



## Michigan Association of County Drain Commissioners

*Northwest District Meeting*

December 7, 2017

# ***Private Drainage Rights: Avoiding Headaches and Litigation***

Stacy L. Hissong

FAHEY SCHULTZ BURZYCH RHODES PLC  
4151 Okemos Road, Okemos, Michigan 48864  
Tel: (517) 381-0100  
Website: [www.fsbrlaw.com](http://www.fsbrlaw.com)

---

### ***1. Introduction***

Private drainage disputes can arise quickly and turn once-friendly neighbors into plaintiffs and defendants. In an effort to keep neighbors from pursuing costly litigation, Drain Commissioners can educate private property owners about their rights and responsibilities in private drainage disputes--and avoid getting into trouble in the process.

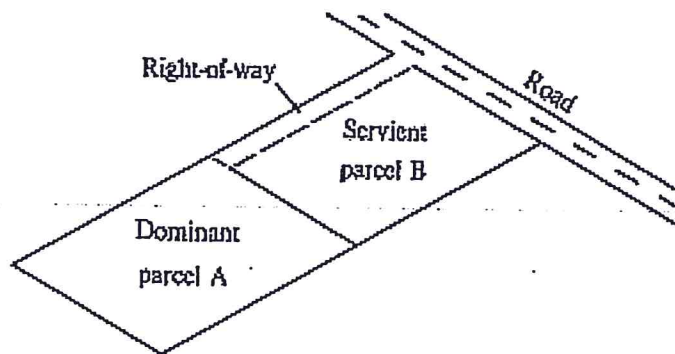
Disputes between neighbors over drainage issues occurred well before Michigan became a state. When a drainage dispute arose, Michigan's first territorial laws required a property owner to apply to a "fenceviewer" for assistance in settling the dispute. Fenceviewers were residents of the township selected to resolve various disagreements between property owners, including drainage disputes, and their decisions were final.

During the early development of Michigan, property owners were required to maintain the existing drainage on their property. If they failed to do so, they could be responsible to their neighbors for any damages that occurred. Drainage was a "mandatory" duty to allow for the development of the property.

In 1884, Michigan courts adopted a "natural flow doctrine" protecting certain rights and responsibilities of each property owner involved in a drainage dispute.

## 2. *Natural Flow Doctrine*

Michigan follows the “natural flow doctrine” where the natural flow of surface waters from the upper, dominant estate forms a “natural servitude” that encumbers the lower dominant estate.



A common example of this doctrine is natural drainage. The water naturally flowing from one property located at a higher elevation to a neighboring property at a lower elevation establishes rights for the higher property owner to have the water flow across the lower property. Conversely, the natural flow doctrine creates a duty in the lower property owner to not obstruct the natural drainage course. Please remember that the natural flow doctrine only pertains to natural flow and not altered drainage patterns, such as man-made ditches.

The lower (servient) property must accept the water from the upper (dominant) property under the following circumstances:

- The drainage is surface water (does not apply to tile systems).
- The upper (dominant) parcel has not increased the amount of water that would otherwise flow naturally.
- The upper (dominant) parcel has not increased the velocity of the water.
- The drainage has not been artificially changed.

## 3. *Prescriptive Easements*

Many property owners have recorded easements that run across different parts of their land for utility companies or county drains. Additionally, property owners may have, or be subject to, prescriptive easements without even knowing it. Prescriptive easements are implied by the surrounding circumstances, rather than expressly granted in a written easement document.



