Drainage Law and Development

by Patrick Kinnally

The presence of the perceived need for continued residential and commercial development has created tension not only between developers, homeowners, and farmers, but also counties as well as municipalities.[1] As to the former, land speculators are seeking to capitalize on the fact that the cost of money is at its lowest in many decades. Therefore, they believe every person in the State of Illinois should own his or her own home, duplex, or condominium. The buildings to house these people require reconfiguring land. In rearranging that space, development corporations often times change the course of the manner in which water drains from the property to be developed. Sometimes, this is done by destroying existing field tiles, increasing the rate at which the water leaves the property, increasing the volume at which it is discharged, or changing the water course from the watershed from which it flows altogether. Any one or all of these alterations can have an adverse effect on an adjoining or servient landowner.

As to counties and municipalities even more is at stake.[2] Some of the infrastructure which serves a segment of our population are county roads. These roads are built and maintained by county government. Yet when these roads become overcrowded by traffic due to municipalities annexing large commercial developments, the jurisdiction of maintaining or expanding such roads remains with the county government. The municipality on the other hand wants to annex these commercial developments so that it can collect the sales tax revenue that commercial stores generate. Artificial "boundary" agreements are created between cities and villages and planning jurisdiction has been conferred on these municipalities by state law even as to lands outside municipal borders.[3] Cities and towns in luring these developers to their jurisdictions award developers with incentives like abatement of real property taxes or tax increment financing districts. These create increased traffic on county roads which cities and villages are not required to maintain. A good example is Randall Road in northern Illinois. County officials in the land plans that they adopt usually take a more conservative approach to development in non-urban county areas. Large residential developments with no access to municipal water and sanitary sewer are discouraged.[4]

In a recent trial, the following issue was presented: whether draining water from a dominant estate located in a municipality to a servient estate located in adjoining county land is a breach of the dominant estate's duty and amounts to a violation of the Illinois Drainage Code ("the Code"), even where the local municipality annexes and approves the developer's drainage plan.[5] The Code provides for injunctive remedies. Hence, these matters are "all or nothing" battles which are largely waged in the trial court.

Illinois follows the civil law rule of surface water drainage, which provides that when tracts of land are situated "[s]uch that surface water falling or coming into one naturally descends upon the other, the owner of the higher (dominant) land has a natural easement in the lower (servient) tract to allow the surface water to flow naturally off the dominant land upon or over the servient land.[6] Under the civil rule, the owner of a servient estate is not obligated to receive surface water in different quantities or at different times than would naturally come on his land.[7] The Code clarifies this rule and states in absolute terms that a "landowner shall not interfere with any ditches or natural drains which cross his land in such manner that such ditches or natural drains shall fill or become obstructed with any matter which shall materially impede or interfere with the flow of water."[8] In *Templeton v. Huss*,[9] the Illinois Supreme Court held that a dominant estate which increased the flow of surface waters, regardless of what construction created this increased flow of drainage, was beyond a range consistent with the policy of reasonableness of use.

There are two exceptions to this rule. The first exception deals with railroads.[10] Most developers rely on the second exception for their actions, which is called the "good husbandry" exception. This exception permits owners of dominant agricultural land to increase or alter the flow of water upon a servient estate if this is required for proper husbandry of the dominant land.[11] Although this exception may allow a reasonable increase in the amount of water drained from the dominant estate to the servient estate, the exception does not allow the natural flow of the surface water or rate at which it is drained to be altered by the drainage development of the dominant estate. In *Peck*, the court states the well settled rule that the owner of an upper field cannot construct drains or ditches so as to create new channels for water in a lower field. The good husbandry exception allows a dominant estate to create drains for agricultural purposes on one's own land.[12]

