

#65.25

8/10/70

First Supplement to Memorandum 70-72

Subject: Study 65.25 - Inverse Condemnation (Water Damage)

Attached is a copy of the Wisconsin statutory provisions referred to in Professor Van Alstyne's study.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

HIGHWAYS, BRIDGES, DRAINS, ETC.

§§.87

RIGHTS OF DRAINAGE; PRIVATE DRAINS; MISCELLANEOUS PROVISIONS.

§§.87 Road grades not to obstruct natural drainage; landowners not to obstruct highway drainage; remedies

(1) It is recognized that the construction of highways and railroad grades must inevitably result in some interruption of and changes in the pre-existing natural flow of surface waters and that changes in the direction or volume of flow of surface waters are frequently caused by the erection of buildings, dikes and other facilities on privately owned lands adjacent to highways and railroad grades. The legislature finds that it is necessary to control and regulate the construction and drainage of all highways and railroad grades so as to protect property owners from damage to lands caused by unreasonable diversion or retention of surface waters due to a highway or railroad grade construction and to impose correlative duties upon owners and users of land for the purpose of protecting highways and railroad grades from flooding or water damage.

(2) (a) Whenever any county, town, city, village, railroad company or the state highway commission has heretofore constructed and now maintains or hereafter constructs and maintains any highway or railroad grade in or across any marsh, lowland, natural depression, natural watercourse, natural or man-made channel or drainage course, it shall not impede the general flow of surface water or stream water in any unreasonable manner so as to cause either an unnecessary accumulation of waters flooding or water-soaking uplands or an unreasonable accumulation and discharge of surface waters flooding or water-soaking lowlands. All such highways and railroad grades shall be constructed with adequate ditches, culverts, and other facilities as may be feasible, consonant with sound engineering practices, to the end of maintaining as far as practicable the original flow lines of drainage. This paragraph does not apply to highways or railroad grades used to hold and retain water for cranberry or conservation management purposes.

(b) Drainage rights and easements may be purchased or condemned by the public authority or railroad company having control of the highway or railroad grade to aid in the prevention of damage to property owners which might otherwise occur as a result of failure to comply with sub. (2) (a).

(c) Whenever any county, town, city, village, railroad company or the state highway commission constructs and maintains a highway or railroad grade not in accordance with sub. (2) (a), any property owner damaged thereby may, within 90 days after the alleged damage occurred, file a claim with the appropriate governmental agency or railroad company. Such claim shall consist of a sworn statement of the alleged faulty construction and a legal description of the lands alleged to have been damaged by flooding or water-soaking. Within 90 days after the filing of such claim, the governmental agency or railroad company shall either correct the cause of the water damage, acquire rights to use the land for drainage or overflow purposes, or deny the claim. If the agency or company denies the claim or fails to take any action within 90 days after the filing of the claim, the property owner may bring an action in inverse condemnation under ch. 32 or sue for such other relief, other than damages, as may be just and equitable.

(3) (a) It is the duty of every owner or user of land who constructs any building, structure or dike or otherwise obstructs the flow of stream water through any watercourse or natural or man-made channel, or obstructs the flow of surface water through any natural or man-made channel, natural depression or natural draw through which surface waters naturally flow:

1. To provide and at all times maintain a sufficient drainage system to protect a downstream highway or railroad grade from water damage or flood-

Deletions are indicated by asterisks * * *

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ing caused by such obstruction, by directing the flow of surface waters into existing highway or railroad drainage systems; and

2. To protect an upstream highway or railroad grade from water damage or flooding caused by such obstruction, by permitting the flow of such water away from the highway or railroad grade substantially as freely as if the obstruction had not been created.

(b) Whoever fails or neglects to comply with a duty imposed by sub. (3) (a) is liable for all damages to the highway or railroad grade caused by such failure or neglect. The authority in charge of maintenance of the highway or the railroad company which constructed or maintains the railroad grade may, within 90 days after the alleged damage occurred, bring an action to recover such damages.

