

# City of Mt. Vernon, Iowa

<b>Meeting:</b>	<b>Mt. Vernon City Council Meeting</b>
<b>Place:</b>	<b>Mt. Vernon City Hall, 213 First Street NW, Mt. Vernon, Iowa 52314</b>
<b>Date/Time:</b>	<b>August 15, 2016 – 6:30 PM</b>
<b>Web Page:</b>	<b>www.cityofmtvernon-ia.gov</b>
<b>Posted:</b>	<b>August 12, 2016</b>

<b>Mayor:</b>	Jamie Hampton	<b>City Administrator:</b>	Chris Nosbisch
<b>Mayor Pro-Tem:</b>	Marty Christensen	<b>City Attorney:</b>	Robert Hatala
<b>Councilperson:</b>	Paul Tuerler	<b>Assis. Admin/City Clerk:</b>	Sue Ripke
<b>Councilperson:</b>	Scott Rose	<b>Deputy City Clerk:</b>	Marsha Dewell
<b>Councilperson:</b>	Tom Wieseler	<b>Chief of Police:</b>	Doug Shannon
<b>Councilperson:</b>	Eric Roudabush		

Prior to the start of the regularly scheduled City Council meeting, the Mayor and City Council will be touring the Wastewater Facility located in 103 Country Club Drive, Mt. Vernon, Iowa. The tour will begin at 5:30 p.m., August 15, 2016.

- A. Call to Order**
- B. Agenda Additions/Agenda Approval**
- C. Communications:**
  - 1. Unscheduled
  - 2. Recognition of Eagle Scout Projects

If you wish to address the City Council on subjects pertaining to today's meeting agenda, please wait until that item on the agenda is reached. If you wish to address the City Council on an item **not** on the agenda, please approach the microphone and give your name and address for the public record before discussing your item. Each individual will be granted no more than five (5) minutes.

**D. Consent Agenda**

**Note:** These are routine items and will be enacted by one motion without separate discussion unless a Council Member requests separate consideration.

- 1. Approval of City Council Minutes – August 1, 2016 Regular Council Meeting

**E. Public Hearing**

- 1. None

**F. Ordinance Approval/Amendment**

- 1. An Ordinance to adopt Chapter 48 Social Host of the City of Mt. Vernon Municipal Code
  - i. Motion to approve second reading and proceed with third and final reading/or suspend rules and proceed to final reading

**G. Resolutions for Approval**

- 1. Resolution Accepting the 2015 Street Improvements as Substantially Complete and Preparing to Release the Project Retainage

**H. Mayoral Proclamation**

- 1. None

**I. Old Business**

1. None

**J. Motions for Approval**

1. Consideration of Claims List – Motion to Approve
2. Discussion and Consideration of Rescheduling the September 5, 2016 Council Date – Council Action as Needed
3. Discussion and Consideration of Change Order #6 – 2015 Street Improvements – Council Action as Needed
4. Discussion and Consideration of Pay Application #7 – 2015 Street Improvements – Council Action as Needed
5. Discussion and Consideration of the City of Mt. Vernon's Application for Traffic Safety Funds – Intersection of 5<sup>th</sup> Ave. SW and 1<sup>st</sup> Street W – Council Action as Needed
6. Discussion and Consideration of City Hall Cleaning Services Contract – Council Action as Needed

**K. Reports to be Received/Filed**

1. Mt. Vernon Police Report
2. Mt. Vernon Parks and Recreation Report
3. Mt. Vernon Public Works Report

**L. Discussion Items (No Action)**

1. None

**M. Reports of Mayor/Council/Administrator**

1. Mayor's Report
2. Council Reports
3. Committee Reports
4. City Administrator's Report

**N. Adjournment**

Pursuant to §21.4(2) of the Code of Iowa, the City has the right to amend this agenda up until 24 hours before the posted meeting time.

**If anyone with a disability would like to attend the meeting, please call City Hall at 895-8742 to arrange for accommodations.**

**JUST A  
REMINDER!!**

**WE ARE MEETING  
AT THE SANITARY  
SEWER  
TREATMENT  
FACILITY AT 5:30,  
BEFORE THE  
REGULAR COUNCIL  
MEETING.**

## **D. Consent Agenda**

Prior to the start of the regularly scheduled City Council meeting, Mayor Pro Tem Christensen and Council toured the Parks and Recreation/Public Works Facility located at 202 7<sup>th</sup> Street NE, Mt. Vernon, Iowa. The tour began at 5:30 p.m., August 1, 2016.

**Call to Order** At 6:31 p.m. Mayor Pro tem Marty Christensen called the meeting to order. Absent: Mayor Hampton.

**Agenda Additions/Agenda Approval** Motion made by Rose, seconded by Wieseler to approve the agenda. Carried all.

### **Consent Agenda**

Approval of City Council Minutes – July 18, 2016 Regular Council Meeting

Approval of Liquor License – Guppy's on the Go. Motion made by Tuerler, seconded by Rose to approve the Consent Agenda. Carried all.

### **Public Hearing**

Public Hearing on an Ordinance to Adopt Chapter 48 Social Host of the Mt. Vernon Municipal Code Police Chief Doug Shannon has been updating Council on changes and suggestions that were made at the previous council meeting. Mayor Pro tem Christensen declared the Public Hearing open. Julie Gondek said that as a mother and mental health therapist she has been aware of some problematic houses. She has concerns for her two young children when she notices partying in the area. She believes that having this ordinance in place will help landlords deal with problem tenants. Casey Rice said that an ordinance like this one can help shelter and keep kids a little safer. Curt Wheeler said that Jones County had ten violations their first year of Social Host. Since then it has dropped to six. The Jones County ordinance applies to all cities in the county. Erica Johnson said that she approached Cornell College and asked if they would approve this or not. They said they would approve it because under this ordinance if someone is charged it is a civil infraction; when they leave college it won't be on their record.

**Close Public Hearing – proceed to F-1** Mayor Pro tem Christensen declared the Public Hearing closed.

### **Ordinance Approval/Amendment**

An Ordinance to adopt Chapter 48 Social Host of the City of Mt. Vernon Municipal Code

Motion to approve first reading and proceed with second reading/or suspend rules and proceed to third and final reading Chief Shannon explained that this a tool that can be used to notify parents or landlords of violations. All violations will be documented so if a property is identified as a party house it can be dealt with quickly. Tuerler said that he sees unintended benefits in this; rather than it being a criminal charge the lessor (civil) charge is an opportunity to teach a lesson without carrying that burden the rest of their lives. It can also be a tool a landlord could use if working towards an eviction because they now have these infractions. Christensen said that he is concerned about the absentee landlord that doesn't know what's going on at his rental. Chief Shannon said that he would like to see the landlords held accountable for their properties and by sending them notices they will know what is going on. This will give them the opportunity to take action to correct the behavior. Christensen said that Cornell has an opportunity to establish a policy relating to an infraction of this kind amongst their students. He continued saying that he believes this is an important direction to go. Evictions aren't the only way to deal with problem properties; the fine a landlord receives could be paid by the tenants by building it into their lease/rental agreement. Tuerler motioned to

approve the first reading of an ordinance to adopt Chapter 48 Social Host of the City of Mt Vernon Municipal Code, seconded by Roudabush. Roll call vote. Motion passes 5-0.

**Motions for Approval**

Consideration of Claims List – Motion to Approve Wieseler motioned to approve the Claims List, seconded by Rose. Carried all.

PAYROLL	CLAIMS	75,291.85
3E	GENERATOR REPAIR-FD	145.00
ALLIANT IES UTILITIES	ENERGY USAGE-SEW	3633.34
ALLIANT IES UTILITIES	ENERGY USAGE-WAT	1466.35
ALLIANT IES UTILITIES	ENERGY USAGE-SEW	631.92
ALLIANT IES UTILITIES	ENERGY USAGE-ST LIGHTS	228.58
ALLIANT IES UTILITIES	ENERGY USAGE-EMA	44.85
ALLIANT IES UTILITIES	ENERGY USAGE-PARKS & REC	30.23
ANDREWS, CHRISTIAN	GATORADE,ICE-RUT	17.37
ARAMARK	RUGS-FD	69.34
AUTO WORX	VEHICLE MAINT-PD	445.54
B4 BRANDS	SUPPLIES-RUT	40.65
BICI,LLC	MIDGE FLY TREATMENT-SEW	861.00
BROWN SUPPLY COMPANY	LOCATORS (2)-WAT	1,410.00
BURROUGHS, RICHARD	CEMETERY MAINT	2,980.00
BUSTER, JACOB	ELITE FITNESS MEMBERSHIP-FD	107.00
CAMPBELL SUPPLY CEDAR RAPIDS	INDOOR/OUTDOOR GLASSES	54.00
CARPENTER UNIFORM CO.	UNIFORMS-PD	125.00
CENTURY LINK	PHONE CHARGES-FD	107.17
CENTURY LINK	PHONE CHARGES-SEW	92.29
CENTURY LINK	PHONE CHARGES-WAT	53.20
CENTURY LINK	PHONE CHGS-SEW	583.75
CHRIS NOSBISCH	MILEAGE-P&A	349.38
CITY TRACTOR CO	DECK BELT/GRAVELY-RUT,P&REC	94.14
COGRAN SYSTEMS	ONLINE REG FEES-P&REC	84.00
CY'S TREE SERVICE	TREE MAINT-RUT	950.00
CY'S TREE SERVICE	TREE MAINT-RUT	200.00
CY'S TREE SERVICE	C.RODMAN RESIDENCE/STORM DAMAGE	8,900.00
DIESEL TURBO SERVICES INC	VEHICLE/EQUIP REPAIRS-RUT	297.50
DUBUQUE PLUMBING & HEATING	FILTERS & HEATERS-POOL BOND	5074.35
ELECTRONIC ENGINEERING CORP	INFORMATION SYS-PW	319.60
ELECTRONIC ENGINEERING CORP	PAGER SERVICE-EMA	11.95
ENGELBRECHT, JACQUELINE	TEACHING/AQUACISE-POOL	50.00
GLENN, MACKENZIE	DEPOSIT REFUND-WAT	64.12
GORDON LUMBER COMPANY	BLDG SUPPLIES-RUT,P&REC	477.00
HAWKEYE FIRE & SAFETY CORP	EQUIP REPAIR-FD	21.25
HAWKEYE READY MIX	SOUTHPARK TRAIL/SIDEWALK-RUT	314.21
IDNR	NPDES PERMIT FEE-SEW	1,275.00
IOWA CODIFICATION INC	CODE UPDATES-P&A	278.00
IOWA DEPT OF PUBLIC SAFETY	ONLINE WARRANTS-PD	300.00
IOWA LAW ENFORCEMENT ACADEMY	RECERTIFICATION-PD	25.00
IOWA PRISON INDUSTRIES	SUPPLIES-RUT	125.84
IOWA SOLUTIONS INC	VIDEO CARD-P&A	152.50
JOHN'S LOCK & KEY INC	DOOR LOCK MAINT-P&A	89.00
KATEY FOREST	SUPPLIES-POOL	32.07
KURT PISARIK	UNIFORMS-PW	67.97
L.L. PELLING CO INC	2016 SEAL COAT IMPROVEMENTS	36,833.33

L.L. PELLING CO INC	2016 SEAL COAT IMPROVEMENTS	13,304.90
LINN CO-OP OIL CO	FUEL-PW	2,322.95
LINN COUNTY PLANNING/DEVELOPMENT	BLDG PERMIT FEES/INSPECTIONS	207.00
LIVERMORE, ASHLEY	DEPOSIT REFUND-WAT	65.06
LYNCH FORD	ALTERNATOR/EXCURSION-FD	289.11
M & K DUST CONTROL	SUPPLIES-RUT	250.00
MOUNT VERNON BANK & TRUST	NSF CHECK-WAT	158.00
MOUNT VERNON LISBON SUN	ADS/PUBLICATIONS-ALL DEPTS	1,120.39
MOUNT VERNON POLICE RESERVES	SPECIAL EVENTS-PAY	24.00
MV ACE HAREWARE	SUPPLIES,EQUIP,MISC-ALL DEPTS	1,271.75
NATE SAVAGE	DEPOSIT REFUND-WAT	54.83
NEAL'S WATER CONDITIONING SERVICE	WATER/SALT-RUT,P&A	128.25
OSDI-SPACESAVER	LOCKER-PD	224.00
POOL TECH INC	CHEMICALS-POOL	714.50
POOL TECH INC	CHEMICALS-POOL	621.00
POSTMASTER	UTIL BILL POSTAGE-WAT,SEW,SW	366.19
RICKLEFS EXCAVATING	2015 SANITARY SEW RETAINAGE	12271.44
SHERWIN WILLIAMS CO.	SUPPLIES-RUT	31.10
SIDERS, MATT	MILEAGE-P&REC	64.80
SIMMONS PERRINE MOYER BERGMAN	LEGAL FEES-P&A	1545.00
SIMMONS PERRINE MOYER BERGMAN	LEGAL FEES-P&A	820.00
SPRAY-LAND USA	EXTENSION-RUT	8.90
STAPLES ADVANTAGE	SUPPLIES-P&A	73.73
TREASURER STATE OF IOWA	SALES TAX	4,622.00
US CELLULAR	CELL PHONE-ALL DEPTS	407.70
VEENSTRA & KIMM INC	DRAIN ISSUES-SCOBAY, LISBON RD	675.00
VEENSTRA & KIMM INC	WASTEWATER FACILITY PLAN	412.00
VEENSTRA & KIMM INC	CITY ENGINEERING GENERAL	316.500
VEENSTRA & KIMM INC	5TH AVE/1ST STREET W SIGNAL	206.00
VEENSTRA & KIMM INC	MUNICIPAL POOL IMPROV	168.00
VEENSTRA & KIMM INC	HIGH SCHOOL SITE PLAN REVIEW	162.00
WAPSI WASTE SERVICE	GB,RECY,LEAF-SW	22,528.63
WENDLING QUARRIES	TILE-ST WAT	120.31
	TOTAL	210,359.68

Discussion and Consideration of Ragbrai Submittal – Council Action as Needed Because of the significant cost and time it takes to be a host town staff asked Council for approval to continue. Council was interested in moving forward with the application process, in hearing from the public and talking to others such as the CDG and business owners. Motion to move ahead and do whatever it takes to let them know that we are interested made by Rose, seconded by Wieseler. Ayes: Tuerler, Wieseler, Christensen, Rose. Nays: Roudabush.

### Reports of Mayor/Council/Administrator

Committee Reports Wieseler reported on the Sustainability Committee. Wayne Peterson (IDALS) spoke to 15 citizens about water retention. The rain barrel program continues. Eagle Scouts are looking for projects. There were discussions regarding purchasing 1-2 lots on the south side for storm water retention. Other topics have been about an electric car charge area, the value of prairie grass burns and community solar.

**Adjournment** As there was no further business to attend to the meeting adjourned, the time being 7:27 p.m., August 1, 2016.

