



January 14, 2019

Dear city administrator,

Pursuant to your question about the town doing drainage work on private property, specifically, at the address in question, first, I am not sure that this should be looked at in context of being on private property. Secondly, sometimes work on “private property” is legitimate. I want to share a legal opinion prepared by Dennis Huffer, former MTAS legal consultant:

“Article II, § 29, of the Tennessee Constitution provides that “The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes, respectively....” From this language has grown the public purpose doctrine, which dictates that public funds can be used only for public purposes. Courts have reasoned that, since taxes can be levied for only corporation or public purposes, expenditures can legally be made for only those same purposes. A public purpose is generally anything that promotes the public health, safety, welfare, morals, security, prosperity, or contentment of the residents of the municipality.  
Shelby Co. v. The Exposition Company, 96 Tenn. 653, 36 S.W. 696 (1896).

Incidental benefit to an individual or individuals will not invalidate an expenditure, but its primary purpose must be to benefit the public.  
City of Chattanooga v. Harris, 223 Tenn. 51, 442 S.W.2d 602 (1969).”

So, the question is, does the drainage work in question at the specified address meet the primary purpose of benefit to the public test?

The problem is caused by a drainage culvert that goes under a public street. The culvert was installed by the town and maintained by the town in order to prevent water from an upstream drainage basin from overtopping the road and creating unsafe conditions or damaging the road. Neither the inlet nor the outlet of the culvert has proper headwalls. The banks around them have some rip-rap armoring. The main impact to the property at the specified address, and the bank on the shoulder of the public road, is that the course of the ditch the culvert discharges into has been turned at an angle to the culvert before it turns back to follow the shoulder of the drive at the specified address. This turn creates an eddy with accompanying scouring which is causing the erosion that the property owner is concerned about. It is also causing damage to the town’s right of way. The remedy would be to rechannelize the ditch at this point and make it parallel to the specified private drive as is the rest of that drive’s side ditch. Then appropriate channel and bank protection should be installed. Proper headwalls should also be considered.

This is a problem associated with the drainage of the town’s public streets, within the public right of way, dedicated or prescriptive. 29 Am. Jur.2d Highways and Streets, ' 52, says that, “*Ditches along the side of a highway acquired by prescription or user are generally regarded as within the boundaries of a highway.*” [Emphasis is mine.] Therefore, this problem could be in the public right of way, but it does not have to be to meet the requirements of the public purpose doctrine.

Therefore, from information that has been provided to me, it appears the primary purpose of the expenditure of public resources in the case at hand would be for the benefit of the general public but would also benefit the property owners at the specified address. Any benefit to the property owner would be secondary to the benefit to the general public.



Remember, the opinion says: “Incidental benefit to an individual or individuals will not invalidate an expenditure, but its primary purpose must be to benefit the public.”

Also, the town has worked on this problem in the past and placed bank protection and done channelization. From former MTAS Legal Consultant Josh Jones:

“...Generally, once a city has violated the public purpose doctrine by performing work on private property for a private benefit the city acquires a duty to maintain. Think of it as a ‘you-break-it-you-fix-it’ doctrine. However, the violation does not require, or even authorize for that matter, the city to continue to violate the public purpose doctrine by performing work on other privately-owned properties. ...”

In cases where city right-of-way is involved, or the general public, rather than a specific property owner, is involved, the city has a defensible reason to do work.

I reviewed this letter with MTAS legal consultant Melissa Ashburn, and she further recommends that the town require the property owner to dedicate a drainage easement to the town before beginning the work in order to clean this up for future purposes, although it is not strictly necessary.

I hope this information is helpful. If you need further assistance, please call.

Sincerely,

John Chlarson, P.E.  
MTAS Public Works/Engineering Consultant