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Should Municipalities Be Liable for Development-Related Flooding

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ABSTRACT

Municipalities contribute to flooding when they permit new construction without requiring drainage facilities adequate to accommodate increased surface water runoff. Poor municipal planning encourages urban sprawl and vacant center cities, while the flooding caused by poor planning deprives existing landowners of investment-backed expectations. Flood planning is even more important under conditions of global warming because cities may be subject to more severe storms and coastal areas may be more frequently inundated by seawater.

Municipal liability for planning-related flood damage and immunity therefrom are largely matters of common law. States diverge as to municipal immunity and liability, supporting rationales, causes of actions, and standards of proof. Public policy argues for a uniform doctrine of prospective municipal liability that limits flood damage and urban sprawl and protects existing landowners but does not penalize cities for planning mistakes made under previous immunity doctrines.

I. INTRODUCTION

In this article, I propose that it is contrary to the public interest to grant municipalities immunity from tort liability for damages suffered from flooding where the municipality has contributed to the flooding through the approval of building permits or of inadequate drainage facilities. Immunity is contrary to the public interest for three reasons: (1) urban development and sprawl have reduced the capacity of the land to absorb water, resulting in greater runoff from storm events; (2) under predicted global warming scenarios, storm events are likely to be more severe, creating a greater risk of flooding; and (3) liability for the consequences of improvidently issued building permits discourages urban sprawl and promotes more condensed development, thus encouraging resource conservation, especially for transportation, which in turn reduces

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the production of greenhouse gases. The evidence supporting the inevitability of global warming is such that the editors of Science have urged developed countries to reduce greenhouse emissions now.1

This article addresses the policy considerations for municipal flood liability, analyzes the relevant case law, and then suggests a simple workable rule prescribing when political subdivisions would and would not be liable for damages caused by flooding. The article then concludes by examining the legal ramifications of municipal flood liability.

II. POLICY REASONS FOR MUNICIPAL LIABILITY FOR FLOODING

Under the predicted climate change scenarios, rainfall is expected to become more variable and storm events more severe. A change in the mean temperature and precipitation of one standard deviation—a likely outcome for an atmosphere with double natural levels of carbon dioxide—is nine times as likely to produce storms currently labeled as 100 year events, and 30 times as likely to produce storms now classified as 10,000 year events.2 If such predictions come true, protections limited to the current 100-year floodplains will become inadequate. Moreover, vulnerability to damage from even more moderate floods will multiply. Storm clustering and storm severity are more important than measuring changes in yearly precipitation.3 A study performed by Changnon and Changnon showed an increase between 1954 and 1994 of weather related catastrophes with damages over $100 million.4

Changnon and Demissie also examined the impact of weather and population patterns on stream flooding in urban and rural areas of Illinois. They found an increase in both precipitation and mean annual flow from 1940 to 1990. Most of the variations in flow were explained by changes in

4. David Changnon & Stanley A. Changnon, Jr., Evaluation of Weather Catastrophe Data for Use in Climate Change Investigations, 38 CLIMATIC CHANGE 435, 435 (1998). The study found that much, but not all, of the increase in the costs of weather related catastrophes was attributable to increases in population density and a shift of populations to regions susceptible to weather-related disasters. The study was not able to consider changes in building design and building codes.
land use, with greater flooding occurring in urbanized areas, but increases in precipitation were also a factor in raised levels of stream flow.\(^5\)

Modern growth patterns exacerbate the flooding problem. Suburbanization increases the land area that is paved or roofed and hence impermeable. Rainfall thus becomes unabated surface flow. Cities zone for large lots because doing so generates higher property values and simultaneously places less strain on public services such as schools and sewage. This yields a greater area of paved space per capita, leading to more storm water runoff.\(^6\) To make matters worse, older industrial cities have a decaying infrastructure less capable than ever of addressing flooding, and suburbanization has deprived them of the tax base necessary to improve their infrastructure.

These are the reasons that municipalities must be made accountable for their storm and sewage waters. In light of older cities’ economic plight and the causation of flooding by suburban sprawl, the fair solution may be to share the burden of flood control and flood liability regionally. Unfortunately, political and watershed boundaries seldom match.\(^7\) This article does not focus on regional coordination, but it is hoped that municipal liability for flooding may encourage regional coordination as one equitable way to adapt to climate change.\(^8\)

III. THE LAW OF MUNICIPAL LIABILITY FOR FLOODING

In the context of this article, the terms “city” and “municipality” are used interchangeably. They mean any political subdivision that permits or fosters urban growth or constructs or regulates sewage and drainage systems associated with urban development. The majority of court decisions favor municipal immunity for flooding related to development, though there does not appear to be a consistent trend in this area of the law. In some circumstances, the result is supported by statutory, constitutional, or common law sovereign immunity. Other jurisdictions treat municipal liability for flooding as an extension of private flooding liability under common law water discharge rights that address the right.

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of a landowner to discharge water from his/her property onto the property of another landowner.  

Few states have developed a consistent policy toward municipal liability for flooding damage, and fewer still have based their policy upon a reasoned analysis. Most often, decisions rest entirely upon stare decisis. McQuillin, in Law of Municipal Corporations, has attempted to summarize the law of municipal flood liability:

Under this rule, while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow unless compensation is made, and for breach of duty in this respect an action will lie....

So too, where a village furnishes a building permit to a contractor for the development of an industrial complex which benefits the village financially, but which also diminishes the surface area available for the drainage of water, causing the flooding of neighboring servient estates, liability for damages resulting from the increased flooding rests with the village rather than with the individual lower riparian owners.

Thus, McQuillin suggests that municipalities are indeed liable where permitting of construction or diversion of water results in the flooding of lower riparian lands but are not liable for their own construction activities. The law varies so much from state to state, however, that McQuillin’s summary is of dubious value. McQuillin’s summary fails to explain why liability should or should not attach.

Conflicts in this area of law occur in several recurring situations. They occur when excessive waters flow from the upstream property (or dominant estate) onto that of the downstream property (or servient estate), when water from the downstream property backs up onto the upstream property, or when water overflows an easement onto a dominant estate.

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9. See, e.g., Looney v. Hindman, 649 S.W.2d 207 (Mo. 1983); see also Bailey v. Floyd, 416 So. 2d 404 (Ala. 1982) (addressing flows outside of a municipality).
11. An easement is a right to use or control land the easement-holder does not own, but for a specific or limited purpose, such as maintaining a utility pole. The land that benefits from an easement is known as the dominant estate, whereas the land burdened by an easement.
Typically, a city has constructed a sewage or storm drainage system but continued urban growth makes these channels inadequate to carry the runoff from storms. Water may then flow over a plaintiff's property, creating a trespass. Sometimes damage occurs (e.g. landslides, sewage in basements), raising the level of tort from trespass to nuisance. Where the flooding is continuous, it may be viewed as a taking.

Municipal involvement proceeds along a continuum. In the least culpable circumstance, the municipality may have only failed to inspect a private development or drainage ditch, or it may have issued a permit for development that increased downstream flows. The development may have been designed and constructed to comply with a city's master plan. Sometimes the water flows directly from city property onto the plaintiff's land, such as from an overflowing storm sewer. The basis for liability may be the city's failure to maintain the storm sewer or the failure to construct a sewer large enough to handle flows. A good jumping off point is therefore the consideration of whether it is a municipality's duty to provide channels for run-off and sewerage.

A. Municipal Duties

Municipalities, as chartered creations of the state, may be thought of as bodies representing the common good. Municipal liability shares the burden of poor planning with the entire community and does not visit it just upon a few innocents. The risk of liability encourages the thoughtful planning necessary to adapt to a changing environment. This adaptation reduces the overall burden to the community as a whole.
Municipalities have the authority to abate nuisances. The abatement of nuisances by a municipality is discretionary, however. The failure of a city to abate a public nuisance does not create a right of action against the city. Courts will not normally interfere in decisions to abstain from abatement.

Consistent with the discretionary authority of municipalities to abate nuisances, the common law rule is that municipalities are under no duty to provide sewerage to their constituents. States disagree as to whether, once a city has undertaken to provide sewerage, it has an obligation to upgrade the service to handle additional inflows. Texas courts have ruled that cities need not upgrade existing sewerage for two reasons: First, doing so would discourage cities from implementing any sewerage, because once they began a sewerage program they would incur the expense of future upgrades—since partial sewerage is better than none at all, it is better to encourage cities to provide at least limited sewerage. Second, judicial review of municipal sewerage decisions would breach the separation of judicial and legislative powers:

To award damages in a private action for insufficient drainage...would be to permit use of the judicial process to supervise the planning and construction of public improvements. Municipal fiscal policy, instead of being set for the city as a whole by the elected representatives of the people, would be subject to piecemeal review and revision by courts in separate actions concerned primarily with the interests of one or more individual landowners....

