

# **BMP Maintenance Model Ordinance**

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# **BMP Maintenance Agreement**

## **Making them Useable & Enforceable**

- Recorded on deed during land division
  - Provides best authority for enforcement
  - Notifies owner upon purchase (Title search)
  - Identifies BMP design, maintenance requirements, who's responsible, back-up plan, cost recovery, etc.
- Archiving BMP design and as-built data/maps
  - Register of Deeds scans all recorded documents
  - Permanently archived and available to the public

# Why a BMP maintenance ordinance?

- To ensure MS4 community can claim pollution credits
- BMPs that predate maintenance agreement requirements
- Avoid BMP failures/damages
- Handle complaints
- It's only a matter of time...



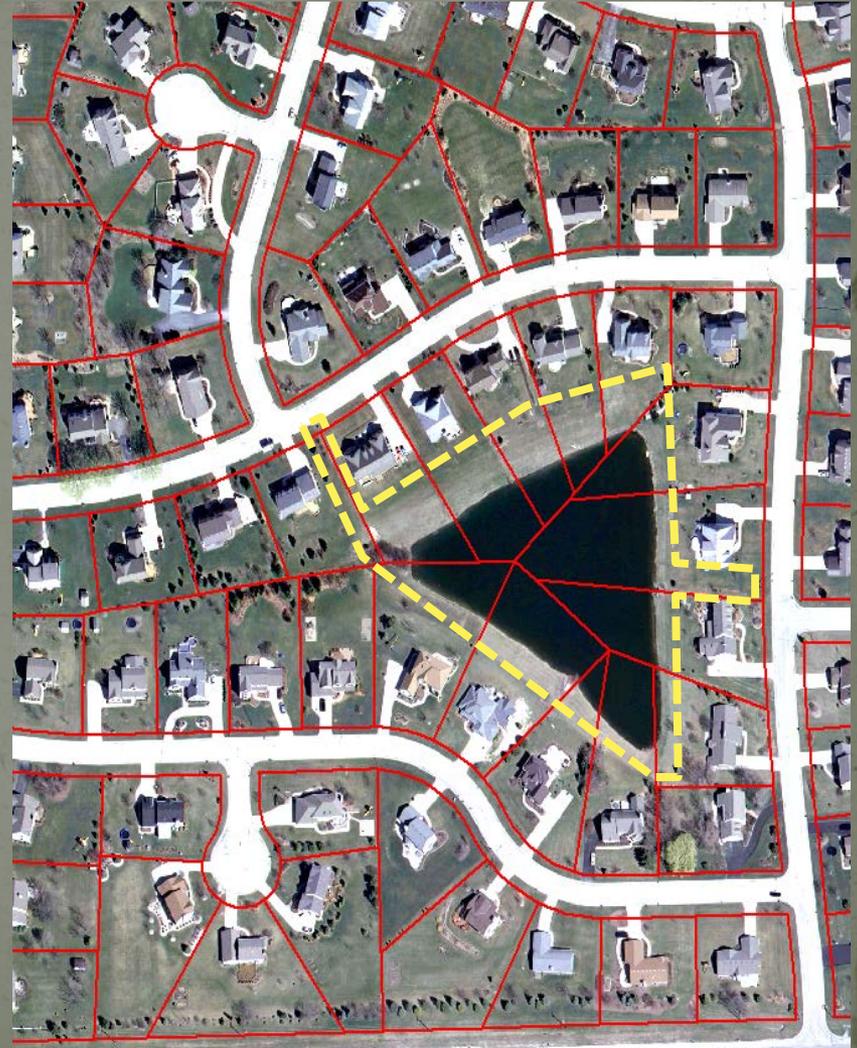
**Model Storm Water Ordinance Insert Language to Address  
Long-term Storm Water Management Practice Maintenance**  
*(Waukesha County Land Resources Division)*

**Table of Contents**

		<u>Page</u>
Section 1.	Authority for Ordinance .....	2
Section 2.	Findings .....	2
Section 3.	Purpose and Intent .....	2
Section 4.	General Administration .....	3
Section 5.	Applicability .....	3
Section 6.	Inspection and Reporting.....	4
Section 7.	Maintenance .....	5
Section 8.	Enforcement .....	5
Section 9.	Appeals .....	9
Section 10.	Definitions .....	9
Section 11.	Validity ...↓.....	10

# Example: **Missing deed language**

- SW pond with “drainage easement” on 14 lots
- Undefined maintenance plan or responsibilities
- Missing watershed map, design data, as-builts, etc.
- Many more lots drain to the SW pond



# Major Ordinance Additions:

- Expand scope of ordinance to include maintenance
- Require BMP inspections & maintenance
  - Collect missing data in the process
- Authorize community inspections & maintenance orders
- Authorize costs recovery by watershed if unspecified

# Ordinance Scope

- Section 2: Findings
  - Establishes the need for other ordinance provisions
  - “Lack of maintenance can lead to malfunction or failure of the practice, flooding, water pollution.....
- Section 3: Purpose & Intent
  - “Establish procedures for BMP inspections, maintenance orders, enforcement, cost recovery.....
- Both very important for legal challenges!

