

**LETTER OPINION
2005-L-19**

August 10, 2005

Mr. Thomas Bair
Attorney at Law
PO Box 100
Mandan, ND 58554-0100

Dear Mr. Bair:

Thank you for your letter requesting an opinion about who is responsible “for managing water runoff to avoid damage to real property.”¹ Your letter asked specifically which political subdivisions or government agencies are responsible for managing surface water runoff:

- Within the corporate limits of a city;
- In areas around cities where the city has exercised its extraterritorial zoning authority under N.D.C.C. § 40-47-01.1; and
- In rural areas outside of the areas where cities have exercised extraterritorial zoning authority.

In a telephone conversation with our office, you also indicated you would like the opinion to primarily address “diffused” surface water² runoff.

The question about who is responsible for managing surface runoff water involves different governments and potentially different agencies within governments depending on the activity and where it occurs. I therefore cannot provide you with a simple, direct answer. Rather, this opinion seeks to provide you with general guidance that can be applied to specific fact situations you may have.

ANALYSIS

Within the corporate limits of a city, a city may manage surface water runoff under its zoning authority.³ 83 Am. Jur. 2d Zoning and Planning § 491 (the municipal requirement

¹ The request for this opinion comes in your capacity as legal counsel for the Morton County Water Resource District.

² Diffused surface water is water that is not in a natural water body or an artificial drain or storage device. See Burlington Northern v. Benson County Water Resource Dist., 618 N.W.2d 155, 160 (N.D. 2000).

that an adequate drainage system be installed is justified by its obvious relation to health and safety); 1994 Ohio Op. Atty. Gen. 94-098 (for purposes of promoting public health and safety, a township may enact zoning regulations that regulate land use in a manner as to control the drainage of surface water from residential subdivisions). All cities are statutorily authorized to “acquire, construct, maintain, operate, finance, and control flood control projects, both within and adjacent to such municipality, and for such purpose to acquire the necessary real property and easements therefor by purchase and eminent domain, and to adopt such ordinances as may reasonably be required to regulate the same.” N.D.C.C. § 40-05-01(68). Cities also have authority to develop a master plan, zone for land use regulation, and approve platting and subdivisions. N.D.C.C. chs. 40-47, 40-48, and 40-50.1. Each of these interrelated powers provides general authority to protect health and the general welfare or to mitigate hazards to life or property. Thus, cities should consider surface water drainage issues when zoning, planning, or approving subdivision plats.

With regard to a city’s extraterritorial jurisdiction, N.D.C.C. § 40-47-01.1(1) provides:

A city may, by ordinance, extend the application of a city’s zoning regulations to any quarter quarter section⁴ of unincorporated territory if a majority of the quarter quarter section is located within the following distance of the corporate limits of the city:

- a. One mile [1.61 kilometers] if the city has a population of less than five thousand.
- b. Two miles [3.22 kilometers] if the city has a population of five thousand or more, but less than twenty-five thousand.
- c. Four miles [6.44 kilometers] if the city has a population of twenty-five thousand or more.

The analysis of a city’s authority to manage surface water runoff within its corporate limits using zoning discussed above also applies to areas where a city has extended its zoning authority by ordinance under N.D.C.C. § 40-47-01.1.

³ See specifically N.D.C.C. § 40-47-03 (city zoning may incorporate emergency management, including mitigation and response from hazards in addition to authority to promote health and the general welfare); N.D.C.C. § 40-48-08 (city master plan is to include the general locations of waterway and other properties); N.D.C.C. § 40-48-09 (the master plan is to promote life, health, safety, as well as other needs); N.D.C.C. § 40-48-20 (planning commission is required to adopt regulations governing subdivision of land); N.D.C.C. § 40-50.1-01 (platting is required to show rivers, streams, creeks, and lakes and is also required to note the 100-year floodplain).

⁴ The term “quarter quarter section” is defined by N.D.C.C. § 40-47-01.1(8).

Counties have authority to zone and to regulate subdivisions. N.D.C.C. chs. 11-33 and 11-33.2. When approving subdivisions plats, the county may adopt provisions ensuring that land subject to flooding is safe for use or set aside for uses which will not endanger life or property or aggravate or increase the flood hazard. N.D.C.C. § 11-33.2-04(2)(e). Counties are also authorized to zone by appointing a county planning commission, whose authority includes dealing with the mitigation of known or unforeseen hazards or situations which may harm lives or property. N.D.C.C. §§ 11-33-03 and 11-33-04.

Townships also may establish zoning districts. N.D.C.C. § 58-03-11. The township zoning district and any regulations and restrictions must be made in accordance with a comprehensive plan designed to promote health, safety, and general welfare. N.D.C.C. § 58-03-12. Township zoning may also provide for emergency management including mitigation of hazards or threatening acts of nature. Id.

Further, counties, cities, and organized townships may cooperate to form a regional planning and zoning commission pursuant to N.D.C.C. ch. 11-35. The regional commission may be authorized by the governing board of a member political subdivision to exercise any of the powers in planning and zoning which could be exercised by the member, whether a county, city, or organized township. N.D.C.C. § 11-35-01.

