natural want of man. So of manufactures, they promote the prosperity and comfort of mankind, but cannot be considered***293** absolutely necessary to his existence; nor need the machinery which he employs be set in motion by steam.

From these premises would result this conclusion; that an individual owning a spring on his land, from which water flows in a current through his neighbor's land, would have the right to use the whole of it, if necessary to satisfy his natural wants. He may consume all the water for his domestic purposes, including water for his stock. If he desires to use it for irrigation or manufactures, and there be a lower proprietor to whom its use is essential to supply his natural wants, or for his stock, he must use the water so as to leave enough for such lower proprietor. Where the stream is small, and does not supply water more than sufficient to answer the natural wants of the different proprietors living on it, none of the proprietors can use the water for either irrigation or manufactures. So far then as natural wants are concerned, there is no difficulty in furnishing a rule by which riparian proprietors may use flowing water to supply such natural wants. Each proprietor in his turn may, if necessary, consume all the water for these purposes. But where the water is not wanted to supply natural wants, and there is not sufficient for each proprietor living on the stream, to carry on his manufacturing purposes, how shall the water be divided? We have seen that without a contract or grant, neither has a right to use all the water; all have a right to participate in its benefits. Where all have a right to participate in a common benefit, and none can have an exclusive enjoyment, no rule, from the very nature of the case, can be laid down, as to how much each may use without infringing upon the rights of others. In such cases, the question must be left to the judgment of the jury, whether the party complained of has used, under all the circumstances, more than his just proportion." 4 Ill. at 495-96.

By using the terms "natural wants" and "artificial wants" in the definition of reasonable use in the Act (Ill.Rev.Stat.1985, ch. 5, par. 1604(f)), the legislature has adopted the same standards for groundwater withdrawals as that which applies to surface water withdrawals pursuant to *Merriweather*. As at least two commentators on Illinois groundwater law have stated, the Act has brought Illinois under a unique, unified doctrine of common law which covers the development and use of both surface and groundwater resources, and this doctrine is based upon the riparian doctrine of reasonable use which is centered upon the opinion of the Illinois Supreme Court in *Merriweather*. ***294** See, *e.g.*, Fred L. Mann, Harold H. Ellis, & N.G.P. Krausz, *Water-Use Law in Illinois* (Univ. Ill. Agric. Experiment Station Bulletin 703, in cooperation with Economic Research Service, U.S. Dept. of Agric., 1964); Gary R. Clark, *Illinois Groundwater Law the Rule of "Reasonable Use"* (State of Illinois, Dept. of Trans., Div. of Water Resources, prepared for presentation to the Illinois Groundwater Association, semi-annual meeting, Ill. Dept. of Trans., 1985).

Defendants, the sanitary district and Bainbridge, contend that the Act does not change the law in Illinois regarding groundwater withdrawals. They base this argument upon the first clause of the following statement which is contained in section 3 of the Act:

> "This Act shall not be construed to regulate or restrict groundwater withdrawals and the requirements of Section 5 of this Act shall not apply to the region governed by the provisions of 'An Act in relation to the regulation and maintenance ****314 ***112** of the levels in Lake Michigan and to the Diversion and apportionment of water from the Lake Michigan watershed', approved June 18, 1929, as amended." Ill.Rev.Stat.1985, ch. 5, par. 1603.

We simply do not agree with defendants' interpretation of the foregoing provision. As defendant, the sanitary district, asserts in its appellate brief, statutes are to be construed, if possible, so that no word, clause, or sentence is rendered meaningless or superfluous. (*People v. Lutz* (1978), 73 Ill.2d 204, 212, 22 Ill.Dec. 695, 698, 383 N.E.2d 171, 174.) Defendants' interpretation of the foregoing provision would render sections 3(b) and 6 of the Act meaningless. (Ill.Rev.Stat.1985, ch. 5, pars. 1603(b), 1606.) These provisions clearly state that the rule of reasonableness shall apply to groundwater withdrawals, thereby supplanting the rule of absolute ownership of groundwater. Rather, we conclude that the foregoing provision, and specifically the first clause of that provision, relied upon by the defendants, applies only to the Lake Michigan watershed area, and is totally inapplicable to the instant case.

