



LOCAL GOVERNMENT TOPICS

Land
Use



Drainage Issues on the Rural-Urban Fringe

Soil drainage, both surface and subsurface, has been a major issue in land use throughout most of Illinois for more than 100 years. Such drainage was used to convert wet prairie lands to crop production. The importance of drainage in Illinois is evident in state statutes addressing the drainage-related rights and responsibilities of landowners.

Complexity and Caution

Drainage can become one of the most controversial management issues landowners must face. It often entails complex legal and social issues.

Legally, local, state, and federal laws can simultaneously apply to a given drainage situation. Sometimes this presents confusing or overlapping regulations. All levels of jurisdiction must be considered before undertaking any actions that may affect drainage. (See page 3.)

Socially, drainage disputes can strain neighbor relations. Disagreements can arise between developers, adjacent landowners, and local officials. Disputes can result in court battles. Be sure to consult proper legal counsel if you become involved in a drainage dispute.

Yesterday to Today

In rural areas of the state, landowners have traditionally been aware of Illinois drainage laws, their impact on drainage between neighboring property, and the importance of working together to successfully implement drainage practices. However, even with such awareness, disputes sometimes arise between farmers over drainage issues.

More recently, as many parts of Illinois have experienced non-farm growth into

agricultural areas, farmers have expressed concern about their own drainage rights and protecting their land from excess water problems caused by neighboring development.

Often on this rural-urban fringe, non-farm landowners, developers, local officials, attorneys, and others lack the traditional awareness, understanding, or appreciation of the importance of maintaining proper drainage to and from adjacent parcels of land.

Rural-Urban Problems

Problems can result between farmers and developers and/or local officials when development impacts neighboring fields. When subsurface drainage tiles are damaged, they may cause water to back up into adjoining farmland. Surface water may be rerouted and discharged at new locations. Increased velocities and/or amounts of water may be discharged to adjacent land. Furthermore, frequency of the discharges may be altered.

Without sufficient planning, the types of problems that impact farmers can cause similar problems for homeowners in neighboring developments. Many communities have local ordinances regulating the care and repair of field tiles during construction and the release of storm water.

Basics of Illinois Drainage Law

The basic principles of Illinois drainage law have not changed since they were originally instituted.

One premise of Illinois drainage law is the *law of natural drainage*, which recognizes natural differences in levels of lands. The principle of the law of natural drainage is that

landowners must take whatever drainage advantages or inconveniences nature places upon their land. What these advantages or inconveniences are ultimately depends on the level of one's property in relation to the land around it.

According to the law of natural drainage, owners of lower ground, known as a *servient tenement*, are bound to receive surface water that flows naturally onto it from higher ground, known as the *dominant tenement*. Therefore, owners of land that is lower than adjoining farms must take the water that flows through natural depressions onto their land. Likewise, unless a city has adopted a system of artificial drainage, owners of lots that are lower than adjoining lots must receive the water that drains from the higher lots.

In Illinois, many landowners seem to understand and accept the law of natural drainage. However, it is important to keep in mind that not all states use the law of natural drainage. For example, Wisconsin law allows landowners greater rights to restrict water movement onto their land from dominant landowners. Persons purchasing property in other states should investigate the applicable state law if drainage is a concern.

Evolution of Illinois Drainage Law in Agriculture

Historically, as the potential for agricultural productivity increased, so did the desire to increase the drainage of farm fields. As a result, Illinois drainage law evolved from simple application of the law of natural drainage to allowing landowners to collect surface water, discharge it, and hasten its flow to lower ground. In an early case, the court held that, in the interest of *good husbandry*, landowners could drain their ponds or collect surface water that would naturally be held in pools and hasten its flow by digging artificial ditches. The court specified, however, that landowners could do this *only* if the water was discharged at the place where it would have flowed if the ponds or pools had been filled with dirt and the water forced out into natural channels of drainage.

All lands lying within a natural basin, therefore, may be drained into a watercourse—whether a stream or a mere depression—that drains this basin, and the owners of lower land cannot object to this increased flow. The water can be carried by artificial ditches or by tile lines, but either system must drain only the natural

basin and the drained water must enter the lower land where it would have in a state of nature.

The courts have also held that substituting tile for surface drainage does not amount to an abandonment of natural drainage rights on the part of the owner. Therefore, the principle of dominant and servient landowners still applies to subsurface drainage.

In addition to surface and subsurface drainage onto neighboring lands, owners of higher ground can drain land within a natural basin into a natural watercourse flowing through their land. As a practical matter, their right to drain into a stream is not often questioned because draining into a creek or stream with ample banks does no actual harm. But even if such drainage does damage lower ground, owners of higher ground have a legal right to drain into the stream so long as they do not cut through a natural divide but simply hasten the flow of water from the basin into the creek. According to this rule, overflow waters from a creek or small stream are surface waters; therefore, owners of lower land are bound to receive them. Furthermore, owners of a stream bank have the right to improve it so long as the improvements do not impair drainage.

