

MEMORANDUM

TO: Mayor McCue and Village Council

FROM: Brady Herman and Bob Hornik, Village Attorney's

DATE: August 26, 2021

RE: Stormwater Drainage and Surface Water Runoff liability

Our office has been asked to provide guidance on the Village's general responsibilities and obligations when it comes to (1) surface water flow runoff from municipal streets and (2) stormwater drainage systems. Below are the general principles of the law on these respective issues:

Diversion and Acceleration of Surface Water Flow on Municipal Streets

The general rule articulated by the NC Supreme Court "in regard to the flow and disposal of surface water incident to the grading and pavement of streets... *a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow of water upon abutting owners, unless there has been negligence on their part causing the damage complained of.* The right to change the grade of the streets and to improve the same, according to modern and generally approved methods, passed to the municipality in the original dedication, and may be exercised by the authorities as the good of the public may require. It is held in [North Carolina], however, *that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and, if, in a given case or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible* (emphasis added)." ¹

This means local governments owe a duty to use due care when it makes improvements to its streets (which includes grading and paving) and/or when it directs water into storm drains; and will only become liable for negligence in not exercising the proper skill or caution in the construction of its artificial drains and watercourse.² As such, if streets are so constructed by the municipality as to collect and concentrate surface water that such an unnatural flow in manner, volume, and mass is turned and diverted onto a property owners' lower lot, so as to cause

¹ *Yowmans v. City of Hendersonville*, 175 N.C. 574, 577, 96 S.E. 45, 46 (1918). See also *Roberson v. City of Kinston*, 261 N.C. 135, 134 S.E.2d 193 (1964) (A hastening of the flow of surface waters necessarily results from the construction of streets and gutters by a municipality, and the city may not be held liable for injuries resulting from such acceleration in flow if the surface waters are not diverted from their natural direction.).

² *Id.*; See also *Eller v. City of Greensboro*, 190 N.C. 715, 720, 130 S.E. 851, 853 (1925).

substantial injury to that property, a municipality will be liable for lack of due care in the construction of the roads and drains.³

Furthermore, it appears a municipality is not required as a matter of law to curb and gutter its streets, but it is subject to the duty to exercise reasonable care in deciding whether or not to construct such drainage facilities.⁴ If a municipality decides to construct such drainage systems, it must exercise ordinary skill and caution in that construction. Generally, this is taken to mean that the artificial drains must be adequate to receive the amount of surface water which will flow into them under ordinary conditions and in the light of ordinary experience.

Municipal Responsibility for Stormwater Drainage Systems

The general rule is a municipality is not responsible for the maintenance and upkeep of drains and culverts constructed by third persons, or liable for injuries resulting from a want of due care thereof, unless such facilities have been adopted, managed, maintained or controlled in some legal manner by the municipality.⁵ The question of whether a local government has “controlled” or “adopted” stormwater drains or pipes constructed by third parties is extremely fact specific, nonetheless, below is a short list of examples where courts have found no municipal liability:

- A City’s control and maintenance of two culverts upstream from owner’s property did not mean the City adopted the entire stream or water runoff;⁶
- A City’s control of portions of stormwater management pipes above and below, but not immediately adjacent to the pipe on landowner’s property was neither adoption or control of the pipe;⁷
- Landowners pipes that were not immediately connected with the City’s pipes but were connected with other drainage pipes that eventually connected with the City’s storm water management facility, no evidence the City had adopted landowners’ pipes;⁸

³ *Eller v. City of Greensboro*, 190 N.C. 715, 720, 130 S.E. 851, 853 (1925) (“The city can only be liable for negligence in not exercising skill and caution in the construction of its artificial drains and watercourses. It is bound to exercise ordinary care and prudence. If [city streets] are so constructed as to collect and concentrate surface water that such an unnatural flow in manner, volume and mass is turned and diverted onto the lower lot, so as to cause substantial injury, the city is liable.”).

⁴ *Id.*; See William P. Aycock II, Real Property--Disposition of Diffused Surface Waters in North Carolina, 47 N.C. L. Rev. 205 (1968). <http://scholarship.law.unc.edu/nclr/vol47/iss1/17>

⁵ *Johnson v. City of Winston-Salem*, 239 N.C. 697, 707, 81 S.E.2d 153, 160 (1954).

⁶ *Mitchell v. City of High Point*, 31 N.C. App. 71, 75, 228 S.E.2d 634, 638 (1976)

⁷ *First Gaston Bank of North Carolina v. City of Hickory*, 203 N.C. App. 195, 205, 691 S.E.2d 715, 724 (2010).

⁸ *Asheville Sports Properties, LLC v. City of Asheville*, 199 N.C. App. 341, 344, 683 S.E.2d 217, 220 (2009).

- City issuing a Certificate of Occupancy to a property owner did not give rise to a duty to maintain and repair a private storm-drain or pipe simply by inspecting or examining construction activities on private property.⁹

In sum, if a drainage system or pipe is privately constructed, is not immediately connected to a municipal drainage system or adjacent thereto, and a local government has taken no action to assume control or management of the drain or pipe at issue, it will have no duty or responsibility for repair, upkeep, or maintenance, and therefore no liability.

In the alternative, if a municipality assumes control and management of stormwater drains or adopts a natural watercourse for drainage purposes, the general rule is they have a duty to keep such drain in good condition and repair, free from obstructions, and will be liable in damages to any property owner injured by its negligence in this respect.¹⁰ Thus, municipalities have a duty to exercise a reasonable degree of watchfulness to ascertain the condition of stormwater drains of which it has assumed control and management thereof. This means periodically checking the drains from time to time so as to prevent them from being obstructed or clogged.¹¹ However, liability will only arise in those situations where the municipality has actual or constructive notice of the existence of an obstruction or defect with respect to a stormwater drain or pipe and fails to act accordingly.¹²

⁹ *First Gaston Bank*, at 205-06, 691 S.E.2d at 723.

¹⁰ *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 526, 151 S.E.2d 35, 37 (1966).

¹¹ *Hotels*, at 537, 151 S.E.2d at 37.

¹² *Ward v. City of Charlotte*, 48 N.C. App. 463, 467, 269 S.E.2d 663, 666 (1980).