**A. What is a Prescriptive Easement?** A prescriptive easement is an implied easement (not a written, recorded easement) created when a person utilizes another's property for a certain purpose in a manner that is:

- **Hostile.** The use must be hostile, or without permission from the property owner. If permission is given, the use is not hostile and there is no prescriptive easement. This hostile use is different than adverse possession in that the use does not need to exclude the property owner from using their own land.
- **Open Manner.** The use must be observable by the property owner.
- **Continuous.** The use must be continuous for a period of at least 15 years. For example, if a farmer tiles his land and outlets the drain tile onto a neighbor's property, and does so uninterrupted for at least 15 years, the farmer may have a prescriptive easement over the neighboring property to continue to use the outlet, regardless of the natural flow of water. Property owners may also "tack" years of the use from a previous property owner of the same parcel. For example, if the same farmer tiles his land and outlets the drain tile onto a neighbor's property, then sells his land to a second farmer seven years later, the second farmer will have a prescriptive easement over the neighbor's property if the second farmer continues to use the tile for another eight years.

**B. Rights and Responsibilities Involving Prescriptive Easements.**

- **Limits of Use.** A prescriptive easement is limited to the use that has taken place over the 15 year period. Any increase or improvement in the use is not covered under the prescriptive easement until the increased or improved use exists for a 15 year period.

For example, if a farmer tiles 40 acres of his land, and outlets the water onto another's property for a period of 15 year meeting the remaining elements of a prescriptive easement, this use may continue at its current rate. However, if the farmer tiles an additional 20 acres, sending more water onto the neighbor's property, this increased/improved use is inconsistent with the prescriptive easement and may be stopped.

- **Maintenance.** A property owner with prescriptive easement rights has the right to maintain those rights. This means that the property owner may be granted access onto the neighbor's property to perform work on the drainage system to maintain it.
- **Obstructions.** Once a prescriptive easement has been established, the property owner may not block or obstruct the use of that prescriptive easement on his property and may be ordered by a court to remove anything that obstructs the easement or outlet.

- **Loss of Prescriptive Easement.** Just like a prescriptive easement can be obtained through 15 years of a certain use, a prescriptive easement can also be lost by 15 years of nonuse.

**C. Actions to Enforce Prescriptive Easements.** If a property owner has a prescriptive easement over a “not-so-neighborly” neighbor, the property owner may want to consider having an easement recorded at the local register of deeds office, specifically listing the rights of the prescriptive easement. Having the prescriptive easement recorded may save the property owner from any future litigation costs if the neighbor attempts to unlawfully block the use.

#### **4. Private Property Owner Drainage Disputes**

**A. Trespass Claims.** Michigan courts define trespass as “an unauthorized direct or indirect intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.”

Most commonly, property owners will sue for trespass to recover damages caused by a neighbor’s unlawful interference with the possession of their property. An action for trespass can result from many common situations. Some property owners may find themselves in need of the construction, repair or maintenance of private drains that traverse their land as well as a neighboring property owner’s land. A property owner should seek permission to enter the neighbor’s land to perform the work.

Although it may seem unnecessary and even burdensome to put an agreement in writing, it is better to be safe than sorry. Failing to put the specifics into a written agreement can cause neighbors to end up spending a significant amount of time and money in court over exactly how much work was to be done and in what locations.

**B. Nuisance Claims.** An action for private nuisance differs slightly from trespass. A nuisance is generally claimed when the actions of a third party interfere with or disturb the property owner’s interests in the private use and enjoyment of his or her property. However, when there is a drainage dispute, many property owners will claim both trespass and nuisance in a single lawsuit.

There are many situations that can give rise to a private nuisance claim. A person may be liable for private nuisance if:

- The person interferes with the use or enjoyment of the property;
- The invasion results in significant harm;
- The person’s conduct is the legal cause of the invasion; and



- The invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra hazardous conduct.

**C. Treble Damages. *It is not always better to seek forgiveness rather than permission!!!***

Neighbors often disagree over property lines or are simply unaware of exactly where the property line is located. While it may seem like a minimal risk to remove a bothersome tree in the back yard, or maintain a ditch that comes close to the neighbor's yard, these actions may turn out to be quite an expensive legal battle.

