

Drainage Law and the Responsibility of the Design Engineer/Local Government

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Drainage Law in Tennessee

Drainage law in Tennessee is governed by the natural flow rule.



Drainage Law in Tennessee

The *natural flow rule* says water has a natural easement along its natural paths, and the upper and lower landowners must accept water that naturally flows, or that would have naturally flowed, onto the property in question. (as opposed to the “common enemy” doctrine.)



Drainage Law in Tennessee

[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).]



Drainage Law in Tennessee

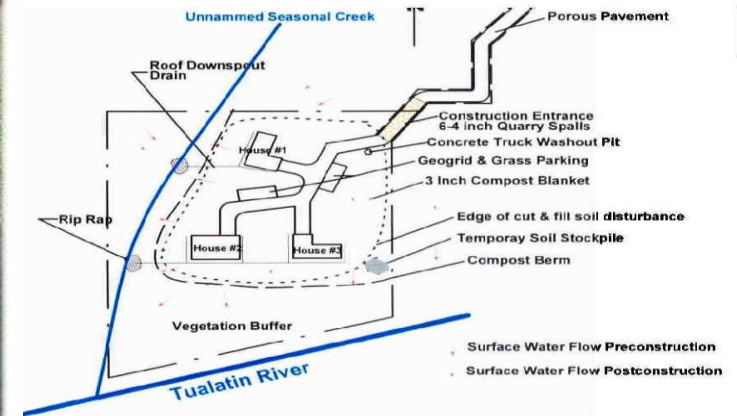
That rule is easier to state than to apply in some cases, but generally a landowner cannot:

1. Impede the natural flow of water.
2. Increase the natural volume of water.
3. Increase the natural velocity of water.



Drainage Law and the Responsibility of the Design Engineer

The design engineer should also do his part to ensure that drainage, erosion, and sediment control problems are avoided during the construction of the project



Drainage Law and the Responsibility of the Design Engineer

Approval or Acceptance of a drainage design by the local government does not relieve the design engineer of either professional liability or ethical responsibility. ...



Drainage Law and the Responsibility of the Design Engineer

... Designs are normally reviewed for compliance with required design standards and codes, with the government reviewer taking no responsibility for the outcome of the project as designed. ...



Drainage Law and the Responsibility of the Design Engineer

... The ultimate responsibility (and/or liability) rests on the design engineer who seals the plans.

Further...



Drainage Law in Tennessee

Tennessee Code Annotated 29-20-204 states that all government entities are guaranteed: (a) Immunity from suit ...for injury...caused by the dangerous or defective condition of any public ...structure, dam, reservoir or other public improvement...



Drainage Law in Tennessee

Tennessee Code Annotated 29-20-205 states that all government entities are guaranteed “-Immunity from suit ...for injury...caused by negligent act or omission of any employee within the scope of his employment...if the injury arises out of:



Drainage Law in Tennessee

(3) the issuance, denial, suspension, or revocation of, or by failure to issue, deny, suspend, or revoke, any permit, license, certificate, approval, order, or similar authorization;

Further...



Drainage Law in Tennessee

Tennessee Code Annotated 29-20-205 states that all government entities are guaranteed “-Immunity from suit ...for injury...caused by negligent act or omission of any employee within the scope of his employment...if the injury arises out of:



Drainage Law in Tennessee

(4) a failure to make an inspection, or by reason of making an inadequate or negligent inspection of any property;



Drainage Law in Tennessee

A city generally has no responsibility for drainage problems among private landowners, unless the city has itself violated the natural flow rule.

[See Miller v. Brentwood, Yates v. Metro. Gov. Nashville & Davidson County.]



Drainage Law in Tennessee

Likewise, in the absence of such a violation by the city, the city generally has no obligation to maintain the integrity of the drainage, and no right to go onto the properties in question.



Drainage Law in Tennessee

A city generally has no responsibility for drainage problems among private landowners, unless the city has itself violated the natural flow rule.



Drainage Law in Tennessee

An exception to this would occur in a case where the landowner has created the drainage problem by violating subdivision regulations, stormwater ordinances, or other ordinances or laws. In such a case the city could deal with the problem as a compliance issue.