The good husbandry exception was created to acknowledge that drainage of surface waters was consistent with the notion of reasonableness which is a policy for the public good and to keep peace among neighboring estates. Cases that rely on *Templeton* have noted that the landowner of the servient estate must simply establish that "increased flow of surface waters from the land of the development estate to that of the plaintiff . . . was beyond a range consistent with the policy of reasonableness of use" in order to avoid the good husbandry exception.[13] This "unreasonableness" is not judged based on the developer's use of their property, but on the interference with the drainage which the developer's changes cause on the servient estate.[14]

To determine the reasonableness of the increased drainage on a neighboring estate, the *Dovin* jury instruction allowed the trier of fact, in balancing the advantages to the dominant estate

against the injury to the servient estate, to consider the following factors: (1) the extent and nature of harm involved; (2) the social value attached to the type or use or enjoyment that is being interfered with; (3) the burden on the person harmed of avoiding harm; (4) the suitability of the particular use or enjoyment involved; and (5) the usefulness of the development project. However, the weight of any one factor is to be determined by the trier of fact in his or her own discretion.[15]

In addition, compliance with a city ordinance as well as "sound" engineering practices does not make the development's drainage system on the dominant estate *per se* reasonable. The Code is state law and cannot be bypassed simply by complying with a city ordinance and obtaining city approval for a project.[16]

The facts of *Bollweg v. Richard Marker Associates, Inc.* seem to be occurring with greater frequency. In that case, Richard Marker Associates, Inc. ("Marker") in 2001 purchased 129 acres for more than $4,000,000. In 2003, the property was annexed by the City of Yorkville. Marker intended to build 262 homes on the property. Marker's development was north of Bollweg's land, which consisted of 12 acres where he had his residence and a small nursery. Bollweg's property adjoined the Fox River.

Prior to Marker's acquisition, approximately 60 acres drained onto Bollweg's land into a catchment. After construction, approximately 80 acres flowed onto Bollweg's property. Before development, Marker destroyed, for the most part, all of the agricultural field tiles. Marker erected detention ponds on its land so water would be retained and then discharged to Bollweg's land at controlled volume rates.

As in every drainage litigation, the battle was joined by civil engineers who testified about best engineering practices, volumes of water before and after the development, and the rate at which such volume is increased/decreased from the dominant to the servient estate. Suffice it to say, the developer's engineers testify that everything was better than it was before because they claim they have complied with village ordinances. Obviously, they face an uphill battle. This is because common sense tells the fact finder that a flooded property owner is not in court by choice.

So it was in *Bollweg*, where in the end, a minimum, of a 12% increase in volume was shown with the concomitant increase in the discharge rate. Marker to its credit, approached plaintiffs and asked permission to install an underground pipe on plaintiff's land but without compensation. This was after flooding and silt deposits occurred on plaintiff's property. Ultimately, the plaintiffs refused. There was also testimony that defendant's investment would be substantially diminished if storm water was not permitted to pass through the plaintiff's lands. The trial court entered a preliminary injunction against the developer, which the appellate court affirmed.

Defendant's argument that it utilized sound engineering practices and complied with Yorkville's storm water ordinance was rejected. The appellate court, sending a clear message, said the issue is one of *state* law, not local government rules. The *Bollweg* court concluded that:

> The evidence supports the trial court's findings. There is no dispute that the development will increase the volume of water flowing onto plaintiff's property. There is also no dispute that the increase will be the result of the addition of impervious surfaces and the regrading of the land so that surface water from an additional 18 acres of defendant's property will drain onto the plaintiff's property.

The court affirmed the trial court's injunction in favor of the plaintiffs in all respects.

