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Re: Stormwater Liability in Maryland (NSGLC-13-04-07)

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Dear Amy,

Several months ago, you asked us to look how Maryland approaches liability for stormwater runoff. In particular, you inquired about the liability from channeling runoff from a public park and road onto private property and whether the government would be liable in such a situation. Below, I have provided a broad overview of the stormwater rules in Maryland. It is important to note, however, that the applications of these rules are very fact-specific and it is therefore difficult to predict how an individual case may be resolved. In addition, I have also provided a broad overview of sovereign immunity for county and local governments in Maryland.

### **Civil Law Rule**

When it comes to the flow of surface water, Maryland follows what is known as the civil law rule. In general, the civil law rule states that the owner of property at a higher elevation is

allowed to have surface water flow naturally over his property and onto adjoining properties that are at a lower elevation.<sup>1</sup> What this means for lower land owners is that they cannot take steps to keep the surface water from flowing naturally onto their property. If they were to do so, they would be liable under the civil law rule because they are preventing the natural flow of water from the upper property onto the lower property.

However, the civil law rule also places limitations on upper landowners. While landowners at higher elevations are allowed to have surface water flow naturally over their properties, these landowners are not allowed under the civil law rule to increase either the amount or volume of water than would flow naturally to the lower land. Similarly, upper landowners are not allowed to change the ordinary drainage on the property by channeling the surface water onto the lower property. Finally, upper landowners are not allowed to direct water to lower land that would not naturally drain onto that land.<sup>2</sup> If the upper landowner changes that natural drainage onto the lower land, the lower owner “is entitled to fill his property to protect it from the unlawful flow of the water.”<sup>3</sup>

### **Reasonableness of Use Rule**

Courts in Maryland have the ability to mitigate the strict application of the civil law rule. In Maryland, courts can apply the reasonableness of use rule if application of the civil law rule will result in hardship to either the upper or lower landowner. The reasonableness of use rule is an equitable principle— this means that courts can apply it in order to produce a fair result in a particular case. As a result, the reasonableness of use rule does not fundamentally change the civil law rule, but rather, simply lessens the harsh outcome of the civil law rule in individual cases.

When a court uses this rule, it creates no precedent for later cases. This means that a court facing a case that has similar facts to a case that previously used the reasonableness of use rule is not required to apply the rule in the present case. Each case is treated separately, and courts simply have the ability to apply the reasonableness of use rule if it decides that strict application of the civil law rule will result in an unfair result. Thus, “[t]he rule of reasonableness is one of fairness, and its application depends on the circumstances evident in

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<sup>1</sup> *Beane v. Prince George’s County*, 20 Md.App. 383 (Md. Ct. Spec. App. 1974) (citing *Sainato v. Potter*, 222 Md. 263 (Md. 1960)).

<sup>2</sup> *Biberman v. Funkhouser*, 190 Md. 424, 429 (Md. 1947); *see also* *Beane v. Prince George’s County*, 20 Md.App. 383 (1974) (citing *Sainato v. Potter*, 222 Md. 263 (Md. 1960) (“This rule is however, subject to the important limitation that the higher landowner cannot artificially collect surface water and discharge it at one point over the lower land, so as to injure it, nor can he precipitate it in greatly increased or unnatural quantities upon his neighbor below to the substantial injury of the latter.”))

<sup>3</sup> *Biberman v. Funkhouser*, 190 Md. 424, 429 (Md. 1948).

the particular case. That is why the manner of its use in one case does not require the same manner of its use in another.”<sup>4</sup>

Whether a court decides to apply the rule will depend on the facts of the individual case concerning the flow of surface waters.<sup>5</sup> A Maryland court has stated that application of the reasonableness of use rule was a question of fact based on the facts of the particular case and not a question of law, noting “[i]t would doubtless be convenient if it could always be answered by citing a stereotyped definition of legal right. But, as the situation of all adjoining owners of land is not the same, and as the circumstances attending the use of land in view of the flow of surface water are infinitely various, the failure to attain substantial justice by the enforcement in all cases of a rule of law which does not recognize these important differences is not surprising.”<sup>6</sup>

Further, courts in the state have noted the reasonableness of use rule is only applied when the upper landowner is acting unreasonably or when the lower landowner is experiencing a special harm.<sup>7</sup> The rule has been applied to stop the upper landowner from:

- (1) increasing materially the quantity or volume of water discharged onto the lower land;
- (2) discharging water in an artificial channel or in a different manner than the usual and ordinary natural course of drainage;
- (3) putting upon the lower land water that would not have flowed there if the natural drainage conditions had not been disturbed;
- (4) causing dirt, debris, and pollutants to be discharged onto the lower land; and
- (5) otherwise creating a health hazard.<sup>8</sup>

### **Examples of the Application of these Rules**

To help illustrate how Maryland courts have applied these rules, I’ve summarized a few key cases below.