In light of our conclusion that the Act represents a significant change in groundwater law in Illinois, we now turn our attention to the issue of whether the court erred by dismissing all counts of plaintiff's complaint with prejudice. When considering a motion to dismiss, a court is obligated to accept as true all well-pleaded facts and all reasonable inferences which could be drawn from those facts. (*Horwath v. Parker* (1979), 72 Ill.App.3d 128, 134, 28 Ill.Dec. 90, 95, 390 N.E.2d 72, 77.) Pursuant to section 2-612(b) of the Code of Civil Procedure (Code) (Ill.Rev.Stat.1985,***295** ch. 110, par. 2-612(b)), "[n]o pleading is bad in substance which contains such information as reasonably informs the opposite party of the nature of the claim or defense which he or she is called upon to meet." Pursuant to section 2-603(c) of the Code (Ill.Rev.Stat.1985, ch. 110, par. 2-603(c)), "[p]leadings shall be liberally construed with a view to doing substantial justice between the parties." Furthermore, as this court stated in *Champaign National Bank v. Illinois Power Co.* (1984), 125 Ill.App.3d 424, 428-29, 80 Ill.Dec. 670, 673, 465 N.E.2d 1016, 1019, "[i]f the facts alleged and any reasonable inferences capable of being drawn from those facts demonstrate a possibility of recovery, the pleading is not subject to dismissal." Consequently, our focus on review is whether any of

the counts of plaintiff's complaint "demonstrate a possibility of recovery."

[2] Count I of plaintiff's first-amended complaint alleged that the Decatur sanitary district constructed a ditch adjacent to her property which caused her property to be completely dewatered, that this ditch caused a waste of subsurface water, that she could not obtain water for her domestic needs from her property, and that the actions of the sanitary district devalued her property. We are of the opinion that the foregoing facts alleged and the reasonable inferences capable of being drawn from those facts demonstrate a possibility of recovery pursuant to the provisions of the Act. Although substantial and difficult questions are raised concerning the Act as it applies to count I of plaintiff's complaint, these questions cannot be avoided by dismissing plaintiff's complaint. One of the questions which must be answered is whether the sanitary district's use of the subsurface water is for "natural wants" or "artificial wants," and whether this use constitutes waste. The question of whether the use of water for a sanitary sewer constitutes a "natural want" or an "artificial want" was not specifically addressed in *Merriweather*, or any other reported Illinois decision, and based upon the evidence in the record, we cannot conclude as a matter of law which category the use of water in the instant case falls into.

[3] Plaintiff also alleges in count I of her complaint that the actions of the sanitary district have contaminated her well with impurities. Pursuant to section 2-603(b) of the Code (Ill.Rev.Stat.1985, ch. 110, par. 2-603(b)), this allegation should have been contained in a separate count. Nevertheless, dismissal with prejudice was not the appropriate remedy under these circumstances, because this minor defect ****315 ***113** would have been easily remedied. See *Horwath v. Parker* (1979), 72 Ill.App.3d 128, 28 Ill.Dec. 90, 390 N.E.2d 72; *Champaign National Bank v. Illinois Power Co.* (1984), 125 Ill.App.3d 424, 80 Ill.Dec. 670, 465 N.E.2d 1016; Ill.Rev.Stat.1985,***296** ch. 110, par. 2-612(b).

[4] The portion of count I of plaintiff's complaint alleging that the actions of the sanitary district contaminated her well clearly states a cause of action. (*Van Brocklin v. Gudema* (1964), 50 Ill.App.2d 20, 199 N.E.2d 457.) The sanitary district presents no authority or argument to the contrary. Therefore, the trial court erred by dismissing this portion of defendant's complaint with prejudice, although we note that the two causes of action contained in count I of plaintiff's first-amended complaint should be split into two separate counts.

[5] We also agree with plaintiff's argument that the trial court's dismissal of count I of her complaint cannot properly be supported by reliance upon section 3-103(a) of the Local Governmental and Governmental Employees Tort Immunity Act (Ill.Rev.Stat.1985, ch. 85, par. 3-103(a)), which provides, in pertinent part:

> "A local public entity is not liable under this Article for an injury caused by the adoption of a plan or design of a construction of, or an improvement to public property where the plan or design has been approved in advance of the construction or improvement by the legislative body of such entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved. The local public entity is liable, however, if after the execution of such plan or design it appears from its use that it has created a condition that it is not reasonably safe."