Drainage Law in Tennessee

Other than this exception, not only does the city have no responsibility in the case of drainage problems between private landowners, the city also has no legal standing in court in such a case.



Who is Who? *Example 1*

FROM: Sid Hemsley, MTAS Senior Law Consultant

RE: Right of City to Excavate Ditch Adjacent to City Street

- The City has the following question: Does the city have the right to excavate a ditch adjacent to the Road?
- The answer is yes, provided that the facts provided to me, and the assumptions I have made, are accurate.



Who is Who? *Example 1*

As I understand those facts, the property owner filled in the ditch on the north side of the Road “several years ago.” The property owner’s filling of the ditch causes flooding on the south side of the Road.



Who is Who? *Example 1*

The property owner contends that the city has no right to excavate the ditch, that the ditch is a part of his property. I have assumed that the Road is properly a city street. I have also assumed that the ditch in question is immediately adjacent to the Road, and that it drained the Road.

Who is Who? *Example 1*

It is difficult to determine the width of many city streets. Some of them are created by an express grant in a deed that does not specify the width. A large number of them are created informally by implied dedication and acceptance, by “user,” or by prescription. ...

Who is Who? *Example 1*

... It is sufficient for the purposes of the city's question to say that streets created by those methods involve the treatment of the property by the public and by the city as streets, and that those methods usually involve no documents. How wide such streets are beyond their actual regularly traveled surfaces is a frequent question.



Who is Who? *Example 1*

It is said in 10A McQuillin, Municipal Corporations, ' 30.03, that “Street in a legal sense, usually includes all parts of the way--the roadway, the gutters and the sidewalks.”

The same authority, ' 30.22, further says that:



Who is Who? *Example 1*

It has been held that the width of a prescriptive easement is not limited to that portion of the road actually traveled, and it may include the shoulders *and the ditches that are needed and have actually been used to support and maintain the traveled portion.* [Emphasis is mine.]



Who is Who? *Example 1*

29 Am.Jur.2d Highways and Streets, ' 52, says that, “*Ditches along the side of a highway acquired by prescription or user are generally regarded as within the boundaries of a highway.*”
[Emphasis is mine.]

Who is Who? *Example 1*

...The above cases make it clear that a street is wider than the paved portion, and that it includes the shoulders, ditches, gutters, and waterways. Common sense also supports those cases. A ditch that drains a street is logically a part of the street.



Who is Who? *Example 1*

Municipalities have police power over their streets regardless of how those streets were created.

[Collier v. Baker, 27 S.W.2d 1085 (1030);
Brimer v. Municipality of Jefferson City, 216
S.W.2d 1(1948); Paris v. Paris-Henry County
Utility District, 340 S.W.2d 885 (1960).]



Who is Who? *Example 1*

The police power cannot be contracted away or surrendered. In addition, in Tennessee (as in other states) municipalities have an affirmative obligation to prevent the obstruction of their streets.



Who is Who? *Example 1*

[City of Nashville v. Hager, 5 Tenn. Civ. App. (Higgins) 192 (1914); State v. Stroud, 52 S.W. 697 (Chan. App. Tenn. 1898); Stewart v. Illinois Central Railroad Co., 143 Tenn. 146 (Tenn. 1920).]



Who is Who? *Example 1*

Where the street includes a ditch adjacent to and draining the surface of the street, that police power and that affirmative obligation, extends to the ditch.



Who is Who? *Example 1*

If the property owner in question refuses to accede to the exercise of the city's authority over the ditch in question, the city may consider obtaining a declaratory judgment that the ditch is a part of the city street or take whatever other appropriate legal action the city attorney thinks best.

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The City's Role? *Example 2*

Dear Mayor _____,

Yesterday you asked me ... (about)...a citizen drainage complaint. The cul de sac on Devonne was constructed by a private developer some 30 years ago so as to drain across some undeveloped property and thence down the common property line of two lots on Gay Street to the gutter on Gay Street. ...



The City's Role? *Example 2*

... The citizen was complaining about the drainage from the cul de sac crossing the undeveloped piece of property. This is not the doing or the responsibility of the City.