Respectfully submitted,  
Sue Ripke  
City Clerk

## **F. Ordinance Approval/Amendment**

**AGENDA ITEM # F – 1**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

<b>DATE:</b>	August 15, 2016
<b>AGENDA ITEM:</b>	Ordinance – Social Host
<b>ACTION:</b>	Motion

**SYNOPSIS:** City Attorney Hatala will be present at the meeting. There have been two emails from citizens that have been circulated to the Council since the last meeting. Each email was sent to all Council members so please let me know if you no longer have them available to you. At this time, there are four options for the Council:

1. Motion to approve 2<sup>nd</sup> reading.
2. Motion to table the 2<sup>nd</sup> reading to a future specified date.
3. Motion to deny the 2<sup>nd</sup> reading.
4. Motion to approve 2<sup>nd</sup> reading and motion to suspend the rules and approve the 3<sup>rd</sup> and final reading.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** Police Chief

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** Ordinance

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16

Prepared by:	City of Mt. Vernon, City Hall, Chris Nosbisch, City Administrator	213 First St. NW, Mt. Vernon, IA 52314 (319) 895-8742
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**ORDINANCE NO. \_\_\_\_\_**

**AN ORDINANCE ADOPTING CHAPTER 48, SOCIAL HOST OF THE CITY OF MT. VERNON MUNICIPAL CODE**

**BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF MT. VERNON, IOWA:**

**SECTION 1. ADOPTION.** The Mt. Vernon Municipal Code is hereby amended to include the language set forth in Exhibit "A," attached hereto and made a part thereof.

**SECTION 2. SAVINGS CLAUSE.** If any section, provision, sentence, clause, phrase or part of this Ordinance shall be adjudged invalid or unconstitutional, such adjudication shall not affect the validity of the Ordinance as a whole or any provision, section, subsection, sentence, clause, phrase or part hereof not adjudged invalid or unconstitutional.

**SECTION 3. EFFECTIVE DATE.** This Ordinance shall be in full force and effect from and after its passage, approval and publication as provided by law.

Approved and adopted this \_\_\_\_ day of \_\_\_\_\_, 2016.

ATTEST:

\_\_\_\_\_  
Jamie Hampton - Mayor

\_\_\_\_\_  
Sue Ripke – City Clerk

I certify that the foregoing was published as Ordinance No. \_\_\_\_\_ on the \_\_\_\_ day of \_\_\_\_\_, 2016.

\_\_\_\_\_  
Sue Ripke, City Clerk

AN ORDINANCE  
RELATING TO THE PROVISION OF ALCOHOLIC BEVERAGES OR CONTROLLED  
SUBSTANCES BY ADULTS TO UNDERAGE PERSONS AT SOCIAL GATHERINGS  
AND PROVIDING PENALTIES.

BE IT ENACTED BY THE CITY COUNCIL OF THE CITY OF MOUNT VERNON,  
IOWA:

Section 1. Purpose.

Pursuant to the authority granted under Iowa Code section 364, this Ordinance is enacted to protect and preserve the rights, privileges, and property of the residents of Mount Vernon and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of the residents of Mount Vernon. The purpose of this ordinance is to prohibit the consumption of controlled substances including any synthetic versions or alcoholic beverages by persons under the age of twenty-one at gatherings where adult persons knowingly tolerate, allow, or permit the illegal possession and consumption of controlled substances or alcoholic beverages by persons under the age of twenty-one (21) on property they own or control.

The City Counsel of Mount Vernon finds that the occurrence of social gatherings at premises where alcoholic beverages are being possessed, served to, or consumed by persons under the age of twenty-one (21) or where controlled substances including any synthetic versions are being illegally possessed, served, or consumed by any persons is harmful to such persons themselves and a threat to public welfare, health, and safety.

The City Counsel of Mount Vernon further finds that adult persons who are in control of premises where a gathering is taking place and either knowingly tolerate, allow, or permit the illegal possession and consumption of controlled substances by

any persons or alcoholic beverages by persons under the age of twenty-one (21) are not fulfilling their responsibility to ensure public welfare, health, and safety. This ordinance will establish penalties for adult persons who knowingly tolerate, allow, or permit the illegal possession and consumption of controlled substances by any persons or alcoholic beverages by persons under the age of twenty-one (21) to ensure that all hosts of social gatherings confirm that those activities are not occurring on premises under their control.

## Section 2. Definitions.

a. "Adult Person" means any person age eighteen (18) or older.

b. "Juvenile" means any person under the age of eighteen (18).

c. "Parent" means any person having legal custody of a juvenile:

(1) As a natural parent, adoptive parent, or stepparent; or

(2) As a legal guardian; or

(3) As a person to whom legal custody has been given by order of the court.

d. "Underage person" means any individual under the age of twenty-one (21).

e. "Alcoholic Beverage" means any beverage containing more than one half of one percent of alcohol by volume including alcoholic liquor, wine, or beer.

f. "Premises" means any home, yard, farm, field, land, apartment, condominium, hotel, or motel room or other dwelling unit, hall or meeting, park or any other place of assembly, public or private, whether occupied on a temporary or permanent basis, whether occupied as a dwelling or specifically, for a

party or other social function, and whether owned, leased, rented, or used with or without permission or compensation. "Premises" does not include property that is licensed to sell or serve alcoholic beverages.

g. "Social Gathering" means any group of three (3) or more persons who have assembled or gathered together for a social occasion or other activity.

## Section 2. Prohibited Acts.

a. An adult person who is the owner or lessee of, or who otherwise has control over, premises, shall not knowingly tolerate, allow, or permit, during a social gathering:

(1) Any person on such premises to possess or consume controlled substances or synthetic alternatives (As defined by Iowa Code sections 124 and 155A); or

(2) Any person under the age of twenty-one (21) on such premises to possess or consume any alcoholic beverage (As defined by Iowa Code section 123.47(2)).

b. The presence of any adult person who is the owner or lessee of, or who otherwise has control over, a premises during the time that any person possesses or consumes controlled substances or synthetic alternatives or any person under the age of twenty-one (21) possesses or consumes any alcoholic beverages on such property shall be prima facie evidence that such adult had knowledge or should have had the knowledge that such activities were occurring.

c. If a person under the age of eighteen (18) hosts a social gathering and the parent(s) of the person under the age of eighteen (18) knows or reasonably should know of the social gathering and knows or reasonably should know that the consumption or controlled substances or synthetic alternatives by any person or alcoholic beverages by any person under the age

of twenty-one (21) is occurring, the parent(s) shall be liable for violations of this Ordinance.

### Section 3. Defenses.

a. It shall be an affirmative defense to this Ordinance if an adult person in control of a premises where a social gathering is taking place takes reasonable steps to prevent the possession and consumption of alcohol by persons under the age of twenty-one (21) and the possession and consumption of controlled substances including any synthetic versions by any persons while on such premises.

b. Reasonable steps include, but are not limited to:

(1) Ensuring that minors do not consume alcoholic beverages by controlling access to alcoholic beverages after verifying the age of persons attending the gathering by inspecting drivers' licenses or other government-issued identification cards; or

(2) Prohibiting the illegal consumption or possession of controlled substances, including the abuse of medications or use of synthetic alternatives at the gathering; or

(3) Supervising the activities of minors at the gathering; or

(4) Notifying law enforcement of any illegal or unsafe activities.

### Section 4. Exceptions.

a. This Ordinance does not apply to the following situations:

(1) When an individual's action is permitted under Iowa Code section 123.47(2); or

(2) When alcohol is consumed during a legally protected religious observance; or

(3) When alcohol is consumed solely between an underage person and his or her parents while present in the parents' household; or

(4) When a person who hosts, permits, or allows a social gathering seeks immediate assistance from local law enforcement; or

(5) When landlords have begun and are continuing with the process of evicting tenants who are in violation of this Ordinance.

#### Section 5. Penalties.

a. A violation of the provisions of this ordinance shall be enforced as a municipal infraction in accordance with Iowa Code section 364.22.

## **G. Resolutions for Approval**

**AGENDA ITEM # G – 1**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

<b>DATE:</b>	August 15, 2016
<b>AGENDA ITEM:</b>	Resolution – 2015 Street Improvements
<b>ACTION:</b>	Proceed to F-1

**SYNOPSIS:** Enclosed is a copy of the letter from V&K Engineering recommending to the City to accept the 2015 Street Improvements as substantially complete. The total project cost with change orders is \$994,777.07, which includes six change orders in the amount of \$30,235.97. City staff will be re-seeding portions of 5<sup>th</sup> Ave NW, allow this has no bearing on the Ricklef contract.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** Resolution and Letter

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16

**RESOLUTION #**

**RESOLUTION ACCEPTING WORK FOR THE PROJECT KNOWN AS THE  
2015 STREET IMPROVEMENTS PROJECT  
WITH  
RICKLEFS EXCAVATING, LTD.**

WHEREAS, on August 3, 2015 the City of Mt. Vernon entered into a contract with Ricklefs Excavating, ltd. for construction of the 2015 Street Improvements Project, and

WHEREAS, said contractor has fully completed the construction of said improvements, known as 2015 Street Improvements Project, in accordance with the terms and conditions of the said contract and plans and specifications, as shown by the Engineer's report, and

WHEREAS, the contractor has completed all delivery and payment has been received.

NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MT. VERNON, IOWA:

Section 1. That letter recommending approval of said improvements from the V&K Engineering firm is hereby accepted as having been fully completed in accordance with said plans, specifications and contract. The total contract cost of the improvements payable under said contract is hereby determined to be \$994,777.07.

NOW, THEREFORE BE IT FURTHER RESOLVED BY THE CITY COUNCIL OF THE CITY OF MT. VERNON, IOWA: That said retainage of \$49,738.85 be released to Ricklefs Excavating, Ltd. as shown in the attached pay application.

PASSED and ADOPTED this \_\_<sup>th</sup> day of August, 2016.

\_\_\_\_\_  
Jamie Hampton, Mayor

ATTEST:

\_\_\_\_\_  
Sue Ripke, City Clerk

**CERTIFICATE OF COMPLETION**

**2015 STREET IMPROVEMENTS PROJECT  
MOUNT VERNON, IOWA**

August 10, 2016

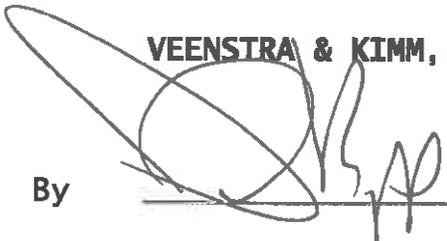
We hereby certify that we have made an on-site review of the completed construction of the **2015 STREET IMPROVEMENTS PROJECT** under the Contract as performed by Ricklefs Excavating, Ltd. of Anamosa, Iowa.

As Engineers for the project it is our opinion that the work performed is in substantial accordance with the plans and specifications, and that the final amount of the contract is Nine Hundred Ninety-Four Thousand Seven Hundred Seventy-Seven and 07/100 Dollars (\$994,777.07).

**VEENSTRA & KIMM, INC.**

Accepted: **CITY OF MOUNT VERNON, IOWA**

By



\_\_\_\_\_

By

\_\_\_\_\_

Title: Project Engineer

Title: Mayor

Date August 10, 2016

Date \_\_\_\_\_

## **J. Motions for Approval**

## CITY OF MOUNT VERNON CLAIMS FOR APPROVAL, AUGUST 15, 2016

PAYROLL	CLAIMS	76,333.60
CLIFTON LARSON ALLEN	FY16 AUDITOR FEES-P&A	2,200.00
STATE HYGIENIC LAB	TESTING-SEW	1,897.50
GARY'S FOODS	CONC STAND-POOL	1,143.97
WEX BANK	FUEL-PD,WAT,SEW	1,031.63
RICKARD SIGN AND DESIGN CORP	REFLECTIVE MATERIAL-PD	630.00
OFFICE EXPRESS	SUPPLIES-P&REC,P&A	526.96
AMERICAN PLANNING ASSOC	MEMBERSHIP-P&A	519.00
INTOXIMETERS	EQUIP MAINT-PD	510.00
SAM'S CLUB #8162	SUPPLIES-POOL	446.08
IOWA PRISON INDUSTRIES	POST BASES-RUT	430.10
GOODLOVE, NATHAN	FIRE CHIEF PAY-FD	416.67
KONICA MINOLTA BUSINESS SOLUTIONS	MAINTENANCE PLAN/COPIES	390.46
ROTO-ROOTER	CLEAN LIFT STATION-SEW	375.00
TEMP VENDOR	BOOM TRUCK INSPECTION-RUT	370.48
BELOU QUIMBY	INTERN-MVHPC	360.00
MARIN DETTWEILER	INTERN-MVHPC	360.00
IOWA SOLUTIONS INC	DBR BACKUP-ALL DEPTS	350.00
ECICOG	ZONING ORDINANCE UPDATE-P&A	332.00
BROWN PLUMBING COMPANY	WATER HEATER-P&REC	288.90
DAN'S TIRES & MORE	TIRES-PD	278.18
FOX APPARATUS REPAIR & MAINT	#214 MAINT-FD	238.21
CR/LC SOLID WASTE AGENCY	DELIVERED TRASH-RUT	218.00
HAWKEYE READY MIX	ALLEY ENTRANCE-RUT	147.25
PITNEY BOWES	POSTAGE METER RENTAL-ALL DEPTS	141.00
CAREPRO PHARMACY	SUPPLIES-POOL	128.36
IOWA POLICE CHIEFS ASSOCIATION	TRAINING-PD	125.00
SUSAN SEE	TEACHING/AQUACISE-OPOOL	125.00
US CELLULAR	CELL PHONE-PD	116.17
MOUNT VERNON LISBON SUN	ADS/PUBLICATIONS-P&REC,POOL	105.00
GARY'S FOODS	CONC STAND-POOL	81.09
CARQUEST OF LISBON	VEHICLE MAINT- PW	65.27
CARQUEST OF LISBON	VEHICLE MAINT-FD	56.63
IOWA ONE CALL	LOCATES-WAT,SEW	52.20
TEMP VENDOR	EDUCATION-MVHPC	50.00
CENTURY LINK	PHONE CHGS-PD	36.95
STAR EQUIPMENT LTD	EQUIP REPAIR-RUT	29.50
AIRGAS INC	CYLINDER RENTAL FEE-PW	28.76
PACE SUPPLY	SUPPLIES-P&REC	1.25
	TOTAL	90,936.17

**AGENDA ITEM # J – 2**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

<b>DATE:</b>	August 15, 2016
<b>AGENDA ITEM:</b>	Rescheduling September 5, 2016 Meeting
<b>ACTION:</b>	Motion

**SYNOPSIS:** The first Council meeting of September will fall on Labor Day and staff is recommending that the Council move this meeting to Wednesday, September 7, 2016.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** None

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16

**AGENDA ITEM # J – 3**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

**DATE:** August 15, 2016

**AGENDA ITEM:** Change Order #6

**ACTION:** Motion

**SYNOPSIS:** Enclosed is a copy of the proposed change order #6 and explanation from V&K Engineering for the 2015 street improvement projects. The total for this change order is \$500.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** Supporting Documents

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16

**CHANGE TO CONTRACT  
CHANGE ORDER NUMBER 6  
2015 STREET IMPROVEMENTS PROJECT  
THIRD AVENUE NW FROM FIRST STREET NW TO THIRD STREET NW  
FIFTH AVENUE NW FROM FIRST STREET NW TO SEVENTH STREET NW**

**July 21, 2016**

**OWNER: CITY OF MOUNT VERNON, IOWA  
CONTRACTOR: RICKLEFS EXCAVATING, ANAMOSA, IOWA**

ITEM 1: On September 2<sup>nd</sup>, 2015, during a telephone conversation with the Contractor, a grading conflict with buried telephone utility was discussed. The buried telephone at the intersection of 2<sup>nd</sup> St. NW and 3<sup>rd</sup> Ave. NW was too shallow to allow for the pavement cuts. The decision was made to have the Contractor lower the utility so that a minimum amount of time was lost. A lump sum price of \$500.00 was agreed upon for this work.