Other entities also have authority to manage and regulate surface water. Under the federal Clean Water Act, developers are responsible for obtaining a construction permit for storm water discharge for both small and large construction activity. Large construction activity is regulated by the Phase I storm water regulations, which establish permitting requirements for storm water discharges from construction activities that disturb five acres or more. 55 Fed. Reg. 47,990 (November 16, 1990). “[S]torm water associated with large construction activity” refers to the disturbance of five or more acres, as well as disturbance of less than five acres of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb five acres or more. 40 C.F.R. §122.26(b)(14)(x)). Phase II storm water regulations added permitting requirements for storm water discharges from construction activities that disturb from one to five acres. 64 Fed. Reg. 68,722 (December 8, 1999).⁵ The Water

⁵ “Storm water associated with small construction activity,” as defined in 40 C.F.R. § 122.26(b)(15), refers to the disturbance of equal to or greater than one and less than five acres of land for construction or the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb equal to or greater than one and less than five acres.

Quality Division of the North Dakota Department of Health is responsible for implementing Phase I and II storm water regulations in North Dakota.⁶

EPA's Phase II rulemaking established standards for operating and maintaining storm drainage systems serving urban areas and new urban growth. The rule refers to these systems as small Municipal Storm Sewer Systems (MS4s) and requires permits for those located in a census bureau defined urbanized area and other MS4s that would have the potential to affect water quality. The Department of Health has incorporated these required elements into its storm water permitting program.⁷ The North Dakota Department of Health charges no fee for obtaining these MS4 permits, but substantial penalties may apply for failure to obtain them.

Other federal, state, and local agencies may also have responsibilities that apply depending on whether the activity involves building a road, dam or dike, or dredging or draining a river, stream, or wetland. For example, draining or altering a wetland may require a permit from the Corps of Engineers. 33 U.S.C. § 1344. The State Engineer regulates the construction and modification of dams, dikes, or other devices for water conservation, flood control regulation, watershed improvement, or water storage. N.D.C.C. § 61-16.1-38.⁸ Drainage of certain surface waters is also regulated. Before draining water from a pond, slough, lake, or sheetwater having a watershed comprising 80 acres or more, a permit is required. N.D.C.C. § 61-32-03. Permit applications are filed with the State Engineer, who refers them to water resource districts for approval. Id. The State Engineer may, however, require a permit to be returned to the State Engineer for final approval if he determines the proposed drainage has statewide or interdistrict significance. Id.

⁶ See N.D.A.C. art. 33-16 in conjunction with federal Environmental Protection Agency regulations at 40 C.F.R. pt. 122.26 incorporated by reference therein. See also the Water Quality Division's webpage discussing storm water permit requirements: <http://www.health.state.nd.us/wq/Storm/StormWaterHome.htm>. EPA's website also has detailed descriptions of different requirements under the storm water regulations governing general construction permits for storm water management: <http://cfpub.epa.gov/npdes/stormwater/cgp.cfm>.

⁷ See North Dakota Department of Health website at <http://www.health.state.nd.us/wq/Storm/MS4/MS4Permit.htm>.

⁸ Note, all dams or other devices constructed within a water district automatically come under the jurisdiction of the water resource board for the district within which the dam, dike, works, or device exists or is to be constructed. N.D.C.C. § 61-16.1-39. But this does not affect the Water Commission or State Engineer's authority relative to such works. Id.

All highways constructed or reconstructed by the Department of Transportation, a county⁹ or township, or their contractors or business organizations are required to take into account surface drainage and to follow stream crossing standards prepared by the Department of Transportation and the State Engineer to prevent flooding and overflow of adjacent or adjoining lands. N.D.C.C. § 24-03-06; see also N.D.A.C. ch. 89-14-01 (Stream Crossing Design). Under this statute, the state, county, or township responsible for a particular road must construct and maintain it in a manner that minimizes obstruction of the natural flow of diffused surface waters. Huber v. Oliver County, 602 N.W.2d 710, 716 (N.D. 1999).

Water resource districts have statutory powers that are found generally in N.D.C.C. title 61. These powers generally include authority concerning dams and water conservation and management devices, water channels, reservoirs, artificial lakes or other water storage devices, maintaining and controlling the water levels and flow of water in bodies of water and streams involved in water conservation and flood control projects, controlling the channels or floodplains of any stream or watercourse, and coordinating proposals for culverts and bridges in road openings. N.D.C.C. § 61-16.1-09. While water resource districts have authority concerning natural or artificial watercourses, the North Dakota Supreme Court has held that water resource districts do not have statutory authority to issue orders regulating diffused surface waters. Burlington Northern, 618 N.W.2d at 160. A water resource district could, however, assist other political subdivisions in addressing drainage issues raised by new development, particularly if a drain would need to be established. Water resource districts also do not have authority to require other political subdivisions to install culverts dealing with surface waters, although they may take action within their jurisdiction concerning drains. Kadlec v. Greendale Tp. Bd. of Tp. Sup'rs, 583 N.W.2d 817, 821.

