

# **Your Neighbor's Water Caused Damage to Your Property: Who Bears Legal Responsibility?**

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Over the last several years, the frequency and intensity of rain and other natural disaster events have increasingly impacted both business and individual property owners across North Carolina in a variety of ways.

One such way involves the impacts of excessive surface water flow and localized nuisance flooding after rain or other natural disasters. Those impacts can be compounded when a property owner makes modifications on his/her property that, in turn, change the surface water flow onto a neighboring or adjoining property, causing flooding or other property damage.

## **North Carolina Law on Surface Water Flow**

As a general rule, North Carolina allows landowners to change the surface water flow on their property. Examples of such changes include performing grading, changing vegetation, and altering drainage channels.

There are several theories that govern the liability of surface water flow:

- Common Enemy Rule - surface water is a common enemy to all landowners
  - A landowner can do what is necessary to address issues with surface water
  - A landowner has no liability to adjoining landowners for property damage resulting from alterations to surface water flow
- Civil Law Rule – a landowner is liable to another when adjoining property is damaged due to alterations in the flow of surface water

North Carolina followed the Civil Law Rule until 1977 when a specific case prompted reconsideration.

Part of the reason for reconsideration was that North Carolina was already following a number of exceptions to the Civil Law Rule. A notable exception was made for municipal construction, including

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street construction.

Essentially, the courts found that even though the construction of a street may result in increased runoff that could cause damage to an adjoining property, the street is built for the public good. So, any potential damage to adjoining property would be outweighed by the benefits the community gained from having the roadway, as long as the roadway was built using sound engineering techniques and was not found to be negligently constructed.

This exception and other reasons led the North Carolina Supreme Court to adopt the Reasonable Use Rule, which provides the following:

- A landowner can make reasonable use of property even if it results in harm to an adjoining landowner
- Liability can occur if the interference is unreasonable and causes substantial damage to the adjoining property

Basically, landowners must take reasonable care to avoid causing unnecessary harm to adjoining landowners. The Court indicated that in some cases, the gravity of the harm to the adjoining landowner might be so significant that compensation is required, regardless of whether the defendant's conduct was reasonable under the circumstances.

## **Reasonable Use Rule in North Carolina**

So, how do North Carolina's courts determine if a use was reasonable or not? The courts will review several factors to determine whether a landowner exercised reasonable care. The factors considered by the courts include:

- Whether the action was intentional, unreasonable, negligent, or reckless
- The extent and character of the harm versus the social value of the use (the purpose of the use)
- Whether the action taken is typical or suitable for the locality
- Whether the landowner took reasonable steps to minimize damage caused by the change

Other factors that the courts will consider are whether the action taken by a landowner violates any federal, state or local laws, easement agreements, or restrictive covenants that govern the land.

For example, if the owner gets approval for a site plan and then makes unauthorized changes to the plan, the owner may be liable for any damage to adjoining properties that results from changes to the natural flow of surface water.

## **North Carolina's Reasonable Use Rule in Commercial and Residential Contexts**

In another example, an owner may receive site plan approval for a large commercial warehouse project based on the construction of a complex series of surface water mitigation measures, including the use of pervious pavement.

During construction, the owner, looking for cost-saving measures, intentionally selects a non-pervious alternative to the more expensive pervious pavement required by the site plan. Two years later, a 500-year flood event hits the region, causing substantial flooding to several properties surrounding the subject property.

A hydrological engineer retained by the adjoining property owners offers an opinion that but for the lack of pervious pavement, the flooding would not have occurred – or would not have occurred to the degree experienced by sounding properties – the commercial warehouse property owner may be found liable for the damage caused by the intentional deviation from the site plans.

Another instance in a residential setting is the neighbor who intentionally builds up several large berms at the rear of the property for privacy reasons. The berms are over four feet above the existing ground level and encroach into an easement area. If these berms disrupt surface water flow, resulting in flooding of several nearby homes, liability may arise.

In most instances, the aggrieved property owners will need to retain an expert to investigate and offer an opinion as to the cause of the flooding. If the expert opines that the berms caused the flooding, then the "berm builder" may be liable for the damage caused to the nearby homes.

## **Limitations of the Reasonable Use Rule in North Carolina**

Since its adoption, some limitations/clarifications on the application of the Reasonable Use Rule have been put in place.

For example, it has been found not to apply in condemnation proceedings, and it has also been found inapplicable in an action between private landowners in a residential subdivision subject to restrictive covenants governing the surface water drainage rights based on maintenance of unobstructed drainage channels within easements reserved on each lot.

Still, as a general rule, the Reasonable Use Rule or doctrine governs the disposal of surface waters among private parties.

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National Law Review, Volume XIV, Number 309

Source URL: <https://natlawreview.com/article/your-neighbors-water-caused-damage-your-property-who-bears-legal-responsibility>