Service Walk Steps 1 LS @ \$ 500.00/ LS= \$ 500.00

**ADDITIONAL PRICE TO CONTRACT: \$ 500.00**

**ADDITIONAL CONTRACT TIME 0 Days**

**CONTRACT SUMMARY:**

CONTRACT PRICE	\$ 902,281.35
CHANGE ORDER 1	\$ 10,260.00
CHANGE ORDER 2	\$ 2,994.00
CHANGE ORDER 3	\$ 2,980.00
CHANGE ORDER 4	\$ 12,950.00 (\$ 6,475.00 X 2)
CHANGE ORDER 5	\$ 551.97
CHANGE ORDER 6	<u>\$ 500.00</u>
REVISED CONTRACT PRICE	\$ 932,517.32

Ricklefs Excavating

By: Sharon Riecke

Title: HR Administrator

Date: 7-28-16

City of Mt. Vernon, Iowa

[Signature]  
Engineer

Date: Aug 10 2016

City of Mt. Vernon, Iowa

\_\_\_\_\_  
City Administrator

Date: \_\_\_\_\_

**AGENDA ITEM # J – 4**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

<b>DATE:</b>	August 15, 2016
<b>AGENDA ITEM:</b>	Pay Application #7
<b>ACTION:</b>	Motion

**SYNOPSIS:** This is pay application #7 for the 2015 street improvement projects. This is the final pay application before the release of the retainage. Pay application #7 is in the amount of \$14,140.94.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** Supporting Documents

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16



**VEENSTRA & KIMM, INC.**

880 22nd Avenue, Suite 4 - Corahville, Iowa 52241-1865  
 319-466-1000 • 319-466-1008(FAX) • 888-241-8001(WATS)

July 21, 2016

**PAY ESTIMATE NO. 7**  
**2015 STREET IMPROVEMENTS**  
**MOUNT VERNON, IOWA**

Ricklefs Excavating, Ltd.  
 12536 Buffalo Rd.  
 Anamosa, IA 52205

Contract Amount \$902,281.35  
 Contract Date August 3, 2015  
 Pay Period

BID ITEMS							
	Description	Unit	Estimated Quantity	Unit Price	Extended Price	Complete d	Value Completed
2.1	Traffic Control	LS	xxxxx	xxxxx	\$ 8,600.00	100%	\$ 8,600.00
2.2	Mobilization	LS	xxxxx	xxxxx	\$ 175,000.00	100%	\$ 175,000.00
2.3	Construction Survey	LS	xxxxx	xxxxx	\$ 14,000.00	100%	\$ 14,000.00
2.4	Erspron Control	LS	xxxxx	xxxxx	\$ 1,000.00	100%	\$ 1,000.00
2.5	Stabilizing Materials	Tons	400	\$ 16.00	\$ 6,400.00	1373.81	\$ 21,980.96
2.6	Surface Removal	SY	6,189	\$ 12.00	\$ 74,268.00	7235	\$ 86,820.00
2.7	Topsoil Borrow Material	CY	200	\$ 13.00	\$ 2,600.00	200	\$ 2,600.00
2.8	Manhole/Intake Removal	Ea.	7	\$ 250.00	\$ 1,750.00	7	\$ 1,750.00
2.9	Granular Backfill	Tons	500	\$ 16.00	\$ 8,000.00	403.21	\$ 6,461.36
2.1	Unclassified Excavation	CY	2,320	\$ 5.00	\$ 11,600.00	2320	\$ 11,600.00
2.11	Clearing and Grubbing	Units	22	\$ 50.00	\$ 1,100.00	57.5	\$ 2,875.00
2.12	Removal & Reinstall Signs	Ea.	33	\$ 160.00	\$ 4,950.00	31	\$ 4,650.00
2.13	Storm Sewer Manhole, SW-401	Ea.	6	\$ 3,200.00	\$ 19,200.00	6	\$ 19,200.00
2.14	Intakes						
	2.14.1 SW-505	Ea.	6	\$ 3,750.00	\$ 22,500.00	6	\$ 22,500.00
	2.14.2 SW-505 MOD	Ea.	3	\$ 4,000.00	\$ 12,000.00	3	\$ 12,000.00
	2.14.3 SW-506	Ea.	0	\$ 3,200.00	\$ -	0	\$ -
2.16	Storm Sewer Pipe in Place						
	2.16.1 16" RCP	LF	70	\$ 60.00	\$ 4,200.00	70	\$ 4,200.00
	2.16.2 18" RCP	LF	741	\$ 70.00	\$ 51,870.00	741	\$ 51,870.00
	2.16.3 24" RCP	LF	213	\$ 80.00	\$ 17,040.00	213	\$ 17,040.00
	2.16.4 24" RCP Arch	LF	0	\$ 90.00	\$ -	0	\$ -
2.16	Manhole Adjustment	Ea.	1	\$ 750.00	\$ 750.00		\$ -
2.17	Flowable Mortar	CY	7	\$ 110.00	\$ 770.00	16	\$ 1,760.00
2.18	Modified Subbase	CY	935	\$ 26.00	\$ 24,310.00	2018	\$ 52,468.00
2.19	HMA Pavement & Overlay	Tons	651	\$ 92.00	\$ 59,892.00		\$ -
2.2	Pavement Milling	SY	0	\$ 7.00	\$ -	0	\$ -

	Description	Unit	Estimated Quantity	Unit Price	Extended Price	Completed	Value Completed
2.21	Portland Cement Concrete						
2.21.1	Pavement	SY	4,453	\$ 31.25	\$ 139,156.25	7178	\$ 224,312.50
2.21.2	Curb and Gutter	LF	1,815	\$ 16.00	\$ 29,040.00		\$ -
2.21.3	6" Driveways	SY	371	\$ 32.10	\$ 11,909.10	424	\$ 13,610.40
2.21.4	7" Driveways	SY	98	\$ 35.00	\$ 3,430.00	122	\$ 4,270.00
2.21.5	Sidewalks	SY	585	\$ 29.00	\$ 16,865.00	1010.8	\$ 29,313.20
2.21.6	Steps	LS	xxxxx	xxxxx	\$ 10,000.00	100%	\$ 10,000.00
2.22	Truncated Domes	SF	438	\$ 21.00	\$ 9,198.00	458	\$ 9,618.00
2.23	Crack & Seal of PCC Pavement	SY	635	\$ 7.00	\$ 4,445.00		\$ -
2.24	ADA Ramp	LS	xxxxx	xxxxx	\$ 33,000.00	100%	\$ 33,000.00
2.25	Segmental Retaining Wall	SF	350	\$ 28.00	\$ 9,800.00	532	\$ 14,896.00
2.26	Brick Pavers	SF	311	\$ 22.00	\$ 6,842.00	308	\$ 6,732.00
2.27	Geogrid	SY	400	\$ 2.10	\$ 840.00	4868	\$ 10,222.80
2.28	Water Main Directional Bored	LF	625	\$ 60.00	\$ 37,500.00	625	\$ 37,500.00
2.29	Water Main Open Cut In Place	LF	140	\$ 60.00	\$ 8,400.00	140	\$ 8,400.00
2.3	Gate Valve	Ea.	5	\$ 1,800.00	\$ 9,000.00	5	\$ 9,000.00
2.31	Water Service Connection	Ea.	14	\$ 1,400.00	\$ 19,600.00	11	\$ 15,400.00
2.32	Hydrant Assembly	Ea.	2	\$ 3,900.00	\$ 7,800.00	2	\$ 7,800.00
2.33	Water Main Removal	LF	140	\$ 12.00	\$ 1,680.00	140	\$ 1,680.00
2.34	Valve Removal	Ea.	1	\$ 180.00	\$ 180.00	1	\$ 180.00
2.35	CIPP Lined Sewer	LF	485	\$ 31.00	\$ 15,035.00	485	\$ 15,035.00
2.36	Sewer Televising	LF	970	\$ 0.80	\$ 776.00	976.1	\$ 780.88
2.37	Sewer Cleaning	LF	485	\$ 1.00	\$ 485.00	485	\$ 485.00
2.38	CIPP Service Connection	Ea.	9	\$ 250.00	\$ 2,250.00	7	\$ 1,750.00
2.39	Sewer Service Grouting	Ea.	9	\$ 350.00	\$ 3,150.00	7	\$ 2,450.00
<b>Contract Price:</b>					<b>\$ 902,281.35</b>		<b>\$ 974,801.10</b>

<b>MATERIALS STORED SUMMARY</b>				
	Description	# of Units	Unit Price	Extended Cost
<b>Total</b>				<b>\$ -</b>

<b>SUMMARY</b>			
		Total Approved	Total Completed
Contract Price		\$ 902,281.35	\$ 974,801.10
Approved Change Order (list each)	Change Order No. 1	\$ 10,260.00	
	Change Order No. 2	\$ 2,994.00	\$ 2,994.00
	Change Order No. 3	\$ 2,980.00	\$ 2,980.00
	Change Order No. 4	\$ 12,950.00	\$ 12,950.00
	Change Order No. 5	\$ 551.97	\$ 551.97
	Change Order No. 6	\$ 500.00	\$ 500.00
	Revised Contract Price		\$ 932,517.32

**Stored**

Total Earned \$ 994,777.07

Retainage (5%) \$ 49,738.85

Total Earned Less Retainage \$ 945,038.22

Total Previously Approved (list each)			
	Pay Estimate No. 1	\$ 241,249.18	
	Pay Estimate No. 2	\$ 308,087.95	
	Pay Estimate No. 3	\$ 172,935.81	
	Pay Estimate No. 4	\$ 45,232.46	
	Pay Estimate No. 5	\$ 108,619.20	
	Pay Estimate No. 6	\$ 54,771.08	

Total Previously Approved \$ 930,897.28

Percent Complete 107%

Amount Due This Request \$ 14,140.94

The amount \$14,140.94 is recommended for approval for payment in accordance with the terms of the contract.

Prepared By:  
Ricklefs Excavating, Ltd.

Recommended By:  
Veenstra & Kimm, Inc.

Approved By:  
Mount Vernon, Iowa

Signature: Stacey Decker

Signature: [Signature]

Signature: \_\_\_\_\_

Name: Stacey Decker

Name: Daniel Boggs

Name: \_\_\_\_\_

Title: AK Administrator

Title: Engineer

Title: \_\_\_\_\_

Date: 7-28-14

Date: July 21, 2016

Date: \_\_\_\_\_

**AGENDA ITEM # J – 5**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

**DATE:** August 15, 2016

**AGENDA ITEM:** Traffic Safety Funds

**ACTION:** Motion

**SYNOPSIS:** Enclosed is an application to reconstruct and replace lights at the intersection of 5<sup>th</sup> Ave. NW and 1<sup>st</sup> Street West. The application is requesting \$59,965 in safety funds for the lighting aspects of the improvements. This will leave \$218,630 as city expense.

It is my understanding, talking to staff, that this was left out of the 5<sup>th</sup> Ave project in order to apply for grant funding. The city expense would be covered from existing bond proceeds should the Council choose to move forward with the project. Nick has informed me that we cannot get parts for the existing lights on 1st St and would have to replace them should they fail. With that being said, no member of staff will be able to give the Council a date when this may happen. The existing lights may last another two months or five years.

**BUDGET ITEM:** N/A

**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** Supporting Documents

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16



## Application for TRAFFIC SAFETY FUNDS

**GENERAL INFORMATION**

**DATE:** \_\_\_\_\_

Location / Title of Project 2017 Traffic Signal Replacement Project

Applicant City of Mount Vernon, Iowa

Contact Person Chris Nosbisch Title City Administrator

Complete Mailing Address 213 first Street West  
Mount Vernon, Iowa 52314

Phone (319) 895-8742 E-Mail cnosbisch@cityofmtvernon-ia.gov  
 (Area Code)

**If more than one highway authority is involved in this project, please indicate and fill in the information below (use additional sheets if necessary).**

Co-Applicant(s) \_\_\_\_\_

Contact Person \_\_\_\_\_ Title \_\_\_\_\_

Complete Mailing Address \_\_\_\_\_

Phone \_\_\_\_\_ E-Mail \_\_\_\_\_  
 (Area Code)

**PLEASE COMPLETE THE FOLLOWING PROJECT INFORMATION:**

**Application Type**

Site Specific	<input type="checkbox"/>
Traffic Control Device	<input checked="" type="checkbox"/>
Safety Study	<input type="checkbox"/>

**Funding Amount**

Total Safety Cost	\$ <u>59,965.00</u>
Total Project Cost	\$ <u>278,595.00</u>
<b>Safety Funds Requested</b>	<b>\$ <u>59,965.00 (Signal Material Cost)</u></b>

Does this project appear on a Safety Improvement Candidate List or is there a safety study recommendation for this project?  Yes – Explain \_\_\_\_\_  
 No

## APPLICATION CERTIFICATION FOR LOCAL GOVERNMENT

To the best of my knowledge and belief, all information included in this application is true and accurate, including the commitment of all physical and financial resources. This application has been duly authorized by the participating local government(s). I understand the attached resolution(s) binds the participating local government(s) to assume responsibility if any additional funds are committed, and to ensure maintenance of any new or improved city streets or secondary roads.

I understand that, although this information is sufficient to secure a commitment of funds, a firm contract between the applicant and the Department of Transportation is required prior to the authorization of funds.

Representing the City of Mount Vernon, Iowa

Signed: \_\_\_\_\_  
Signature Date Signed

Chris Nosbisch  
Typed Name

Attest: \_\_\_\_\_  
Signature Date Signed

Sue Ripke  
Typed Name

# Narrative

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The City of Mount Vernon, Iowa is submitting this application for Traffic Safety Improvement Program funds under the traffic Control device category. The funding request is to provide funding for the material cost for the purchase of traffic signal equipment to replace the existing pedestrian activated signals at the intersection of First Street West and Fifth Avenue West. The city of Mount Vernon, Iowa is responsible for the operation and maintenance of the signals.

