

# Drainage Revisited

By: Mark Finamore, Township Legal Counsel

Since I last addressed drainage issues in the March/April 2004 issue of the *Ohio Township News*, it has been my most requested article. Drainage is a township issue that just won't go away. The ongoing interest in the role and responsibility of townships in addressing drainage problems deserves revisiting with a comprehensive look and update of township drainage issues.

Generally speaking, Ohio Revised Code statutes dealing with township drainage have not changed and my observations noted in the prior article have only been reinforced. With that in mind, here is a detailed review of evolving drainage issues facing townships and the respective legal responsibilities of the township and private landowners.



## OVERVIEW OF TOWNSHIP DRAINAGE PROBLEMS

Historically, townships have been plagued with drainage problems on private property and to a lesser extent on township roads. Private drainage problems have been brought before the township Board of Trustees by private landowners seeking resolution of the problem by action of the township trustees and commonly expecting the township to bear the cost and expense of correcting the problem. Not as prevalent, drainage problems on township roads cause flooding and erosion of the road surface. Drainage problems traditionally result from: inability of surface water to permeate and be absorbed into the soil; natural and man made obstruction of the natural water course; intentional or negligent diversion of the natural water course; excess surface water run off from paved or covered land areas; damage, collapse or erosion of existing private drainage systems; excessive rain (one-hundred year storms); and over development of land, without proper drainage detention and/or retention ponds or reservoirs.

## LEGAL THEORIES FOR ADDRESSING AND CORRECTING DRAINAGE PROBLEMS

Historically, four recognized legal doctrines developed over time to address landowners' drainage problems. These are the (1) Common Enemy Rule - surface water was considered to be a common enemy to all, and it allowed a landowner to get rid of his surface water as he saw fit,

regardless of any harm or damage created to another landowner's property, (2) Civil Rule Law - a landowner could dispose of surface water in any manner, so long as the landowner did not alter or divert the natural flow of the water course, (3) Reasonable Use Rule - a landowner, abating surface water, cannot unreasonably use, alter or divert the natural water flow and water course, and (4) The Capacity of Stream Theory - an upper landowner cannot increase the flow of surface water from his property, where such increase exceeds the capacity of the existing water course downstream.

As Ohio has undergone progressive development in both urban and rural areas, the "Reasonable Use Doctrine" has evolved through Ohio's courts as the prevailing legal doctrine to resolve surface water drainage issues in Ohio, and to define the statutory legal

responsibilities of cities and townships for drainage problems and the rights and obligations of private landowners for drainage problems on their lands or drainage problems caused by them to adjoining lands.

## LEGAL OBLIGATIONS OF PRIVATE LANDOWNERS

The "Reasonable Use Doctrine" provides that no landowner shall unreasonably increase or decrease the flow of surface water drainage onto adjoining lands, or unreasonably divert or alter the natural water course. Also, ORC 5589.06 provides that:

"No person shall wrongfully obstruct any ditch, drain, or water course along, upon or across a public highway, or divert any water from adjacent lands to or upon a public highway."

## STATUTORY OBLIGATIONS OF THE TOWNSHIP

The following statutes prescribe the legal obligations of the township in managing drainage problems in the township, mostly related to township road maintenance:

- ORC Section 5571.02 - Control and Maintenance of Township Roads
- ORC Section 5571.09 - Suits by Board of Township Trustees
- ORC Section 5589.06 - Obstructing Ditch, Drain Water Course - Duty of Superintendent

- ORC Section 5589.03 - Offenses Relating to Highways
- ORC Section 505.82 - Emergency Resolutions

### **LEGAL REMEDIES FOR ADDRESSING AND CORRECTING SURFACE WATER DRAINAGE PROBLEMS**

The application of the "Reasonable Use Doctrine" adopted by Ohio courts, and the Revised Code sections prescribing the legal responsibilities in addressing drainage issues, allocate the respective rights and responsibilities of the township and private landowners.

The responsibility and procedure for addressing excess surface water drainage problems on private property and the order in which they must be taken are as follows:

1. Private property owners are responsible, at their own expense, to clean and maintain all drainage ditches and natural water courses located on their land, to provide for the free flow of excess surface water and drainage across their property.
2. A private landowner must take private legal action to correct or abate excessive surface water build up and drainage problems on his property, caused by an adjoining landowner's failure to clean and maintain drainage ditches and natural water courses on their adjoining property, or caused by an adjoining landowner's unreasonable use, alteration or diversion of excessive surface water drainage from their property on to neighboring property. The township is not responsible to correct private drainage problems. Townships are only responsible for roadside ditching to maintain township roads from flooding and erosion.
3. To petition the county commissioners to construct a new township ditch to address and correct surface water drainage problem, with the cost thereof to be apportioned between and paid by all area landowners benefitted from the township ditch improvement.
4. If a landowner is experiencing flooding or excess collection of surface water on his township road, caused by the failure of a landowner to maintain and clean drainage ditches and natural water courses across his property, upon complaint to the township, the township is required by law to order the offending landowner to clean the natural ditches or water courses on their property and/or to remove any obstructions. If the offending landowner fails to comply within five days, the township can enter upon his property and provide for the cleaning and maintenance of the private drainage ditch and natural water courses, with the cost assessed and recovered as a lien against the property.