Michigan law allows "treble" (*triple*) damages for certain actions. In order for treble damages to be awarded, the action must be intentional, and not merely negligent. Treble damages are meant to punish a wrongdoer. A trespasser who winds up as a defendant has the burden to prove the trespass was casual and involuntary. If a court finds that the trespass was casual and involuntary, the trespasser will only be liable for single damages. A court will look at factors such as whether the trespasser displays mere negligence, as opposed to willful or wanton conduct or evil design.

The types of actions that may give rise to treble damages include:

- ***Cutting/Removing Trees.*** Treble damages are paid when a person wrongfully cuts down or carries away "any wood, underwood, trees, or timber or injures any trees on another's lands." A Michigan court recently awarded treble damages totaling \$30,300 for cutting down one tree and damaging another.
- ***Stone, Dirt.*** Treble damages are also paid for digging up or carrying away stones, ore, gravel, clay, sand, turf on another's lands.
- ***Plants, Grass, Hay, Grains.*** Treble damages also apply to roots, fruits, plants, grass, hay or any type of grain.

**D. Equitable Relief.** In addition to compensation for damages, a property owner may also be ordered to stop the trespass or nuisance from continuing.

**E. Drain Commissioner's Involvement in Private Drainage Disputes: *No good deed goes unpunished!!!***

- ***Jurisdictional Issues.*** Drain Commissioners only have jurisdiction to perform work on established county drains. Be mindful that work outside of your jurisdiction could create liability issues for you, your office and your contractors.
- ***Witness in Litigation.*** Involvement in a private drainage dispute could subject Drain Office employees or contractors to depositions and witness testimony during a private drainage trial.

## 5. *Property Acquisition for Petitioned Projects*

Drain Commissioners should work closely with the engineers/attorneys during a project to determine:

### A. *Necessity of Property Acquisition*

- *Historical Easements.* Drain records should be reviewed to determine where easements exist, as well as the length and scope/limitations of the easement for each property.
- *Section 6/Prescriptive Easements.* Prescriptive easements or easements pursuant to Section 6 of the Drain Code may be available. However, you should consult your attorney before relying on this type of easement, as any improvement to the drain as part of the design may impact these rights.
- *Design Considerations.*
  - *Future maintenance of system.* Ensure that your easement includes sufficient width to allow for future maintenance of the system to avoid the need for temporary easements in the future.
  - *Detention/retention/flooding.* If the design anticipates the need for storage on the property, specific language to allow for those rights should be included in the easement.
  - *Pump stations/other "facilities."* We recommend specific language in the easement in the event that permanent improvements (pump stations, water control structures, etc.) are located on the property.

### B. *Permanent/Temporary Easements vs Full Ownership*

- *Full Ownership.* A drainage district may wish to purchase the property rather than an easement when the drainage district's use prevents other reasonable uses of the property.
  - *Fenced detention area*
  - *Water Control Structure*
  - *Design storage created wetland area*
- *Permanent Easements.* Permanent easements should be obtained wherever *the* drain is located and the future maintenance of the drain will take place. Section 151 of the Drain Code requires that the Drain Commissioner shall secure easements/releases of rights of way along the entire route and course of the Drain prior to signing the Final Order of Determination.



- **Temporary Easements.** Temporary easements are needed when *construction* is anticipated to require that the contractor go outside of any permanent easement or drainage district property. Temporary easements should:
  - Include a *specific* scope (e.g., storage of equipment, tree removal, ingress/egress)
  - Must be signed by all property owners to be valid
  - State a time *period* for expiration
- **Landowner Agreement Forms.** If a contractor plans on working outside of the easements held by the drainage district, it is necessary to ensure that the contractor obtains written landowner agreement forms prior to going outside of the easement area. The agreement form should be signed by all property owners and should include the specifics of the agreement. The Drain Office should require copies of any agreement prior to work outside the easement area.