The location of this project, the intersection of Fifth Avenue and First Street West, is the intersection of two minor arterials which also service specific pedestrian traffic. The main contributors to the pedestrian traffic along these two arterials include Washington Elementary School, The Cornell College campus, Memorial Park, Mount Vernon United Methodist Church, First Presbyterian Church, and the Mount Vernon Uptown Business district. Please refer to Figure 1 in Section E for reference.

The purpose of this project is to replace the existing pedestrian activated crossing signal which is outdated, in poor repair, and of dysfunctional operation. Specifically the traffic on Fifth Avenue is controlled by stop signs, the existing pedestrian activated signal controls only traffic on First Street West. This leads to confusion on both the pedestrian as well as vehicle users.

**Safety Needs:** The intersection of Fifth Avenue and First Street West has a high pedestrian use due to a number of sources. These include:

- Washington Elementary School
- Cornell College
- Mount Vernon "Uptown Business" district
- Memorial Park
- First Presbyterian Church
- United Methodist Church (Including Preschool)

The existing condition explained below, are only partially ADA compliant. The existing pedestrian activated signals are in poor repair, and are not compliant with Manual on Uniform Traffic Control Devices (MUTCD) requirements. This causes an unsafe situation for pedestrians trying to cross the streets at this intersection.

**Existing Conditions:** Outdated pedestrian activated signals which control traffic on First Street West only. Fifth Avenue traffic is controlled by stop signs. Fifth Avenue has been reconstructed with brick crosswalk handicap crossings from two separate reconstruction projects. The pedestrian ramps are American with Disabilities Act (ADA) compliant on the northerly leg of the intersection. The pedestrian ramps are not ADA compliant on the southerly leg of the intersection. The marked (painted) pedestrian crosswalk on First street West is on the westerly side of the intersection. Please refer to Figure 2 in Section G for reference.

**Project Concept:** The proposed project concept and scope includes the installation of MUTCD and compliant pedestrian activated signals which would provide safe pedestrian passage for three pedestrian crosswalks from vehicular traffic from all four intersection legs. Pedestrian ramps which presently do not meet the ADA requirements will be reconstructed to comply with ADA requirements. Please refer to Figure 3 in Section G for reference.

**Manual on Uniform Traffic Control Devices (MUTCD) Requirements:** The proposed pedestrian activated crossing signal will meet the applicable MUTCD requirements as set forth in Chapter 4D. Additionally, as set forth in Section 4D.03 Provisions for Pedestrians, Pedestrian signal heads conforming to the provisions set forth in Chapter 4E shall be installed.



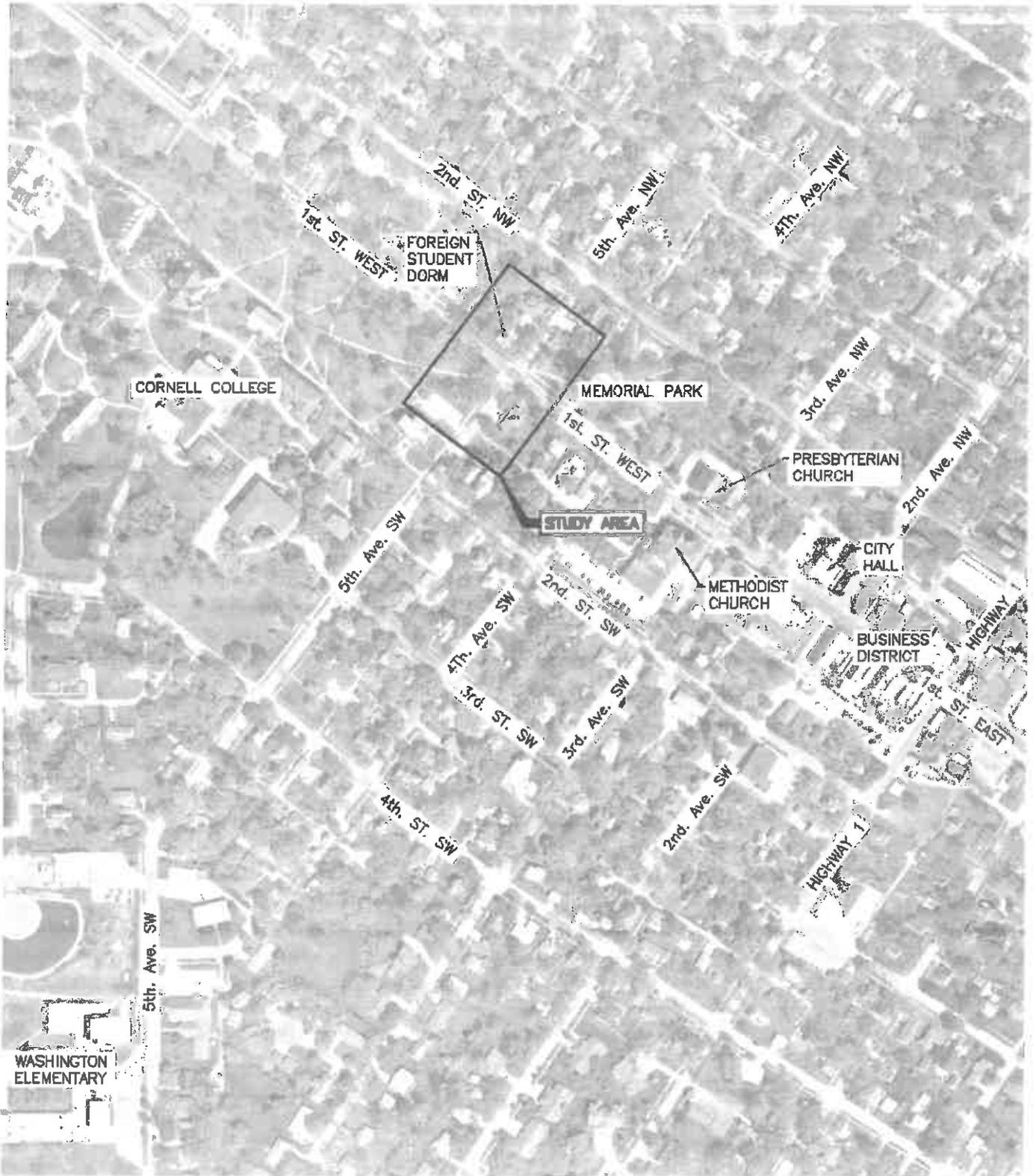
<b>Opinion of Cost for 2016 PEDESTRIAN ACTIVATED CROSSING SIGNALS</b>					<b>C</b>
<b>ESTIMATED MATERIAL COST FOR PROPOSED SIGNALS</b>					
<b>Mount Vernon, Iowa</b>					
<b>10-Aug-16</b>					
<b>No.</b>	<b>Description</b>	<b>Unit</b>	<b>Unit Price</b>	<b>Quantity</b>	<b>Extended Price</b>
1	8 Phase Controller Cabinet & Base	Each	\$14,000.00	1	\$14,000.00
2	Vehicle Detection	Each	\$650.00	4	\$2,600.00
3	Push buttons w/ Signs	Each	\$200.00	8	\$1,600.00
4	Side of Pole Mount R,Y,G LED w/ Bracket Signal Heads	Each	\$575.00	4	\$2,300.00
5	Mast Arm Mount R,Y,G LED w/ Bracket Signal Heads	Each	\$575.00	4	\$2,300.00
6	12" LED Hand/Person Side Of Pole Mount Pedestrian Signal	Each	\$500.00	8	\$4,000.00
7	Cable & Conduit	L.F.	\$7.75	300	\$2,325.00
8	Pedestal Bases	Each	\$200.00	2	\$400.00
9	Traffic Signal Footing	Each	\$1,060.00	2	\$2,120.00
10	10 Ft Pedestrian Signal Pole	Each	\$1,440.00	4	\$5,760.00
11	Traffic Pole Powder Coated w/ 21' & 35' MA	Each	\$9,360.00	2	\$18,720.00
12	Remote Pedestrian Push /button Pole Powder Coated	Each	\$960.00	4	\$3,840.00
<b>REQUESTED FUNDING</b>					<b>\$59,965.00</b>

# Schedule

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<b>August 2016</b>	<b>Application Submittal</b>
<b>December 2016</b>	<b>Grant Award</b>
<b>January 2017</b>	<b>Begin Design</b>
<b>March 2017</b>	<b>Award Contract</b>
<b>July 2017</b>	<b>Begin Construction</b>
<b>October 2017</b>	<b>Finish Construction</b>

# Location Map



# Photos

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**Photo 1 – Looking Easterly along First Street West**

# Photos

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Photo 2 – Looking Easterly along First Street

# Photos

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Photo 3 – Looking Northerly along Fifth Avenue

# Photos



Photo 4 – Looking Northerly along Fifth Avenue

# Photos

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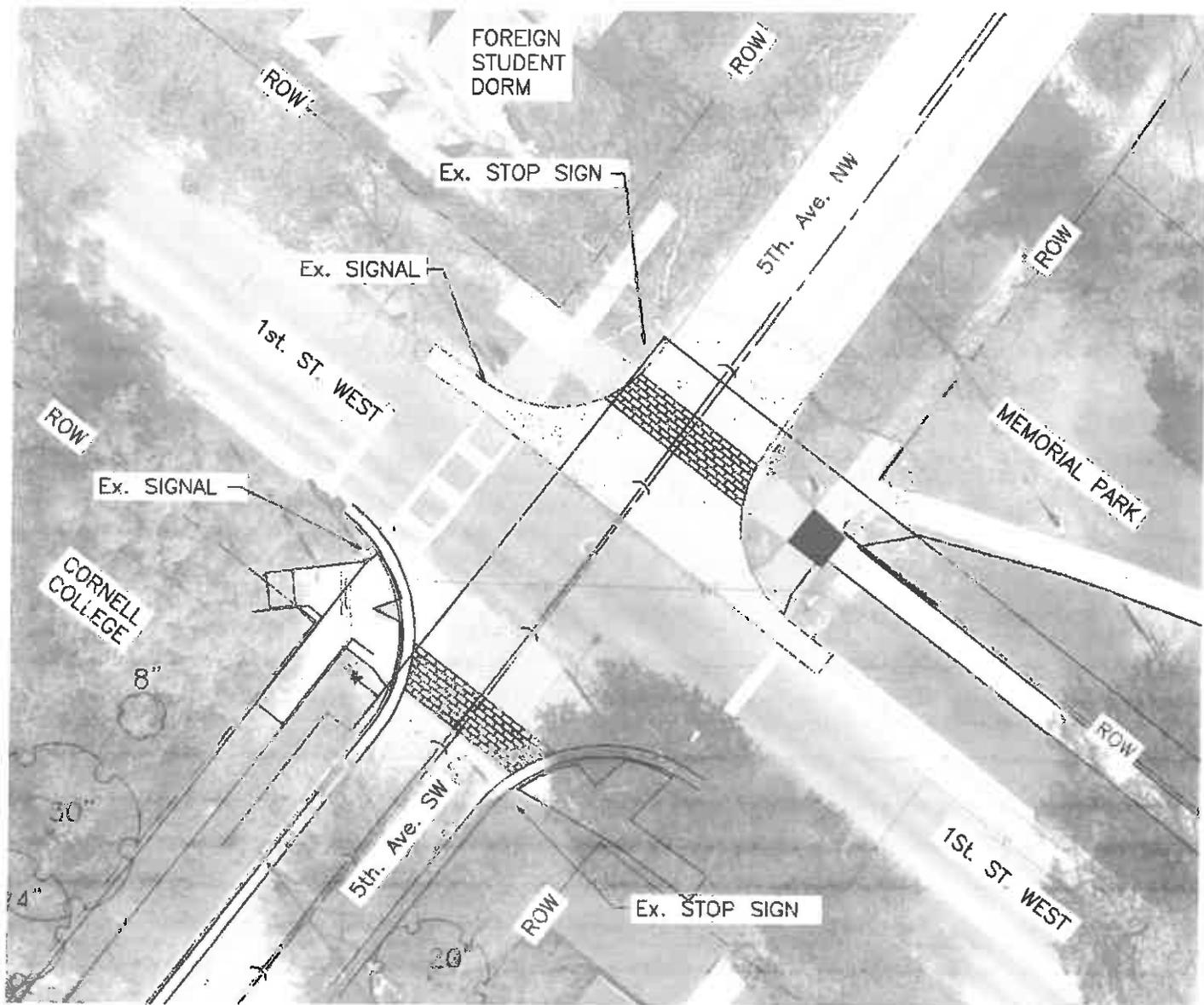
**Photo 5 – Looking Westerly along First Street**

# Photos

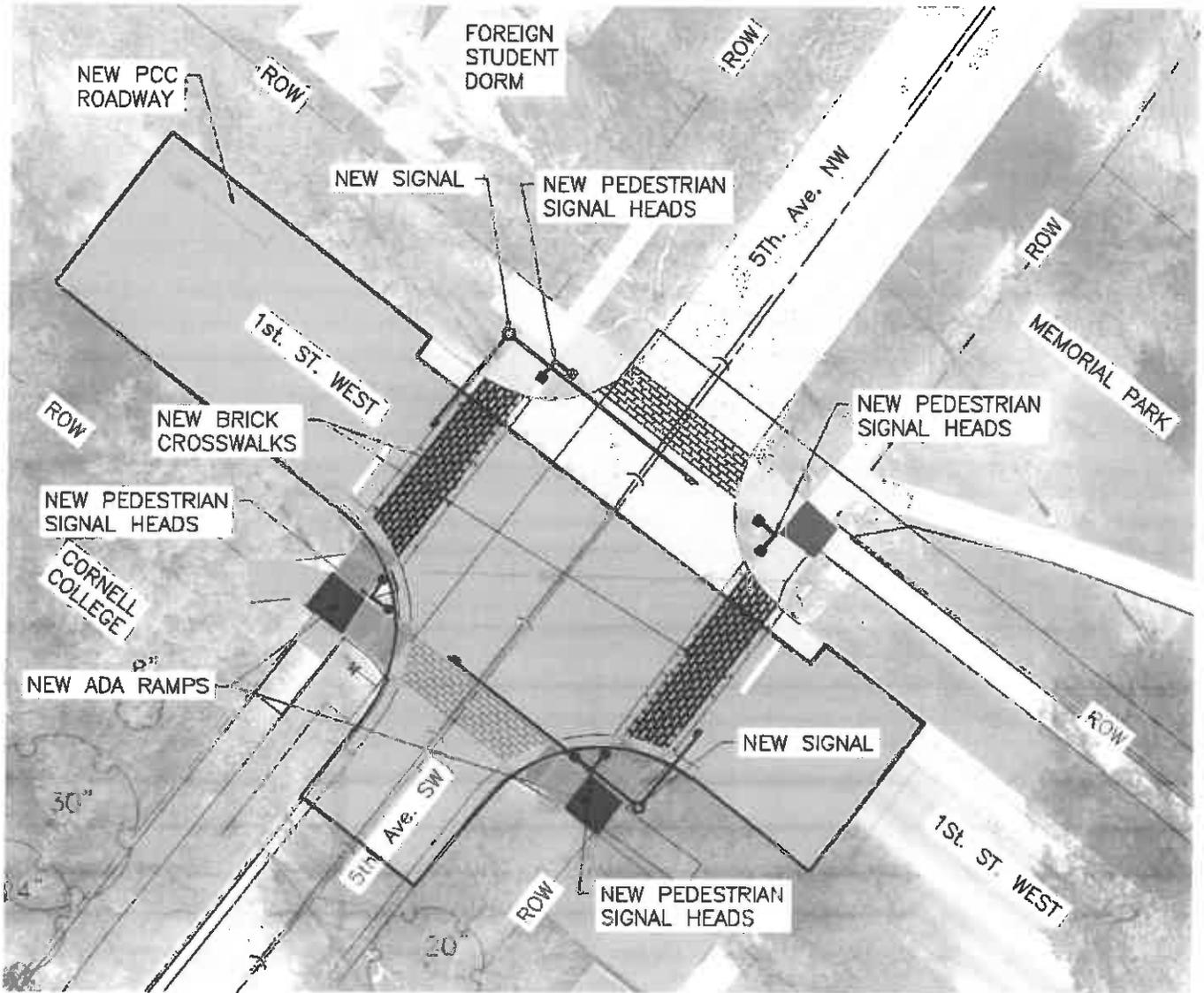


Photo 6 – Looking Westerly along First Street

# Plan View - Existing



# Plan View - Proposed



**AGENDA ITEM # J – 6**

**AGENDA INFORMATION  
MT. VERNON CITY COUNCIL COMMUNICATION**

<b>DATE:</b>	August 15, 2016
<b>AGENDA ITEM:</b>	City Hall Cleaning Services
<b>ACTION:</b>	Motion

