



INDEPENDENT RISK MANAGEMENT AND INSURANCE COUNSEL

February 17, 2009

Walter J. Packard, PhD  
President  
McHenry County College  
8900 US Highway 14  
Crystal Lake, IL 60012

**Re: McHenry County College Liability Issues From Broadcasting Tower**

Dear Dr. Packard:

Our firm has been asked to provide an opinion to the trustees of McHenry County College (MCC) regarding its exposure to loss or liability arising from the construction and operation of a broadcast tower that may be located on land currently owned by MCC, but which will be sold prior to the commencement of the construction.

We have received and studied a letter from your legal counsel, Sandra S. Kerrick, Esq., dated Tuesday, February 3<sup>rd</sup>, 2009 and spoken with her by telephone.

In her letter, she relates the facts surrounding the proposed sale of the parcel of land where the tower will be located and the financial arrangements relating to the sale. We are asked to give a general opinion about the exposures to loss or liability faced by MCC as a result of this transaction. Ms. Kerrick has also asked us to provide our thoughts on four specific exposures to loss or liability.

We begin with a few caveats. As you know, we have had lawyers on our staff for many years, but we are not a law firm engaged in the practice of law and we are not licensed to practice law in the state of Illinois. We are authorities on insurance and risk management and can offer insight as to whether a given type of loss or liability exposure would normally be covered by insurance. We defer to your legal counsel, as you should, on matters requiring legal interpretation.

A few other things are important to remember. First, anyone can sue anyone else for anything, regardless of whether the lawsuit is groundless, false, or fraudulent. Even if the suit is without merit, it will still need to be defended until there is a successful disposition. Second, whether insurance applies to a given cause of loss or exposure to liability is fact sensitive. With liability claims, the allegations contained in the underlying complaint for damages will help determine whether there is insurance coverage available.

**A General Discussion**

It appears to us that MCC has developed an excellent plan to minimize its exposure to liability associated with the proposed construction and operation of a broadcasting tower. MCC will not own the real estate

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or the tower structure itself, or hold any type of mortgage or security interest in the land or the structure. MCC will not own any part of the company which will own the tower, the real estate or the structure. The construction cannot begin until the real estate is conveyed to the buyer. Once the real estate has been conveyed, MCC will have no further legal interest in the land or what the buyer chooses to do with it. However, MCC will grant an easement to the new owner so that it may gain access to the property. This is necessary because there is no public roadway which will allow the purchaser ingress to, or egress from, the sale property. Given the foregoing, it seems to us that the exposure to liability to MCC is extremely remote.

We have reviewed MCC's property insurance, covering its real and personal property against risks of direct physical loss or damage. We have also reviewed MCC's commercial general liability and umbrella liability policies, along with its management liability (Educators Legal) policy. We do not find specific exclusions or limitations in those policies which affect that protection that would be afforded to MCC for activities engaged in by an adjacent land owner.

We will now address the four specific areas outlined in Ms. Kerrick's letter.

2). **Tower Collapse** If the tower collapses in such a manner that there is damage to MCC buildings and/or contents, MCC's property insurance would cover the loss. If it is determined that the collapse resulted from some fault on the part of the contractor, MCC's insurers may seek to recover the amounts paid to MCC from the party at fault. As to liability, it is difficult to imagine a scenario where the collapse of a tower situated on land adjoining MCC's campus would somehow render MCC liable. However, if such a collapse were to occur, and cause bodily injury to someone on MCC's property, and the injured party claims that somehow MCC's negligence caused the injury, MCC's CGL and Umbrella policies would provide defense and indemnity if MCC was found to be liable, subject, of course, to normal policy terms and limitations.

This would be true for falling ice, windblown debris, and other hazards created by the proximity of the tower to the MCC campus.

3). **Health/Electrical Interference** This is a radio tower, not part of a power grid for distribution of electrical power, so we would not expect electromagnetic fields to be a factor. Since MCC will not own the land, or the tower, or generate any radio waves, we find it difficult to foresee how MCC could be liable to someone who alleges they sustained injury or damage resulting from the existence of radio waves in the atmosphere. Again, if someone were to make such a claim, MCC has a CGL policy and an Umbrella liability policy to protect it. If the claim involved an MCC employee, it would be submitted to the workers' compensation insurer. A word of caution here is that both the CGL and Umbrella policies contain pollution exclusions, which might be raised by the insurer.

4). **Traffic Liability** The operation of vehicles on campus, on the permanent easement, or elsewhere, is no different than if the easement did not exist. If injury or damage is caused by operation of a vehicle, the party at fault is responsible. If someone alleges that somehow MCC is responsible, MCC's liability insurance will respond. MCC could ask to be named as an additional insured on the auto policy of the landowner with respect to the permanent easement, but this is not absolutely necessary and creates an annual administrative burden in the collection of certificates.

5). **Construction Accident** The temporary easement granted to the landowner does create an increase in exposure because there will be activity taking place on MCC's land that did not exist before. Of course, MCC has its own insurance (again, CGL and Umbrella Liability), but this is a case where we want the landowner or his contractor to produce insurance that will protect MCC if MCC gets sued because of




something that happens as a result of the landowner or contractor's use of the easement. MCC should ask for the following: a). Proof of workers compensation, automobile, general liability and umbrella liability insurance; b). To be named as an additional insured on the general liability, automobile and umbrella policies, for any liability arising from the use of the easement, or ingress/egress to the site during the course of the construction; c). The insurance should be in force before the contractor starts the work, and should remain in force until the owner has signed off on the completed work and all workers, tools and equipment are off of the site; d). The insurance should be placed with companies authorized to do business in the state of Illinois and having a current A.M. Best rating of not less than A-. MCC should ask for Certificates of Insurance confirming the foregoing.

We think you should ask for a \$5,000,000 umbrella policy above primary insurance. As always, the questions of how much insurance to carry cannot be answered with any certainty and contractors frequently assert that they cannot afford anything more than primary limits, (i.e. \$1,000,000). However, this sounds like a pretty substantial project, and usually the additional insurance can be built into the project cost. All of the foregoing matters should probably be addressed at the time the temporary easement is to be negotiated. This is because, except for the granting of the temporary easement, we are not certain how MCC could compel any adjoining landowner to buy certain types and amounts of insurance.

Please feel free to call if you have any questions, or need any further elaboration.

Cordially,



Daniel C. Free, CPCU, ARM  
President and General Counsel