On the other hand, the Kentucky Supreme Court, in City of Louisville v. Cope, held that a city that constructs a sewer system has an obligation to upgrade the service to handle additional inflows. New York communities are under no affirmative duty to abate or prevent flooding. O'Donnell v. City of Syracuse, 76 N.E. 738, 740 (N.Y. 1906). Accord Office Park Corp. v. County of Onondaga, 409 N.Y.S.2d 854, 858 (N.Y. App. Div. 1978).


obligation to insure that the system remains adequate, even if there is additional growth in the city.\textsuperscript{19} The Kentucky courts treat sewers as artificial drainages. Under the natural course rule, once the city has altered the flow through these drains, it is responsible to ensure that no damages result from the flows. Pennsylvania adopts a similar view.\textsuperscript{20}

The logic of both the Texas and Kentucky courts has appeal. On one hand, if a municipality has no common law duty to install sewerage, then it certainly should have no duty to install complete sewerage. However, is it fair to the landowner who builds believing in the reliance of an adequate sewer system to have his expectation eviscerated because the city now allows the system to service more flow than its capacity? Is it fair to the pre-existing landowner to be burdened with sewage that would not be there but for the city’s construction of municipal sewerage works? Texas courts indulge in a fiction that ignores that the city creates the excess burden on the sewerage system by approving development.

Ultimately, the choice between these two options boils down to a question of public policy. The underlying premise that a city has no obligation to install sewage facilities is false because the Federal Clean Water Act prohibits unpermitted point-source discharges of pollution.\textsuperscript{21} Sewage service is now an expected amenity of urban and suburban living. This undercuts the Texas argument that liability for flooding and backup will discourage the construction of sewerage facilities. Nor does there appear to be evidence to support a conclusion that creating municipal liability for inadequate sewerage leads to a surfeit of litigation, or that in the jurisdictions that approve such liability, it has led to excessive judicial interference with municipal planning functions.

Adoption of the Kentucky rule does, on the other hand, promote better municipal planning, and it enables landowners to rely on their reasonable expectations as to the value of their property. It also confines growth to areas that have either the infrastructure or the natural capacity to handle runoff.

\begin{itemize}
  \item \textsuperscript{19} \textit{City of Louisville v. Cope}, 176 S.W.2d 390 (Ky. 1943); \textit{accord} \textit{City of Harrodsburg v. Yeast}, 247 S.W.2d 383 (Ky. Ct. App. 1952). Arizona’s Supreme Court concurs. In \textit{City of Tucson v. Apache Motors}, 245 P.2d 255, 260 (Ariz. 1952), it observed, “although no legal duty devolved upon the city of Tucson to construct the culverts here involved, but having undertaken to do so, it was required under the law to build culverts of sufficient size to adequately carry away all water accustomed to flow, or which may be reasonably anticipated to flow down such arroyo as a result of rains upon the watershed which it drained. Having failed to do this it was, in law, guilty of negligence....”
  \item \textsuperscript{20} \textit{See} \textit{City of Philadelphia v. Messantonio}, 533 A.2d 1127 (Pa. Commw. Ct. 1987) (holding that once a city has undertaken the discretionary act of installing a traffic light, it is under a duty to maintain the device).
  \item \textsuperscript{21} \textit{See} \textit{Federal Water Pollution Control Act}, 33 U.S.C. § 1342 (2000).
\end{itemize}
B. Sovereign Immunity and Statutory Liability

Because municipal liability is generally premised on principles of nuisance, trespass, or common law water rights, statutory grounds are infrequently cited as the basis for municipal liability. As an exception, Louisiana's determination is based upon Section 2315 of its Civil Code:

"Every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." In Eschete v. City of New Orleans, the plaintiff alleged that the city's approval of new subdivisions resulted in flooding of his property. The Louisiana Supreme Court relied upon Section 2315 and reversed the trial court's dismissal of the lawsuit, holding that allegations of the city's foreknowledge of flooding, combined with damage, were sufficient to sustain the suit. Although made easier by its statutory foundation, the Louisiana decision is nonetheless elegant in its simple logic. The city caused an injury through its error and is therefore liable.

Many states still protect their municipalities from suit under the doctrine of sovereign immunity. Sovereign immunity originated in the English common law and was premised upon the king's infallibility. When the doctrine was imported into the American common law, its rationale was more basic: government could not afford to do its job if it were always financially liable for its misdeeds. The unfairness of the doctrine to the individual was mitigated with the 1946 passage of the Federal Tort Claims Act. The Federal Tort Claims Act has been interpreted to waive immunity for non-discretionary activities but not for discretionary ones. State courts

22. LA. CIV. CODE ANN. art. 2315 (West 1997 & Supp. 2001). Unlike the other 49 states, Louisiana is a civil law jurisdiction. Instead of relying on the rich tradition of common law inherited originally from Roman law but more recently from English jurisprudence, Louisiana law is more determined by code and places more emphasis on the rights of individuals as opposed to government. Robert Pascal, Louisiana Civil Law and Its Study, 60 LA. L. REV. 1, 1 (1999).


have generally followed the federal lead in the abrogation of traditional sovereign immunity.\footnote{28}

In \textit{Wilson v. Ramacher}, Minnesota’s Supreme Court said, “[s]ome services to the public cannot be effectively accomplished if performance of these services is chilled by concern for second-guessing by a tort litigant....”\footnote{29} The court’s conclusion, however, is more assumption than fact. It dodges the real policy questions: (1) Would lawsuits for improper approval of development hinder municipal function? (2) Does sovereign immunity, if it protects improper development, benefit or harm the community? and (3) Is the application of sovereign immunity fair to injured persons?

In the municipal arena, courts have applied two different doctrines to protect cities from flood liability under the rule of sovereign immunity: the discretionary/non-discretionary distinction and the proprietary function/governmental function distinction. Texas applies both doctrines:

1. When a municipal corporation acts in its private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government, it is liable for the negligence of its representatives.

2. A municipal corporation is not liable for the negligence of its agents and employees in the performance of purely governmental matters solely for the public benefit.\footnote{30}

Governmental immunity protects a city when it exercises discretionary powers of a public nature involving judicial or legislative functions....The City’s design and planning of its culvert system are quasi-judicial functions subject to governmental immunity.\footnote{31}

In another case, the Texas Supreme Court found that flood damages related to a subdivision fell within sovereign immunity. “In this case, plat approval is a discretionary function that only a governmental unit can perform. By definition, a quasijudicial exercise of the police power is exclusively the province of the sovereign.” By comparison, the court


29. 352 N.W.2d 389, 393 (Minn. 1984) (the city of Lino Lakes was held to have immunity in its decision to approve a subdivision).

30. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997) (quoting Dilley v. City of Houston, 222 S.W.2d 992, 993 (Tex. 1949). In \textit{City of Tyler}, the city was held immune from a suit alleging negligence in the planning of a culvert system.

31. Id. at 501.}
characterized maintenance of a storm sewer as a non-discretionary governmental function for which the state can be held liable.  

Texas’s search for a bright line determiner of liability raises the question, Are plat approval and the issuance of building and subdivision permits truly discretionary activities? Some state appellate courts believe that the approval of building permits is not really a discretionary municipal function. In *Winters v. Commerce City*, the Colorado Court of Appeals found that the denial of a building permit was ministerial, not discretionary, because grant or denial of the permits was compelled by set rule and did not require discretion on the part of the government agency. As a consequence, the municipality did not receive blanket immunity. Similarly, the Arizona Court of Appeals observed, "The issuance of a building permit appears to us to be more of an administrative or executive function rather than legislative." For states wishing to preserve their immunity for municipal discretionary decisions, it would be advisable for their courts to examine whether the permits are granted as a matter of right if all the criteria are met, or whether the municipality has any real discretion in the issuance of such permits. Merely because the approval of developments is done by a planning agency does not mean that such approvals are discretionary planning activities.

Like Texas, Maryland grants its political subdivisions a limited sovereign immunity for the performance of its governmental functions but not its proprietary responsibilities. In *Irvine v. Montgomery County*, the county issued permits for excavation, grading, and paving of streets as part of subdivision development. This construction activity diverted water onto the plaintiff’s property. The court said, "[I]n issuing permits for construction a municipality is only exercising its governmental authority and is immune from action against it"; and "[e]ven though the permits were for street construction, the municipal corporation is immune from liability for error of judgment." These statements would seem to shut the door on municipal liability but for a caveat near the end of the opinion: "Here the bill of complaint does not allege any acts of negligence on the part of the county in approving the plan of subdivision, or any failure of the plan, in respect of streets, to conform to the specifications of the county

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DEVELOPMENT-RELATED FLOODING

So, had the county been negligent in the performance of its permitting duties, liability might have resulted.

The Virginia Circuit Court of Appeals, in *Linda Lee Corp. v. Covington Co.*, relied upon the proprietary/governmental function distinction to relieve the city of Bedford of liability for flood damages caused by the construction of a shopping center without an adequate stormwater drainage system. The plaintiff argued that the city was negligent both in failing to construct an adequate system and in approving the construction of the shopping center without an adequate system. Not confident in the soundness of its rationale, the Virginia court added an alternative basis for exemption—the public duty doctrine—holding that sovereign immunity applies where the city function is to serve the public at large, and not individual citizens. The public duty doctrine thus seems to mirror the proprietary/governmental function distinction. It raises the question of whether the issuance of a building permit is designed to protect the public at large, or a particular segment.