(c) The authorities in charge of maintenance of highways or railroad companies maintaining railroad grades and their agents and employees may enter any lands for the purpose of removing an obstruction in a watercourse or highway drainage ditch which is in violation of sub. (3) (a) and which is flooding or causing damage to a highway under its jurisdiction.

(4) If a railway company fails to comply with sub. (3), any person aggrieved thereby may file a complaint with the public service commission setting forth the facts. The commission shall investigate and determine the matter in controversy in accordance with ch. 195, and any order it makes in such proceeding has the same effect as an order in any other proceeding properly brought under ch. 195.

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This section is a consolidation and revision of ss. 88.38 and 88.48. It makes several changes in the law. It recognizes that, under modern methods of highway construction, it is impossible to maintain the free and unobstructed flow and percolation of water as required by present s. 88.38. It therefore substitutes the requirement that sound engineering practices be employed and that the flow of surface or stream water not be impeded in any unreasonable manner so as to cause any unnecessary accumulation of water. It repeals the provisions which, under s. 88.38(1), gave the landowner a right to bring repeated actions for damages for flooding or water-soaking of lands located on the upper side of the highway and, under s. 88.38(2m), for flooding or water-soaking lands located on the lower side of the highway. Instead, the landowner will be required either to sue for equitable relief or to bring an action of inverse condemnation to recover compensation for the taking of the land by flooding or water-soaking. The section also imposes a duty upon the landowner to refrain from impeding or diverting surface or stream water in such a way as to cause damage to or flooding of highways. The present section only imposes duties upon the highway authorities and fails to impose any such correlative duty upon landowners.

History—Created by L. 1962, c. 571, § 2.
Law Review Commentaries
Current trends in Wisconsin's Water Law. J. H. Beuscher. 40 Wis. Bar Bull. 15 (April 1967).
Inverse condemnation: Constitutional limits of responsibility. Daniel R. Mandelker. 1966 Wis. L. Rev. 3 (Winter).
Procedural and notice requirements for claims against governments. Henry A. Field, Jr. 28 Gavet 22 (June 1967).
Library references: Highways § 88.38 (1-5); C.J.S. Highways § 185 et seq.

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1. Sufficiency of outlets

Where culvert constructed by railroad in its embankment as required by this section provided landowners' lands with adequate drainage, and thereafter city under agreement with third party filled

in lands on other side of railroad's embankment, so that culvert no longer provided an escape for landowners' surface water, statute did not require railroad to substitute other drainage facilities. *Laur v. Chicago & N. W. Ry. Co.* (1967) 85 N.W.2d 353, 1 Wis.2d 561.

2. Liability

Rights of property, owner against state for flood damage in spring of 1964 as result of alleged blocking of highway ditch and failing to provide proper drainage was governed by Sta. 1959, § 88.38 which authorized action for damages against state for water damage because of negligence in failing to construct necessary ditches, culverts or outlets to prevent flooding and which was repealed by this section taking effect on June 13, 1964, under § 296.04 providing that repeal shall not defeat liability accrued under statute before repeal. *Niesen v. State* (1966) 141 N.W.2d 294, 30 Wis.2d 490.

Town could be held liable for its alleged acts in failing to provide a proper culvert, thus creating a continuing nuisance in that water was diverted

and contaminated landowner's well, causing sickness in landowner's children. *Stockstad v. Town of Rutland* (1946) 99 N.W.2d 813, 3 Wis.2d 538.