**SYNOPSIS:** Staff has reviewed four bids that were submitted for City Hall cleaning services. The bids ranged from a high of \$518 a month to a low of \$400 a month. The low bid was removed as it will be difficult to complete the cleaning services during regular business hours (a requirement of the bid). There was then a tie, with two submittals proposing the same \$480 a month bid. Staff is recommending the bid of the Mt. Vernon submittal of Diligent Cleaning Services. Diligent is owned and operated by Joan Burge and Francesca Thompson. If you would like a copy of the submittals, please let me know and I will bring them on Monday.

**BUDGET ITEM:** N/A

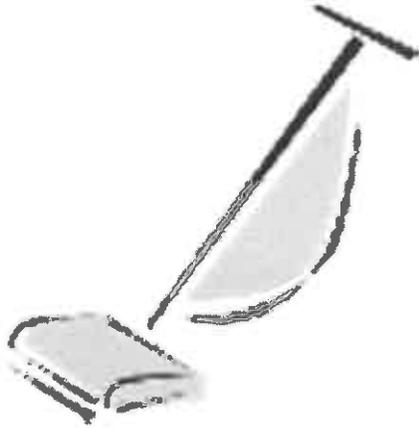
**RESPONSIBLE DEPARTMENT:** City Administrator

**MAYOR/COUNCIL ACTION:** Motion

**ATTACHMENTS:** None Documents

**PREPARED BY:** Chris Nosbisch

**DATE PREPARED:** 8/10/16



## DILIGENT CLEAN

August 9, 2016

City Administrator Chris Nosbisch, Chief Doug Shannon, and City Hall Staff,

Francesca and I are lifelong residents of Mount Vernon and have an established cleaning service in the local area. We are interested in applying and obtaining the cleaning position as posted in the Sun newspaper in July 2016, and submit this bid.

We performed a test cleaning on August 4th, 2016, without charge, in order to accurately estimate the amount of time needed to do a diligent clean of the areas specified by City Clerk Sue Ripke during our initial conversation. Our assessment clean showed it will take approximately three hours a week to do a complete cleaning.

We will be available for cleaning after special events, and will gladly come up and clean during high traffic times during the winter when there is more sand and salt from the winter traffic and to do any additional cleaning projects that you would like done.

In addition to the list of cleaning requirements, we are proposing adding cleaning the entry ways and vacuuming/wiping down inside the elevator into the weekly list of duties, since they are the front door to the city and make an initial impression.

Our usual individual rate is \$20.00 per person or \$40 an hour for both of us, or a bid of \$120.00 per week. We will work for an hourly rate or weekly rate. We will provide you with a list of maintenance issues as noted- for example: the faucet in the men's bathroom is rusted through and the leak is staining the sink. The overhead light in the men's down stairs bathroom is burnt out, as well as suggested additional areas of focus that could be cleaned on a rotating basis, as needed, in order to help City Hall shine and look its best at all times, in all areas.

We thank you in advance for reviewing our bid, and appreciate the opportunity to apply. We look forward to hearing from you in the near future. If you have any questions at all about this bid we would be happy to answer them.

We are a hard working team who will always do a diligent clean.

Respectfully,

*Joan Burge  
Francesca Thompson  
Diligent Clean  
415 B First Avenue SW  
Mt. Vernon, Iowa 52314*

## **K. Reports-Received/File**



**Mount  
Vernon**  
IOWA

**Chris Nosbisch, City Administrator**  
**Doug Shannon, Chief of Police**

**Jamie Hampton, Mayor**

**Council:**

**Eric Roudabush**  
**Paul Tuerler**  
**Marty Christensen**  
**Scott Rose**  
**Tom Wieseler**

**July 2016**  
**POLICE REPORT**

**Vehicle Collisions**

There were 5 reported collisions for July. The first collision occurred at the intersection of Hwy 1 & Palisades Road when a vehicle failed to stop with assured clear distance and collided with a vehicle, forcing that vehicle into the vehicle in front of them. Minor injuries resulted in this collision, and damage was estimated at \$17,500. The second collision occurred at Hwy 30 & Willow Creek Rd, when a vehicle swerved to miss a deer, entering the ditch and bean field. The driver was transported to the hospital for possible injuries. Damage was estimated at approximately \$7,000. The third collision occurred at the intersection of 1<sup>st</sup> Avenue & 1<sup>st</sup> Street when a vehicle that was stopped for the flashing red light was rear ended by another vehicle. No injuries were reported, and damage was estimated at \$600. The fourth collision occurred in the 100 block of 1<sup>st</sup> Street East near Polly Ann's Antiques. This accident occurred when a vehicle stopped in the travelled portion of the roadway, and began driving in reverse without ensuring it was safe to do so. This vehicle collided with the vehicle behind him. No injuries were reported, and damage was estimated at \$1,100. The fifth collision occurred when a vehicle attempting to park on Bryant Rd SW collided with another legally parked vehicle. No injuries were reported and damage was estimated at \$2,000.

Mount Vernon officers also responded to Knapp Rd to assist Linn County Sheriff's Office with a ATV accident, which resulted in a fatality.

**Incidents/Arrest**

There were 32 reported incidents in July. Reports included, driving under suspension, theft, false reports to law enforcement, identity theft, disorderly conduct, possession with intent to deliver methamphetamine, possession of controlled substances, possession of drug paraphernalia, counterfeit currency, identity theft, credit card fraud, public intox, assault, domestic abuse, criminal mischief, and found bikes.

The reported incidents resulted in 3 arrests for July. Charges included: possession of methamphetamine with intent to deliver, possession of drug paraphernalia, public intox, interference with official acts, an arrest warrant, obstruction of emergency communication, and driving while suspended.

**Community Service**

- Officers assisted with Heritage Days events Thursday, Friday, & Saturday, including Fireworks, traffic control, event security during street festivities, and the parade.



Mount  
Vernon  
IOWA

Chris Nosbisch, City Administrator  
Doug Shannon, Chief of Police

**Jamie Hampton, Mayor**

**Council:**

Eric Roudabush  
Paul Tuerler  
Marty Christensen  
Scott Rose  
Tom Wieseler

- Officer Moel visited Mount Vernon swimming pool on August 3<sup>rd</sup>, and entertained the kids with a cannonball (while in uniform) and handed out popsicles to kids in attendance.
- Officers assisted with night time security for the July 4<sup>th</sup> Antique Extravaganza

**Training**

- Chief Shannon attended A.L.I.C.E. Training in Nevada, Iowa, and received certification to instruct the ALICE Training.

**GTSB**

Officers worked a total of 17.5 hours of extra traffic enforcement for July. This traffic enforcement resulted in 9 speed violations, 2 stop sign/light violations, 5 motorist assists, 3 insurance violations, 1 seat belt violation, 1 texting law violation, 2 equipment violations, and 2 other traffic violations.

Our department also purchased a new Preliminary Breath Testing device, paid for with funds from GTSB.

Respectfully Submitted,

Doug Shannon  
Chief of Police



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Parks and Recreation Department  
Directors Report  
July 15 – August 15

Parks

- **Staff are finishing last minute summer tasks preparing for a busy fall season.**
- **Met with Curt Wheeler with ASAC about signage for Nicotine Free Parks. ASAC is able to provide signage for our parks. The number of signs is still to be determined.**
- **Staff was able to add additional lime on all of the Elliott ballfields.**
- **Several Eagle Scout projects have been completed in last couple of months and we would like to recognize Chris Banwart and Justin Clarke for their contributions to our park system. Chris built five very sturdy picnic tables for Bryant and Davis Park. Justin built a hand railing for the walk-up hill at the Nancy Doreen Huffman Dog Park at Nature Park. He also constructed a Free Library at the Dog Park. Thank you Eagle Scouts for your service.**

Sports

- **Fall Flag Football and Fall Soccer practices will begin the week of August 22<sup>nd</sup>...registration is available now.**
- **MV Park and Recreation will host an NFL Punt Pass and Kick Local Event for Ages 6-15 on September 23<sup>rd</sup> at Elliott Park.**

Pool

- **We are having difficulties in getting certain pool chemicals from our existing outlet. We are seeking other alternatives for these chemicals.**
- **Pool Triathlon took place on July 30<sup>th</sup>. A total of 22 participants competed and showed some great final times in the events.**
- **We have received two gas bills and are awaiting a third month for a comparison to see the impact the heaters have had on utilities.**



Mount  
Vernon  
IOWA

Chris Nosbisch, City Administrator  
Douglas Shannon, Chief of Police

**Jamie A. Hampton, Mayor**

**Council:**

Eric Roudabush  
Paul Tuerler  
Marty Christensen  
Scott Rose  
Tom Wieseler

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**Public Works Report**  
**August 15, 2016**

*Trees and ROW*

City staff has finished the tree trimming on Highway 1. At the request of the State DOT city staff raised the trees on Highway 1 to what city code requires to be 18 feet over the roadway and 9 feet over the sidewalks. City staff was able to do this while road work was being done on Highway 1 north of town. This allowed for less traffic during the work process, which in turned helped with traffic control. Staff did a great job of attacking this project given the extreme temperatures during the trimming process.

*Streets and Parking*

City staff has removed the parking stalls from the north uptown parking lot. Parking is no longer allowed on the south side of the north city parking lot. City staff has also placed no parking signs on the south side indicating that you cannot park along the south side. During removal of these lines city staff also able to remove the double center line at the intersection of 3<sup>rd</sup> Avenue and 1<sup>st</sup> Street West. This should help clean up that intersection.

*1<sup>st</sup> Street West*

After conversations with Police Chief Shannon about safety concerns for the crosswalks near Cornell College. City staff moved cross walk signs and painted extra curb line along 1<sup>st</sup> Street near Cornell College. The minimum distance you can park clear of a crosswalk is 20 feet. By moving the cross walk signs to the proper advanced distance of 20 feet, along with painting the curb line yellow indicating no parking, should allow passing cars to see pedestrians in the cross walk as they approach.

*Storm Water*

City staff for the first time installed two new storm inlets at the intersection of Country Club Drive and Oak Ridge Drive. Staff had not previously attempted to install storm inlet basins. The need for the new inlets was determined after consulting the engineering firm along with numerous observations during rain events. The inlets were placed in hopes to prevent the continued erosion of the shoulder further south of this intersection. By installing these inlets staff used it as a learning opportunity. In the future staff is hopeful that we can start picking and choosing storm inlet projects off the list of 30 or so inlets around town that need to be replaced. This should help alleviate the cost of replacing storm inlets.

## **M. Reports Mayor/Council/Admin.**

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**CITY OF MT. VERNON  
CITY ADMINISTRATOR  
REPORT TO THE CITY COUNCIL  
August 15, 2016**

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- Matt and I will be traveling to Osage and Waukon Friday, August 19, 2016 to look at their community centers. Their designs are more in line with what is currently being proposed in Mt. Vernon
- Staff will be meeting with members of the Linn County Board of Supervisors on the 18<sup>th</sup> to further the discussion of the proposed dispatch fees.
- There has been an email distributed to Linn County communities regarding the proposed changes to the minimum wage. To date, Linn County has worked with a focus group to study the issue. I have not yet seen the details on the proposal.
- Enclosed with this report are two documents that have been provided to me by V&K Engineering. The first is a brief from an Iowa Supreme Court case involving storm water in the City of Ottumwa, Iowa. The second is an article that talks about storm water and development related flooding. V&K will be at the first meeting in September to present on the storm water issues and the street evaluation plan. I wanted to give you this information in preparation of this discussion.

**IN THE SUPREME COURT OF IOWA**

No. 13-0778

Filed May 2, 2014

**DAVID P. GARR JR. and JULIE A. GARR,**

Appellees,

vs.

**CITY OF OTTUMWA, IOWA,**

Appellant.

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Appeal from the Iowa District Court for Wapello County, Daniel P. Wilson, Judge.

City appeals the district court's denial of its motion for judgment notwithstanding the verdict after the jury awarded the plaintiffs damages for property damage allegedly caused by the City's negligent storm water management. **REVERSED AND REMANDED.**

Mark W. Thomas and Robert J. Thole of Grefe & Sidney, P.L.C., Des Moines, for appellant.

John C. Wagner of John C. Wagner Law Offices, P.C., Amana, for appellees.

**ZAGER, Justice.**

Property owners sued a city alleging the city negligently approved a development that caused flooding to the downstream property owners' home. A jury returned a verdict in favor of the property owners and awarded them damages. The district court then denied the city's motion for judgment notwithstanding the verdict, and the city appealed. We retained the appeal. For the reasons set forth below, we reverse.

**I. Background Facts and Proceedings.**

In the 1940s, the federal government constructed an officers' club at 3105 North Court Road in Wapello County, Iowa. At some point, the club was remodeled into a residence. In 1971, the City of Ottumwa (the City) annexed the property and the surrounding area. In 1980, the City declared the property to be within a 100-year floodplain. In December 1997, David and Julie Garr purchased the property at 3105 North Court Road to use as their residence.

Located north-to-northwest of the Garrs' residence is a golf course. The golf course was constructed in the 1960s and was annexed by the City in 1975. The City maintains the golf course. In 2001, an irrigation pond was dug and a new sprinkler system was installed at the golf course. Drainage tile on the golf course, damaged during the sprinkler system installation, was also repaired. Storm water from the golf course drains into Little Cedar Creek.

