

What Townships need to know about Drainage Law

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Township supervisors often find themselves both downstream and upstream of disputes over the management of surface waters. Navigating the common laws cases, statutes, and regulations that balance the interests of private property owners with the interest of the public respecting drainage can be daunting.

As the road authority, supervisors are responsible for ensuring surface water is managed when roads are constructed or improved. Proper water management is necessary to accommodate frequent flooding; prevent erosion and sedimentation issues; address the concentration of flow on adjacent properties; prevent damages to roads, bridges, and other infrastructure; and to address non-point source pollution washed off from impervious surfaces. Private drainage problems are sometimes brought to the township board with the expectation that the township will bear, in part, the cost and expense of correcting a private drainage problem among neighbors.

Natural and man-made obstruction of the natural watercourse, intentional or negligent diversion of the natural watercourse, excess surface water run-off from impervious or covered areas, collapse of existing drainage systems, excessive rainfall, and development of land without proper water management planning can all lead to drainage problems faced by township boards.

In this article, we address property rights associated with drainage, the statutory obligations of road authorities when accommodating water with road ditches, and conclude with a discussion on ways environmental regulations impact township officials managing the treatment of storm-water runoff.

COMMON LAW: PROPERTY RIGHTS TO REASONABLE USE OF LAND

Common law is the basis of our legal system; it applies equally to all owners of property unless it is specifically modified by statute. Common law is created when disputes that are unable to be resolved mutually are brought to the courts through initiation of a lawsuit resolved by the court's ruling.

The first case on record in Minnesota addressing a dispute over drainage was decided by the State Supreme Court in 1872. The dispute arose over the City of Saint Paul's discharge of a large quantity of storm water across plaintiff's property, in amounts the plaintiff alleged exceeded the capacity of the existing natural watercourse and caused a nuisance by eroding the banks of channel. The Supreme Court found in favor of the plaintiff, but the standard it

used to conclude that the city's stormwater management actions constituted a nuisance is not immediately clear.

Over time, more disputes respecting water were brought to Minnesota's courts for resolution. These court decisions established precedents in drainage disputes and from these precedents, a set of rules or principles were developed that apply to water and property rights. The cases separate rights that applied to "natural watercourses" from rights that applied to the management of "surface water;" thus, we must first explain how courts characterize the two.

Natural Watercourses: "Natural watercourses" and drainways for "surface water" differ in their physical characteristics. In order to constitute a "natural watercourse," "the flow ordinarily must have some substantial permanency and continuity and must be a part of a well-defined stream or body of water." To decipher the difference, the courts look at the physical characteristics of the flow in terms of volume, topography, or continuity.

Surface Waters: "Surface waters," on the other hand, consist of waters from "rains, springs, or melting snow which lie or flow on the surface of the earth, but do not form a part of a well-defined body of water or natural watercourse." These waters have a tendency to follow the natural depressions and contour of the land. While they might flow in a worn, small natural channel, they do not flow in the well-defined channels that rise to the description of natural watercourses above.

The distinction is relevant because the common law rule for resolving disputes over obstructing, enhancing, or diverting natural watercourses differs slightly from the rule for surface waters. When it comes to resolving disputes over natural watercourses, some courts cite the Latin phrase *aqua currit et curere debet*, which means, "water flows naturally and should be permitted thus to flow." Obstructing a natural watercourse, for example, violates the property rights of riparian landowners—owners of property adjacent to the natural watercourse. Surface water, on the other hand, does not impose riparian rights on to an abutting property owner; therefore, the rule addressing the manipulation of surface water requires a much more in-depth analysis into the facts of that particular situation.

Initially, many state courts, including Minnesota, treated surface waters as a "common enemy" which each owner may get rid of as best as he or she can. Over time, that standard evolved to what is commonly referred to as "the rule of reasonable use."

The Rule of Reasonable Use: Applying the "reasonable use rule" requires balancing competing property rights. In simple terms, it means that a landowner may exercise rights on her land as she pleases, provided she does not interfere with the rights of others. The courts describe the rule as follows:

[I]n effecting a reasonable use of his land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if:

- (a) There is a reasonable necessity for such drainage;
- (b) If reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
- (c) If the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm to the land receiving the burden; and
- (d) If, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonably carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.

If damage is caused to others from the obstruction, enhancement, or diversion of surface waters, the person making the improvements will only be liable for such damages if the court finds that in planning and executing the diversion, the acting party made "unreasonable" use of its property. Drainage that is found by the courts under these factors to be "reasonable," will not carry with it liability for the damages downstream.