Plaintiff relies upon *Starcevich v. City of Farmington* (1982), 110 Ill.App.3d 1074, 66 Ill.Dec. 811, 443 N.E.2d 737, in support of her argument that the foregoing provision does not apply to such damages as those claimed by her in the present case. In *Starcevich*, the plaintiff sought to recover damages from the city of Farmington, which had altered the natural flow of surface waters in such a way that his driveway was washed out on two occasions. The

city had assisted with the cost of his repairs on the first occasion but on the second occasion, refused to do so. He sought damages in the amount of $4,200 for the repair of his driveway. The city of Farmington raised the same immunity relied upon by the Decatur sanitary district. The appellate court ruled that it did not appear that there was a sufficient basis for raising such immunity, stating:

> "Although the defendant city alluded generally to statutory immunities in its motion to dismiss, it does not appear to us that a sufficient basis for raising such immunities exists. Specifically, we do not believe that the crux of plaintiff's complaint is ***297** defendant's failure to inspect property (Ill.Rev.Stat.1979, ch. 85, par. 2-105), or adoption of a design approved by a body exercising discretionary authority to give such approval (Ill.Rev.Stat.1979, ch. 85, par. 3-103). Nor do we find a factual basis to establish nonliability of any of the defendant city's employees (Ill.Rev.Stat.1979, ch. 85, par. 2-109) or that a public employee was serving in a position involving the determination of policy or exercise of discretion and as a result of such employee's act plaintiff suffered the injury complained of (Ill.Rev.Stat.1979, ch. 85, par. 2-201). On the face of the pleadings, we cannot therefore determine that the defendant city will necessarily prevail on the statutory defenses." *Starcevich*, 110 Ill.App.3d at 1080-81, 66 Ill.Dec. at 815, 443 N.E.2d at 741.

As plaintiff points out, the instant case was decided solely upon the pleadings which had been filed by plaintiff. No answer or affirmative matter has been filed or included in this record by the Decatur sanitary district. Furthermore, no affidavit or affirmation of fact is contained in the record which would give rise to any defense under section 3-103(a) of the Local Governmental and Governmental Employees****316 ***114** Tort Immunity Act. (Ill.Rev.Stat.1985, ch. 85, par. 3-103(a).) There is not even an allegation in the common-law record that the design or plan for the sewer project was approved in advance of the construction by a legislative body. The sanitary district does not even address the issue of governmental immunity in its brief. Thus, for the foregoing reasons, we conclude that the dismissal of count I of plaintiff's complaint was improper.

[6] We next turn our attention to the propriety of the dismissal of count II of plaintiff's first-amended complaint, which was directed at defendant Bainbridge. This count alleges that Bainbridge was employed to design the plans for the sewer project, that these plans called for the use of granular fill, that the use of granular fill in the plans and specifications was a negligent design, and that as a result of this negligent design, the undersurface water was permanently removed from plaintiff's land and that the value of her property was reduced. Plaintiff relies upon *W.H. Lyman Construction Co. v. Village of Gurnee* (1980), 84 Ill.App.3d 28, 38 Ill.Dec. 721, 403 N.E.2d 1325, in support of her argument that a plaintiff may sue a designer of a public improvement for negligent preparations of plans and specifications. Defendant Bainbridge does not dispute this argument in its brief. Rather, it relies solely upon an allegation made in its motion to dismiss that the use of granular fill is a common construction practice and was not negligent. This appears to this court to raise a question of fact which ***298** cannot be disposed of by a motion to dismiss. Certainly, the dismissal of count II of the complaint with prejudice for the reason argued by defendant Bainbridge was improper, because it cannot be determined as a matter of law that count II does not demonstrate a possibility of recovery.

Plaintiff raises no argument in her brief regarding the propriety of the dismissal of counts III and IV of her complaint, which were addressed against defendant Wiegand. Therefore, we do not address the propriety of the dismissal of these counts.

For the reasons stated herein, the portion of the order of the circuit court dismissing counts I and II of plaintiff's complaint with prejudice is hereby reversed and remanded, and the portion of the circuit

court's order dismissing counts III and IV of plaintiff's complaint with prejudice is hereby affirmed.

Affirmed in part; reversed in part and remanded.

GREEN, P.J., and KNECHT, J., concur.

Ill.App. 4 Dist.,1987.
Bridgman v. Sanitary Dist. of Decatur
164 Ill.App.3d 287, 517 N.E.2d 309, 115 Ill.Dec. 107

END OF DOCUMENT