Good husbandry does not permit the dominant estate landowner an unlimited right to increase the amount of water diverted onto the servient estate landowner. The real test becomes whether the benefit to the dominant estate outweighs the harm done to the servient neighbor. Moreover, to meet the burden of proof for trespass, the plaintiff must merely show that the course of water has been changed *or* that the flow has been increased.[17] The dominant owner of the estate does not have an "unlimited right to increase the rate or the amount of surface-water runoff" which flows onto the servient estate, regardless of the cause of the increase or the extent of the increase.[18] In fact, "[i]nterference with the natural drainage has been limited to that which was incidental to the reasonable development of the dominant estate for agricultural purposes."[19]

In Illinois, the landowner of a dominant estate has the right to drain his land through any of the regular channels on his own land, but may not be able to increase points of entry, the volume, or rate of water drainage over the servient estate. Although the flow of water from an upper field may be increased in some scenarios under the good husbandry exception, the dominant estate may not drain its land so as to create new channels upon the servient estate.[20]

So where does this leave the homeowner, farmer, or developer in an era where commercial and residential development is at its zenith and shows no sign of abating? Should the government step in with some "planning authority"? Was the City of Yorkville as culpable as Marker in approving a storm water drainage plan that does not comply with state law? We know now that municipalities have an insatiable thirst for sales tax revenue, building permit fees, and the like. All forms of government seem to have a widened imagination when it comes to creating new fees or taxes. Who needs to take the lead?

The issue presented in *Village of Chatham* was whether the village or Sangamon County had zoning and building code jurisdiction over unincorporated property which was located within the statutory zoning jurisdiction of the county but subject to an annexation agreement with the village. The land owner wanted obviously to be subject to the village's rules, not the county's. The trial court ruled for the village and the appellate court in a fractured opinion based on two competing state statutes found for the village. In the near future, the Illinois Supreme

Court will review that decision. But in the interim, until either the Illinois Supreme Court or General Assembly address this issue, on behalf of our clients we have a potent tool in the Code to make sure that those doing the building, do it right.

1. *See Village of Chatham v. County of Sangoman.* 351 Ill. App. 3d 889, 814 N.E.2d 216 (4th Dist. 2004) leave to appeal granted No. 99136 Ill. S.Ct. (May 2005).
2. *See City of Springfield v. Judith Jones Dietsch Trust*, 321 Ill. App. 3d 239 (4th Dist. 2001).
3. *Compare* 65 ILCS 5/11-15.1-1; 65 ILCS 5/1-15.1-2 *with* 55 ILCS 5/5-1063.
4. *See Smeja v. County of Boone*, 34 Ill. App. 3d 628 (2d Dist. 1975); *Pettee v. County of DeKalb*, 60 Ill. App. 3d 304 (2d Dist. 1978).
5. 70 ILCS 605/2-1 *et seq.*
6. *Pinkstaff v. Steffy,* 216 Ill. 406, 411-12, 75 N.E. 163 (1905).
7. *Dovin v. Winfield Township*, 164 Ill. App. 3d 326, 517 N.E.2d 1119 (2d Dist. 1987).
8. 70 ILCS 605/2-1 *et seq.*
9. 57 Ill.2d 134, 311 N.E.2d 141 (1974).
10. *See Coomer v. Chicago & North Western Transportation Co.*, 91 Ill. App. 3d 17, 414 N.E.2d 865 (1980).
11. *Peck v. Herrington*, 109 Ill. 611 (1884).
12. *Peck*, 109 Ill. at 4.
13. *Starcevich v. City of Farmington*, 110 Ill. App. 3d 1074, 443 N.E.2d 737 (1982).
14. *Starcevich*, 110 Ill. App. 3d at 1080.
15. *Dovin*, 164 Ill. App. 3d at 336.
16. *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill. App. 3d 560, 574 (2d Dist. 2004).
17. *Dovin*, 164 Ill. App. 3d at 339.
18. *Bollweg*, 353 Ill. App. 3d. at 574.
19. *Delano v. Collins*, 49 Ill. App.3d 791, 794, 364 N.E.2d 716 (1977) citing *Templeton v. Huss,* 57 Ill.2d 134 (1974).
20. *Comm'rs of Highway of Pre-Emption v. Whitsitt*, 15 Ill. App. 318 (2d Dist. 1884) *available at* 1884 WL 10147.

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