In addition, other factors must be considered in the management of surface water runoff. “[T]he owner of the lower, or servient, estate must receive surface water from the upper or dominant estate in its natural flow.” Kadlec v. Greendale Tp. Bd. of Tp. Sup'rs, 583 N.W.2d at 822 (N.D. 1998). But “[n]either the owner of the upper land or the owner of the lower land may interfere with the natural drainage so as to injure the rights of the other.” Id.

North Dakota follows the reasonable use doctrine in cases concerning surface water drainage in situations where a drain permit is not required. Nilson v. Markestead, 353 N.W.2d 312, 315 (N.D. 1984); Jacobsen v. Pedersen, 190 N.W.2d 1, 6-7 (N.D. 1971). A drain permit is not required to drain a pond, slough, lake, or sheetwater, or any series thereof if the contributing watershed area comprises less than 80 acres. N.D.C.C.

⁹ The county engineer may also have a responsibility, if directed by the county commissioners, to prepare plans and specifications and supervise the construction of drainage ditches. N.D.C.C. § 11-31-03.

§ 61-32-03.¹⁰ The reasonable use doctrine permits an upper land owner to, in good faith and for a legitimate purpose, drain land of surface waters onto the land of another even though such drainage carries with it some waters which would otherwise never have been so directed. Jacobsen, 190 N.W.2d at 6 (quoting Enderson v. Kelehan, 32 N.W.2d 286, 289 (Minn. 1948)). There must be a reasonable necessity for such drainage, reasonable care must be taken to avoid unnecessary injury to the land receiving the burden, the utility or benefit occurring to the land drained must reasonably outweigh the gravity of harm resulting to the land receiving the burden, and, if practicable, the drainage should be accomplished by improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity or through use of a reasonable and feasible artificial drainage system. Id. Therefore, the reasonable use doctrine allows an upper land owner to drain land without liability to the lower owner under certain circumstances.¹¹

One treatise on water law discussed the difficulty in applying private drainage law to urban growth and development as follows:

The difficulty with the private drainage law approach is that it tends to ignore other relevant, but noneconomic, factors and to focus on too limited a horizon -- the particular, individual landowners -- rather than on general resource planning needs. Certainly in municipalities a natural situation no longer exists. Because the reasonable use test analyzes the gravity of the harm versus the utility of the benefit, it provides the best approach for dealing with the problems as between individuals. An element of public interest is interjected in these cases, as well, in ascertaining not just the harm and utility to the individual, but also to the public. If a public-interest-oriented result would be confiscatory, eminent domain or inverse condemnation would be the recourse.

However, the best way today to approach drainage, as well as other water problems, is through comprehensive planning. As further requirements for controlling nonpoint sources of water pollution and pollution from urban

¹⁰ A drain permit is not required for *maintenance* of a drain. N.D.A.C. § 89-02-01-05. A drain includes "any natural watercourse opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains of any nature or description constructed for such purpose, including dikes and other appurtenant works. This definition may include more than one watercourse or artificial channel constructed for the aforementioned purpose when the watercourses or channels drain land within a practical drainage area." N.D.A.C. § 89-02-01-02 (4). See also N.D.C.C. § 61-16.1-02.

¹¹ The North Dakota Supreme Court has applied the reasonable use doctrine to landowner management of diffused surface waters, but has not decided a case involving governmental regulation of surface drainage. Burlington Northern, 618 N.W.2d at 160.

storm sewers come on line, there will be more planning and, as a result, more control.

Robert E. Beck, Water and Water Rights § 59.03 (1998). The treatise further provides:

For excellent illustrations of what can happen when landowners are permitted to drain without consideration of and planning for long-range consequences, see City of Garfield v. Borough of East Paterson, 47 N.J. 195, 197, 219 A.2d 865, 866 (1966) (reasonable use jurisdiction where the court observed: "The situation seems to us to call for responsible cooperative effort by the several municipalities and the county, and perhaps to require legislative solution if these governmental agencies cannot effect one within existing laws"). See also Howard v. City of Buffalo, 211 N.Y. 241, 105 N.E. 425 (1914).

The quote from East Paterson seems pertinent to situations involving regulation of surface water drainage in areas of growth and development. I agree with the court that these situations call for responsible cooperative efforts by the political subdivisions involved. Thus, when exercising its zoning or other authority, a public entity should be aware of and coordinate with other state or federal agencies from which the developer may need to receive permits. Since many new developments larger than one acre occur in areas subject to a public entity's zoning authority, the public entity should encourage the developer to get any federal or state permits that may be required. And they may consider incorporating evidence of such permitting, when required by federal or state law, as one of the steps in its zoning application process. When a new development affects landowners and surface waters both within and outside of the city's jurisdiction, or involves non-zoning issues where other agencies or political subdivisions may have authority or jurisdiction, the city may consider entering into a joint powers agreement¹² or memorandum of understanding with state agencies or political subdivisions that have authority or jurisdiction over non-zoning issues that may develop.

Sincerely,

Wayne Stenehjem
Attorney General

eee/lgw

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

¹² See N.D.C.C. ch. 54-40.3.