Surface water runoff is a naturally occurring and generally unavoidable event: water flows downhill. Owners of higher elevated property, whether that be a private farm field or a roadway, should consider how their grading and discharge of surface waters may potentially impact the lower property. Lower property landowners, including road authorities managing a public roadway, must recognize the natural rules of reasonable drainage while considering the impact of restricting runoff from a higher property. A reasonable and cooperative approach to resolving drainage disputes may require some compromise, but will save each party time and money. When disputes cannot be resolved between affected properties, then the injured party must seek resolution through initiation of legal action and the court system.

What Townships need to

TOWNSHIP ROADS & DRAINAGE

When a new road is constructed, reconstructed, improved, relocated, or reconstructed, the impact of construction on surface waters must be an important part of the road authority's design considerations. As the road authority, the township is responsible for roadside ditching to protect township roads from flooding and erosion, and to also accommodate reasonable improvements to the flow of surface waters toward the roadway. Courts will analyze the management of surface water between private property owners and road authorities under the same reasonable use rule factors described above. Because "reasonableness" is measured on a case-by-case basis, professional assistance from an engineer with training in hydrology should be sought before undertaking a project that will impact the accommodation of drainage. Improper handling of changes in the right-of-way that impact drainage could land the township in litigation by affected property owners.

As explained above, one of the many rights that attach to property is the right to remove excess water from your property, within reason, and the right to prevent an unreasonable amount of water from draining onto your property. In some instances, the township roadway will be located downstream of a natural watercourse or artificial improvements to drainage. In such instances, the township must ensure it accommodates that level of drainage which is natural, plus some quantity of reasonable improvement upstream. In some instances, the township may find its roadway is enhancing or diverting drainage upstream. In such instances, the township must ensure that any enhancement or diversion of the waters downstream is reasonable.

If the road authority obstructs, diverts, or enhances drainage in an unreasonable way, compensation from the township to the private landowner may be required. It is important to understand the extent of invasions of property rights by drainage which constitutes a taking, versus an invasion of property rights by drainage which does not constitute a taking.

Bridges & Culverts: Historically, towns carried the responsibility to pay for culverts in approaches unless the town electors voted at an annual meeting to place the responsibility on the owner. The law was amended in 1998 to place the primary responsibility for paying for culverts on the abutting property owners. When a town board gives an owner permission to construct an approach, the owner is responsible for paying for the culvert if one is needed in the approach. If

the town board chooses, it can adopt a policy by resolution to make the town responsible for part or all of the cost of culverts needed for approaches in town roads. If the town is building an approach because it is building a new road or moving a road as is required under Minn. Stat. § 160.18, subd. 2, it should continue to pay for the culvert if one is needed – even if the board has not adopted a policy of accepting responsibility for culverts.

“Takings Claims” for Unreasonable Use: Road authorities must place openings in roadways to permit surface water to escape in its natural course from the higher to the lower lands. The road authority must make proper and adequate provisions for passage of waters that can reasonably be anticipated to approach the roadway based on past history and all facts and circumstances reasonably available to the road authority. An injunction may be granted to restrain township officials from improving a roadway, or from eliminating, altering or installing new culverts that divert water from its course of natural drainage and causes it to flow upon land in an unreasonable manner. If a road does not reasonably accommodate the area's natural flows, the township could be responsible to pay a monetary judgment for property that is damaged, typically in a case that is rooted in a claim for “inverse condemnation.”



Photo courtesy of Minnesota Public Drainage Manual

The road authority is not liable for unexpected flooding if the road's outlet is reasonably sufficient for the water from such storm events as ought to have been anticipated. In an early case before the Minnesota Supreme Court, the Court held that as long as the road authority provided a suitable outlet for flood waters that it ought to have anticipated, the road authority could not be held liable for damages caused by water retained on properties adjacent to the roadway. However, if the road crossing was not sufficient to accommodate storm events that ought to be anticipated in that area, then the road authority

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could be held liable for overflow damages that the road contributed to, even if unprecedented rains for that area occurred. By failing to provide a suitable outlet for anticipated rainfall, the Court ruled, the road authority's negligence contributed to the overflow and resulting damage.

Statutory Road Ditch Authority: As the road authority, town boards are authorized to repair, clean out, deepen, widen, and improve town road ditches for the purpose of draining public roads and preventing water from accumulating in the road ditch. Whether such work is necessary is determined by the town board; however, the board must ensure there is an adequate outlet before improving or enhancing road ditches.

Obstructions to Road Ditches: It is unlawful to obstruct any ditch draining any highway or drain any noisome materials into any ditch and to damage or tamper with any drains on or along any highway. This is often a common situation that will lead a resident to request assistance from the Town Board. For example,

when a neighbor obstructs the road ditch in a manner that impedes another neighbor's drainage, it is reasonable for the harmed neighbor to ask the Town Board to intervene.