Located northwest of the golf course and the Garrs' property is Quail Creek Addition. The City approved Quail Creek Addition in 1995, and it sits on approximately forty-four acres of land. When the Garrs bought their home in 1997, only a few houses had been constructed at Quail Creek Addition. Since approval of the addition, approximately twenty-eight homes have been constructed in the addition, most of them

after 2000. Storm water from Quail Creek Addition drains into Little Cedar Creek, which lies south of the addition.

Located to the south of the Garrs' residence, approximately sixty-four feet from the Garrs' garage, is Little Cedar Creek. The creek flows behind Quail Creek Addition, through the golf course in a southeasterly direction, behind the Garrs' residence, and ultimately through a box culvert under state-owned Highway 63/149. The highway sits to the east of the Garrs' residence and runs in a north-south direction. The distance from the Garrs' garage to the shoulder of Highway 63/149 is about sixty-eight feet.

Like water from Quail Creek Addition, water from the Garrs' property and the golf course drains into Little Cedar Creek. In all, the Little Cedar Creek watershed (the area of land from which all of the water drains to the same place) is made up of about 2075 acres. Quail Creek Addition comprises about two percent of the total watershed.

According to David Garr, from the time the Garrs purchased their home until 2002, Little Cedar Creek rose above its bank a couple of times each year, and the Garrs occasionally had a trickle of water into their basement. In 2002, the Garrs waterproofed and remodeled their basement. Two years later they began to experience problems from the flooding of Little Cedar Creek. Each year, flooding from the creek would get worse, with the water from the creek rising farther above its banks. Water eventually permeated the ground and put pressure on their basement wall.

The Garrs estimated that between 2004 and 2010, they had water in their basement at least 100 different times. In 2010 alone, David estimated there was at least one foot of water in their basement on at least twenty-five different occasions. On one occasion in 2008, water

filled the Garrs' basement to its seven-foot ceiling. On this occasion, the Garrs filed an insurance claim and received \$5000. They used the money to clean up the basement and replace damaged property.

David estimated that at least a dozen times between 2008 and 2010, he spoke with Keith Caviness, a member of the Ottumwa City Council. According to Caviness, however, he spoke with David one time in 2008 and not again until August 2010. When they spoke, David asked Caviness to have the City investigate the flooding problem.

David also tried to contact the Ottumwa Public Works director on multiple occasions, speaking with him just once in April 2010. According to David, despite a general agreement to have an employee come to the Garrs' property and examine Little Cedar Creek, the City never sent anyone from the public works department to investigate the flooding.

The public works director, Larry Seals, testified he came to the Garrs' property sometime in 2010. During this encounter, Seals fielded David's suggestion that the City clear the creek and straighten it. According to Seals, he explained to David that straightening the creek would decrease the time it would take for creek water to get to the culvert under the highway, thereby increasing the peak water level and causing flooding. In response to David's further suggestion that the City clean out the culvert, Seals explained the culvert was under the jurisdiction of the Iowa Department of Transportation and David would have to ask the department to clean the culvert.

On August 10, 2010, water from Little Cedar Creek flooded the Garrs' backyard and filled their basement. Despite David's calls to Larry Seals and Keith Caviness, nobody from the City came to his property. On August 20, a major rainstorm hit Ottumwa and the surrounding

area. Around 4:30 p.m. on this date, after returning to Ottumwa from a trip, David Garr received a frantic call from his wife, Julie. Julie, who was on her way to the couple's home, could not get to the house because water on the road blocked her path. David estimated that when he arrived about fifteen minutes later, the water on Highway 63/149 was twenty-five feet deep. The water around the couple's home had risen to the doorknob on the front door. The flooding caused extensive damage.

In August 2010, parts of Iowa, including Wapello County where Ottumwa is located, were declared a disaster area. The declaration made disaster assistance available under the aegis of the Federal Emergency Management Agency (FEMA) for areas struck by severe storms and flooding between June 1, 2010, and August 31, 2010. The Garrs applied for and received about \$30,000 in disaster assistance because of damage to their home and personal property caused by flooding. Estimates of the total cost to repair the Garrs' home were around \$145,000.

In October 2011, the Garrs filed a lawsuit against the City. They alleged the City negligently managed storm water by approving Quail Creek Addition, by failing to establish storm water detention projects at Quail Creek Addition and the golf course, and by failing to comply with storm water management policies. After the district court denied the City's motion for summary judgment, the case proceeded to trial. At trial, the Garrs presented exhibits and testimony from several witnesses, including an expert who testified about causation. After the Garrs rested their case, the City moved for a directed verdict, but the district court reserved its ruling. After the close of all the evidence, the City renewed its motion for a directed verdict. The district court again reserved its ruling and submitted the case to the jury, which returned a verdict in favor of the Garrs. The jury awarded the Garrs damages of \$84,400.

The City's motion for judgment notwithstanding the verdict or a new trial was denied.

The City timely appealed, and we retained the appeal.

## **II. Issues on Appeal.**

The City appeals on several grounds. First, the City argues the Garrs' claim is barred by the fifteen-year statute of repose contained in Iowa Code section 614.1(11) (2011). Second, the City argues it is immune under three separate provisions of Iowa's Municipal Tort Claims Act: section 670.4(3) (exempting any municipality from liability for discretionary functions), section 670.4(8) (exempting any municipality from liability for claims arising from negligent design or specification of public improvements or facilities that were constructed according to generally recognized engineering criteria), and section 670.4(10) (exempting any municipality from liability for an officer or employee's act or omission in issuing a permit if the damage was caused by an event outside the municipality's control). *See* Iowa Code § 670.4(3), (8), (10).<sup>1</sup> Third, the City argues the Garrs' expert's testimony was insufficient to establish a causal connection between the City's allegedly negligent conduct and the Garrs' damages. Finally, the City argues it was prejudiced by improperly admitted evidence and statements made by plaintiffs' counsel during closing arguments. Because we find the causation issue dispositive, "we address only that issue."<sup>2</sup> *See Gerst v.*

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<sup>1</sup>In 2013, as part of nonsubstantive code corrections, Iowa Code section 670.4 underwent renumbering. *See* 2013 Iowa Acts ch. 30, § 196. The renumbered sections corresponding to those under which the City sought immunity are section 670.4(1)(c), (h), and (j). *See id.*

<sup>2</sup>The City did not argue on appeal that the Garrs failed to establish the City breached its duty of care. Therefore, we assume for purposes of this appeal that the City breached its duty of care.

*Marshall*, 549 N.W.2d 810, 813 (Iowa 1996) (addressing only the issue of causation when it was found to be dispositive).

### **III. Standard of Review.**

We review a district court's ruling denying a motion for judgment notwithstanding the verdict for correction of errors at law. *Royal Indem. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 846 (Iowa 2010). On review, we "determine whether sufficient evidence existed to justify submitting the case to the jury at the conclusion of the trial." *Lee v. State*, 815 N.W.2d 731, 736 (Iowa 2012). To justify submitting the case to the jury, substantial evidence must support each element of the plaintiff's claim. *Van Sickle Constr. Co. v. Wachovia Commercial Mortg., Inc.*, 783 N.W.2d 684, 687 (Iowa 2010). "Evidence is substantial when reasonable minds would accept the evidence as adequate to reach the same findings." *Doe v. Cent. Iowa Health Sys.*, 766 N.W.2d 787, 790 (Iowa 2009). We view "the evidence in the light most favorable to the nonmoving party." *Id.*

### **IV. Discussion.**

In a negligence cause of action, the plaintiff must prove causation. *See Faber v. Herman*, 731 N.W.2d 1, 7 (Iowa 2007) (calling causation "an essential element" in a negligence cause of action). Until recently, we described causation as consisting of two components: cause in fact and proximate, or legal, cause. *See, e.g., Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 883 (Iowa 2009) (noting "that causation has two components: cause in fact and legal cause"); *Faber*, 731 N.W.2d at 7. We no longer refer to proximate or legal cause; instead, we use a different formulation, scope of liability. *See Thompson v. Kaczinski*, 774 N.W.2d 829, 839 (Iowa 2009) (adopting the scope-of-liability concept).

To determine whether the defendant in fact caused the plaintiff's harm, we apply a "but-for" test. *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005). Under that test,

"the defendant's conduct is a cause in fact of the plaintiff's harm if, but-for the defendant's conduct, that harm would not have occurred. The but-for test also implies a negative. If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm."

*Id.* (quoting Dan B. Dobbs, *The Law of Torts* § 168, at 409 (2000) [hereinafter Dobbs, *The Law of Torts*]); accord *Yates v. Iowa W. Racing Ass'n*, 721 N.W.2d 762, 774 (Iowa 2006).

Causation is ordinarily a jury question. *Thompson*, 774 N.W.2d at 836. In some cases, however, causation may be decided as a matter of law. See, e.g., *Faber*, 731 N.W.2d at 11 (deciding as a matter of law there was no causation between attorney's negligence and the damages sought by the plaintiff); *Gerst*, 549 N.W.2d at 818–19 (upholding district court's grant of summary judgment where plaintiffs failed to produce sufficient evidence on causation).

Cause in fact must exist between the City's negligence and the damages sought by the Garrs. See *Faber*, 731 N.W.2d at 7 (explaining a causal connection must exist between defendant's breach and the damages sought by the plaintiff). To assess the existence of a causal connection, we begin with the claims of negligence on which the jury was instructed. See *id.* at 7–11 (analyzing for a causal connection with damages each of four negligence claims on which the jury was instructed); *Hasselmann v. Hasselmann*, 596 N.W.2d 541, 545 (Iowa 1999) ("Before reviewing the evidence of causation, it is helpful to note the specifications of negligence that were claimed to have caused the plaintiff's injury."). In this case, the jury was instructed the Garrs

alleged the City was negligent by failing to: (1) protect downstream property owners from increased water flow due to development approved by the City that led to the Garrs' flooding and property damage; (2) establish storm water detention projects to protect the Garrs and other downstream property owners from increased water flow caused by development approved and managed by the City; and (3) comply with its policies regarding storm water management and flooding. We now evaluate the evidence presented to support the Garrs' claims these negligent acts caused their injuries. *See Faber*, 731 N.W.2d at 7; *Hasselmann*, 596 N.W.2d at 546.

To establish causation, the Garrs presented the expert testimony of Dr. Stewart Melvin, a former college professor who specializes in hydrology, the study of water's movement in the environment. Dr. Melvin testified that he had evaluated Quail Creek Addition's water control measures and found water from the addition discharges into Little Cedar Creek. When asked by the Garrs' counsel whether Quail Creek Addition had an effect on Little Cedar Creek, Dr. Melvin responded, "It's had some. I can't tell exactly how much right now, but it's had some." On cross-examination, the City's counsel established Dr. Melvin had not performed exact calculations supporting his conclusion that developing Quail Creek Addition had an effect; rather, Dr. Melvin relied on his estimations of water depths and flow in the area.

Those estimates were presented in a report prepared by Dr. Melvin that was entered into evidence at the trial. The report concedes not having specific information about sizes of culverts, ponds, and other landmarks in the area surrounding the Garrs' home because it relied on aerial photos. Nevertheless, the report estimates "peak flows from different sized storms in the 2000-acre watershed [north of] the US

Highway 63[/149] box culvert directly [southeast of] Mr. Garr's house." According to the report, if a rainstorm dropped 5.5 inches of rain in twenty-four hours, which according to the report would result in a twenty-five-year flood, flooding would occur to the first floor of the Garrs' home. If it rained 6.1 inches in twenty-four hours, which according to the report would result in a fifty-year flood, the first floor of the Garrs' home would be flooded with three feet of water. In the report, Dr. Melvin acknowledged his understanding that the flood underlying the Garrs' lawsuit "put approximately 4 [feet] of water above the floor of the Garr residence and water was running over the road." The report thus implies the storm that struck the Ottumwa area on August 20, 2010, dropped more than 6.1 inches of rain in twenty-four hours.

On cross-examination, Dr. Melvin admitted he had heard reports that as much as ten inches of rain fell on the 2000-acre watershed on August 20, 2010. If true, that amount of rainfall would have far exceeded a 100-year-flood event, which, according to Dr. Melvin's report, was a storm during which 6.8 inches of rain falls in twenty-four hours. The report makes clear that 6.8 inches of rain in twenty-four hours would have caused water from the creek to flow over US Highway 63/149.

Evidence confirmed water did flow over US Highway 63/149 on August 20, 2010. The water was deep enough to enable (or require) sheriff's deputies to use jet skis to rescue flood victims. In fact, David estimated the water on the highway was twenty-five feet deep. The evidence confirms a significant, rare rainstorm occurred in the area of the Garrs' home on August 20, 2010.

The City's counsel challenged Dr. Melvin with this evidence. The City's counsel asked:

Q. [W]ould you agree with me that if, in fact, there was 10 inches of rain that fell in a very short period of time in that drainage area, then there was going to be water in the plaintiff's home no matter what? A. Yes.

Q. No matter whether Quail Creek [Addition] existed or not; correct? A. Yes.

Before the City's attorney could ask another question, Dr. Melvin broke in: "Let me qualify. If there was 10 inches of rainfall in that period, probably when you get that kind of a quantity, the effects of hardly anything makes any difference. It's just the rainfall."

However, there may be more than one cause in fact of a plaintiff's damages. See *State v. Hennings*, 791 N.W.2d 828, 836 (Iowa 2010) ("An actor's tortious conduct need only be a factual cause of the other's harm.") (quoting Restatement (Third) of Torts § 26 cmt. c, at 347 (2010)); Dobbs, *The Law of Torts* § 168, at 410 ("Nothing is the result of a single cause in fact."); see also, e.g., *Stevens v. Des Moines Indep. Cmty. Sch. Dist.*, 528 N.W.2d 117, 118, 119–21 (Iowa 1995) (holding district court erred in giving instruction on superseding cause when plaintiff alleged school failed to adequately supervise hall monitor who assaulted the plaintiff). Thus, the major rainstorm is not, in and of itself, a cause that relieves the City of its liability for the Garrs' damages. There is no evidence, however, that the City's negligence caused the Garrs' damages.

The question posed to Dr. Melvin by the City's counsel, a counterfactual, goes to the core of the but-for causation test. See *Faber*, 731 N.W.2d at 11 (concluding that although an attorney negligently drafted an illegal stipulation in a qualified domestic relations order, the damages would have been the same if the attorney had drafted a legal stipulation); see also David W. Robertson, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765, 1770 (1997) (explaining the but-for causation test requires "using the imagination to create a counterfactual

hypothesis"). In other words, Dr. Melvin's answers confirmed that no reasonable efforts by the City to control upstream drainage, or other flood control measures, could have prevented the flooding to the Garrs' property in such a heavy rain event. Therefore, the damage to the Garrs' property, which the evidence established sat in a 100-year floodplain, would have occurred regardless of any negligence by the City. *See Berte*, 692 N.W.2d at 372 ("If the plaintiff would have suffered the same harm had the defendant not acted negligently, the defendant's conduct is not a cause in fact of the harm.") (quoting Dobbs, *The Law of Torts* § 168, at 409)). Hence, Dr. Melvin's testimony suggests the City's negligent approval of Quail Creek Addition and its management of storm water were not actual causes of the Garrs' damages. Thus, although Dr. Melvin presented expert testimony on the causal connection between the City's negligent approval of Quail Creek Addition and the Garrs' damages, the testimony was insufficient to create a jury question.