Evolution of Illinois Drainage Law into the Rural-Urban Fringe

As land use in many parts of Illinois shifted from agricultural to urban development, the good-husbandry doctrine was applied in situations where land was not to be used for farming. Unfortunately, this nineteenth-century doctrine was not easily adapted to urban environments.

In response to a 1974 lawsuit, the Illinois Supreme Court adopted a limitation of *reasonable use*, which was the first significant modification of Illinois natural drainage law since the nineteenth century. In general, the opinion specifies that urban landowners, in addition to recognizing natural drainage law limits to points of discharge and bringing water in from another watershed, cannot increase drainage flows *unreasonably*. In the *Templeton v. Huss* case, the defendants owned the dominant estate, which they subdivided and developed. The plaintiff owned the servient estate, a parcel of farmland. Recognizing that natural drainage could be altered by urban development, the court held that the developer of the subdivision was liable for damages to the lower land if the houses and streets interfered so much with natural seepage that the amount and velocity of water

running off the developer's land were unreasonably increased.

As becomes evident rather quickly, though, the court's ruling is difficult to apply generally without a clear definition of "reasonableness." What may seem reasonable to one landowner may not seem so to another, so despite the presence of the case law, individual court actions may often be necessary to adjudicate disputes.

Obstructing Surface Water Flow

Just as there are laws pertaining to owners of dominant ground and their removal of water onto servient lands, there are also laws that pertain to the acceptance of that water by the owner of the servient land.

According to civil law as applied in Illinois, the owner of lower land has no right to build a dam, levee, or other artificial structure that will interfere with the natural drainage of higher land. However, constructing artificial or temporary impoundments may be allowable.

On the other hand, the owner of higher land cannot compel the owner of lower ground to remove natural obstructions, such as shrubs, weeds, brush-wood, cornstalks, or other crop residues, that may accumulate and impair natural drainage. In some circumstances, the owner of the higher land has the right to enter the servient tract to make reasonable repairs and clean out the watercourse. Caution should be used when resorting to such self-help—to ensure adherence to the law, the dominant landowner should seek legal counsel before exercising these rights.

Remember also that in some states landowners may have the right to restrict water movement onto their land from dominant landowners. Persons purchasing property in other states should investigate the local laws if drainage is a concern.

Know All Pertinent Drainage Laws

It is important to recognize that even though certain drainage practices may be allowed under the Illinois drainage code, other superceding and overlapping laws may restrict such activities.

The U.S. Army Corps of Engineers, Environmental Protection Agency, Natural Resource Conservation Service (NRCS), and Illinois Department of Natural Resources may all have regulations that apply to a given situation. Appropriate agencies should always be consulted before altering any area that might be considered a waterway, floodplain, or wetland.

Local ordinances regarding storm water and erosion should also be reviewed, especially in urbanizing areas.

Improperly altering farm drainage may reduce eligibility for participation in farm programs. Check with the USDA-NRCS and Farm Service Agency before doing any farm drainage work.

Seek Legal Expertise

Since drainage issues between landowners can be very sensitive and can become costly problems to correct, landowners are always encouraged to consult appropriate legal counsel regarding any specific drainage problem.

Farmers, developers, contractors, local officials, and others should seek legal counsel before altering any land use pattern that affects drainage. Be sure to review all potential local, state, and federal regulations.

Landowners should discuss the issues of concern to them carefully before hiring an attorney. When hiring an attorney, it is important to shop around for someone with expertise in drainage law, especially for agricultural applications. Ask neighbors, local agricultural professionals, or others in the community for names of attorneys with drainage law experience.

Summary

This fact sheet highlights some of the major issues and laws related to drainage in Illinois, especially in light of recent land use trends. As has been discussed, all situations need to be addressed individually and with proper legal counsel if necessary.

Further Reading

- For more detailed information on drainage law issues in Illinois, read Donald Uchtman and Bernard Gehris. 1997. *Illinois Drainage Law* (Circular 1305). University of Illinois Extension. Available through University of Illinois Extension county offices or on the World Wide Web at: http://web.aces.uiuc.edu/farm.doc/legal/drainage_law.html.

- Other related reading materials from U of I Extension include:

Carroll J. W. Drablos and Roger Moe. 1984. *Illinois Drainage Guide* (Circular 1226). University of Illinois Extension.

Illinois Department of Agriculture. 1997. *HomeACRE Manual—Homestead Assessment for Community and Residential Environs*.

Ohio State University Extension. 1998. *Agricultural Drainage—Water Quality Impacts and Subsurface Drainage Studies in the Midwest* (Bulletin 871).

- Other related readings include:

Randall Arendt. 1999. *Growing Greener—Putting Conservation into Local Plans and Ordinances*. Washington DC: Island Press.

Delaware Department of Natural Resources. 1997. *Conservation Design for Stormwater Management*.

Reference

Donald Uchtmann and Bernard Gehris. 1997. *Illinois Drainage Law* (Circular 1305). University of Illinois Extension.

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