Drainage in Railroad Rights-of-Way: When a drainage ditch constructed by the town board to drain a road crosses the right-of-way of any railroad, the town board may demand the railroad company allow the ditch under and across the railroad's right-of-way and divide the cost proportionately between the road authority and the railroad company on the basis of benefits that accrue to each.

Railroads have the same obligation as road authorities when it comes to accommodating natural flow and reasonable drainage improvements across the railroad bed. Under the Federal Railroad Safety Act, the Secretary of Transportation was ordered to prescribe regulations for railroad safety. Those regulations require "each drainage or other way carrying facility under or immediately adjacent to the roadbed shall be

maintained and kept free from obstruction, to accommodate expected water flow for the area concerned."

TOWNSHIPS & PUBLIC DRAINAGE SYSTEMS

The first state drainage act was passed in 1858, the same year that Minnesota became a state. The primary purposes of the act and subsequent state drainage law were to enable joint, private drainage projects across private ownership and governmental boundaries to make land more productive for



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agriculture, to enable and protect roadways, to protect public health from stagnant waters, and to promote commerce. Over the years, Minnesota drainage law has retained these purposes, while adding provisions with regard to protection of public waters and, more recently, wetlands, as well as consideration criteria for environmental and natural resource protection. Minnesota drainage law (sometimes referred to as the "Drainage code") is currently contained in Minnesota Statutes, chapter 103E.

State drainage law initially authorized townships to serve as public drainage authorities; however, current drainage authorities include county, joint county, or watershed district boards. There are very few "town" ditches remaining in Minnesota. For the few that do exist, the township is still the drainage authority for maintenance of the ditch and may assess benefited landowners to pay for the maintenance. However, improvements to town ditches must be petitioned to the county, joint county or watershed district drainage authority.

What Townships need to know about Drainage Law

Townships may be assessed benefits for drainage benefits provided to the roadway. If a town is assessed for benefits to a town road in a drainage project proceeding and the town road is later vacated by the board under Minn. Stat. § 164.07, the town board may petition the drainage authority to cancel the assessment.

Bridges & Culverts across Public Drainage Systems: A public bridge or culvert may not be constructed or maintained across or in a public drainage system with less hydraulic capacity than specified in the detailed survey report. If the detailed survey report does not specify the hydraulic capacity, a public bridge or culvert in or across a public drainage system may not be constructed without the approval of the hydraulic capacity required from the Director of the Division of the Division of Ecological and Water Resources of the Department of Natural Resources.

Bridges and culverts on public roads required by the construction or improvement of a drainage project or system must be constructed and maintained by the road authority responsible for keeping the road in repair. If the road authority does not complete construction within the required time, the drainage authority may order the construction to be completed and will deduct the cost of construction from any damages awarded to the road authority arising from the project, or assess the cost as a benefit. When a drainage improvement or project proceeding is taking place, the viewers award damages for the cost of construction and maintenance of the bridges provided for in the engineer's report, less the value of the wreckage from the bridges to be replaced.

Road authorities are obligated to take care of surface waters when constructing and improving public highways; however, the disposal must be adapted to existing public drainage systems so as to permit those drainage systems to function substantially as established. Once a public drainage system is established, the owners of the land who have been assessed for benefits or have recovered damages for its construction have a vested property right to have the ditch maintained in the same condition as it was when originally established. This vested property right cannot be divested without due process of law. Towns, in improving and maintaining public highways, do not have the authority to substantially change or interfere with the operation of duly established drainage systems.

PRIVATE DRAINAGE IN TOWN ROAD RIGHT-OF-WAY

Road authorities may not prohibit natural drainage or reasonable drainage improvements from entering the road right-of-way. Enforcement of such a rule would run counter to the

reasonable use principles that prohibit unreasonable obstructions to the natural flow of surface waters and even those surface water drainage improvements upstream that are reasonable. Thus, a town board must exercise caution in how it handles requests from landowners to drain surface waters into and across road ditches.

Connecting Private Drains to Town Road Ditches: When the course of natural drainage of any land runs to a road, the adjacent owner has a right to enter the right-of-way in order to connect a drain or ditch to the town road ditch as long as the highway is left in as good condition in every way as it was before the connection was made. The road authority may prescribe and enforce reasonable rules and regulations with reference to the connections by implementing a permitting system for such drainage connections, obligating the adjacent owner to obtain a permit before connecting a drain or ditch to the town road ditch. The permit may set forth specifications for the work and the town board may establish reasonable rules and regulations governing connections.

