



From: Melissa Ashburn, MTAS Legal Consultant
Re: Municipal Liability for damages caused by failing drainage systems
Date: May 2022

From the city:

Does MTAS have a list of factors that should inform municipal decisions regarding whether they reimburse homeowners for property damage caused by claimed drainage problems?"

Response:

We do not have such a list at MTAS, but we advise that cities be aware of their very limited liability for drainage problems occurring on private property.

Legally there are only 2 questions that drive the decision:

1. Is the drainage failure located on public property?
 - If answer is "yes" has there been constructive notice of the problem?
2. Is the drainage failure located in a drainage easement held by the city?
 - If the answer is "yes" did the city install the infrastructure in the easement that is failing?

If the answer to both of these questions is "no" then the discussion should end and the decision is not to pay for damages.

This issue comes up frequently for city water and sewer utilities and damage caused by line failures occurring on private property. City leaders understandably want to reimburse impacted property owners. However, if a court would not find the city liable for negligence and the insurer will not cover such damages, the city may not do so at its option without violating the public purpose doctrine and potentially negating some protection afforded by the Governmental Tort Liability Act.

Drainage law in Tennessee is governed by the natural flow rule, which provides that water has a natural easement along its natural paths, and the upper and lower landowners must accept water that naturally flows onto the property in question. [Dixon v. Nashville, 301 S.W.2d 178 (1976); Miller v. City of Brentwood, 548 S.W.2d 878 (1977); Butts v. City of South Fulton, 565 S.W.2d 879 (Tenn. App. 1978); Yates v. Metropolitan Government Nashville & Davidson County, 451 S.W.2d 437 (1969).] The rule is that generally a landowner cannot impede the natural flow of water or increase the natural volume or velocity of water.

A city has no responsibility for drainage problems among private landowners unless the city has itself violated the natural flow rule. Likewise, in the absence of such a violation by the city, the city generally has no obligation to maintain the integrity of the drain, and no right to go onto the properties in question.



Municipal stormwater systems (MS4's) provide some authority to enter onto private property and fix failing drainage infrastructure, but cities should not undertake such work in my opinion without first obtaining easements for those areas. I expect the city's insurer would want the same. This is language expanding on the definition of storm water facilities, which may include ditches on private property if an easement exists:

- (7) "Storm water" means storm water runoff, snow melt runoff, surface runoff, street wash waters related to street cleaning or maintenance, infiltration (other than infiltration contaminated by seepage from sanitary sewers or by other discharges) and drainage;
- (8) "Storm water facilities" means the drainage structures, conduits, combined sewers, sewers, and all device appurtenances by means of which storm water is collected, transported, pumped, treated or disposed of

Tenn. Code Ann. § 68-221-1102 (West)

The governing body of any municipality may authorize the construction, extension, enlargement, or acquisition of necessary storm water facilities or flood control improvements within its corporate boundaries. The improvements may include, but are not limited to, the extension, enlargement, construction, or acquisition of storm water facilities or flood control improvements; the widening, straightening, or relocating of streams, surface waters, or water courses; and the acquisition, extension, enlargement, or construction of any works necessary to regulate the quantity or quality of water for the protection of streams, water courses, surface waters, life, and property; provided, that the municipality obtains all applicable permits and complies with all applicable state and federal laws.

Tenn. Code Ann. § 68-221-1103 (West)

I've attached a more recent court opinion on the subject for further guidance on municipal liability for damages caused by drainage problems, and you'll note that the Yates opinion is still largely controlling. Unless there is constructive notice of the problem occurring on public property, under which circumstances I think your liability insurer would cover damages, there is no municipal liability for damages caused by drainage failures. The fallout from paying for damages not caused by the city is that similarly situated property owners will claim they are entitled to similar treatment and the practice may never end.

Then there are public purpose doctrine issues that could result in a myriad of problems depending on specific facts. If you need help explaining the public purpose doctrine, I've attached a general memo on the subject. It is aimed at preventing work on private property, but the same analysis applies to use of public funds for such work or reimbursement. I encourage you to discuss each situation with your City Attorney and insurer prior to taking action on any request for payment of damages.

Please let me know if there is anything else I may provide to assist you as you navigate this topic with your city.