IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| RICHARD and ELAINE SCOTT,<br>Plaintiffs | : | NO. 14 - 02,511 |
| | : | CIVIL ACTION - LAW |
| vs. | : | |
| CHARLES and LOUISE FERGUSON,<br>Defendants | : | |
| vs. | : | |
| SUSQUEHANNA TOWNSHIP,<br>Third Party Defendant | : | Preliminary Objections |

***OPINION AND ORDER***

Before the court are preliminary objections filed by Susquehanna Township on July 20, 2015, by which it seeks to dismiss the third party complaint filed against it by Plaintiffs. Argument was heard August 21, 2015.

Plaintiffs originally complained that Defendants "allowed their guinea fowl to enter onto Plaintiffs' property thereby causing damage to said property." Plaintiffs asked for the costs to re-landscape the property, specifically $825.51. Defendants responded that they owned only three guinea hens, not a "flock" as alleged by Plaintiffs, and that they did not allow them to enter onto Plaintiffs' property. In a counter-claim, Defendants then complained that "Plaintiffs installed a pipe that drains water from their property onto the Defendants' property" and "as a result … there has been damage to [Defendants'] curbing and driveway." Defendants asked for $3,320.00 to make the necessary repairs. Plaintiffs denied that the pipe drains water onto Defendants' property, asserting that it drains water onto the road, and also filed the subject third-party complaint, alleging that "the damages referred to in Defendants' Counterclaim, if any, were

caused not by the Plaintiffs but by Susquehanna Township, …, by its negligent failure to install catch basins on or near the Plaintiffs' and Defendants' respective properties, as required." In the instant preliminary objections to that complaint, the Township argues that it is not "required" to install a catch basin, that in fact it has no duty to Plaintiffs under the circumstances. The court agrees.

The "law of surface waters" was reviewed by the Superior Court in LaForm v. Bethlehem Township, 499 A.2d 1373, 1379-80 (Pa. Super. 1985), wherein the Court concluded:

> [W]e are certain that a city cannot be held liable for the effects of an incidental increase in surface waters flowing in a natural channel where the increase is owing to normal, gradual development in the city. This principle was firmly established long ago in the case of Strauss v. Allentown, supra, where the question was stated as follows:
>
> > is the city liable to a property owner for the increased flow of surface water over or onto his property, arising merely from the changes in the character of the surface produced by the opening of streets, building of houses, etc., in the ordinary and regular course of expansion of the city[?]
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> The Court answered in the negative:
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> > the guiding principle for a decision is not at all doubtful, and is of frequent application. Every man has the right to the natural, proper and profitable use of his own land, and if in the course of such use without negligence, unavoidable loss, is brought upon his neighbor, it is damnum absque injuria. This is the universal rule of the common law, and nowhere is it more strictly enforced than in Pennsylvania.
> >
> > . . .

> The same rule must apply to the natural and proper development of a municipality. Cities are authorized to open, grade and improve streets and the abutting lot owners may build according to their requirements. In this natural change and development from agricultural or rural to urban territory some disturbance of the surface drainage is inevitable, but without negligence the municipality is not liable for the results: Carr v. Northern Liberties, 35 Pa. 324. Though a city may be authorized to construct sewers or an adequate system of drainage it is not bound to do so, nor is it liable for an erroneous judgment as to what will be adequate: Fair v. Philadelphia, 88 Pa. 309.

215 Pa. at 98-99, 63 A. at 1073-74. These principles remain vital in the latter-day context of urban development. See Leiper v. Heywood-Hall Construction Co., 381 Pa. 317, 113 A.2d 148 (1955); Chamberlin v. Ciaffoni, supra; Kunkle v. Ford City Borough, 305 Pa. 416, 158 A. 159 (1931).

In their Answer to Defendants' Counter-claim, Plaintiffs assert that the pipe from their property drains onto the road, so the court assumes (which was confirmed at argument) that the water coming from Plaintiffs' property enters the road and then travels downhill onto Defendants' property. Plaintiffs argue that the Township installed catch basins at other locations and should have put one to catch the water coming off their property, but there is no authority to support that claim. As noted in LaForm, a municipality's discretion in providing drainage is not subject to attack.