# Applicability

- Applies to all BMPs approved/permitted by the community, regardless of when, by who, etc.
  - Could be a SW permit, zoning permit, grading permit
  - If the community authorized BMP construction, then more authority exists to ensure its maintenance
- Several legal issues involved in older BMPs

# BMP Inspection

- How often? (Req'd every 1 or 2 years)
- By Who? “Qualified inspector” means L.A., P.H., P.E. or other person experienced in BMP design, installation or maintenance
  - Community may reject any report that does not meet standards for accuracy or professionalism
- Exceptions? “Temporary inspection waiver” is allowed if Administrator determines it's not necessary
  - May require Administrator visit and/or photos, etc.
  - May help address lack of access/easements
  - 2-year maximum waiver period

# Inspection Report

- Must follow community standards and include, at a minimum:
  - Location map
  - BMP description & list of features inspected
  - List of maintenance done during inspection
  - Photos of each feature inspected (before/after)
  - Condition statements
  - Maintenance recommendations
  - Signature and verification statement (true & accurate)

# Maintenance Required

- Recommended maintenance shall be completed in reasonable time & follow technical standards
- Owner is responsible for costs/preparing plans & obtaining applic. permits (may require a SW permit)
- 10 day prior notice to Administrator (land disturbing)
- Administrator may require professional oversight and verification of compliance with approved plans
- Maintenance report is required upon completion
  - May need photos, surveys, soil test, planting etc.

# Enforcement



- List of violations subject to enforcement
- Inspection order:
  - Administrator determines is needed to check compliance with maintenance requirements
  - If owner refuses, may “arrange for” inspection
- Maintenance order:
  - Administrator determines lack of maintenance may lead to failure or malfunction; and
  - May cause damages to public infrastructure, nuisance conditions, property damage/values, environmental degradation, or other adverse impact up/downstream
  - If owner refuses, may “arrange for” maintenance work

# Enforcement (cont.)

- Notice of violation/orders sent to owner and other “responsible party” with a 30 day response limit
- Enforcement actions:
  - Forfeitures (\$100-\$1000 per violation/day)
  - Injunction (court order) by govt. or affected person
  - Citation [s. 66.0113(3) Wis. Stats.]
  - “Special charge” owner for inspection & maintenance costs [s. 66.0627 Wis. Stats.]
    - May prorate to watershed properties

# Legal Issues Involved (old BMPs)

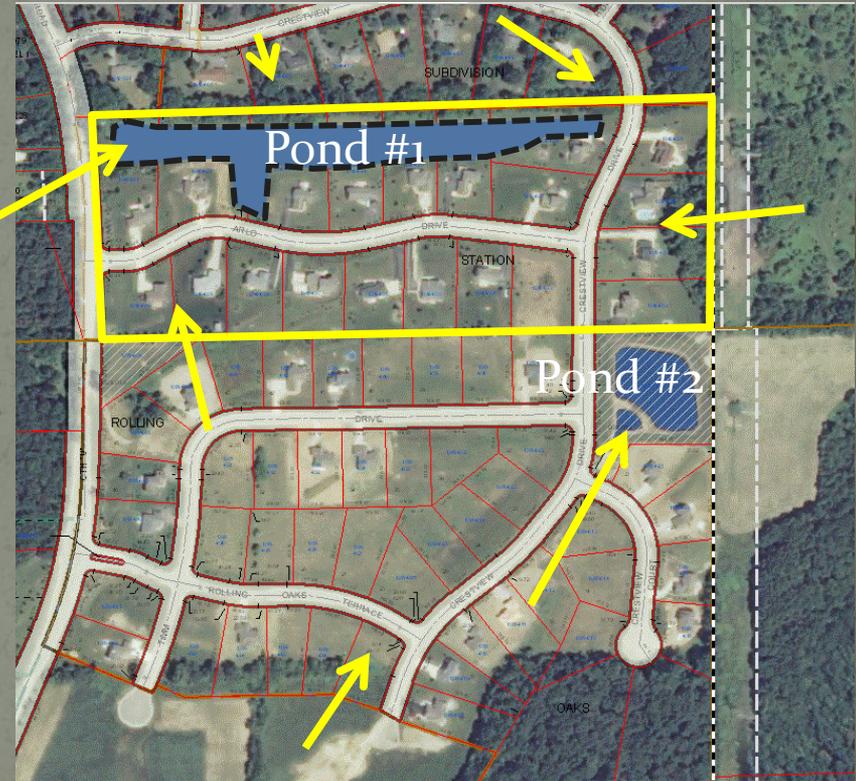
- Can't fix deed problems with an ordinance
  - Changing deed language requires approval by all affected property owners and their mortgage holders
  - Lack of access easements or easement definitions
    - Need landowner(s) permission, or inspection warrant
  - Conflicting or unclear deed language on BMP maintenance
    - Voluntary resolution/mediation; or court order
- Conclusion: make sure the deed language is accurate & complete before recording
  - "Certification of compliance" (new land divisions)
- Pick your battles carefully

# Legal Issues (cont.)

- Lack of BMP documentation & construction oversight
  - What was the original BMP design?
  - Was it built right? If not, why not? Who should pay?
- Lack of BMP maintenance standards
  - What maintenance is required? Says who?
- Conclusions:
  - Require recorded as-builts & maintenance plans
    - If maintenance responsibilities are adequately identified on deeds, these can help to enforcement efforts
  - Adopt min. maintenance standards for BMP types
    - Helps ensure fairness where nothing is recorded

# Example: Complicated Site

- Several phases/40 years
- 225 acre watershed
- 20 lots at the bottom must maintain Pond #1
  - Many other lands drain to it
  - Pond #2 upstream later
- Conclusion:
  - Ordinance may help spread out maintenance costs more fairly



# Conclusions/Recommendations

- SW ordinance scope must be expanded to allow enforcement of BMP maintenance
  - Authorize inspection & maintenance orders
  - Authorize costs recovery by watershed if unspecified
- Ordinance implementation:
  - Adopt maintenance standards for each BMP type
  - Prioritize enforcement based on adopted criteria
  - Assemble & read BMP documents carefully
  - Be consistent
- **Consult with your legal counsel!**

**The End**