### **CONSTRUCTING A TOWNSHIP DITCH IMPROVEMENT (ORC 6131.04)**

Landowners have a right to request the construction of a public ditch improvement to alleviate drainage problems on their land and neighboring properties. Any landowner may file a petition with the clerk of the board of county commissioners of the county in which is located a part of the land that is averred to be benefitted by the construction of a proposed improvement.

## **Frequently Asked Questions**

### **Question:**

Are township trustees authorized to construct township ditches?

### **Answer:**

No. Previous ORC Sections 6139 and 6141 authorizing township trustees to construct township ditches were repealed effective April 9, 1981. The county commissioners are responsible for constructing township ditches. Townships have the authority and responsibility to construct, maintain and clean roadside ditches on township roads pursuant to their authority and responsibility to properly maintain dedicated township roads. Roadside drainage ditches are distinguished from township drainage ditches established under ORC Section 6131.

### **Question:**

May township equipment be used to repair, clean or maintain private ditches or private water courses?

### **Answer:**

No.

### **Question:**

Do the township trustees have the authority to clean out and repair privately constructed underground tiled ditches?

### **Answer:**

No.

### **Question:**

Who has the responsibility of cleaning and repairing township ditches (those ditches established by petition under ORC Section 6131)?

### **Answer:**

The county commissioners have the sole authority and responsibility as to both township and county ditches, except that townships are responsible for cleaning and maintaining township roadside ditches.

### **Question:**

May the township enter upon private property and expend township funds to correct a drainage problem that is damaging a dedicated township road?

### **Answer:**

Yes. ORC Section 5589.96 authorizes a township to enter upon private property to correct a drainage problem damaging a dedicated township road, if, after five days advance notice to a property owner, the property owner fails to correct the problem. The township is authorized to pay the expense thereof from funds collected and available in the township road fund, and then to collect by civil action reimbursement of the funds to be returned and deposited in the township road fund.

The petition shall state that the construction of the improvement is necessary, will benefit the petitioner, and will be conducive to the public welfare; shall state the nature of the work petitioned for; and may ask to locate, clean, remove obstructions from, construct, reconstruct, straighten, deepen, widen, alter, box, tile, fill, wall, or arch any ditch, drain, water course, floodway, creek, run, or river or to change the course, location, or terminus thereof, or may ask to construct a levee, wall, embankment, jetty, dike, dam, sluice, revetment, reservoir, holding basin, control gate, breakwater, or other structure for control of water. The petition shall state the course and termini of the proposed improvement and the branches, spurs, or laterals, if any are petitioned for. The petitioner shall state that all costs of engineering, construction, and future maintenance will be assessed to the benefitting parcels of land. The petition shall contain a list of the names and addresses, where known, of all the owners of the land that the petitioner or the county engineer claims will be benefitted or damaged by the construction of the proposed improvement. The petition shall be signed by one or more owners as petitioners. Upon the filing of the petition, the petition shall be processed in accordance with the provisions of ORC Chapter 6131.

## REGIONAL STORM WATER DISTRICTS

Another alternative is for a township, alone or in cooperation with other townships, to form a Regional Storm Water District pursuant to ORC Chapter 6119. Such a district could implement a comprehensive storm water drainage plan for a portion of the township(s) or the entire unincorporated area(s) of the township(s). My colleagues John B. Albers and Eric L. Luckage at Albers and Albers Law Firm in Columbus are doing this around the state for townships who want the ability to address these drainage problems without relying on other public or private entities to do so. *For more information on establishing a regional*

## Relevant Attorney General Opinions

### Opinion No. 1958-2775

The township trustees have no authority to construct drains or sewers to carry off surplus water, except to the extent incidental to and necessary in the improvement of a township road.

### Opinion No. 1981-039

The township has the responsibility to clean and repair roadside ditches and storm sewers along township roads.

### Opinion No. 1994-061

A township is not responsible for the repair of a storm sewer pipe installed by a home owner to carry water from his property to a township storm sewer pipe.

### Opinion No. 1994-098

A board of township trustees may, for the purpose of promoting public health, safety and morals, and in accordance with a comprehensive plan, enact zoning regulations that regulate land use in such a manner as to control the drainage of surface water from residential subdivisions, as long as such regulations are not in conflict with federal, state and county regulations for surface water drainage.

## Leading Ohio Case Law Applying the Reasonable Use Doctrine

*Lunsford v. Stewart*, 95 Ohio App. 383 (1953)

*Myotte v. Mayfield*, 54 Ohio App. 97 (1977)

*Masley v. Lorain*, 48 Ohio St. 2d. 344 (1976)

*McGlashan v. Spade Rockledge Corp.*, 62 Ohio St. 2d. 55 (1980)

*Rogers v. Hood*, 2009-Ohio-5799

*Davis v. Widman*, 2009-Ohio-5430

*Creech v. Brook & Associates Construction*, 2009-Ohio-3930

*storm water district in your area, see the article by Albers & Albers in the March/April 2009 issue of the Ohio Township News or contact them directly.*

The laws and regulations for drainage issues are complex and have developed over a very long period of time, starting with the common law and evolving into a myriad of federal, state, and local laws and regulations. I hope this review gives you better insight into identifying, analyzing and responding to drainage issues in your township. Remember, though, before acting, always consult your prosecuting attorney or private legal counsel. Caution is always preferable to litigation. How well I know. ☺



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