ROAD DITCHES AND DRAINAGE

One of the most controversial issues town boards deal with is the drainage of water to, from, across, and along its roads. Because no one wants the water, the town board usually finds itself in the middle of a dispute with the owners on either side of the road threatening to sue.

To help town boards better understand their role in these disputes, the following provides a brief overview of surface water drainage and related public and private projects. This paper will not discuss county drainage ditches, the few township drainage ditches that remain in the state, or natural watercourses.

**Surface Waters:** In most cases, town road ditches are built to accommodate the flow of surface waters. The courts have defined surface waters as rains, springs, or melting snow that lie or flow on the surface, but do not form part of a well-defined body of water or natural water course (e.g., a stream). Because natural watercourses give rise to public and private rights, the law treats such waters differently than those classified as surface water.

Surface water is considered a common enemy that may, within reason, be used or expelled by an owner. In some cases, an owner may alter the natural flow of surface waters to dispel the water. Whether an owner acted appropriately with respect to surface water is measured by the “reasonable use” doctrine. The doctrine essentially involves determining whether the use was reasonable under the facts of the particular situation. If harm results to others from the use of surface waters, the owner incurs liability only if that use is found to be unreasonable as determined by the courts. See Enderson v. Kelahan, 32 N.W.2d 286 (Minn. 1948). Some of the factors that may be considered when determining liability are the reasonable necessity for drainage, whether care was taken to avoid unnecessary injury, whether the utility to the drained land outweighs the harm to the burdened land, and whether the drainage was accomplished by improving a natural drainage system or by adopting an artificial drainage system. Claims based on surface water use are usually brought as nuisance suits.

**Public Projects:** As the road authority, town boards are authorized to repair, clean out, deepen, widen, and improve town road ditches. Minn. Stat. §§ 160.201, subd. 1; 164.36 (8). The board determines when such work is necessary. However, before any ditch work is done, the board must examine and determine that the ditch will be provided with an adequate outlet.

When a town constructs a new road, or relocates or reconstructs an existing road, it is required to construct a suitable approach to the adjacent parcels within the right-of-way when the approach is reasonably necessary and practicable to provide abutting owners a reasonable means of access to their property. Minn. Stat. § 160.18, subd. 2.

Statutory authority exists for owners within a town to petition to have the question of creating a town road drainage tax submitted to the electors at the town election. Minn. Stat. § 164.05. If approved, the town board is authorized to annually levy a tax to be placed in the town road drainage
fund. The funds are to be used to pay the cost and expenses of draining the public roads in the town. This specific taxing authority remains until the electors at a subsequent town election withdraw it.

If a ditch that the board constructs to drain a road runs across a railroad right-of-way, the statutes provide for a division of costs with the railroad. Minn. Stat. § 160.19.

**Private Projects:** When the course of natural drainage of any land runs to a road, the adjacent owner has a right to connect a drain or ditch to the town road ditch. Minn. Stat. § 160.20, subd. 1. However, before any connections are made, the owner must receive a written permit for the connection from the town board. The permit may set forth specifications for the work and the town board may establish reasonable rules and regulations governing connections. The owner is required to leave the road in as good of condition as before the connection was made.

An owner may seek a permit from the town board to install a drain tile along or across the road right-of-way. Minn. Stat. § 160.20, subd. 4. The town board may set specifications, adopt reasonable rules, and may require a bond before issuing a permit. Certain restrictions are placed on what may be permitted. See Minn. Stat. § 160.20, subd. 3 & 4. Once installed, the town board is not responsible for damage to the drain tile.

An owner, with permission of the town board, may install additional approaches as needed to facilitate the efficient use of the property for a particular lawful purpose. Minn. Stat. § 160.18, subd. 3. Such approaches are subject to reasonable regulation by and permit from the town board as is necessary to prevent interference with the construction, maintenance, and safe use of the road. If land is divided so that additional approaches are needed to an existing town road, it is appropriate to consider these as additional approaches that are the obligation of the owner to build with permission from the town board.

It is a misdemeanor offense for a person to: install drain tile along or across a road without a permit (Minn. Stat. § 160.20, subd. 4(b)); obstruct a town road or drain any noisome material into any ditch (Minn. Stat. § 160.2715, a(7)); or litter (Minn. Stat. § 609.68).

**Culverts:** In 1998 the law was changed to place the primary responsibility for paying for culverts on the abutting property owners. Minn. Stat. § 160.18, subd. 1. Previously, the town carried the responsibility to pay for culverts in approaches unless the town electors voted at an annual meeting to place the responsibility on the owners. Under the amended law, when a town board gives an owner permission to construct an approach, the owner is now responsible for paying for the culvert if one is needed in the approach. If the town board chooses, it can adopt a policy by resolution to make the town responsible for part or all of the cost of culverts needed for approaches in town roads. If the town is building an approach because it is building a new road or moving a road as is required under Minn. Stat. § 160.18, subd. 2, it should continue to pay for the culvert if one is needed – even if the board has not adopted a policy of accepting responsibility for paying for culverts.

**Potential Liability:** Before doing any ditch work, the town board must consider its obligations and potential liabilities. In almost all cases, whether the town is liable to a damaged owner will be measured by the reasonable use doctrine. Because reasonableness is measured on a case-by-case basis, it is very important that boards seek the necessary professional assistance before undertaking a project. Drainage is such a dynamic system that assistance is necessary to consider all the variables and impacts.
that can result from a project. If a project is challenged, the board will rely on the advice of the engineer to demonstrate its reasonableness.

The need to seek engineering advice also applies when permitting owners to undertake a project that affects drainage along or across a road. If not handled properly, a town could find itself in a suit over a private project it permitted.

Another source of potential liability is failure to obtain or follow permits from regulatory agencies. The circumstances under which the town board must obtain a permit for a project are varied. Unfortunately, there is no simple way of determining when those circumstances arise or from whom permits must be obtained. As such, town boards should always assume permits are needed. It is much easier to make a few phone calls than it is to defend against a civil suit or criminal complaint. Town boards should work with the local soil and water conservation district offices to identify permit needs.