

Appendix 2-B

Legal References

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Legal Precedent to Discharge Surface Water

The legal precedent concerning the drainage of surface waters was established by the Michigan Supreme Court in *Tower v Township of Somerset*, 143 Mich 195, 201-202 (1906):

"Highway commissioners have the right to have the surface water, falling or coming naturally upon the highway, drained through the natural and usual channel upon and over the lower lands," and may construct drains or ditches for that purpose. [*Id.*, quoting 2 Farnham on Waters and Water Rights, p. 696.]

Natural flow doctrine stipulates the following drainage requirements:

- The owner of a lower or servient estate is obligated to receive surface water from the upper or dominant estate in its natural flow. Refer to *Thompson v Enz*, 379 Mich 667, 677 (1967); *Mich Citizens for Water Conservation v Nestle Waters North America Inc*, 269 Mich App 25, 54 (2005). Refer to also 4 Restatement 2d Torts, introductory note to §§ 850 to 857.
- The owner of the lower or servient estate may not fill its lands in such a way as to restrict the natural flow of surface water or cause water to impound upon the upper owner's land. Refer to *Reed v Soltys*, 106 Mich App 341, 349 (1981); *Thompson*, 379 Mich at 677; *Kernen v Homestead Dev Co*, 232 Mich App 503, 512 (1998); *Bennett v Eaton Co*, 340 Mich 330, 335-336 (1954). Refer to also Restatement, §§ 850 to 857.
- The owner of the dominant estate has no right to divert, concentrate, or increase the velocity of the natural surface water. Public authorities do not have the right to divert surface water that would, in the natural state, disperse over a large area and cast such in concentrated form upon the lands of the abutting owner to cause property damage without compensation to the owner. Refer to *Wiggins v Burton*, 291 Mich App 532, 563, 572-573 (2011); *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189 (1994); *Kernen*, 232 Mich App at 512; *Peacock v Stinchcomb*, 189 Mich 301, 307 (1915); *Lewallen v Niles*, 86 Mich App 332, 334 (1978). Refer to also Restatement, §§ 850 to 857.

Under Michigan's Constitution, Article 7, Section 16:

The legislature may provide for laying out, construction, improvement, and maintenance of highways, bridges, [and] culverts... [*Id.*]

As noted, the "maintenance of highways" includes drainage.

Chapter V of Public Act 283 of 1909, MCL 225.1 *et seq.*, created a state highway department (now, the Michigan Department of Transportation (MDOT)) and commissioner whose responsibilities included building roads and bridges. MCL 225.1; MCL 225.2b. Specifically, Act 283 provided MDOT the "same measure of authority" as county road commissioners for the "construction of drains when necessary for the

construction or improvement of any highway within the contemplation hereof" MCL 225.2b.

The control of drainage to the MDOT right-of-way is outlined in Public Act 200 of 1969, MCL 247.321 *et seq.*, which states, in relevant part:

Permits for driveways shall be granted in conformity with rules promulgated by the highway authority which shall be consistent with the public safety and based upon the traffic volumes, drainage requirements and character of the use of the land adjoining the highway and other requirements in the public interest. [MCL 247.324.]

And the Michigan Administrative Code states, in relevant part:

Altered natural drainage shall not be permitted to flow onto the highway right-of-way unless special provisions are approved by the department. [Mich Admin Code, R 247.224(f).]

Michigan's Land Division Act, Public Act 288 of 1967, MCL 560.101 *et seq.*, states that the approval of preliminary and final plats must comply with MDOT's promulgated rules relating to highway access safety and MDOT's published standards relating to "drainage." MCL 560.105(d). The Michigan Administrative Code considers when a proposed plat would alter existing drainage of a state trunkline highway and refers to MDOT's "drainage policy and guide." Mich Admin Code, R 560.204.

Additional information on the legal aspects of highway drainage may be found in the following publication:

- *Highway Drainage Guidelines*, American Association of State Highway and Transportation Officials, Washington, D.C., 2007. Chapter 5 - The Legal Aspects of Highway Drainage, which also includes a glossary of legal definitions.

There are instances where federal, state, or local laws may conflict. In those cases, contact legal counsel before taking action.