Sts. 1955, § 88.38 relating to the provision of ditches or culverts to permit natural drainage did not afford a cause of action for personal injury, and it did not render town liable for personal injuries resulting from its alleged failure to provide a proper culvert. *Id.*

When surface waters escaped from low-lying land of plaintiffs through culvert, which railroad had installed under its embankment, and onto low-lying land of individual defendant, and subsequently pursuant to agreement between individual defendant and defendant city, city filled individual defendant's low-lying land up to level of railroad embankment, and thereafter surface waters from plaintiffs' land remained on plaintiffs' land and also water from individual defendant's land flowed onto plaintiffs' land, neither individual defendant nor city was liable to plaintiffs for consequential damage. *Laur v. City of Milwaukee* (1957) 35 N.W.2d 449, 1 Wis.2d 561.

3. **Claim for damages**
Complaint against town, alleging that town had breached its statutory duty

to provide a proper culvert, that this created a continuing nuisance, and that personal injuries resulted, properly stated a cause of action in nuisance, for which town could be held liable, even though it could also be construed as an attempt to recover under Sts. 1955, § 88.38 which did not afford a cause of action. *Stockstad v. Town of Rutland* (1946) 99 N.W.2d 813, 3 Wis.2d 538.

4. **Actions**

That Sts. 1955, § 88.38 requiring town to provide a proper culvert did not create a cause of action for personal injuries resulting from noncompliance did not preclude injured persons from recovering on ground that noncompliance created a continuing nuisance. *Stockstad v. Town of Rutland* (1946) 99 N.W.2d 813, 3 Wis.2d 538.

In action by landowners against railroad to compel railroad to provide landowners' lands with certain drainage facilities, evidence sustained jury's negative answer to question inquiring whether prior to time that culvert was obstructed, surface water naturally flowed and percolated from landowners' lands toward third party's lands on other side of embankment. *Laur v. Chicago & N. W. Ry. Co.* (1957) 35 N.W.2d 462, 1 Wis.2d 567.

88.88 Railroad to construct ditch or sluiceway across right of way

(1) Whenever the owner of land desires to drain the same by a blind or open ditch and, to properly drain such land, a connecting ditch or sluiceway should be constructed across the right of way of a railway company, such owner shall file with the depot agent of such company nearest to such land a written petition stating the kind of ditch proposed to be built and requesting the company to construct a ditch or sluiceway across its right of way which will conform thereto. Within 60 days after the filing of such petition, the railway company shall construct such ditch or sluiceway. The petitioner shall pay the cost of such construction and shall assume all expenses in connection with maintaining such ditch or sluiceway on the railroad's right of way.

(2) If the railway company fails to comply with sub. (1), the person aggrieved thereby may file a complaint with the public service commission setting forth the facts. The commission shall investigate and determine the matter in controversy in accordance with ch. 195, and any order it makes in such proceeding has the same effect as an order in any other proceeding property brought under ch. 195.

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Consolidates and restates s. 88.39 and part of s. 88.40.

History—Created by L. 1955, c. 573, § 2.

Library references: Railroads §2198;
C.J.S. Railroads §§ 185-187.

88.39 Roads not to obstruct natural watercourse

(1) Whenever any embankment, grade, culvert or bridge (including the approaches to such culvert or bridge) built or maintained by any person across a natural watercourse or natural draw so obstructs such watercourse or draw that waters therein are set back or diverted upon any lands in a drainage district, such person shall so enlarge the waterway through such embankment, grade, culvert or bridge and the approaches thereto that it will not set back or divert such waters upon lands in the district.

(2) The drainage board or the owner of any land upon which water is set back or diverted by the obstruction mentioned in sub. (1) may serve notice

Deletions are indicated by asterisks * * *

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upon the owner or maintainer of such embankment, grade, culvert or bridge to enlarge the opening for the waterway or to make new openings so as to permit the water to pass without being set back or diverted onto the lands of the district. If the owner or person maintaining such embankment, grade, culvert or bridge fails to comply with the directive of such notice within 60 days after the service thereof, the drainage board or injured landowner may report the facts to the county court and petition the court to order such owner or maintainer to enlarge the waterway or to provide new openings through the embankment or grade.