Plaintiffs seek nevertheless to rely on Piekarski v. Club Overlook Estates, Inc., 421 A.2d 1198 (Pa. Super. 1980), wherein the Court upheld a finding of liability against a municipality based on an unreasonable or

unnecessary flow of water onto lower-lying property. That case was distinguished in LaForm, however, as follows:

> In Piekarski, a developer converted a hillside tract of completely rural land all at once into a housing development. Penn Township then inspected the streets and storm sewers installed in the subdivision and assumed ownership and control over them. The storm sewers emptied into a gully leading onto the property of an adjoining landowner at the bottom of the hill. After installation of the drainage system, water flooded the adjoining landowner's parking lot and flowed out onto an adjacent roadway during rainstorms. The landowner notified the Township of these conditions, but nothing was done to correct them. One evening during a heavy rain, an arc of water 3 or 4 feet wide and several inches deep was discharged onto the roadway from the Township's drainage system 900 feet away. A passing car entered the water and veered into an oncoming truck, killing both drivers.
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> Thus, Penn Township oversaw the rapid improvement of a rural tract of land without making adequate provisions for the increase in surface water caused by the development. As a consequence, water flooded directly onto a public roadway where no water had flowed before development, causing the dangerous condition in question.
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> The present case is fundamentally different. Here a section of the City of Bethlehem underwent gradual, orderly development which resulted in an incremental increase in the rate of flow of surface waters draining through a natural swale. Different rules apply to the two situations.
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> By the latter half of this century, our courts started taking account of the special problems posed by the rapid urbanization of rural land. Urban- and suburban-type developments began expanding into the countryside, often replacing large portions of permeable ground with impenetrable hard surfaces. Often such precipitous development of rural land caused wrenching changes in the watershed, destroying in one fell stroke the land's natural ability to

> absorb surface waters, thus forcing them to flow in vastly increased rates and quantities onto neighboring land. Responding to these changing circumstances, the courts carved out a special exception to the general law of surface waters, and held that an "unnatural" use or development of rural land carries with it a responsibility on the developer to properly accommodate the increased flow of surface waters off the land, where such increase was predictable and preventable. *See Westbury Realty Corp. v. Lancaster Shopping Center, Inc.*, 396 Pa. 383, 152 A.2d 669 (1959) (17-acre tract of rural land completely macadamized and made into shopping center); *Miller v. C.P. Centers, Inc.*, 334 Pa.Super. 623, 483 A.2d 912 (1984) (apartment development in rural area an "artificial" use of the land).
>
> Although *Piekarski* did not explicitly recognize the exception promulgated in *Westbury Realty*, the development in *Piekarski* clearly fell within the category of an "artificial" land use. The increase in surface waters caused by development on a rural hillside was predictable and preventable. Penn Township therefore had an affirmative duty to provide adequate drainage for the land, and its failure to do so was a crucial factor in the decision holding it liable for an unreasonable or unnecessary increase in surface waters.
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> However, the rule imposing a positive duty on a rural developer to provide adequate drainage has never been extended to urban property. Nor has it ever been used to find liability for an increase in surface waters incidental to a gradual changeover from rural to urban land. On the contrary, the orderly development of land within a city has always been regarded as a natural use of land, for which a resulting increase in surface waters flowing through the natural ways is damnum absque injuria.

<u>LaForm</u>, *supra* at 1380-81 (citations omitted). In the instant case, Plaintiffs have not alleged that the Township altered the flow of the water, and at the most could allege that there has been an incremental increase in the rate caused by the

macadam's lack of porosity. As in LaForm, any damage to Defendants' driveway is *damnum absque injuria*.

***ORDER***

AND NOW, this day of August 2015, for the foregoing reasons, Third-Party Defendant's preliminary objections are sustained and the Third-Party Complaint is hereby DISMISSED.

BY THE COURT,

Dudley N. Anderson, Judge

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