New Jersey goes even further in granting immunity. As long as a governmental decision or action is made in good faith, sovereign immunity attaches, even if the municipality acted negligently. In New Jersey, "if a sewer is adequate when constructed the municipality is not liable because of subsequent inadequacy occasioned by the growth of the municipality and the increased demands made upon the sewer." The New Jersey

code." 38 38

38. *Id.* 38

39. 36 Va. Cir. 590 (1993). For it's public duty rationale, the Court relied upon the West Virginia case of *Wolfe v. City of Wheeling*, 387 S.E.2d 307, 311 (W. Va. 1989), which in turn had relied upon the New York case of *Cuffy v. City of New York*, 505 N.E.2d 937, 940 (N.Y. 1987). In *Cuffy*, the court held that the city was not liable for its failure to provide police protection to a landlord who had been injured by a tenant after the landlord requested police protection. The New York Supreme Court held that liability on the part of the government would exist only if four criteria were met: (1) an assumption by local government entity, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the local government entity's agents that inaction could lead to harm; (3) some form of direct contact between the local government entity's agents and the injured party; and (4) that party's justifiable reliance on the local government entity's affirmative undertaking. *Id.* Thus, the only element missing in the Virginia case is direct contact between the government and the flooding victim. It is worth questioning why the absence of contact between victim and regulator should absolve the regulator, where the regulator has at least constructive knowledge of the potential harm. A more logical test would be simply whether the regulator was negligent in not accounting for the potential for flood damage.


Supreme Court has recently noted that the purpose of New Jersey's Tort Claims Law was to create immunities, not remove them.

Other jurisdictions attach liability only if the watercourse or pipe from which the flood waters originated is owned by the government entity. Thus, two California cases adjudged municipalities liable in trespass for flooding where the cities approved and accepted privately constructed drainage systems, and two California cases found the cities immune where the offending drainage system was not actually owned by the cities. It did not matter that the government approved or permitted the private subdivision plans or sewage systems that generated the floodwaters; the determinative issue was ownership.

Some courts determine municipal liability according to common law water discharge rights, even if the city does not own the floodway. The Minnesota Supreme Court has suggested that common law water discharge rules are inapplicable to political subdivisions of the state, because the state owns no estate, but rather derives its control over land from its sovereignty, making the issue of flood liability strictly a question of sovereign immunity. Most jurisdictions gloss over this distinction.

If, however, as proposed above by the Minnesota Supreme Court, the municipality owns no estate and is strictly a child of the sovereign, then is not all of its activity governmental, and any distinction between proprietary and governmental function false? The approval of subdivision development and the construction or acceptance of storm sewers are both governmental actions in furtherance of the common good. Where a city approves a subdivision plat without provision for adequate drainage, or where it physically constructs a too-narrow storm sewer, the net result is the same: flooding. Both are the result of poor planning by the municipality. It is illogical to allow a city to shoulder responsibility for one but not the other.

The United States Supreme Court has also questioned the validity of distinguishing between proprietary and governmental municipal

46. 352 N.W.2d 389, 394 (Minn. 1984).
functions. In *Owen v. City of Independence,* the Court noted that there was no consistency among the states in the interpretation of the doctrine. It went on to state that "[a] comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound."\(^{48}\)

C. Common Law Water Discharge Rights

A common source of flood liability rulings is the common law of water discharge rights.\(^{49}\) Using the common law approach, one can treat the municipality as an upstream landowner, attributing water discharges to the municipality, if it permitted them.

Three distinct doctrines define this field. The "common-enemy" rule holds that every landowner has the right to discharge water from his property and to protect itself from the inflow of water onto his property, even if he or she harms the downstream landowner in the process.\(^{50}\) The upstream owner is given primacy. This rule reflects an attitude that landowners have absolute rights of control over their own property and that development is the highest and best use of any land.\(^{51}\)

Few jurisdictions still follow a pure common-enemy rule.\(^{52}\) Even common-enemy states have modified the rule so as to consider the impact on the lower or servient estate and to consider how much of the flow has been artificially modified.\(^{53}\) These considerations mitigate the potential harshness of the common-enemy rule.


\(^{48}\) Id. (quoting Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (on rehearing)).


\(^{50}\) *Myotte v. Village of Mayfield,* 375 N.E.2d 816, 818 (Ohio Ct. App. 1977). See also *Bailey v. Floyd,* 416 So. 2d 404, 404 (Ala. 1982) ("Each landowner has an unqualified right to divert the surface waters without incurring legal consequences, while other landowners possess the duty and right to protect themselves from the effects of this diversion.").

\(^{51}\) JOSPEH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 92 (3d ed. 2000).

\(^{52}\) See, e.g., *Heins Implement Co. v. Mo. Highway & Transp. Comm’n,* 859 S.W. 2d 681 (Mo. 1993) (rejecting the common-enemy rule for the reasonable use approach because the diversion of additional waters onto lower lands can be viewed as a trespass).

\(^{53}\) In *State v. Feenan,* 752 P.2d at 260, the court held that even though under the common-enemy rule a landowner is not liable for vagrant waters that cross from his lands to his neighbor’s, the landowner is nevertheless required to exercise reasonable care in avoiding damage to the neighbor’s property. More importantly, the Montana Supreme Court held that the common enemy rule is not a defense to governmental obligations to compensate landowners whose property has been taken through government-caused flooding. *Id.* Missouri also applies a "modified common-enemy rule," disallowing destructive flows of water that exceed the natural capacity drainages and discharge onto lands upon which they would not naturally drain. *Looney v. Hindman,* 649 S.W.2d 207, 211 (Mo. 1983).
The natural watercourse doctrine (also known as the "civil law" or "natural flow" rule) grants the right to discharge any amount or rate of water so long as it is discharged into its natural receiving watercourse and is not artificially diverted. This rule arbitrarily emphasizes the ultimate channel conveying the storm drainage. If the water would have naturally flowed down the particular river or drainage ditch, then it matters not that its excess floods private property.

The natural watercourse doctrine ignores the fact that but for additional development, ground absorption would have delayed and lessened the amount of water reaching the conveyance, and the water would not have overflowed the banks onto private property. Thus, while the watercourse may be natural, the flow is not, so the distinction between artificial and natural made by the courts is false. The source of the damage to the property owner is just as artificial as if the water were diverted.

The "reasonable use" rule seeks a more equitable sharing of burdens between upper and lower landowners but, in so doing, it is less clearly defined:

Where a lower riparian landowner stands to be seriously damaged by the actions of an upper riparian landowner, who, at a relatively small expense, is in a position to avoid

54. In Rau v. Wilden Acres, the Pennsylvania Supreme Court elaborated on the nature of the natural watercourse doctrine:

A landowner may not alter the natural flow of surface water on his property by concentrating it in an artificial channel and discharging it upon the lower land of his neighbor even though no more water is thereby collected than would naturally have flowed upon the neighbor's land in a diffused condition. One may make improvements upon his own land, especially in the development of urban property, grade it and build upon it, without liability for any incidental effect upon adjoining property even though there may result some additional flow of surface water thereon through a natural watercourse, but he may not, by artificial means, gather the water into a body and precipitate it upon his neighbor's property. Even a municipality, while not liable to a property owner for an increased flow of surface water over his land arising merely from changes in the character of the surface produced by the opening of streets and the building of houses in the ordinary and regular course of the expansion of the city, may not divert the water onto another's land through the medium of artificial channels.

103 A.2d at 423-24.

55. Johnson v. Bd. of County Comm'rs, 913 P.2d 119, 127 (Kan. 1996) (Construction of a bridge resulted in river water overflowing its banks. Because the water merely overflowed its usual route, but did not choose a different course, the County would have been immune under the natural watercourse rule, except that the County ran afoul of a statute that deprived the County of immunity where it fails to obtain the proper bridge permit.).

56. "Alterations to a natural watercourse, such as the construction of conduits or other improvements in the bed of the stream, do not affect its status as a 'natural' watercourse." Locklin v. City of Lafayette, 867 P.2d. 724, 734 (Cal. 1994).
the harm threatened to the servient owner's estate, it is only reasonable and fair that the offending landowner bear the burden of his own actions.57

General principles of fairness justify this rule, but the decision of how much of a burden the upper and lower owners must bear can only be resolved on a case-by-case basis.58

Nevada, in its aridity, has visited this issue but once. In County of Clark v. Powers,59 as part of the county's master plan, lands immediately to the west of the plaintiffs' land were developed, diverting water so as to flood the plaintiff's property. The Nevada Supreme Court held the County liable for trespass from the diversion of the water for two reasons. First, the county's involvement was greater than just the grant of permits to private builders—the county actually drafted the master plan that created the flooding condition. Second, the court applied a reasonable use rule:

Our prior cases, however, have enunciated three central principles: one, the law of water rights must be flexible, taking notice of the varying needs of various localities; two, a landowner may make reasonable use of his land as long as he does not injure his neighbor; and three, a landowner should not be permitted to make his land more valuable at the expense of the estate of a lower landowner....

