

## **FACTSHEET: STORMWATER DRAINAGE / SURFACE WATER RUNOFF**

**\*This Factsheet is not a substitute for good legal advice.**

**Always consult a lawyer if a professional legal opinion is needed.\***

There is probably no subject that generates more disputes than surface drainage coming from one landowner's property to another's. The following is a synopsis of the various schools of thought regarding this controversial issue. There are, generally speaking, three schools of thought or doctrines that may be applicable when determining the 'right' and 'wrong' of a drainage issue. All are interpretive and all have been applied completely, partially or in combination in court cases.

*Maryland applies a modified Civil Law Rule to the natural flow of surface water based upon the "reasonableness of use" doctrine. The reasonableness of use doctrine balances the benefits and harms caused by surface water flow to make sure that the lower landowner is not unreasonably denied the use of his or her property. Generally, under Maryland's modified Civil Law Rule, landowners are entitled to have surface water flow naturally from the higher land over the lower land, and the lower landowner cannot prevent the escape of water from the higher land onto the lower land.*

### **"CIVIL LAW" RULE**

"Civil Law" rule is otherwise known as the Natural Flow Rule or Continental Rule and it is the rule State of Maryland operates under.

The simplest definition of the natural natural flow rule is found in the Roman Law "Aqua currit et debet currere, ut currere solebat", translating to "Water runs and ought to run as it was accustomed to run."

This rule states that between owners of higher and lower land, the higher property landowner has a right or easement over the property of the lower property landowner, upon which a duty or servitude to receive the water is visited. This duty on the lower landowner estate extends even if there is no natural outlet to relieve them from the waters of the dominant, upper landholder.

### **"COMMON LAW" OR "COMMON ENEMY" RULE.**

The common enemy doctrine is a rule derived from [English common law](#). It holds that since surface water is a "common enemy" to landowners, each landowner has the right to alter the drainage pattern of his land (for example by building [dikes](#) or [drainage channels](#)) without regard for the effects on neighboring parcels, as long as that water flows to where it otherwise would have naturally flowed. Typically, a landowner can capture surface water (e.g. by [rain barrels](#) or [dams](#)) as well, and lower landowners will not have a [cause of action](#) unless the diversion is malicious.<sup>[2]</sup> This rule is followed by approximately half the U.S. states, although some states have modified the doctrine to hold landowners liable for [negligent](#) damage to the parcels belonging to neighboring landowners.

### **"REASONABLE USE" RULE**

The third surface water doctrine is generally known as the rule of reasonable use. A few jurisdictions, Maryland included, finding it undesirable to apply either the 'common law' or 'civil

law' doctrines in their rigid or extreme forms, whereby the higher property landowner has either no right of drainage or an absolute right of drainage, have evolved a rule of reasonable use which attempts to determine the rights of the parties with respect to the disposition of surface waters by an assessment of all the relevant factors. Simply speaking, the 'reasonable use' doctrine is:

A landowner may exercise their own right on their land as they please, provided they do not interfere with the rights of others. More thoroughly, the 'reasonable use' rule generally holds that in effecting a reasonable use of his land for a legitimate purpose a landowner, acting in good faith, may drain his land of surface waters and cast them as a burden upon the land of another, although such drainage carries with it some waters which would otherwise have never gone that way but would have remained on the land until they were absorbed by the soil or evaporated in the air, if:

- (a) there is a reasonable necessity for such drainage;
- (b) if reasonable care be taken to avoid unnecessary injury to the land receiving the burden;
- (c) if the utility or benefit accruing to the land drained reasonably outweighs the gravity of the harm resulting to the land receiving the burden; and
- (d) if, where practicable, it is accomplished by reasonably improving and aiding the normal and natural system of drainage according to its reasonable carrying capacity, or if, in the absence of a practicable natural drain, a reasonable and feasible artificial drainage system is adopted.

However, any interference with natural drainage, injurious to the land of another and not reasonable, is unjustifiable. In any particular case, what is a reasonable use or management becomes a question of fact to be determined in each case under a consideration of all the relevant circumstances, including such factors as the amount of harm caused, its foreseeability, the purpose or motive with which the act was done, and the consideration whether the utility of the use of the land out-weighed the gravity of the harm resulting.

## **IN CONCLUSION**

Stormwater drainage or surface water runoff is a naturally occurring and generally unavoidable event. Water will always follow the rules of gravity. Higher property landowners should consider how their lot grading and discharge of surface water may potentially impact the lower property. Lower property landowners should recognize the natural rules of drainage while considering the impact of restricting runoff from a higher property. A reasonable and cooperative compromise will serve both parties and foster a neighborly attitude that may be enjoyed for years to come. However, when disputes arise that cannot be resolved between the affected landowners; it is incumbent upon the injured party to seek resolution through the court system.