Though he offered his opinion about drainage control measures that could be used on a golf course, Dr. Melvin never testified about any causal connection between the sprinkler system, the irrigation pond, and the drainage tiles added to the golf course in 2001 and the Garrs' damages. Expert testimony is not necessary to establish causation in all negligence cases. *See, e.g., Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 636 (Iowa 1990) ("Questions of causation which are beyond the understanding of a layperson require expert testimony."). We have explained that "it is unnecessary to present expert testimony on causation in those situations in which the subject is within the common experience of laypersons." *Estate of Long ex rel. Smith v. Broadlawns Med. Ctr.*, 656 N.W.2d 71, 83 (Iowa 2002) (quoting *Welte v. Bello*, 482 N.W.2d 437, 441 (Iowa 1992)), *abrogated on other grounds by Thompson*,

774 N.W.2d at 839. On the other hand, when the connection between the defendant's negligence and the plaintiff's harm is not within the layperson's common knowledge and experience, "the plaintiff needs expert testimony to create a jury question on causation." *Doe*, 766 N.W.2d at 793.

Courts have found that establishing a causal link between the topographical changes and flooding requires expert testimony. See *Hendricks v. United States*, 14 Cl. Ct. 143, 149 (1987) ("Causation of flooding is a complex issue which must be addressed by experts."); *Herriman v. United States*, 8 Cl. Ct. 411, 420 (1985) (discounting the testimony of laypeople in relation to expert testimony in a flooding case); *Davis v. City of Mebane*, 512 S.E.2d 450, 453 (N.C. Ct. App. 1999) (holding expert testimony necessary to establish dam caused flooding). We believe the issue whether the flooding that damaged the Garrs' property was caused by approval of a residential development and alterations to a golf course is beyond the common understanding of a juror. Therefore, expert testimony on causation was required. See *Vaughn*, 459 N.W.2d at 636. Dr. Melvin testified as to the alterations to the golf course, but he offered no testimony about the causal connection between those alterations and the Garrs' damages. Because there was no expert testimony of any sort on this causal connection, the evidence on causation was insufficient. See *Gerst*, 549 N.W.2d at 819 (explaining an expert must, at a minimum, testify there was a possibility of a causal connection between negligence and damages); *Vaughan*, 459 N.W.2d at 637 (concluding evidence was insufficient to establish causation when plaintiff failed to present expert testimony on an issue for which it was required).

In sum, given Dr. Melvin's testimony the flooding that damaged the Garrs' property would have occurred regardless of whether Quail Creek Addition was built and the Garrs' failure to present expert testimony that the City's other negligent conduct caused their damages, there was not substantial evidence from which a jury could conclude the City's negligence caused the Garrs' damages. *Cf. Steuben v. City of Lincoln*, 543 N.W.2d 161, 163-64 (Neb. 1996) (concluding plaintiffs failed to prove proximate cause because they offered no proof that the city's approval of developments and golf course irrigation increased surface water drainage during a flood). We therefore conclude the district court erred by denying the City's motion for judgment notwithstanding the verdict.

**V. Conclusion.**

As substantial evidence in the record did not support causation, there was insufficient evidence to support submitting the case to the jury. Therefore, the district court erred by denying the City's motion for judgment notwithstanding the verdict. We reverse the judgment entered by the district court and remand for entry of judgment in favor of the City.

**REVERSED AND REMANDED.**

STEVEN FREDERIC LACHMAN\*

# Should Municipalities Be Liable for Development-Related Flooding?\*

## 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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\* Steven Frederic Lachman is a doctoral candidate in Geography at Penn State University. He formerly served as an attorney for the Pennsylvania Department of Environmental Protection.

\*\* The author thanks C. Gregory Knight and the Center for Integrated Regional Assessment at Penn State University for their generous support of this project.

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.<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> A study performed by Changnon and Changnon showed an increase between 1954 and 1994 of weather related catastrophes with damages over \$100 million.<sup>4</sup>

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

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1. See *The Science of Climate Change*, 292 *SCIENCE* 1261, 1261 (2001).

2. D. I. Smith, *Greenhouse Climatic Change and Flood Damages, the Implications*, 25 *CLIMATIC CHANGE* 319, 320 (1993).

3. Dong Wang & Larry Mayer, *Effect of Storm Clustering on Water Balance Estimates and Its Implications for Climate Impact Assessment*, 27 *CLIMATIC CHANGE* 321, 321 (1994).

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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup>

### 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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5. Stanley A. Changnon & Misganaw Demissie, *Detection of Changes in Streamflow and Floods Resulting from Climate Fluctuations and Land Use-Drainage Changes*, 32 CLIMATIC CHANGE 411, 411 (1996).

6. See generally William Goldfarb & Byron King, *Urban Stormwater Runoff*, 11 REAL EST. L. J. 3 (1982); Chester L. Arnold, Jr. & James C. Gibbons, *Impervious Surface Coverage: The Emergence of a Key Environmental Indicator*, 62 J. AMERICAN PLAN. ASS'N 243 (1993).

7. William Goldfarb, *Watershed Management: Slogan or Solution*, 21 B.C. ENVTL. AFF. L. REV. 483, 484 (1994).

8. See generally James K. Mitchell & Neil J. Erickson, *Effects of Climate Change on Weather-Related Disasters*, in CONFRONTING CLIMATE CHANGE 141 (Irving Mintzer, ed. 1992).

of a landowner to discharge water from his/her property onto the property of another landowner.<sup>9</sup>

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.<sup>10</sup>

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.<sup>11</sup>

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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).

10. 18A EUGENE MCQUILLIN, *LAW OF MUNICIPAL CORPORATIONS* § 53.144 (3d ed. 1993).

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.<sup>12</sup> Sometimes damage occurs (e.g. landslides, sewage in basements), raising the level of tort from trespass to nuisance.<sup>13</sup> Where the flooding is continuous, it may be viewed as a taking.<sup>14</sup>

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.

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is known as the *servient estate*. BLACK'S LAW DICTIONARY 527 (7th ed. 1999).

12. A trespass to land occurs when a person unlawfully enters or remains on another person's property, or, as is most relevant to municipal flood liability, places or projects any object upon another's property without lawful justification. *Id.* at 1509. See also *Graybill v. Providence Township*, 593 A.2d 1314, 1319 (Pa. Commw. Ct. 1991).

13. A nuisance is a condition or situation that interferes with the use or enjoyment of property. Implicit in a nuisance is that the tortfeasor, or person causing the nuisance, acted unreasonably or failed in a duty to act reasonably. A nuisance may be continuing, in that it may occur repeatedly. BLACK'S LAW DICTIONARY, *supra* note 11, at 1094. See also *Fulton County v. Wheaton*, 310 S.E.2d 910, 911 (Ga. 1984).

14. A Constitutional taking occurs when the government acquires private property by "ousting the owner and claiming title or by destroying the property or severely impairing its utility," or "when government action directly interferes with or substantially disturbs the owner's use and enjoyment of the property." BLACK'S LAW DICTIONARY, *supra* note 11, at 1467. See also *Marty v. State*, 838 P.2d 1384, 1387 (Idaho 1992); *Menick v. City of Menasha*, 547 N.W.2d 778, 780 (Wis. Ct. App. 1996).

Municipalities have the authority to abate nuisances.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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....<sup>18</sup>

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

15. 6A EUGENE MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 24.88 (3d ed. 1997). See generally *Town of Dartmouth v. Silva*, 90 N.E.2d 832, 835 (Mass. 1950); *City of Washington v. Mueller*, 218 S.W.2d 801, 803 (Mo. Ct. App. 1949), *Joseph v. City of Austin*, 101 S.W.2d 381, 384 (Tex. Ct. App. 1936).

16. See *City and County of Denver v. Ristau*, 33 P.2d 387, 388 (Colo. 1934). 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).

17. 18A EUGENE MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 53.119 (3d ed. 1993).

18. *Norman & Schaen, Inc. v. City of Dallas*, 536 S.W.2d 428, 430 (Tex. App. 1976). Accord *City of Watuga v. Taylor*, 752 S.W.2d 199 (Tex. App. 1988). New York decisions are in agreement with Texas. See, e.g., *Vanguard Tours, Inc. v. Town of Yorktown*, 442 N.Y.S.2d 19, 20 (N.Y. App. Div. 1981) (citing *Beck v. New York*, 199 N.Y.S.2d 584 (N.Y. Sup. Ct. 1960)). See also *Morain v. City of Norman*, 863 P.2d 1246, 1251 (Okla. 1993) (stating that because cities are under no obligation to install sewerage, they cannot be held liable for approving development that exceeds the capacity of sewerage. Moreover, the city is not liable because it does not exercise dominion over the source of the flooding).

obligation to insure that the system remains adequate, even if there is additional growth in the city.<sup>19</sup> 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.<sup>20</sup>

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.<sup>21</sup> 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.

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19. *City of Louisville v. Cope*, 176 S.W.2d 390 (Ky. 1943); *accord* *City of Harrodsburg v. Yeast*, 247 S.W.2d 383 (Ky. Ct. App. 1952). Arizona's Supreme Court concurs. In *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...."

20. See *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).

21. See Federal Water Pollution Control Act, 33 U.S.C. § 1342 (2000).

## 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<sup>22</sup>: "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*,<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> The unfairness of the doctrine to the individual was mitigated with the 1946 passage of the Federal Tort Claims Act.<sup>26</sup> The Federal Tort Claims Act has been interpreted to waive immunity for non-discretionary activities but not for discretionary ones.<sup>27</sup> State courts

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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).

23. 245 So. 2d 383 (La. 1971). *Accord* *Pennebaker v. Parish of Jefferson*, 383 So. 2d 484 (La. Ct. App. 1980); *McCloud v. Parish of Jefferson*, 383 So. 2d 477 (La. Ct. App. 1980) (but note Judge Chehardy's vigorous dissent). *See also* *Falgout v. St. Charles Sewerage District #3*, 351 So. 2d 206 (La. Ct. App. 1977) (holding municipal utility strictly liable for damages from a sewage back-up because the plaintiff's property was compelled by statute to be attached to the municipal sewerage system).

24. *Eschete v. City of New Orleans*, 245 So. 2d at 385.

25. Amy Hall, Comment, *The Immunity Provision of the Flood Control Act: Does It Have a Proper Role after the Demise of Sovereign Immunity?*, 31 MCGEORGE L. REV. 77, 83 (1999).

26. 28 U.S.C. §§ 2671-2680 (1994).

27. *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

have generally followed the federal lead in the abrogation of traditional sovereign immunity.<sup>28</sup>

In *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...."<sup>29</sup> 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....<sup>30</sup>

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.<sup>31</sup>

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

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28. See, e.g., *Hurley v. Town of Hudson*, 296 A.2d 905 (N.H. 1972).

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 *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.<sup>32</sup>

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*,<sup>33</sup> 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."<sup>34</sup> 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.<sup>35</sup> In *Irvine v. Montgomery County*,<sup>36</sup> 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."<sup>37</sup> 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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32. *City of Round Rock v. Smith*, 687 S.W.2d 300, 303 (Tex. 1985). See also *City of Fort Worth v. Adams*, 888 S.W.2d 607 (Tex. App. 1994).

33. 648 P.2d 175 (Colo. Ct. App. 1982).

34. *Bischofshausen v. Pinal-Gila Counties*, 673 P.2d 307, 308 (Ariz. Ct. App. 1983).

35. *Snyder v. State Dep't of Health & Mental Hygiene*, 391 A.2d 863, 866-67 (Md. Ct. Spec. App. 1978).

36. *Irvine v. Montgomery County*, 239 Md. 113, 210 A.2d 359 (Md. Ct. Spec. App. 1965). Accord *Spriggs v. Levitt & Sons, Inc.*, 298 A.2d 442, 445 (Md. 1973).

37. *Irvine v. Montgomery County*, 210 A.2d at 361.

code."<sup>38</sup> 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.*,<sup>39</sup> 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.<sup>40</sup> 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."<sup>41</sup> The New Jersey

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38. *Id.*

39. 36 Va. Cir. 590 (1993). For its 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.

40. In *Panepinto, v. Edmark, Inc.*, 323 A.2d 533 (N.J. Super. Ct. 1974), the court denied recovery against the city of Bayonne for flooding caused by the city's failure to inspect a sewer line.

41. *Barney's Furniture Warehouse v. City of Newark*, 303 A.2d 76, 82 (N.J. 1973).

Supreme Court has recently noted that the purpose of New Jersey's Tort Claims Law<sup>42</sup> was to create immunities, not remove them.<sup>43</sup>

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,<sup>44</sup> and two California cases found the cities immune where the offending drainage system was not actually owned by the cities.<sup>45</sup> 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.<sup>46</sup> 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

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42. N.J. STAT. ANN. §§ 59:1-1 through 1-7 (West 1992 & Supp. 2001).

43. *Russo Farms v. Board of Education*, 675 A.2d 1077 (N.J. 1996) (summary judgment in favor of municipality denied in lawsuit for flooding damages allegedly caused by the city's failure to enlarge the sewer system following the construction of a new school).

44. *Marin v. City of San Rafael*, 168 Cal. Rptr. 750 (Cal. Ct. App. 1980), and *Frustuck v. City of Fairfax*, 28 Cal. Rptr. 357 (Cal. Ct. App. 1963). An older Iowa case, *Damour v. Lyons City*, 44 Iowa 276 (1876), created municipal liability for flooding based upon the city permitting the construction of a railroad embankment.

45. *Yox v. City of Whittier*, 227 Cal. Rptr. 311 (Cal. Ct. App. 1986); *Ullery v. Contra Costa County*, 248 Cal. Rptr. 727 (Cal. Ct. App. 1988).

46. 352 N.W.2d 389, 394 (Minn. 1984).

functions. In *Owen v. City of Independence*,<sup>47</sup> 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."<sup>48</sup>

### C. Common Law Water Discharge Rights

A common source of flood liability rulings is the common law of water discharge rights.<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

Few jurisdictions still follow a pure common-enemy rule.<sup>52</sup> 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.<sup>53</sup> These considerations mitigate the potential harshness of the common-enemy rule.

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47. 445 U.S. 622, 645 n.26 (1980).

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

49. *See, e.g., State v. Feenan*, 752 P.2d 182 (Mont. 1988); *Rau v. Wilden Acres*, 103 A.2d 422 (Pa. 1954).