By contrast, the natural flow rule, restricted by definition, to a rigid application of the laws of nature and the boundaries of natural watercourses, is ill-suited to the complexities of urban growth and expansion....

[L]andowners, developers, and local officials must take into account the full costs of development to the community prior to the implementation of their plans.60

This last quoted portion of the County of Clark decision strikes at the heart of the liability issue. For our society, are the costs of expansion going to be borne by those private individuals who seek to profit through expansion, by the public as a whole, or by downstream landowners who happen to be unfortunately placed?

58. See Armstrong v. Francis Corp., 120 A.2d 4, 10 (N.J. 1956). In this private dispute, the New Jersey Supreme Court implies that because the project causing the flooding is of high utility, the burden may be imposed upon the servient estate.
60. Id. at 1075, 1076.
The Ohio Court of Appeals likewise relied upon reasonable use standards in its decision in Myotte v. Village of Mayfield.\textsuperscript{61} Myotte's property was flooded following the construction of an upstream industrial park. The Village of Mayfield augmented its 48-inch sewer pipe with a 42-inch pipe, but this still proved inadequate. After quoting from the Ohio Supreme Court case of Masley v. City of Lorain, the Court of Appeals held that the Village of Mayfield's failure to provide adequate drainage was unreasonable in light of the cost of doing so, and the fact that it received tax revenue from the industrial park.\textsuperscript{62}

The Myotte decision is interesting for two reasons. First, it runs contrary to the notion that a municipality has no duty to "keep up" with runoff from development. Second, although relying upon Masley v. City of Lorain, Myotte's logic is contrary to that expressed in Masley. The Court in Masley held that a city may not plan and build a storm sewer system knowing it to be insufficient, and therefore likely to cause flooding. The Court also said, however, that municipalities are not liable for flooding from increased development:

The correct principle of these cases is that a municipal corporation may make reasonable use of a natural watercourse to drain surface water, and will not be liable for incidental damages which may be considered \textit{damnum absque injuria}. It is also not liable for increased flow caused simply by improvement of lots and streets.\textsuperscript{63}

This leaves Ohio law in disarray. The more recent decision in Myotte comes from a lower appellate court, relies upon the Ohio Supreme Court's decision in Masley, and is more widely cited than the Supreme Court decision. Myotte applies a reasonable use test, while Masley applies a modified version of the natural watercourse doctrine. Myotte holds a municipality responsible for waters from a privately owned industrial park for which the village was only the owner of the streets and sewers, while Masley exonerates the city from liability "caused simply by improvement of lots and streets." Myotte suggests that a municipality has a duty to modify its sewage facilities to accommodate urban growth, while Masley confines liability to when a municipality knowingly plans and builds inadequate sewer systems.

Courts have been reluctant to modify common law water discharge rights without legislative authority. In Baldwin v. City of Overland Park,\textsuperscript{64} the plaintiffs complained that additional flows in a drainage ditch, resulting

\begin{thebibliography}{99}
\bibitem{footnote1} Myotte v. Village of Mayfield, 375 N.E.2d at 819.
\bibitem{footnote2} \textit{Id.} at 820.
\bibitem{footnote3} Masley v. City of Lorain, 358 N.E.2d 596, 600 (Ohio 1976).
\end{thebibliography}
from upstream development, were causing a nuisance—debris, odor, and mosquitoes. In choosing to perpetuate the natural drainage rule, the Kansas Supreme Court observed, "Where rapid growth has occurred the resultant problem is primarily an economic one for cities and citizenry, and under the present state of our law, its solution properly lies in concerted political action rather than in the courts." 65

Where a policy of immunity is firmly established in statute or common law, such deference to legislative bodies seems merited. Baldwin, however, is not rooted in a long-standing policy of municipal immunity. The court offers no explanation as to why the courts are not the proper arena to settle competing water and property rights.

D. Urban Growth as a Defense to Liability

Municipal ownership of drainage facilities as a prerequisite to liability can lead to inequitable results. In LaForm v. Bethlehem Township, 66 a woman whose car had stalled along a flooded roadway drowned when she fell in a drainage ditch, the borders of which were obscured by the floodwaters. The drowning took place in Bethlehem Township, but the majority of the waters came from the City of Bethlehem. A jury apportioned the negligence between the City, the Township, and the state highway department at 51 percent, 34 percent, and 15 percent, respectively. Pennsylvania's Superior Court reversed, holding that because the City did not artificially divert its drainage, it was not responsible for waters that flowed off its property, even though downstream Bethlehem Township had complained about the increased flow of water from the City and had unsuccessfully attempted to reach an agreement with the City for the joint installation of an adequate drainage system. 67 The court said a city is not responsible for "the effects of an incidental increase in surface waters flowing in a natural channel when the increase is owing to the normal, gradual development of the city." 68 By providing two separate rationales for its decision (lack of ownership at the locus of injury and immunity from the effects of gradual growth), the LaForm court made ambiguous whether either rationale stands on its own.

In a penetrating dissent, Judge Spaeth attacked the LaForm adjudication from another angle. The common law of water discharge liability upon which the court relied addresses the relative rights of neighboring landowners. As Spaeth notes, however, the victim in LaForm was not a landowner but an automobile driver. Thus, the court should have

67. Id. at 1383-84.
68. Id. at 1379 (citing Strauss v. Allentown, 63 A. 1073 (Pa. 1906)).
focused its analysis not on whether the City of Bethlehem had the right to discharge its water, but rather on whether it had a duty of care to the victim, and if it was negligent in the exercise of that duty.\textsuperscript{69} If, as Judge Spaeth suggested, the focus is shifted from the issue of water rights to that of duty of care, it should not matter that the victim was killed on Bethlehem Township property if the source of the injury was from the City of Bethlehem, unless the duty of care ends with one's political boundaries.\textsuperscript{70}

The Pennsylvania Superior Court in \textit{LaForm} did not explain its distinction between liability for waters from rapid, as opposed to gradual, development. If there is a distinction, it should pull in the other direction. With slow growth, a municipal planning agency has more time to contemplate adequate measures to protect its citizens than when faced with an economic boom. The court offers no bright line to distinguish between "rapid" and "normal" development, but perhaps the better rule is that regardless of how swift the pace of expansion is a municipality owes a duty to its citizens to not allow flood damage to result from growth.

Some jurisdictions modify their water discharge rules according to whether the locale is urban or rural. For example, in Alabama, outside of a municipal boundary, the civil law/natural drainage rule applies. Within municipal boundaries a strict common-enemy rule governs.\textsuperscript{71} With suburban sprawl blurring of urban-rural distinctions, imposing separate water discharge rules is outmoded in the twenty-first century.\textsuperscript{72} No longer should urban development be encouraged at the expense of green space and agricultural lands. To accommodate urban crowding, city residents deserve protection from unnatural flooding.

\textsuperscript{69} \textit{Id. at} 1386-88. Judge Spaeth relies in part upon \textit{Cooper v. City of Reading},\textsuperscript{104} 104 A.2d 792 (Pa. 1958), and \textit{Decker v. City of Scranton}, 25 A. 36 (Pa. 1892). The plaintiff in Decker successfully sued for injuries incurred when his sleigh overturned on ice resulting from a broken water main.

\textsuperscript{70} See \textit{Mark Downs, Inc. v. McCormick Props., Inc.}, 441 A.2d 1119, 1127 (Md. Ct. Spec. App. 1982) (stating that "[i]t is not necessary that the offending property abut, or be 'adjacent' to, that of the complainants to afford a cause of action").

\textsuperscript{71} \textit{Bailey v. Floyd}, 416 So. 2d 404, 405 (Ala. 1982). However, in \textit{Street v. Tackett}, 494 So.2d 13, 15 (Ala.1986), the Alabama Supreme Court held that where water from an incorporated area flowed onto land in an unincorporated area, the civil rule, not the common-enemy rule, governed. \textit{Illinois also distinguishes between urban and rural settings, though more progressively. Agricultural areas practice the "good husbandry rule," which allows the upstream owner to modify flows as long as he does not injure his neighbor. A reasonable use rule is practiced in urban and suburban areas, balancing the benefit to the dominant estate with the detriment to the servient estate. Dovin v. Winfield Township, 517 N.E.2d 1119, 1124 (Ill. App. Ct. 1987).}

IV. CAUSES OF ACTION AND REMEDIES

The flooding of private property has been characterized as a trespass, a nuisance, and a taking, depending on both the courts and circumstance. The nature of the cause of action will determine the appropriate remedy, and often the success of the lawsuit against a municipality. Causes of action may be pled in the alternative.