(3) Upon receipt of a report and petition under sub. (2), the court or judge shall fix a time and place of hearing thereon and shall order the owner or maintainer of the embankment, grade, culvert or bridge to show cause why an order should not be issued in accordance with the petition. At least 10 days before the time fixed for hearing on the petition, such order to show cause shall be served on the owner or maintainer, or on both if both are named in the petition, as prescribed in s. 262.06 for the service of a summons.

(4) If the court is satisfied that the embankment, grade, bridge or culvert so obstructs the watercourse or draw that it causes water to be set back or diverted upon lands in the drainage district, the court shall order the owner or maintainer of such embankment, grade, bridge or culvert to enlarge the waterway or construct a new waterway through the same, as the facts warrant. The period of time that such embankment, grade, bridge or culvert has been in existence is no defense to a proceeding under this section.

(5) Any person who fails to comply with the order issued by the court under this section may be punished as for contempt and also is liable to the injured party for all damages caused by such failure.

Legislative Council—1963 Report, vol. 1

This section restates s. 39.65.

History—Created by L. 1962, c. 571, § 2.

Library references: Waters and Water Courses § 31 et seq.; C.J.S. Waters § 15 et seq.

88.90 Removal of obstructions from natural watercourses

(1) Whenever any natural watercourse becomes obstructed so that the natural flow of water along the same is retarded by the negligent action of the owner, occupant or person in charge of the land on which the obstruction is located, the owner or occupant of any lands damaged by such obstruction may request the removal thereof by giving notice in writing to such owner, occupant or person in charge of the land on which the obstruction is located.

(2) If the obstruction is not removed within 6 days after receipt of such notice, the owner or occupant of the damaged lands may make complaint to the supervisors of the town, filing at the same time a copy of the notice. Such supervisors, after viewing the watercourse and upon being satisfied that the complaint is just, shall make recommendations in writing to the owner or occupant of the lands where the obstruction is located, for the removal of such obstruction. If such recommendations are not followed within a reasonable time, the supervisors shall order the obstruction removed. The cost of view and of removal shall be charged and assessed against the lands from which the obstruction was removed and shall be collected as other special assessments are collected.

(3) Whenever any natural watercourse becomes obstructed through natural causes, the owner or occupant of any lands damaged by the effect which the obstruction has upon the flow of the water may go upon the land where the obstruction is located and remove it at his own expense. Such person is not guilty of trespass for entry upon the land but is liable for damage caused to crops or structures. The rights and privileges conferred by this subsection also

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extend to the agents or employes of the person causing the obstruction to be removed.

(4) This section does not in any manner limit the scope of s. 88.87.

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Restates s. 88.41.

History—Created by L.1963, c. 572, § 2.

Library references: Waters and Water Courses § 68; C.J.S. Waters § 23.

88.91 Penalty for placing obstruction in ditches

(1) Except as authorized by s. 88.93, no person shall place any kind of obstruction to the free flow of water in any drainage ditch, constructed under any drainage law of this state or lawfully constructed by any other person, without first obtaining the written consent of the drainage board or other person or authority in charge of such ditch.

(2) Any person violating this section may be fined not more than \$100 and in addition is liable to the drainage district and to all persons whose ditches or lands are injured by such obstruction for all damages caused by the obstruction.

Legislative Council—1963 Report, vol. 1

Consolidates and restates s. 88.63 and most of s. 88.32. Part of s. 88.32 is covered by the general statute on criminal damage.

History—Created by L.1963, c. 572, § 2.

Library references: Drains § 64; C. J.S. Drains § 54.

88.92 Private drains not to be connected with district drains

(1) Except as provided in s. 88.93 no person shall connect any drain with a district drain or remove any spoil bank except under written plans and specifications approved by the drainage board.

(2) Any person violating sub. (1) may be fined not more than \$50 and is liable to the district for all damages caused by such violation.

(3) The board shall preserve a copy of any plans and specifications approved under sub. (1).

