

## PROPERTY DRAINAGE ISSUES

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Sooner or later, most attorneys are asked the following question by one or more clients—"Can my neighbor drain his/her water onto my property?" Issues involving water drainage frequently arise for properties around lakes. Water flowage problems can range from minor aggravations due to wet soil to major headaches such as basement flooding, property damage and even the undermining of foundations.

Local government regulations regarding water flowage from one property to another are quite rare, especially in rural areas. Therefore, water flowage issues are normally governed by common law principles in Michigan. In legal parlance, the "dominant estate" (or dominant property) is the property at the higher elevation, from which water flows. The "servient estate" (or servient property) is the property with the lower elevation, onto which water flows.

If water flowage exists in its natural state, the owner of the property at the higher elevation has the right to have water flow from his/her property onto all properties having lower elevations pursuant to the natural flow. That is, so long as water is flowing off the higher property at the natural flow (i.e., the speed, frequency, intensity and channel of the water has not been changed from its natural state), the owners of the lower properties upon which water flows naturally cannot change that flowage to the detriment of the owner of the higher property. In other words, properties at a lower elevation must continue to "accept" water which flows naturally from properties located at higher elevations. If the owner of a lower property attempts to alter or impede such flowage and such alteration causes damage or injury to the higher property (for example, water is backed up onto the higher property, which did not occur before), the owner of the lower property could be liable for damages or subject to a cease and desist order from a court.

The flip side of the above common law rule is the mandate that the owner of the higher property may not change the conditions on his or her land in such a fashion as to increase the burden of the water flowage onto the lower properties. That is, the owner of the higher property cannot by development or other alteration of the land increase the amount, intensity or speed of water flowage onto the lower properties in such a fashion as to injure or damage the lower properties. If the owner of a higher property alters water flowage onto a lower property in such a fashion as to cause injury or damage, the owner of the higher property can be liable for damages or be subject to an injunction.

In a nutshell, anyone who alters the natural drainage can potentially be liable for damages or be required by a court to put the land back the way it was before the alteration. Once exception to this rule involves drainage easements by prescription. If someone has altered the natural water drainage and such alteration occurs or is tolerated for 15 years or longer, the property owner claiming damage could lose his/her claims. In that case, the

property owner who altered the drainage for in excess of 15 years may, in certain cases, obtain a drainage easement by prescription. If that occurs, the altered drainage which has occurred for more than 15 years essentially becomes the new natural water course.

What can a property owner do if he or she believes that the neighboring property has been altered in such a fashion as to adversely affect drainage onto his/her property? Unfortunately, the above-mentioned common law rules are not “self-executing”—that is, the property owner will normally have to file a civil lawsuit for damages or injunctive relief if the neighboring property owner refuses to remedy the situation. Since Michigan generally subscribes to the “American system of attorney fees” (i.e., each party pays their own legal fees, regardless of who wins or loses), the prevailing property owner will normally still have to pay his or her own attorney fees. Accordingly, it is usually beneficial to all parties involved to attempt to resolve drainage problems pursuant to compromises and only use litigation as a last resort due to the expense, time and negative emotions involved. Even if a compromise cannot be reached initially, the parties are sometimes willing to submit the dispute to a third party for mediation or binding arbitration, which can also lead to a resolution of the matter.