Invasion of property is the essence of an action in trespass. Damage is not a prerequisite to such an action. The mere intrusion of waters upon the surface is sufficient to diminish the right of the landowner to exclusive possession of his property. For municipal liability, however, the plaintiff must show that the intrusion was the result of a volitional action by the municipality, and that the breach was direct and immediate. An argument can be made that city approval of a building permit is not an immediate and direct cause of flooding. Black's Law Dictionary has defined "immediate" as meaning "directly connected; not secondary or remote...." The Nebraska Supreme Court has fleshed out the definition, stating, "the proximate cause of an injury is that cause which, in a natural and continuous sequence without any efficient, intervening cause, produces the injury and without which the injury would not have occurred."

One Texas court held, in the context of a nuisance action, that the approval of upstream development was not the direct cause of flooding-related erosion of the plaintiff's property—rainfall was! A more appropriate analysis would have been a "but for" approach, in which the court questions whether flooding would have occurred without the intervention of upstream development.

More commonly, plaintiffs claim actual damage and therefore allege negligence by the municipality. This raises problems of proof. While the damages may be simply proven, even in jurisdictions favoring municipal liability for flooding, it is more difficult to prove the hydrologic connection between increased development and flooding. Thus in Steuben

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73. Naturally, if the upstream owner has a right of discharge, such as under the civil rule or common enemy rule, no action at all will arise per law. See LaPuzza v. Sedlacek, 353 N.W.2d 17, 18 (Neb. 1984) (holding that owners of upper estate who did not alter natural course of surface waters were not liable to lower landowners for damage from increased flow).
76. Id. at 749.
the lack of a qualified expert witness on hydrology proved fatal to a claim that waters from city-approved subdivisions and a golf course were the proximate cause of the plaintiffs' flood damage. In *Curtis v. Town of Clinton,* even though subdivision development may have contributed to flooding of the appellant's property, the appellant was unable to refute evidence that its contribution was insignificant. And, in *Kemper v. Don Coleman, Jr.*, the plaintiffs' complaint did not allege that flooding was caused by the permitting of upstream development, nor did the evidence establish the facts necessary to prove such an allegation. Specificity of both complaint and proof are required.

Sovereign immunity may prevent plaintiffs from obtaining relief via nuisance or trespass actions. The alternative is to petition for inverse condemnation. Because the source of inverse condemnation is constitutional—*i.e.*, the Fifth Amendment of the United States Constitution, as applied through the Fourteenth Amendment, requires that people be compensated for all takings of public property taken for public use—sovereign immunity does not prevent recovery. Often state constitutions grant a similar, or sometimes broader, relief. The Georgia Court of Appeals observed that

> [w]here a county causes, creates, or maintains a nuisance which amounts to an inverse condemnation, the county is liable in damages that would be recoverable in an action for inverse condemnation....The reason sovereign immunity is not applicable when a nuisance amounts to a taking of property of one of its citizens for public purposes is that inverse condemnation is a form of eminent domain.

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79. 543 N.W.2d at 163-64.
82. Inverse condemnation is defined as "[a]n action brought by a property owner seeking just compensation for land taken for a public use, against a government or private entity having the power of eminent domain. It is a remedy peculiar to the property owner and is exercisable by him where it appears the taker of the property does not intend to bring eminent domain proceedings." [BLACK'S LAW DICTIONARY, *supra* note 75, at 825. Where sovereign immunity bars recovery in nuisance or trespass, it is only through inverse condemnation that a property owner may recover damages. Canfield v. Cook County, 445 S.E.2d 375, 376 (Ga. Ct. App. 1994). Note that while Texas is very protective of its municipalities' immunity from liability for flood damages in nuisance, in *Kite v. City of Westworth Village,* 853 S.W.2d 200, 201 (Tex. App. 1993), the Court of Appeals ruled that a plaintiff could recover on its inverse condemnation claim alleging that flooding resulted from the city's approval of a subdivision plat.
83. See, *e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).
A state, however, may impose reasonable procedural prerequisites before an aggrieved landowner files an inverse condemnation claim, or it may provide no state remedy at all and limit landowners to the federal remedy.85

The question becomes, When does municipal flooding become a taking, as distinguished from a trespass or a nuisance? As noted above, in physical invasion cases, any physical occupation of the land is a taking for which compensation must be paid. This concept, however, has both spatial and temporal facets. One or two flooding incidents do not meaningfully take away from a landowner’s right to sole possession of his property. Instead, recourse lies in nuisance or trespass.86 To prove inverse condemnation, a landowner must establish a strong probability of future flooding, not just damage to the land capable of restoration.87 The entire property need not be taken for an inverse condemnation claim to succeed. Inverse condemnation is proper where the value of the land has been diminished, because the measure of compensation is the loss in value from the intrusion.88 Through a successful inverse condemnation claim, a landowner surrenders absolute possession of the portion of the property that is “taken” in exchange for compensation from the governmental entity.

A municipality cannot completely void an inverse condemnation claim by correcting the problem or modifying its police power regulations. In such circumstances, the municipality is still liable to the landowner for a temporary taking, compensating the victim for a temporary loss.89 Nor can it avoid inverse condemnation through a subsequent action in eminent domain. The size of compensation in an eminent domain action should merely reflect the diminished value of the property from the previous inverse condemnation.90

Inverse condemnation provides a powerful, but incomplete, plaintiff’s tool. It restricts recovery to the value of the property taken. Where future flooding is uncertain it may provide no remedy at all. But, it does overcome municipal immunity, and because recovery is based upon physical invasion of the land, it allows recovery without any showing of negligence, or even of physical damage.

85. Drake v. Town of Sanford, 643 A.2d 367, 369 (Me. 1994). Maine’s constitution does not provide for compensation for takings. Before pursuing a federal remedy, an injured property owner must first follow the state procedure for seeking compensation. Id.
V. TWO CASE STUDIES

Georgia and Washington have developed their case law on municipal flood liability more than perhaps all others, but with different results. The Georgia Supreme Court has stressed issues of community responsibility and fairness in its decisions, while the Washington courts have adhered to sovereign immunity and stare decisis. The different approaches of these states provide a counterpoint useful in understanding the development of the law in this field.

A. Georgia: Stumbling in the Right Direction

Georgia has consistently held that municipalities managing a sewerage system have a concurrent duty to maintain the system to accommodate flows resulting from additional development, so as not to cause a nuisance to adjoining private property.91 Perhaps the most widely cited case on the subject is City of Columbus v. Myszka,92 in which the Georgia Supreme Court applied the doctrine of discretionary nonfeasance to hold that the City of Columbus could be held liable for both compensatory and punitive damages caused by the discharge of sewage across Myszka's property as a result of the city's approval of upstream development. As a per curiam opinion, the decision is short on explanation, such that the reader is left with little more than the cause and effect rationale of the Louisiana Supreme Court in Eschete.93

The Georgia Supreme Court clarified, or depending on one's perspective, mystified Myszka in 1984 in Fulton County v. Wheaton.94 There, the county knew of flooding problems created by upstream development,

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92. 272 S.E.2d 302 (Ga. 1980) (per curiam). In 1984, the City of Columbus again paid the price of poor planning. In Columbus v. Smith, 316 S.E.2d at 766, the Georgia Court of Appeals first found that the continuous discharge of water over the plaintiff's property was a continuous trespass, which was the equivalent of a continuing nuisance. Next, it quoted City of Atlanta v. Williams, 128 S.E.2d 41 (Ga. 1962), stating, "[i]f the city claims the right to use the drainage [system] then it is under a duty to maintain it so that the content and flow of the surface waters [do] not overflow to the damage of the adjacent property owners." Columbus v. Smith, 316 S.E.2d at 766. The Court on one hand thereby adopted the ownership rule. Its liability was contingent upon its control over the drainage system creating the nuisance. In an earlier case, City of Macon v. Cannon, 79 S.E.2d 816, 821 (Ga. Ct. App. 1954), the Georgia Court of Appeals found that the City of Macon was liable for flooding damages from runoff caused in part by the paving of two city streets.
yet persisted in issuing building permits, worsening the problem. The court pronounced, "[h]owever, liability of a municipality cannot arise solely from its approval of construction projects which increase surface water runoff. Rather, it is the county's failure to maintain properly the culvert, resulting in a nuisance, which creates liability."\(^9\)

In the context of the controversy, the court's words in *Fulton County* mean that a city issuing building permits has a corresponding duty to insure adequate drainage to handle the runoff from the newly paved areas, and it is the breach of that duty that is the basis of a cause of action. The *Fulton County* language was approved without additional explanation in *Hibbs v. City of Riverdale*.\(^9\) Unfortunately, on remand in *Hibbs*, the Georgia Court of Appeals divorced the *Fulton County* quotation from its context and used the literal language so as to require an actual defective water conveyance system for liability. The court of appeals said, "As the Supreme Court noted, the City assumed no responsibility for any nuisance created by the subdivision's stream drainage systems merely because it approved the construction project." In fact, under the court of appeals' reading of *Fulton County*, whether the city improperly approved building permits becomes irrelevant, since the maintenance of a faulty sewer alone becomes the basis for liability.\(^9\) Under this misinterpretation, the only questions are whether the city has ownership or control over the drainage system, and if so, whether it was negligent in its maintenance of that system. The intent implied in both *Myszka* and *Fulton County* that a city has some liability for the consequences of its planning decisions has been eviscerated by the lower court. One can only hope that the Georgia Supreme Court will soon provide an unambiguous declaration of its intent.