*Beane v. Prince George’s County*, 20 Md.App. 383 (Md. Ct. Spec. App. 1974)

The Beanes brought this suit based on the improvement of a road by the Prince George County Department of Public Works and the department’s installation of catch basins and drainage pipes along the road for 450 feet. The pipes ran along 4 residential properties and discharged water through an outfall that was located 40 feet inside the Beanes’ property. The water then drained onto an abandoned public road that separated the Beane property from

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<sup>4</sup> Mark Downs, Inc. v. McCormick Properties, Inc., 51 Md.App. 171, 184 (Md. Ct. Spec. App. 1982).

<sup>5</sup> Kidwell v. Bayshore Dev. Corp., 232 Md. 577, 584 (Md. 1963).

<sup>6</sup> Whitman v. Forney, 181 Md. 652, 659-660 (Md. 1943).

<sup>7</sup> Mark Downs, Inc. v. McCormick Properties, Inc., 51 Md.App. 171, 184 (Md. Ct. Spec. App. 1982).

<sup>8</sup> Id. at 183-84.

their neighbors the McMullens' property and then passed through a pipe under the road on the western end of the Beanes' property. An issue that the court considered was whether the amount of water that was draining was larger than the amount that has been draining before the road improvements. The court determined the new drainage system was not a reasonable use by the county, even though water had previously drained onto the property. The court stated that the drainage system amounted to an "abnormal and unlawful' channeling of the surface water from up to ten acres of land which had not previously drained onto the appellants' property."<sup>9</sup>

*Mark Downs, Inc. v. McCormick Properties, Inc.*, 51 Md.App. 171 (Md. Ct. Spec. App. 1982)  
In this case, the plaintiffs' property was in a 10-year floodplain and had a history of being inundated, including by a tropical storm in 1973. When the property sustained damage from a tropical storm in 1979, the owners sued several parties, including the county. The plaintiffs claimed that despite the history of flooding on the property, the county didn't follow a consultant's recommendation to implement flood control measures and did not stop development or the issuance of construction permits in the area. The plaintiffs also claimed that by developing their property, the other defendants reduced the land's absorption capacity and increased the amount of stormwater run-off.

The claims against the county were dismissed due to the county's governmental immunity defense. However, the court found that the plaintiffs had sufficiently stated a claim for trespass, negligence and private nuisance against the other landowners since there was evidence that the defendant landowners had each filled, graded and altered their land. These alterations caused surface water to be discharged in a way that differed from the land's natural drainage and increased the speed and amount of stormwater runoff in an artificial, material way.<sup>10</sup>

*Whitman v. Forney*, 181 Md. 652 (Md. 1943).

In this case, there was a drainage pipe from a state highway that went across the Forneys' property and under their house. When the Forneys bought the house, they noticed the pipe and the foul-smelling, black, slimy water that came out of the pipe. The Forneys notified the State Road Commission, who tried to negotiate with the Forneys to move the pipe outside of the house. When the Forneys failed to agree with the roads commission, they contacted the County Health Officer, who eventually told the Forneys to block off the ditch where it entered their property. The Forneys did this, which prompted the road commission to file a suit seeking an injunction to restore the flow of water through the ditch.

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<sup>9</sup> Beane v. Prince George's County, 20 Md.App. 383, 400 (Md. Ct. Spec. App. 1974).

<sup>10</sup> Mark Downs, Inc. v. McCormick Properties, Inc., 51 Md.App. 171, 186 (Md. Ct. Spec. App. 1982).

The court reviewed the civil law rule and emphasized that the reasonableness of use rule could be applied in certain cases to mitigate the harsh application of the civil law rule.<sup>11</sup> The court also noted that the two parties could work out an agreement between themselves that would benefit both parties. Since the parties in this case did not reach an agreement, the court applied the reasonableness of use rule. The court stated that it believed fairness dictated that the road commission should fix the pipe and ditch so that it was no longer a health risk to the Forneys, and once the drainage system was fixed, the Forneys would have to reopen the drain and have the surface water flow on their land.

*Biberman v. Funkhouser*, 190 Md. 424 (Md. 1948)

This case involved the Funkhouser and Biberman properties. Originally, the Biberman lot was the upper estate and drained onto the Funkhouser property. However, the Funkhousers later filled their property, making it higher than the Biberman property. The Bibermans then filled and graded their own property, making the property drain onto the Funkhousers' property once again. The flow of surface water would occasionally flood the Funkhousers' basement, which prompted the Funkhousers to sue the Biebermans.

