March 8, 2005

Mr. Russell McCain
City of South Pittsburg
P.O. Box 705
South Pittsburg, Tennessee 37380

Re: Drainage work on private property

Dear Russell:

Pursuant to our recent discussion about the City doing drainage work on private property, I wanted to share a legal opinion prepared by Mr. Dennis Huffer, an MTAS Legal Consultant:

"... It is my understanding that the city did not cause the problems that are proposed to be addressed and that the general public will derive little or no benefit from the city doing the work. In my opinion this would be a questionable use of public resources.

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).

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 private benefit of the property owners and not for the general public. Any benefit to the general public would be remote at best. Therefore, it is my opinion that this expenditure would be held invalid if challenged. ..."

MTAS senior Legal Consultant, Sidney Hemsley, wrote the following:

"... Storm water drainage in Tennessee is governed by the natural flow rule. Under the natural flow rule, the lower property owner is required to accept the water that would naturally flow from the upper landowner; he is not liable for any damages that arises from that natural flow. [Slatten v. Mitchell, 124

S.W.2d 310 (1938); Dixon v. Nashville, 203 S.W.2d 178 (1976); Miller v. City of Brentwood, 548 S.W.2d 878 (1977); Butts v. City of South Fulton, 565 S.W.2d 879 (Tenn. App. 1978); Yates v. Metropolitan Gov., Nashville & Davidson County, 451 S.W.2d 437 (1969).]

In Miller, landowners in a subdivision argued that the city was liable for flooding problems in the subdivision, principally on the grounds that the city issued the permit for the subdivision. The Court rejected that argument, declaring that, "The mere fact that a nuisance exists and has occasioned an injury to a third person, does not render the corporation liable therefore, provided the nuisance was not created or maintained by the corporation itself." [At 880.] ... ... The point of Miller's with respect to the property owners in Oakland (South Pittsburg - J.C.) is that simply because a private landowner suffers damage from drainage that violates the natural flow rule, the city is not liable for damage for which it was not the cause. ..."

So as we previously discussed, I recommend against the city entering onto private property to do drainage work. In addition to the legality concerns, there are liability and risk management concerns. For example, how would the city defend itself in court if a resident claimed that some of her personal property was missing/damaged after city crews entered the property? Also, what if a mishap with City equipment caused damage to the home? Not only would you have a potential workers' compensation claim, but a potential property damage claim from the homeowner as well.

Here's another point to consider: If you offer the service to one resident, you have to offer the service to all residents. According to Title VI of the Civil Rights Act of 1964, cities cannot discriminate between who receives services. Even if it were legal and desirable, does the city have the time, personnel, and funds to go to every home and do drainage work?

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, but not a legal obligation. MTAS strongly recommends that the City avoid this pitfall.

To recap: The City should not do drainage work on private property. There are legal issues, liability and risk management issues, and financial responsibility realities that all combine against the City doing drainage work on private property.

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

Sincerely,

MUNICIPAL TECHNICAL ADVISORY SERVICE

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