**B. Washington: Consistent, but Consistently Wrong**

The cases from the state of Washington have, until recently, consistently opposed any municipal liability for planning decisions. Only recently did a Washington court uphold municipal liability for planning errors, although under the guise of the natural watercourse doctrine.

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95. *Id.* at 910, 911.
97. *Hibbs v. City of Riverdale*, 490 S.E.2d 436, 437 (Ga. Ct. App. 1997); accord *Provost v. Gwinnett County*, 405 S.E.2d 754, 756 (Ga. Ct. App. 1991), in which the court of appeals said, "Since the evidence showed only that Gwinnett County had approved PKP's upstream project and did not show a taking or damaging of appellants' property as the result of Gwinnett County's maintenance of its downstream culvert, the trial court correctly granted a directed verdict in favor of Gwinnett County."
In the leading case of *Laurelon Terrace v. City of Seattle*, the Washington Supreme Court adopted the natural watercourse doctrine: "It is well settled that the flow of surface waters along natural drains may be hastened or incidentally increased by artificial means, so long as the water is not diverted from its natural watercourse onto the property of another." As to municipal liability for its expansion, the court went on to quote the Kentucky case of *City of Bowling Green v. Stevens*: "The rule has been applied in favor of a municipal corporation, and its right to carry off surface water in order to improve the streets and render its territory more suitable for building purposes has been recognized...." Under *Laurelon Terrace*, a city is only liable if (a) the city diverts flood waters from their natural course or (b) the city requires a landowner to connect to the city sewer system but then maintains inadequate capacity to prevent flooding or backing up onto the landowner's property. The *Laurelon Terrace* decision implies that a city assumes a duty of care toward its utility customers that it does not owe to the public at large. Furthermore, Washington's definition of "natural course" appears to include areas that have been flooded by excess drainage. The consequence to the landowner is the same, regardless of whether the floodwaters reach the property by natural or artificial path.

Washington's reliance upon *City of Bowling Green* provides a flawed foundation for its doctrine. In 1943, nineteen years after *City of Bowling Green* but nine years before *Laurelon Terrace*, the Kentucky Supreme Court reversed its position on the natural watercourse doctrine in the case of *City of Louisville v. Cope*, wherein the Kentucky Supreme Court decided that a city that undertakes the obligation to build a sewer system also undertakes the obligation to maintain and upgrade that system in order to accommodate growth. As *City of Bowling Green* has been negated so should have Washington's position, especially since the *Bowling Green* opinion is devoid of logical support.

To the contrary, 22 years after *Laurelon Terrace*, the Washington Supreme Court expanded its rule to exonerate cities from liability for general development.

A municipality ordinarily is not liable for consequential damages occurring when it increases the flow of surface water onto an owner's property if the damages arise wholly

100. *Id.* (quoting *City of Bowling Green v. Stevens*, 265 S.W. 495 (Ky. 1924)).
101. *Id.* at 1118.
102. *City of Louisville v. Cope*, 176 S.W.2d 390, 391 (Ky. 1943).
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from changes in the character of the surface produced by the opening of streets, building of houses, and the like, in the ordinary and regular course of the expansion of the municipality.\(^{104}\)

As with Pennsylvania, Washington fails to define what is meant by "ordinary and regular course," or to explain why it provides special immunity for a municipality.

In *Patterson v. City of Bellevue*,\(^ {105}\) the Washington Court of Appeals sidestepped that need for explanation by quoting *Baldwin v. Overland Park*, holding that even where rapid urban growth has occurred, recourse is in the political, not the judicial, arena. The *Patterson* Court also added another element to the plaintiff's proof against a city: to prove negligence the plaintiff must show that the city owed and breached a duty against the plaintiff as distinguished from the public at large—apparently adopting the public duty doctrine much as the Virginia Circuit Court of Appeals did in *Linda Lee v. Covington Co.*\(^ {106}\) Even applying these doctrines, *Patterson* reached a questionable result. The case involved the creation of sewers that increased the rate of stream flow at least 33 percent beyond the natural capacity of the stream. Because the purpose of the ordinance in question was the creation of a public utility and not flood control, the court held that no duty was owed to protect riparian owners from flooding.\(^ {107}\) Moreover, because the plaintiff's assertion, supported by an expert's affidavit, spoke in terms of an increased *rate* of flow reaching the plaintiff's property, the court held the plaintiff's proof deficient for not alleging an increase in the *quantity* of the water reaching the plaintiff's property.\(^ {108}\)

Immunity was again extended in *Gaines v. Pierce County*, where the Washington Court of Appeals declared that a municipality owes no duty of care for drainage accumulating on subdivisions approved by the municipality, unless the municipality accepts ownership or control over that drainage.\(^ {109}\) That court reiterated its position in *Hoover v. Pierce County*, stating that for a municipality to be liable to a landowner, the municipality must have collected the water by artificial means, channeled the water, and then deposited the water on private property, causing damage.\(^ {110}\)

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104. *Id.* at 188.
107. There is a federal analogy to Washington's approach. The Flood Control Act of 1928 has been interpreted to provide immunity for actions at federal dams constructed for the sole purpose of flood prevention, rather than dams constructed for other purposes, such as recreation. Hall, *supra* note 25, at 84.
More recently, the Washington Supreme Court has used the common-enemy doctrine to justify municipal authority to pass excess runoff to downstream landowners. "[M]unicipal rights and liabilities as to surface waters are the same as those of private landowners within the city."¹¹¹ Such a holding confuses the status of the city. When the city is performing governmental functions, or even proprietary functions, such as approval of subdivisions, it is not acting as a landowner. Therefore, its duty of care should be defined in terms of the proper exercise of its governmental function—i.e., did it exercise proper care in approving the subdivisions? Did it owe a duty of care to consider or mitigate increased flows from new development before approving those developments? If so, did its failure to do so rise to the level of negligence?

Peculiarly, two years after the Hoover decision, the Washington Court of Appeals, in Phillips v. King County,¹¹² upheld a claim of inverse condemnation against King County for a development whose discharge resulted in a "flowage easement" over the plaintiff's property. The court quoted the 1962 case of Buxel v. King County,¹¹³ saying,

It is an exception to the general rule of nonliability, in that a municipality is liable if, in the course of an authorized construction, it collects surface water by an artificial channel, or in large quantities, and pours it, in a body, upon the land of a private person, to his injury. Under this rule, while municipal authorities may pave and grade streets and are not ordinarily liable for an increase in surface water naturally falling on the land of a private owner where the work is properly done, they are not permitted to concentrate and gather such water into artificial drains or channels and throw it on the land of an individual owner in such manner and volume as to cause substantial injury to such land and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie.¹¹⁴

The court of appeals' slight moderation of its no-liability stance proved too radical for the Washington Supreme Court, which reversed the Phillips decision a year later, forcefully stating,

There is no public aspect when the County's only action is to approve a private development under then existing

regulations. Furthermore, the effect of such automatic liability would have a completely unfair result. If the county or city were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties....

We hold that county's acceptance of a drainage system for maintenance does not give rise to liability based on the developer's obsolete design. However, we hold that a county which allows a private developer to construct a drainage facility on public land, or land subject to public control, which acts to channel surface water onto adjacent property, may be liable in inverse condemnation if the plaintiff can prove liability under existing law regarding dispersal of surface waters and consequent damages.\(^{115}\)

In its decision, the Washington Supreme Court did not discriminate between those cases in which a developer has negligently constructed a drainage system from those cases in which the municipality had no business approving development or approving a poorly designed system, because flooding would result. In short, the court missed the point. The purposes of municipal liability are to make the injured party whole and to deter future harmful conduct by the municipality. Municipal liability is not about governmental units serving as guarantors of the actions of private developers, but rather as guarantors of their own permitting decisions.

Juxtaposed to the Phillips case, the Washington Supreme Court did hold for the plaintiffs in one recent case, DiBlasi v. City of Seattle.\(^{116}\) In DiBlasi, the court held that cities were liable for water running off of city streets and artificial conveyances. In the context of the court's previous cases, I assume that cities will not be liable for water that originates in developments but happens to get channeled onto public conveyances.

Until the Washington Supreme Court's decision in Phillips, Washington's courts consistently failed to question the underlying principles governing the doctrines they apply. In Phillips, the Court at least contemplates a rationale for municipal immunity—cost to the taxpayers. Now, it is time for the state of Washington to take the next step: weigh whether the burdens of flooding should be borne individually or societally. In addition, Washington should weigh whether the aggregate burden will be expanded or diminished if municipalities are held liable for their

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permitting decisions. The courts should recognize that the current rule of immunity is judicially made, and because it is judicially made, it can be judicially modified. It is time to move beyond Baldwin. The common law routinely assigns rights and liabilities to parties. In the absence of legislative initiative, municipal liability for flooding is a judicial question. Stare decisis is not a reason for immunity.