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. JOSEPH 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.<sup>54</sup> 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.<sup>55</sup>

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.<sup>56</sup> 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

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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.<sup>57</sup>

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.<sup>58</sup>

Nevada, in its aridity, has visited this issue but once. In *County of Clark v. Powers*,<sup>59</sup> 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.<sup>60</sup>

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?

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57. *Myotte v. Village of Mayfield*, 375 N.E.2d 816, 819 (Ohio Ct. App. 1977) (citing *Armstrong v. Francis Corp.*, 120 A.2d 4, 10 (N.J. 1956); *Masley v. City of Lorain*, 358 N.E.2d 596 (Ohio 1976)).

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.

59. *County of Clark v. Powers*, 611 P.2d 1072, 1074 (Nev. 1980).

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*.<sup>61</sup> 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.<sup>62</sup>

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 *damnum absque injuria*. It is also not liable for increased flow caused simply by improvement of lots and streets.<sup>63</sup>

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*,<sup>64</sup> the plaintiffs complained that additional flows in a drainage ditch, resulting

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61. *Myotte v. Village of Mayfield*, 375 N.E.2d at 819.

62. *Id.* at 820.

63. *Masley v. City of Lorain*, 358 N.E.2d 596, 600 (Ohio 1976).

64. *Baldwin v. City of Overland Park*, 468 P.2d 168, 170 (Kan. 1970).

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."<sup>65</sup>

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*,<sup>66</sup> 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.<sup>67</sup> 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."<sup>68</sup> 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

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65. *Id.* at 173. *Accord* *Gaines v. Pierce County*, 834 P.2d 631, 634 (Wash. Ct. App. 1992).

66. *LaForm v. Bethlehem Township*, 499 A.2d 1373, 1374 (Pa. Super. Ct. 1985).

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.<sup>69</sup> 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.<sup>70</sup>

The Pennsylvania Superior Court in *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.<sup>71</sup> With suburban sprawl blurring of urban-rural distinctions, imposing separate water discharge rules is outmoded in the twenty-first century.<sup>72</sup> 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.

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69. *Id.* at 1386-88. Judge Spaeth relies in part upon *Cooper v. City of Reading*, 104 A.2d 792 (Pa. 1958), and *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.

70. See *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").

71. *Bailey v. Floyd*, 416 So. 2d 404, 405 (Ala. 1982). However, in *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. 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).

72. PETER G. ROWE, *MAKING A MIDDLE LANDSCAPE* 217-47 (1991); Ralph G. Martin, *A New Lifestyle*, in *SUBURBIA IN TRANSITION* 15 (L. Masotti & J. Hadden eds., 1974); DAVID C. THORNS, *SUBURBIA* 19-34 (1972).

#### 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.<sup>73</sup> Causes of action may be pled in the alternative.<sup>74</sup>

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.<sup>75</sup> 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...."<sup>76</sup> 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."<sup>77</sup>

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!<sup>78</sup> 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).

74. See, e.g., *Steuben v. City of Lincoln*, 543 N.W.2d 161 (Neb. 1996) (plaintiffs asserted claim of negligence, and, in the alternative, inverse condemnation).

75. BLACK'S LAW DICTIONARY 1503 (6th ed. 1990).

76. *Id.* at 749.

77. *Moore v. State*, 515 N.W.2d 423, 428 (Neb. 1994).

78. *Dalon v. City of DeSoto*, 852 S.W.2d 530, 539 (Tex. App. 1992).

*v. City of Lincoln*,<sup>79</sup> 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*,<sup>80</sup> 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.*,<sup>81</sup> 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.<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup>

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79. 543 N.W.2d at 163-64.

80. 583 N.Y.S.2d 646, 648 (N.Y. App. Div. 1992).

81. 746 So. 2d 11, 16 (La. Ct. App. 1999).

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).

84. *Fielder v. Rice Construction Co.*, 522 S.E.2d 13, 15 (Ga. Ct. App. 1999) (citations omitted).

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.<sup>85</sup>

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.<sup>86</sup> To prove inverse condemnation, a landowner must establish a strong probability of future flooding, not just damage to the land capable of restoration.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup>

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.

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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.*

86. *Hawkins v. City of LaGrande*, 843 P.2d 400 (Or. 1992).

87. *Marty v. State*, 838 P.2d 1384, 1387 (Idaho 1992); *Menick v. City of Menasha*, 547 N.W.2d 778, 781 (Wis. Ct. App. 1996).

88. See generally *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

89. See *Williams v. City of Central*, 907 P.2d 701, 704 (Colo. Ct. App. 1995) (citing *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)). See also *Maloley v. City of Lexington*, 536 N.W.2d 916, 921 (Neb. Ct. App. 1995).

90. *Andersen v. Village of Little Chute*, 549 N.W.2d 737, 743 (Wis. Ct. App. 1996).

## 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.<sup>91</sup> Perhaps the most widely cited case on the subject is *City of Columbus v. Myszka*,<sup>92</sup> 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*.<sup>93</sup>

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

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91. *Columbus v. Smith*, 316 S.E.2d 761, 766 (Ga. Ct. App. 1984), *City of Lawrenceville v. Heard*, 391 S.E.2d 441, 443-44 (Ga. Ct. App. 1990).

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.

93. *Eschete v. City of New Orleans*, 245 So. 2d 383 (La. 1971).

94. *Fulton County v. Wheaton*, 310 S.E.2d 910 (Ga. 1984), *overruled on other grounds by DeKalb County v. Orwig*, 402 S.E.2d 513 (Ga. 1991).

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."<sup>95</sup>

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*.<sup>96</sup> 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.<sup>97</sup> 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.

96. *Hibbs v. City of Riverdale*, 478 S.E.2d 121, 122 (Ga. 1996).

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 evidenceshown 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*,<sup>98</sup> 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."<sup>99</sup> 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...."<sup>100</sup> 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.<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup>

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

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98. 246 P.2d 1113 (Wash. 1952). See also *Strickland v. City of Seattle*, 385 P.2d 33 (Wash. 1963).

99. *Laurelon Terrace v. City of Seattle*, 246 P.2d at 1119.

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).

103. *Wilber Dev. Corp. v. Les Rowland Const., Inc.*, 523 P.2d 186, 188 (Wash. 1974).

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.<sup>104</sup>

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*,<sup>105</sup> 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.*<sup>106</sup> 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.<sup>107</sup> 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.<sup>108</sup>

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.<sup>109</sup> 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.<sup>110</sup>

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104. *Id.* at 188.

105. *Patterson v. City of Bellevue*, 681 P.2d 266, 267 (Wash. Ct. App. 1984).

106. *Id.* at 267; *Linda Lee v. Covington Co.*, 36 Va. Cir. 590 (1993).

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.

108. *Patterson*, 681 P.2d at 267.

109. *Gaines v. Pierce County*, 834 P.2d 631, 634-35 (Wash. Ct. App. 1992).

110. *Hoover v. Pierce County*, 903 P.2d 464, 468 (Wash Ct. App. 1995).

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."<sup>111</sup> 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*,<sup>112</sup> 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*,<sup>113</sup> 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.<sup>114</sup>

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

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111. *Phillips v. King County*, 968 P.2d 871, 877 (Wash. 1998) (quoting 18A EUGENE MCQUILLIN, LAW OF MUNICIPAL CORPORATIONS § 53.140 (3d ed. 1993). Compare *Wilson v. Ramacher*, 352 N.W.2d 389, 394 (Minn. 1984).

112. 943 P.2d 306, 318 (Wash. Ct. App. 1997).

113. 374 P.2d 250 (Wash. 1962).

114. *Phillips v. King County*, 943 P.2d 306, 319 (Wash. Ct. App. 1997).

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.<sup>115</sup>

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*.<sup>116</sup> 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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115. *Phillips v. King County*, 968 P.2d 871, 878, 882 (Wash. 1998).

116. 969 P.2d 10 (Wash. 1998).

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.<sup>117</sup> 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

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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.

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.*<sup>118</sup> 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.<sup>119</sup>

*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.<sup>120</sup> 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.<sup>121</sup> Municipalities already have liability for their

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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. Div. 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...").

119. See Frank E. Maloney et al., *Stormwater Runoff Control: A Model Ordinance for Meeting Local Water Quality Management Needs*, 20 NAT. RESOURCES J. 713, 713-64 (1980).

120. PETER CALTHORPE, *THE NEXT AMERICAN METROPOLIS* 31 (1993).

121. See, e.g., *Millard Farms, Inc. v. Sprock*, 829 S.W. 2d 1, 3 (Mo. Ct. App. 1991); *Johnson v. Phillips*, 433 S.E. 2d 895, 899 (S.C. Ct. App. 1993), *aff'd in part, rev'd in part on other grounds sub nom. Smith v. Phillips*, 458 S.E. 2d 427 (S.C. 1995); *State v. Feenan*, 752 P.2d 182, 185 (Mont.

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.<sup>122</sup> The United States Supreme Court has held that these citizen actions have replaced common law rights to sue.<sup>123</sup>

*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.<sup>124</sup> 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.<sup>125</sup>

*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.

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1988). *But see* *White v. Pima County*, 775 P.2d 1154, 1160 (Ariz. Ct. App. 1984) (flooding caused by diking water behind defendant's property was held reasonable). It is only under the cloak of sovereign immunity that the trend is reversed.

122. Federal Water Pollution Control Act, 33 U.S.C. §1365 (1994).

123. *City of Milwaukee v. Illinois*, 451 U.S. 304, 332 (1981).

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;<sup>126</sup> build, or require developers to build, retention ponds;<sup>127</sup> impose moratoria on new development;<sup>128</sup> 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;<sup>129</sup> and purchase of open space by the municipality.<sup>130</sup> 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.<sup>131</sup> Flooding of private property is a preventable nuisance.<sup>132</sup>

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126. *Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 302 S.E.2d 204, 209 (N.C. 1983).

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.

128. Kushner, *supra* note 117, at 71.

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.

132. See, e.g., *State v. Feenan*, 752 P.2d 182, 185 (Mont. 1988).

The New Jersey courts have been accepting of limits on excessive growth. In *Lom-Ran Corp. v. Department of Environmental Protection*,<sup>133</sup> 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 *Cappture Realty Corporation v. Board of Adjustment of the Borough of Elmwood Park*,<sup>134</sup> 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.<sup>135</sup> 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

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133. 394 A.2d 1233, 1236-37 (N.J. Super. Ct. App. Div. 1978).

134. *Cappture 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 *Cappture* 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 Bitteringer v. Corp. of Bolivar*, 395 S.E.2d 554 (W. Va. 1990). However, in *Brazos Land, Inc. v. Bd. of County Comm'rs*, 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.

135. No. 82AP-919, 1983 Ohio App. LEXIS 15225, at \*4 (Ohio Ct. App. Oct. 6, 1983).

sewage system will result in unlawful pollution.<sup>136</sup> Such moratoria have been upheld by the federal courts.<sup>137</sup>

Like New Jersey, New York has consistently and liberally upheld temporary moratoria on issuing building permits.<sup>138</sup> 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.<sup>139</sup> Yet, where it is clear that zoning restrictions were not reasonably related to a legitimate purpose, they have been found unconstitutional and invalid.<sup>140</sup> 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.<sup>141</sup>

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?<sup>142</sup> 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,<sup>143</sup> 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

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136. Federal Water Pollution Control Act, 33 U.S.C. § 1342(h) (1994).

137. See *United States v. Metro. Dist. Comm'n*, 930 F.2d 132, 135-36 (1st Cir. 1991).

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. Assocs. v. Village of Irvington*, 566 N.Y.S.2d 954 (N.Y. App. Div. 1991); *McDonald's Corp. v. Village of Elmsford*, 549 N.Y.S.2d 448 (N.Y. App. Div. 1989); *Noghrey v. Acampora*, 543 N.Y.S.2d 530 (N.Y. App. Div. 1989); *West Lane Prop. v. Lombardi*, 527 N.Y.S.2d 498 (N.Y. App. Div. 1988); *Turnpike Woods, Inc. v. Town of Stony Point*, 503 N.Y.S.2d 898 (N.Y. App. Div. 1986); *Dune Assocs., Inc. v. Anderson*, 500 N.Y.S.2d 741 (N.Y. App. Div. 1986); *Ozols v. Henry*, 438 N.Y.S.2d 349 (N.Y. App. Div. 1981); *Rhema Christian Fellowship v. Common Council*, 452 N.Y.S.2d 292 (N.Y. Sup. Ct. 1982).

139. *Golden v. Planning Bd.*, 285 N.E.2d 291, 294-95 (N.Y. 1972), *appeal dismissed sub nom. Rockland County Builders Assoc. v. McAlevey*, 409 U.S. 1003 (1972).

140. In *Jensen v. City of New York*, 369 N.E.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.

141. *Schenck v. City of Hudson Village*, 937 F. Supp. 679, 691, 693 (N.D. Ohio 1996). A preliminary injunction was granted against the application of a municipal growth control ordinance to developers who already had preliminary or final plat approval.

142. See Ken Edelman, *Expensive Solutions for Aging Sewers*, *GOVERNING*, Feb. 1991, at 21.

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.<sup>144</sup> 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.<sup>145</sup> 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."<sup>146</sup> 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.<sup>147</sup>

Other litigants have unsuccessfully claimed property takings against federal and state agencies where federal and state regulations set

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144. The New Jersey Superior Court, in *Toll Bros., Inc. v. West Windsor Township*, 712 A.2d 266, 270-71 (N.J. Super. Ct. 1998), struck the portion of Section 90(b) of the New Jersey Municipal Land Use Law, N.J. STAT. ANN. § 40:55D-90(b) (West 1991) allowing moratoria if "a clear imminent danger to the health of the inhabitants exists." The California Court of Appeals has ruled similarly:

We conclude section 65858 is clear. It authorizes a city to prohibit any uses which may be in conflict with a general plan being studied so long as the city makes a finding the approval of additional subdivisions and other entitlements of use would result in a current and immediate threat to the public health, safety, or welfare. Nothing in that section permits a city to prohibit the formal processing of development applications, such as the tentative subdivision map. Accordingly, the city's ordinance is invalid.

*Bldg. Indus. Legal Defense Found. v. Superior Court*, 85 Cal. Rptr. 2d 828, 834 (Cal. Ct. App. 1999).

145. *Responsible Citizens v. City of Asheville*, 302 S.E.2d 204, 212 (N.C. 1983).

146. *Id.* (quoting *Guthrie v. Taylor*, 185 S.E.2d 193 (N.C. 1971)).

147. *Id.* at 209-12.

standards that made it harder for developers to obtain building permits from municipalities. In *Adolph v. Federal Emergency Management Agency*,<sup>148</sup> 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.<sup>149</sup> 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,<sup>150</sup> 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

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148. 854 F.2d 732 (5th Cir. 1988).

149. 678 N.Y.S.2d 781, 783 (N.Y. App. Div. 1998).

150. KENNETH H. YOUNG, *ANDERSON'S AMERICAN LAW OF ZONING* § 5.13 (4th ed. 1996).

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.