An owner may seek a permit from the town board to install a drain tile along or across the road right-of-way. The town board may set specifications, adopt reasonable rules, and may require a bond before issuing a permit. Certain restrictions are placed on what may be permitted. For example, the permits must ensure that the length of the tile installation is restricted to the minimum necessary to achieve the desired agricultural benefits. A permit must not allow open trenches to be left on the right-of-way after installation of the drainage tile is complete. Once installed, the town board is not responsible for damage to the drain tile.

In some instances, the town road blocks a landowner's access to a suitable outlet for drain tile improvements. If a person desires during construction or reconstruction of a highway to install a tile drain for agricultural benefits in a natural drainage line in lands adjacent to any highway, and if a satisfactory outlet cannot be secured on the upper side of the right-of-way and the tile line must be projected across the right-of-way to a suitable outlet, the expense of both material and labor used in installing the tile drain across the roadbed shall be paid from funds available for the roads affected provided the road authority is notified of the necessity of the tile drain in advance of the construction of the roadbed so that the drain may be placed and the roadbed constructed in the same operation.

It is a misdemeanor offense for a person to install drain tile along or across a road without a permit, to obstruct a town road, or to drain any noisome material into any ditch.

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Drainage Easement Agreements: The uncertainty regarding drainage liability can be overcome through execution of a drainage easement agreement between parties with an interest in property. A drainage easement is permanent permission given by one property owner burdened by water to the owner of property imposing the drainage burden. The easement is both a contract and a creation of a property right. The contract defines rights and obligations of the parties, limitations or restrictions on use, and enforcement remedies. Property interests are created by the terms of the contract which may grant reciprocal easements and rights of entry to ensure the parties maintain the ability to use and repair the drainage improvements over time. Typically, these rights attach to the property and are binding on future owners and parties.

Townships, like all road authorities, are statutorily authorized to acquire, voluntarily or through condemnation, easements needed for drainage in order to meet its obligations to take care of surface waters in a manner that is necessary for the construction, maintenance, safety, or convenience of public travel.

Considerations when Vacating Town Roads:

When a township is petitioned to vacate a town road, the board must determine whether the road ditches are essential for surface drainage of the adjacent lands, or for drainage of other public highways, in the area. If the board finds that preservation of such drainage facilities is for the general health and welfare of the public, then the board may cause the road to be vacated with a provision that the town shall retain the right of access for the purpose of maintaining such drainage facilities. An owner of land adjacent to the vacated portion of the road shall not interfere with the functioning of such drainage facilities.

ENVIRONMENTAL CONSIDERATIONS: ROADWAY RUNOFF

Under the Clean Water Act, some township road ditches are categorized as Municipal Separate Stormwater Systems (MS4) and the township is considered a MS4 entity based on its ownership or operation of the system collecting and conveying stormwater. The purpose of the MS4 program under the Clean Water Act is to maintain and benefit water quality in creeks, streams, and waterways by reducing pollution in the stormwater runoff.

A township will be considered a MS4 and be subject to stormwater regulation under the Clean Water Act and Minnesota Rule 7090 if:

- (1) Its stormwater system is located fully or partially within an urbanized area as determined by the last Decennial Census and owned or operated by a publicly owned entity that has the potential resident capacity, bed count occupancy, or average daily user population of 1,000 or more.
- (2) The township itself is located fully or partially within an urbanized area as determined by the latest Decennial

Census and owns or operates an MS4.

- (3) The township has a population of 10,000 or more.
- (4) The MS4 is owned or operated by a township with a population of at least 5,000 and discharges or has the potential to discharge stormwater to one of the following:
 - (a) A water identified as an outstanding resource value water as identified in Minn. R. 7050.0180, subp. 3 & 6.
 - (b) A water identified as a trout lake or trout stream as identified in Minn. R. 6264.0050, subps. 2 & 4.
 - (c) A water listed as impaired under section 303(d) of the Clean Water Act, 33 U.S.C. § 1313.

MS4s are required to develop and implement a stormwater pollution prevention program (SWPPP) to reduce the discharge of pollutants from their storm sewer system to the maximum extent practicable. The SWPPP must cover six minimum control measures. The MS4 must identify best management practices (BMPs) and measurable goals associated with each minimum control measure. An annual report on the implementation of the SWPPP must be submitted each year.

Conclusion:

Drainage and water management involves a complex system of law and regulation. As road authorities, Town Board's must navigate multiple requirements and landowner concerns. In all cases, Town Board's should consider and balance its obligations to provide for the health, safety and welfare of its community and the protection and maintenance of its infrastructure.



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