VI. THE SOLUTION

A. A Proposed Rule of Municipal Flood Liability

How then do we tailor the law of municipal liability for flooding to (1) make urban development compatible with the hydrologic cycle, (2) protect landowners from harm caused by poorly planned development, and (3) create a doctrine of law that is grounded in both natural systems and logic, and not one predicated upon false or outdated distinctions? Urban sprawl transforms flood control from a local problem into a regional problem.117 Each municipality should be responsible for its contribution to downstream flow. The largest defect in Pennsylvania's LaForm decision was the lack of congruence between political boundaries and hydrologic boundaries. Downstream communities should not be at the mercy of upstream communities. After all, they are subdivisions of the same sovereign.

With the gradual erosion of the doctrine of sovereign immunity, policy can now guide the common law to charge municipalities with liability for flood damages caused by poor planning and permitting decisions. I propose a rule to this effect here. As a predicate, I acknowledge it would be unfair to give municipalities ex post facto liability for their past planning sins when they operated under various water discharge rules and rules of immunity, except where, as in Colorado, Georgia, and Nevada, the state has already created such liability. Cities should not now be prejudiced by past reliance upon a century of precedent, nor should they fall victim to a flood tide of flood-related tort litigation. Therefore, this doctrine should only take effect prospectively. Below, I outline the elements of a plan for municipal liability.

Municipalities bear the blame and responsibility for flooding resulting from negligent planning decisions made from this point onward. In a crowded world, the duty of care should be defined broadly. One person's actions are likely to affect the lives of others. Cities owe a duty of care to all who live

117. In James A. Kushner, Growth Management and the City, 12 YALE L. & POL'Y REV. 68, 68-92 (1994), Kushner argues that to effectively manage the growth of urban areas, decisions as to the staging of new development must be made on a regional basis.
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downstream or down-ditch of urban water collection, whether the conveyances be natural or artificial.

The issuance of building permits does not create municipal liability for defects in building construction. It is the fact of construction that causes the flooding. This is distinct from city approval of a building with a weak roof. Moreover, it is the city that often provides the vehicle for damage, where floodwaters are conveyed by inadequate municipal sewers. If the approved permit provides for sufficient drainage but the builder fails to conform to approved plans, it is the builder, not the city, that bears responsibility for flooding, unless, of course, the city negligently certifies the development as constructed.

Cities cannot plead ignorance of the consequences of development. They should be deemed negligent if they approve development that increases water flow if the current drainage system is inadequate to handle it, or if they build drainage systems inadequate to handle existing or anticipated development. To avoid liability, cities are encouraged to implement stormwater runoff control ordinances that require developers to submit stormwater management plans to local government agencies prior to plan approval.

A city can no longer reasonably maintain that it has no obligation to provide drainage. If it allows construction that increases the rates or quantities of flows, it assumes a responsibility to mitigate the consequences. The reasonable use rule should be applied to discharges from urban and suburban areas, with high values placed on urban infilling and preservation of open space. This will make the law of municipal flood liability consistent with the trend for private litigants favoring the reasonable use doctrine. Although a number of jurisdictions profess to adhere to the common-enemy and civil law doctrines, the modern private litigant cases are few in which an upstream landowner is not held accountable for injury inflicted upon the downstream owner by the discharge of storm water. Municipalities already have liability for their

118. See Garrett v. Holiday Inns, Inc., 447 N.E.2d 717, 722 (N.Y. 1983) (finding that plaintiff failed to assert facts necessary to establish the town's liability for a motel fire); Dutton v. Mitek Realty Corp., 463 N.Y.S.2d 471 (N.Y. App. 1983) (finding the town not liable to a volunteer fireman who fell from the roof of a building lacking a safety barrier); Georges v. Tudor, 556 P.2d 564, 566-67 (Wash. Ct. App. 1976) ("We agree...that the city owed no duty to appellant individually in issuing the building permit or in inspecting the Olympic Block Building. To hold otherwise would cause the city to become a guarantor of each and every construction project....").


polluting discharges under the federal Clean Water Act. Citizens may sue dischargers, including municipalities, to obtain compliance, and may sue the Environmental Protection Agency to compel enforcement of the Clean Water Act.¹²² The United States Supreme Court has held that these citizen actions have replaced common law rights to sue.¹²³

Municipal liability does not end at town borders. Unlike the LaForm decision, a city may not allow its development to cause downstream flooding directly or indirectly. It is unfair to allow a larger municipality to cast its burden upon a smaller political subdivision less able to bear the expense of flood control.

The act of nature or act of god defense will seldom be allowed. Cities will not be responsible for flooding that would have occurred prior to new planning decisions. Climatologists have predicted, however, greater storm severity in the future. What was once a 100-year storm event may now occur at 25-year intervals.¹²⁴ Future planning exercises must accommodate more significant storm events.

Liability is joint. Merely because a city now assumes liability for flood damage does not exonerate developers from blame. Where there are multiple upstream developments it may be impossible to apportion liability, and in that case the city may have to take full responsibility for its poor planning. But where relative negligence can be assigned, the finder of fact should do so. Courts likewise should not exonerate downstream owners from their assumption of the risk for building in flood prone areas.¹²⁵

Common law doctrines such as the natural watercourse rule, government ownership, and the distinctions between proprietary and governmental functions and between discretionary and non-discretionary functions are abrogated insofar as they relate to flood liability. These doctrines detract from the focus on causation, fairness, reasonable expectations, and duty of care. They substitute doctrine for a balanced weighing of the public interest. They serve to reduce the standards of urban planning.

¹²⁴ Smith, supra note 2, at 320, 330.
¹²⁵ The principle of assumption of risk is as follows: “A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.” RESTATEMENT (SECOND) OF TORTS § 496A (1965). The elements of assumption of risk are “(1) knowledge by the plaintiff of the condition; (2) appreciation by the plaintiff of the danger under the surrounding conditions and circumstances; and (3) the plaintiff's failure to exercise reasonable care...and, with such knowledge and appreciation, the plaintiff's putting himself into the way of danger.” Slade v. City of Montgomery, 577 So. 2d 887, 892 (Ala. 1991).
B. Tools for Flood Control without Liability

To accomplish better flood control, municipalities have a number of tools available: impose stricter building codes for properties within the floodplain, thereby creating an economic disincentive to build in these areas and also protect against damage in the event of flooding; build, or require developers to build, retention ponds; impose moratoria on new development; downzone—reducing the intensity of development by reducing building heights, increasing lot sizes, or imposing more restrictive use classifications (these approaches should not be used if they will only disperse development, because that would contribute to urban sprawl and aggravate the flooding problem); impose permit caps—limit the number of permits issued for a certain area in a given time period; timed sequential zoning—permits for development of a particular section of a city are timed so as to coincide with planned utility extension; and purchase of open space by the municipality. State legislatures can assist by expanding municipal zoning powers.

The proposals advanced in this article will modify the dynamic between city planners and builders, giving city planners a sword by which they can refuse inappropriate development. They can shift the burden of sewer development and expansion to the developer where the development would otherwise cause a risk of flooding. Initially, there will be litigation. Some builders will complain that their property has been taken because they cannot obtain a building permit or because they must dedicate a portion of their property for water retention. These lawsuits will fail because government prevention of a nuisance or trespass does not equal a taking. Flooding of private property is a preventable nuisance.

127. Retention ponds and sedimentation basins store water for gradual release or evaporation; they also allow sediment time to drop out of suspension, resulting in less clogging of drainage ditches and less force of floodwaters. See generally L.A.J. Fennessey & A.R. Jarrett, The Dirt in a Hole: A Review of Sedimentation Basins for Urban Areas and Construction Basins, 49 J. SOIL & WATER CONSERVATION 319 (1994). In some circumstances, artificial or natural wetlands can serve these purposes.
129. Id.
130. Id. at 72.
131. In Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1030-31 (1992), the United States Supreme Court suggested that police power prohibitions of common law nuisances do not constitute takings because the landowners never had the right to perform the noxious use in the first place.
The New Jersey courts have been accepting of limits on excessive growth. In *Lom-Ran Corp. v. Department of Environmental Protection*, Little Falls Township denied the plaintiff a sewer connection permit because its sewage treatment plant was already over-extended. The New Jersey Superior Court upheld the state environmental agency's denial of an exemption to the plaintiff. The court held that under New Jersey law an exemption had to be granted only when the other permits necessary for development had already been obtained and substantial investment had already been made. Further, in *Capapture Realty Corporation v. Board of Adjustment of the Borough of Elmwood Park*, the court upheld an interim zoning ordinance that created a moratorium on construction in a flood prone area until the borough had time to complete scheduled flood control projects. In *C&D Partnership v. City of Gahanna*, the Ohio Court of Appeals denied a suit for damages resulting from a city's delay in approving a subdivision application, saying that there was no prejudice because had the city acted within 30 days it would have been justified in denying the application because of legitimate concerns about flooding. Implicit in the Ohio decision is that flooding potential is a legitimate basis for permit denial. It is also worth noting that the Federal Clean Water Act expressly provides for moratoria on sewage hook-ups where additional input to a

