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MEMORANDUM

TO: Joanna Richey, Assistant Division Director, Water and Land Resources Division

FROM: Joseph B. Rochelle, Senior Deputy Prosecuting Attorney

SUBJECT: Drainage Law Issue

Issue Presented: King County's municipal stormwater system collects stormwater according to a natural drainage pattern and conveys that water through a pipe into another jurisdiction's system, which in turn conveys the original water plus that jurisdiction's water into a pipe that is owned by a private property owner in the second jurisdiction. The water is then discharged out of the private pipe into waters of the state. The interconnected drainage system reflects natural drainage patterns. If the private pipe requires repair to remain functioning, does King County have authority to require the repair?

Answer: In terms of regulatory authority, King County's regulatory stormwater authority is co-extensive with its jurisdictional boundaries; so from a purely regulatory standpoint, it could not force the repair on property, whether public or private, that is within the stormwater jurisdiction of another government. If the private pipe were in an area within unincorporated King County, where King County does have stormwater regulatory authority, a case could be made that the County could proceed under King County Code 9.04.120 - 180 to require abatement of a hazard (if indeed there were one) and require that the pipe be repaired.

In terms of real property law, if King County owned the pipe and had an easement through the private property, it could itself make the repair. However, this is hypothetical and does not comport with the facts presented. King County does not own the pipe, nor does it have an easement, so it cannot under real property law make the repairs.

In terms of drainage law, the matter is less straightforward, but it does carry with it a remedy, though this remedy would likely involve costly legal proceedings. Under drainage law, a downstream property owner may not alter the natural drainage system to the detriment of an upstream user. *See Island County v. Mackie*, 36 Wash.App. 385 (1984) at 391. A natural drain has been defined as that course, formed by nature, which waters naturally and normally follow in draining from higher to lower lands. *Id* at 388, citing *King County v. Boeing Co.*, 62 Wash.2d 545, 550 (1963). Under the facts presented, the existence and use of the pipe appears to be consistent with the natural drainage flow. However if the pipe were to become clogged and in effect frustrate the natural flow of waters, upstream property owners and users, if threatened by or actually experiencing a backwater effect, would likely have a cause of action to require the pipe owner to unclog or perhaps even remove the pipe, as the creation and use of the pipe, an "artificial" drainage

conveyance, would be viewed as carrying with it the corresponding obligation to maintain and repair it. To not do so would frustrate the functioning of the natural drainage system.

A case with a fact pattern very close to these facts, *Wilber v. Western Properties,* 14 Wash.App. 169 (1975), supports the proposition that the downstream property owner would be liable for damages for interfering with the natural drainage function. Two statements of the court in that case merit citation: "A person who so obstructs a natural drain [by placing in a drainage way a pipe incapable of carrying ordinary high flows] that damage is caused by flooding, which damage would not have resulted without the obstruction, is liable for such damage regardless of negligence." *Id* at 173. "A lower landowner who would impede or obstruct the flow of water through a natural drainway must provide adequate drainage to accommodate the flow during times of ordinary high water. If the obstruction does not accommodate that amount of flow, it has been negligently and wrongfully constructed as to the upland owner whose land becomes flooded." [citations omitted] *Id.*

King County may not be able to claim the status of damaged property owner under the facts and holding of the *Wilber* case. However, it is my opinion that if King County could demonstrate that the functioning of its municipal stormwater system is dependent upon the downstream property owner keeping the pipe it owns functionally operating in order to comport with the natural drainage function and pattern, a court would be likely to rule in King County's favor and compel the private property owner to meet this duty under the rationale and facts of the *Wilber* decision.

The case law under drainage law offers the best avenue for King County to obtain relief on keeping the pipe open and functioning. However this remedy would require initiating court proceedings and could potentially involve considerable expense and time in obtaining the desired outcome.