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ROAD DITCHES AND DRAINAGE

One of the most controversial issues town boards consider is the drainage of water to, from, across, and along its roads. When no one wants the water, the town board usually finds itself in the middle of a dispute with the owners on either side of the road.

The following is a brief overview of surface water drainage and related public and private projects. This paper will not discuss county drainage ditches, the few township drainage ditches in the state, or natural watercourses.

I. SURFACE WATERS

In most cases, towns build road ditches to accommodate the flow of surface waters. The courts have defined surface waters as rains, springs, or melting snow that lies or flows on the surface but does not form part of a well-defined body of water or natural watercourse (e.g., a stream). Because natural watercourses give rise to public and private rights, the law treats such waters differently than those classified as surface water.

Surface water is considered a common enemy that may, within reason, be used or expelled by an owner. In some cases, an owner may alter the natural flow of surface waters to dispel the water. Whether an owner acted appropriately concerning surface water is measured by the "reasonable use" doctrine. The doctrine essentially involves determining whether the change was reasonable under the facts of the particular situation. If harm results to others from the use of surface waters, the owner incurs liability only if the court finds that the change was unreasonable.[1] Some of the factors that courts consider when determining liability under the reasonable use doctrine include:

1. Are the landowner's changes to the water flow reasonably necessary for drainage;
2. Did the landowner take care to avoid unnecessary injury;
3. Did the utility to the drained land outweigh the harm to the burdened land; and
4. Did the landowner accomplish the drainage by improving a natural drainage system or by adopting an artificial drainage system?

[1] *Enderson v. Kelehan*, 32 N.W.2d 286 (Minn. 1948).

Challengers usually bring surface claims based on surface water use as nuisance suits, but other claims such as trespass or takings claims have become more common.

II. PUBLIC PROJECTS

As the road authority, town boards are authorized to repair, clean out, deepen, widen, and improve town road ditches.[2] The board determines when such work is necessary. However, before the town does any ditch work, the board must ensure that the work to be performed includes adequate outlets for the surface water expected to encounter the road. Adequate ditching, culverts, field and driveway approaches, among other structures, may be needed to accommodate the road project.

When a town constructs a new road or relocates or reconstructs an existing road, **it must construct** a suitable approach to the adjacent parcels within the right-of-way, when the approach is reasonably necessary and practicable, to provide abutting owners a reasonable means of access to their property.[3] In other words, the town's road project cannot interfere with the adjacent landowner's accesses to their property. The town generally does not need to construct approaches where there was not one before the road project, but the town will need to replace or modify existing approached. The town will need to pay the costs of replacing culverts in the approaches, if the existing culvert cannot be reused or is inadequeate to accommodate the expected surface water drainage.

If a ditch that the board constructs to drain a road runs across a railroad right-of-way, the statutes provide a division of costs with the railroad.[4]

III. PRIVATE PROJECTS

There are several types of projects that a private party may engage in that affects the town road and the surface water drainage. Drainage laws impose certain conditions upon the landowner before they may engage in those activities.

Connecting Drain Tile or Ditch: When the course of natural drainage of any land runs to a road, the adjacent owner has a right to connect a drain or ditch to the town road ditch.[5] Before the landowner may make any connections, the owner must receive a written permit for the connection from the town board. The permit may set forth specifications for the work, and the town board may

[2] Minn. Stat. §§ 160.201, subd. 1; *and* 164.36 (8).
[3] Minn. Stat. § 160.18, subd. 2.
[4] Minn. Stat. § 160.19.
[5] Minn. Stat. § 160.20, subd. 1.

establish reasonable rules and regulations governing connections. The owner must leave the road in as good of condition as before it made the connection.

Drain Tile Across the Road: An owner may seek a permit from the town board to install a drain tile along or across the road right-of-way.[6] The town board may set specifications, adopt reasonable rules, and require a bond before issuing a permit, including restrictions on what may be permitted.[7] Once installed, the town board is not responsible for damage to the drain tile.

Field Approaches: With permission of the town board, an owner may install additional approaches as needed to facilitate the efficient use of the property for a particular lawful purpose.[8] Such approaches are subject to reasonable regulation by and permit from the town board as is necessary to prevent interference with the construction, maintenance, and safe use of the road. If a town road divides someone's land so that they need additional approaches, it is appropriate to consider these as additional approaches that are the obligation of the owner to build with permission from the town board.

It is a misdemeanor offense for a person to: install drain tile along or across a road without a permit;[9] obstruct a town road or drain any noisome material into any ditch;[10] or litter.[11]

IV. Approach Culverts

Landowners are primarily responsible for the cost and installation of new and replacement approach culverts on land adjacent to the right of way.[12] Landowners are entitled to at least one approach culvert to their property, but landowners must receive a permit from the town board to install it. The town board may set reasonable regulations concerning the location, size, materials, and manner of installation of the culvert.

However, the township is responsible for the costs and installation of an approach culvert if the town's actions required replacement or relocation of the culvert. If the town board chooses, it can adopt a policy by resolution to make the town responsible for part or all of the culverts' cost needed for approaches within town roads.[13]

[6] Minn. Stat. § 160.20, subd. 4.
[7] Minn. Stat. § 160.20, subd. 3 & 4.
[8] Minn. Stat. § 160.18, subd. 3.
[9] Minn. Stat. § 160.20, subd. 4(b).
[10] Minn. Stat. § 160.2715(a)(7).
[11] Minn. Stat. § 609.68.
[12] Minn. Stat. § 160.18, subd. 1.
[13] Minn. Stat. § 160.18, subd. 2.

V. Potential Liability

Before doing any ditch work, the town board must consider its obligations and potential liabilities. In almost all cases, whether the town is liable to a damaged owner will be measured by the reasonable use doctrine. Because the law measures reasonableness on a case-by-case basis, boards must seek the necessary professional assistance before undertaking a project. Drainage is such a dynamic system that assistance is necessary to consider all the variables and impacts resulting from a project. If someone challenges a project, the board will rely on the engineer's advice to demonstrate its reasonableness.

The need to seek engineering advice also applies when permitting owners to undertake a project that affects drainage along or across a road. If not handled properly, a town could find itself in a suit over a private project it permitted.

Another source of potential liability is the failure to obtain or follow permits from regulatory agencies. The circumstances under which the town board must obtain a permit for a project are varied. Unfortunately, there is no simple way of determining when those circumstances arise or from whom the town must obtain the permits. As such, town boards should always assume permits are needed. It is much easier and cheaper to make a few phone calls than defend against a civil suit or criminal complaint. Town boards should work with the local soil and water conservation district offices to identify permit needs.