134. Capapture Realty Corp. v. Bd. of Adjustment, 313 A.2d 624, 631 (N.J. Super. Ct. Law Div. 1973), aff'd, 336 A.2d 30 (N.J. Super. Ct. App. Div. 1975). Unanswered in the Capapture decision is whether municipalities have an obligation to construct drainage facilities necessary to accommodate future development. In Maine, moratoria are also allowed; however, they must be prospective and they cannot be applied to existing building applications, even if the new development will exceed present sewer capacity. Cumberland Village Housing Assocs. v. Town of Cumberland, 609 F. Supp. 1481, 1487 (D.C. Me. 1985). In *San Antonio River Authority v. Garrett Brothers*, 528 S.W.2d 266, 270-71, 273 (Tex. Ct. App. 1975), the denial of a permit to connect a subdivision to the sewerage system after substantial investment had been made was upheld as the basis for a damage award against the municipal utility. The case seems to be decided on a takings theory as there is little discussion of whether the denial was a proper exercise of police power authority. The precedential value of this case is ambiguous. The Virginia Supreme Court, on the other hand, reached a different conclusion. When Fairfax County implemented a moratorium on the issuance of site plans and subdivision plats in an attempt to cope with rapid growth, the court found that zoning and moratoria were distinct from each other. Lacking express legislative authority to issue a moratorium, the county's action was struck down. Bd. of Supervisors v. Home, 215 S.E.2d 453, 456-57 (Va. 1975). Accord Bittinger v. Corp. of Bolivar, 395 S.E.2d 554 (W. Va. 1990). However, in *Brazos Land, Inc. v. Bd. of County Comm'r's*, 848 P.2d 1095, 1101 (N.M. Ct. App. 1993), the New Mexico Court of Appeals upheld Rio Arriba County's moratorium on subdivision approval, stating that the moratorium was supported by the state legislature's broad grant of police powers to the counties.

sewage system will result in unlawful pollution. Such moratoria have
been upheld by the federal courts.

Like New Jersey, New York has consistently and liberally upheld
temporary moratoria on issuing building permits. New York’s Court of
Appeals has also favorably adjudicated the legality of staged growth in
accordance with a municipal master plan based upon the limits of
infrastructure capacity. Yet, where it is clear that zoning restrictions
were not reasonably related to a legitimate purpose, they have been found
unconstitutional and invalid. Likewise, for a moratorium to be sustained,
it must be tied to a plan to provide adequate infrastructure in the future so
as to guarantee that the moratorium is temporary.

Despite the plentiful case law on the subject, no case has tested
how long a temporary restriction is too permanent. Nor have any cases
decided whether growth must be allowed in cities too poor to expand their
infrastructure burden in the foreseeable future. Must a city such as
Columbus, Georgia, which has already gone deeply into debt to improve
its deficient sewage system, burden its taxpayers even further to satisfy
developers’ desires? Logic says no. Statutory obligations on the part of
a municipality to provide sewerage in the first place, and common law
obligations to update sewer systems, need not impose a burden on
municipalities to accept additional burdens on utilities. An affirmative duty
upon cities to prevent flooding is not a carte blanche for developers to

138. The lead case for this proposition is Charles v. Diamond, 360 N.E.2d 1295, 1300 (N.Y.
1977), and it has been followed in a long series of more recent cases. See 119 Dev. Assoc’s. v.
Village of Irvington, 566 N.Y.S.2d 954 (N.Y. App. Div. 1991); McDonald’s Corp. v. Village of
Turnpike Woods, Inc. v. Town of Stony Point, 503 N.Y.S.2d 898 (N.Y. App. Div. 1986); Dune
140. In Jensen v. City of New York, 369 N.Y.2d 1179, 1080-81 (N.Y. 1977), the court of
appeals struck down zoning that incorrectly placed the bulk of plaintiff’s private property on
a city street map, making it ineligible for a building permit. In Svenningsen v. Passidimo, 463
N.Y.S.2d 874, 876 (N.Y. App. Div. 1983), the state supreme court nullified a municipality’s
conditioning of a sewer hook-up on a limitation of the number of parking spaces at the new
facility, because traffic would not burden the sewer system.
preliminary injunction was granted against the application of a municipal growth control
ordinance to developers who already had preliminary or final plat approval.
143. See City of Louisville v. Cope, 176 S.W.2d 390, 391 (Ky. 1943).
demand infrastructure expansion. Developers can undertake the cost and responsibility themselves. Their failure to do so is grounds for permit denial if the development will cause unlawful or nuisance discharges. This brings us full circle to the common law of drainage. If a municipality upholds its duties in the permitting process, and new development still adds to flooding, then under the reasonable use doctrine the new developer remains liable for the injury or trespass it causes, and without negligence, the city is immune from suit.

Where a statute expressly defines the criteria necessary for a moratorium, state courts have construed local authority narrowly and have only sustained an ordinance if it squarely satisfied the prerequisites.\textsuperscript{144} If a permit moratorium is not a viable option for a community, it can still design its zoning ordinance so as to deny any permit application that would result in a flooding nuisance.

Less onerous flood-related restrictions than moratoria have been sustained. North Carolina’s Supreme Court upheld Asheville’s ordinance creating special requirements for buildings within a floodplain, as necessary to obtain federal flood insurance under the National Flood Insurance Act.\textsuperscript{145} The burdens placed upon owners of the floodplain property did not violate the equal protection provisions of the United States and North Carolina constitutions: “The test is whether the difference in treatment made by the law has a reasonable basis in relation to the purpose and subject matter of the legislation.”\textsuperscript{146} The court also found the City of Asheville’s ordinance did not effect a taking, because, while it may have diminished the value of the property, it did not render the property valueless.\textsuperscript{147}

Other litigants have unsuccessfully claimed property takings against federal and state agencies where federal and state regulations set
standards that made it harder for developers to obtain building permits from municipalities. In *Adolph v. Federal Emergency Management Agency*,¹⁴⁸ Plaquemines Parish Louisiana passed a building elevation ordinance to comply with FEMA National Flood Insurance Program regulations. And in *HBP Associates v. State of New York*, the New York Department of Environmental Conservation withstood an inverse condemnation claim where its regulations prohibited Orange County from approving a sewer hook-up because of pollution.¹⁴⁹ These cases suggest that regulations at the state or federal scale may successfully provide a base of support for municipal action.

In conclusion, a municipality may not be compelled to issue permits for construction where such construction will create a nuisance. Since some municipalities may lack moratorium authority, their ordinances should require permit applicants to demonstrate that their development will not exceed the capacity of the existing system or will not cause flooding such as would cause a nuisance. Just as spot zoning is prohibited,¹⁵⁰ availability of sewerage capacity ought to be part of a comprehensive municipal plan and should not be allocated on an ad hoc basis.

VII. CONCLUSION

Municipal flood liability creates several consequences. It encourages infilling—or construction in previously developed areas, where the new development contributes less runoff because the area may already be paved and sewer lines in place. This infilling preserves the urban core and consumes less transportation energy. It reduces private property damage. It increases the area reserved for retention ponds and preserves wetland areas for water absorption.

The question of municipal liability for flooding is only one facet of the increasing tension between property rights and the need for orderly planning in an increasingly urban and crowded society. As municipalities compete for tax revenues, they encourage building and paving at the expense of flood control. As they seek to minimize the services they provide, increase their tax base, and exclude undesirable people, they zone for large lots, and thereby extend urban sprawl. The fear of takings claims and other lawsuits makes cities reluctant to deny building permits and utility hook-ups. The net result is that pre-existing owners of property face more flooding from urban and suburban development. Add the prospect

¹⁴⁸ 854 F.2d 732 (5th Cir. 1988).
of increasing storm severity caused by global climate change, and the economic consequence to American cities is enormous.

Property owners will lose either way. Increased governmental regulation bites into the bundle of "rights" associated with title. Yet, the risk of becoming victim to flooding deprives one of the security inherent in land ownership. A person's view on this issue may depend on whether he or she has already developed a property, or hopes to in the future. Since property rights suffer in either scenario, the logical solution lies in what best serves the common good.

That choice is clear. The fulfillment of reasonable expectations, taking responsibility for the consequences of one's actions, and not unreasonably causing harm to others, all point in the direction of better flood control planning. This means that municipalities must adopt a more active role in planning. The threat of tort or eminent domain liability is the incentive to encourage municipalities to take that more active role. A rule of prospective liability may yield some additional litigation, but a city whose planners act reasonably will not be overly burdened. These expenses will surely be offset by reductions in flood damages and flood insurance. Transaction costs decrease when the rights of property owners are clear. Better planning by the government should reduce private litigation over flooding.