The City's Role? *Example 2*

Pursuant to our discussion yesterday about the City doing drainage work on private property, I wanted to share a legal opinion prepared by Mr. Dennis Huffer, an MTAS Legal Consultant:



The City's Role? *Example 2*

“... It is my understanding that the city did not cause the problems that are proposed to be addressed and that the general public will derive little or no benefit from the city doing the work. In my opinion this would be a questionable use of public resources.”



The City's Role? *Example 2*

Article II, § 29, of the Tennessee Constitution provides that “The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, respectively....”

From this language has grown the public purpose doctrine, which dictates that public funds can be used only for public purposes.



The City's Role? *Example 2*

Courts have reasoned that, since taxes can be levied for only corporation or public purposes, expenditures can legally be made for only those same purposes. A public purpose is generally anything that promotes the public health, safety, welfare, morals, security, prosperity, or contentment of the residents of the municipality. Shelby Co. v. The Exposition Company, 96 Tenn. 653, 36 S.W. 696(1896).

The City's Role? *Example 2*

Incidental benefit to an individual or individuals will not invalidate an expenditure, but its primary purpose must be to benefit the public. City of Chattanooga v. Harris, 223 Tenn. 51, 442 S.W.2d 602 (1969).



The City's Role? *Example 2*

From information that has been provided to me, it appears the primary purpose of the expenditure of public resources in the case at hand would be for the private benefit of the property owners and not for the general public. Any benefit to the general public would be remote at best. Therefore, it is my opinion that *this expenditure would be held invalid if challenged. ...*”



The City's Role? *Example 2*

Sidney Hemsley, MTAS Senior Legal Consultant, wrote the following:

“... Storm water drainage in Tennessee is governed by the natural flow rule. Under the natural flow rule, the lower property owner is required to accept the water that would naturally flow from the upper landowner; he is not liable for any damages that arises from that natural flow.”

The City's Role? *Example 2*

[Slatten v. Mitchell, 124 S.W.2d 310 (1938); Dixon v. Nashville, 203 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 Gov., Nashville & Davidson County, 451 S.W.2d 437 (1969).]



The City's Role? *Example 2*

In Miller, landowners in a subdivision argued that the city was liable for flooding problems in the subdivision, principally on the grounds that the city issued the permit for the subdivision. The Court rejected that ..., declaring ..., “The mere fact that a nuisance exists and has occasioned an injury to a third person, does not render the corporation liable therefore, provided the nuisance was not created or maintained by the corporation itself.” [At 880.]...”

The City's Role? *Example 2*

...The point of Miller's with respect to the property owners in Oakland is that simply because a private landowner suffers damage from drainage that violates the natural flow rule, the city is not liable for damage for which it was not the cause. ...”

The City's Role? *Example 3*

Drainage from the First Party's Property onto John Smith's Property:

The city is not liable for any water that drains from the first party's property onto John Smith's property for the same reason it has no liability for stormwater drainage from the County landfill: Nothing it has done has caused the problem. ...

The City's Role? *Example 3*

As ...(the)... report states, and my own observations confirm, stormwater draining from the northerly stream flows across the first party's property. Apparently, it periodically flooded the basement of the their home sitting on that property. For that reason, they dug a shallow ditch behind the home. The ditch runs south parallel with the west side of the major road, and diverts the stormwater away from the home and into a pond adjacent to the west side of the major road.

The City's Role? *Example 3*

The pond drains into a culvert that runs under the major road (which was undoubtedly installed by the state, probably when the highway was built many years ago), and onto John Smith's property.

...The first party's ditch may concentrate the flow of stormwater into the pond and through the culvert somewhat,



The City's Role? *Example 3*

and may slightly increase its volume by ultimately channeling onto John Smith's property stormwater that would otherwise have flowed into the first party's basement, but roughly all the stormwater that John Smith's property is accepting is stormwater that would naturally flow onto that property. John Smith's property is simply the low point in the area.



The City's Role? *Example 3*

In any event, *none of that is the city's doing;* and whatever improper diversion and/or concentration of stormwater there might be, if any, *is a legal problem between the first party and John Smith* and perhaps other upper landowners.

MTAS senior Legal Consultant, Sidney Hemsley, J.D.



Wrap-up

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