The court recognized that while the grading of the Bieberman property may have increased the amount of water flowing onto the Funkhousers property, the increase appeared to be trivial. Likewise, while the Biebermans may have concentrated the flow of surface water to a certain extent, this concentration and change of direction of the flow also appeared to be trivial. Thus, the court found that since the cost to install a drain on the Funkhouser property would be low, the appropriate resolution was to have the Funkhousers pay for a drain to be installed on their property.

### **Sovereign Immunity**

In Maryland, the state and its agencies have always been given broad immunity from tort and contract suits, unless the General Assembly has expressly waived the immunity through legislation. However, counties and municipalities have not been given the same broad immunity. Under Maryland law, the immunity of counties and municipalities only applies to tort actions, which are civil actions based on harm to a person, property and other interests. Counties and municipalities are not given immunity when a party sues them based on a contract.

The immunity that counties and municipalities receive for a tort action is also limited, though. For nuisance actions, which are suits based on an alleged injury to or interference with the use

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<sup>11</sup> *Whitman v. Forney*, 181 Md. 652, 659 (Md. 1943).

of a neighboring property, counties and municipalities never receive immunity.<sup>12</sup> The reasoning behind this rule is that a county or municipal government does not have any more of a right to cause and maintain a nuisance on its land than a private landowner does.<sup>13</sup> County and municipal governments also do not have immunity for constitutional rights violations or when they are sued by the state, since local government immunity is derived from state sovereign immunity.<sup>14</sup>

In other (non-nuisance) tort actions, a county or municipal government will only have immunity if the challenged function is governmental. In other words, the local government will have no immunity if the challenged function is proprietary or corporate.<sup>15</sup>

While the distinction between these two functions is not always clear, the Maryland Court of Appeals has formulated a test for making this distinction. In looking at whether the action is governmental or proprietary, parties should consider “[w]hether the act performed is for the common good of all or for the special benefit or profit of the corporate entity.”<sup>16</sup> Another test established by the Maryland courts is as follows: “Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.”<sup>17</sup>

The Maryland courts’ application of this rule has resulted in some odd distinctions. For instance, the Maryland courts have consistently held that the maintenance of public parks by local governments is a government function, and thus, immunity applies.<sup>18</sup> On the flip side, Maryland courts have found that municipalities have “a ‘private proprietary obligation’ to maintain its streets, as well as the sidewalks, footways and the areas contiguous to them, in a reasonably safe condition.”<sup>19</sup> Since it is a proprietary function, local governments do not receive immunity for the maintenance of its streets. The courts have observed that this may be an illogical distinction, but it is a distinction that will remain in Maryland.<sup>20</sup> Finally, courts have noted that the distinction between governmental functions, which receive immunity, and proprietary functions, which don’t, can be fuzzy when a hybrid function is involved, such as a public road or walkway that leads to or goes through a park.<sup>21</sup>

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<sup>12</sup> Tadjer v. Montgomery County, 300 Md. 539, 550 (Md. 1984).

<sup>13</sup> Board of Educ. of Prince George’s County v. Mayor and Common Council of Riverdale, 320 Md. 384, 388 (Md. 1990).

<sup>14</sup> Id. at 390.

<sup>15</sup> Id.

<sup>16</sup> Tadjer v. Montgomery County, 300 Md. 539, 547 (Md. 1984).

<sup>17</sup> Mayor and City Council of Baltimore v. State, ex rel. Bluford, 173 Md. 267, 276 (Md. 1937).

<sup>18</sup> Higgins v. City of Rockville, 86 Md.App. 670, 677 (Md. Ct. Spec. App. 1991).

<sup>19</sup> Id. at 679.

<sup>20</sup> Id. at 680.

<sup>21</sup> Id. at 680.

## **Conclusion**

Maryland is a civil rule state, which means that an upper landowner has the right to have surface water flow over his land onto a lower landowner's property, and the lower landowner has to allow this flow. However, an upper landowner has no right to alter materially this flow of water. If the strict application of this civil rule will result in a harsh outcome for either the upper or lower landowner, the court does have the ability to apply the reasonableness of use rule to reach a fairer result. As a result, how a court will rule will depend on the facts of each case, and the previous decisions of Maryland courts have no bearing on future cases.

Finally, sovereign immunity may apply for the actions of local governments. Immunity applies to governmental actions, like the maintenance of a park, but not to proprietary actions, like the maintenance of roads. Further, immunity does not attach to contract or nuisance actions.

Under these broad rules, it is hard to determine how a court will view a particular set of facts. Since the maintenance of roads is a proprietary function that does not receive immunity, if stormwater was running off a county road, immunity may not be available for the county. However, as discussed above, if there is a hybrid situation involved, such a road through or leading to a park, the status of immunity for the local government may be harder to determine.

I hope you have found this information helpful. If you would like additional information or have follow-up questions, please let us know.

Sincerely,



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