### C. Scope of Easements

- **Basic drain easement.** Basic drain easement language should include the ability to maintain as well as perform improvements, and should *specifically* include spreading of spoils, tree removal, etc.
- **Buffer strips/rain gardens.** If the design includes buffer strips or rain gardens on a property, the Drain Commissioner should consider specific language in the easement to protect the plantings.
- **Detention/retention/flooding.** Specific scope language should be included for detention, retention, and anticipated flooding of property to allow from the use, and to prevent the property owner from making grading changes that will impact the design.
- **Repair/replacement of existing structures/landscaping.** The *easement* language should give property owners a clear understanding of the Drain Commissioner's responsibilities in removing, repairing, or replacing such items as fencing, landscaping, etc. Do not use such phrases in the easement as "return to the original or better condition."

## 6. PA 222 Actions by Property Owners

Drain Commissioners can be liable for damages to a person's property caused by an established drain. The type of damages allowed in the claim depends on whether the damages were "event based" or whether the damages were based on a continuing use of the property without permission.

Michigan's Public Act 222 of 2001 ("PA 222") provides an exception to governmental immunity and clarifies when municipalities may be liable for sewage disposal system events.

PA 222 provides the only remedy for damages or injuries caused by sewage disposal system events.

**A. PA 222 Definitions:**

- “*Affected property*” means real property affected by a sewage disposal system event.
- “*Appropriate governmental agency*” means a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury.
- “*Defect*” means a construction, design, maintenance, operation, or repair defect.
- “*Sewage Disposal System*” means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency.
- “*Sewage Disposal System Event*” or “*Event*” means the overflow or backup of a sewage disposal system onto real property. An overflow or backup is not a sewage disposal event if any of the following was a substantial proximate cause of the overflow or backup:
  - An obstruction in a service lead that was not caused by a governmental agency.
  - A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.
  - An act of war, whether the war is declared or undeclared, or an act of terrorism.
- “*Substantial Proximate Cause*” means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury.

**B. Claim Requirements**

- Proper Notice: A written claim must be filed within 45 days after the date the damage or physical injury was discovered, or should have been discovered in the exercise of reasonable diligence.



- All of the following existed at the time of the event:
  - The governmental agency was an appropriate governmental agency.
  - The sewage disposal system had a defect.
  - The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
  - The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
  - The defect was a substantial proximate cause of the event and the property damage or physical injury.

### C. Damages

- Economic damages are the only compensation for claims unless there is a claim that includes death, serious impairment of a body function, or permanent serious disfigurement. For any claimed damage to personal property, reasonable proof of ownership and the value of the damaged personal property is required.
- Damages are based on an “event,” and payment of damages do not give any right to future use/flooding on the property. Continuing flooding or damage to a property as a result of a system’s design may give rise to a takings claim rather than a PA 222 claim.

## 7. Takings Claims (Inverse Condemnation) by Property Owners

While PA 222 generally provides the only remedy for damages or injuries caused by flooding events, PA 222 does not prohibit *constitutional* claims of taking property without just compensation.

- **Compensable Takings.** Inverse condemnation is a claim based on violating the Constitution by taking private property for public use without just compensation. A claim may be filed by a property owner whose property has been damaged by a public improvement or other public activity. A *governmental action* that has *permanently deprived* a property owner of *any possession or use* of the property is a taking for purposes of inverse condemnation. A property owner claiming inverse condemnation must show a causal connection between the governmental agency’s actions and the property owner’s loss.

To show a causal connection, a property owner must establish that (1) the government’s actions were a substantial cause of the decline in property value; and (2) the government abused its legitimate powers in *affirmative* actions directly aimed at the property.

- ***Difference Between Takings and PA 222 Claim.*** A PA 222 claim is a tort (negligence) based action. Governmental agencies engaged in governmental functions are generally immune from tort actions, unless an exception like PA 222 applies.

Governmental immunity, however, does not apply to constitutional claims. An inverse condemnation claim is not a tort action. Whether the governmental agency was negligent is not an issue in an inverse condemnation action. The issue in an inverse condemnation action is whether the governmental agency's actions constituted a "taking" in violation of the Constitution.