Legislative Council—1963 Report, vol. 1

Restates s. 88.42, except that a fine of not more than \$50 has been substituted for the \$5 to \$25 fine of the present section.

History—Created by L.1963, c. 572, § 2.

Library references: Drains § 64; C. J.S. Drains § 54.

88.93 Right to take water from drainage ditch

Any owner of lands which are located in or which adjoin a drainage district and which border on a drainage ditch may take water from such ditch for use in flooding lands for cranberry culture or for irrigation, if such water is taken from the ditch in such a manner as not to injure the ditch and the taking thereof does not materially defeat the purposes of such drainage and, in case the water is to be used for irrigation, a permit has been obtained under s. 80.18(8) to (10).

Legislative Council—1963 Report, vol. 1

This section restates s. 88.64 with minor clarifications.

History—Created by L.1963, c. 572, § 2.

Law Review Commentaries
Diffused surface water and riparian rights. William F. Dolson. 1966 Wis.L. Rev. 58 (Winter).

Library references: Drains § 62; Waters and Water Courses § 119(1-5); C.J.S. Drains § 49; C.J.S. Waters § 114 et seq., 125.

Deletions are indicated by asterisks * * *

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88.94 Drains for individual landowners

(1) Whenever any owner of agricultural lands desires to install drainage upon not more than 80 acres of such land owned by him, he may present a petition to the drainage board or, if there is no drainage board in the county, to the town supervisors of the town in which such land is located. Such petition shall set forth that:

- (a) He desires to install drainage upon agricultural lands owned by him;
- (b) Because of the contour of the land there is no suitable outlet on lands owned by him;
- (c) The proposed drain will promote the general welfare and health of the community;
- (d) It is impractical for such owner to drain his land without crossing the lands of others; and
- (e) It is desired that a drain be laid out to a suitable natural outlet, specifying the course of the drain and location of the proposed outlet and ownership of lands through which such proposed drain would be laid.

(2) After receiving the petition the drainage board or supervisors of such town shall promptly fix a time and place of hearing thereon and shall give notice thereof under s. 88.05 to the owners and occupants of all lands through or along which the drain may pass and to the persons specified in s. 88.05(4) (a).

(3) At the time and place fixed for hearing, the drainage board or town supervisors shall meet and hear all interested persons wishing to appear for or against the petition. If the board or supervisors decide that the facts set out in the application are true, that a drain is necessary and that the benefits will exceed the cost of construction, they shall by order lay out a drain through which applicant's lands may be drained as a public drain. Otherwise, they shall deny the application. An order laying out a drain shall specify the benefits and damages to lands of others through which such drain will be laid out and shall provide that the drain may not be constructed until the excess of damages over benefits, if any, has been paid to the landowners entitled thereto. The order also shall contain a description of the location of the drain and specifications therefor. Lands of others shall not be assessed for costs even though benefited by the drain.

(4) Within 10 days after the making of an order laying out a drain, the board or supervisors shall cause a copy of the order to be sent by registered mail to each owner through whose lands the drain will pass, but failure to mail the copy within 10 days does not render the order void. Such order is final unless appealed from to the circuit court within 30 days after the mailing of the copy thereof as provided in this subsection.

(5) Within 30 days after the time for appeal from such order has expired or after such order is confirmed on appeal, the board or supervisors shall cause a copy of the order to be filed with the register of deeds of the county in which the lands are located. Thereupon, the drain becomes a public drain and the applicant may proceed with construction after having paid any excess of damages over benefits as specified in the order.

(6) This section does not authorize entry upon lands of another without the consent of the owner thereof during any time when there is any growing crop on such land, and no order issued under this section is effective to authorize such entry.

(7) This section does not apply to the installation or construction of a drain across the right of way of any railroad company, proceedings for which shall be as provided in s. 88.58.

(8) Expenses incurred by the drainage board under this section shall be paid by the petitioner.