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PUBLIC UTILITIES: COUNTIES: HIGHWAYS AND ROADS: Laying of water pipes in city streets.

MUNICIPALITIES: CITIES: TOWNSHIPS: VILLAGES: Consent to lay water pipes in city streets.

CONSTITUTIONAL LAW: Article VII, § 29, 1963 Constitution, consent of cities to use of streets for public utility facilities.

A county may not lay its water pipes in city streets without first obtaining the consent of the city pursuant to Article VII, § 29, 1963 Michigan Constitution. A city may condition its consent upon payment of inspection fees and approval of construction plans. However, a city may not withhold or condition its consent arbitrarily and unreasonably.

No. 4331 August 8, 1968.

Mr. William L. Cahalan
Wayne County Prosecutor
1300 Beaubien
Detroit, Michigan 48226

Dear Mr. Cahalan:

Your office advises that, pursuant to the provisions of Act No. 342, P.A. 1939, as amended, Wayne County has engaged in the installation of water lines within the public streets of municipalities lying within the territorial limits of the county. The county has on occasion desired to use the streets of the City of Detroit for the purpose of laying large water mains to connect segments of the county owned and operated water system.

Based upon the foregoing your office asks:

(1) May a city within the county deny the county the use of particular city streets for the purpose of laying water lines?

(2) May a city within whose streets a proposed water line is to be laid require the county to submit its construction plans and specifications for approval or disapproval, or demand permit or inspection fees of the county, as a condition of using the city's streets for water line purposes?

I.

Article VII, Section 29 of the Michigan Constitution of 1963 provides as follows:

> "No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."

Thus, a public corporation operating a public utility shall not use the city's streets for pipes or other utility facilities without the consent of the city. The county, being a municipal corporation, *Mosier v. Wayne County Board of Auditors* (1940), 295 Mich. 27, *Wright v. Bartz* (1954), 339 Mich. 55, is a public corporation. A water system is a public utility. *Bay City Plumbing & Heating Co. v. Lind* (1926), 235 Mich. 455; *Schurtz v. City of Grand Rapids* (1919), 208 Mich. 510, 524. In the latter case, the court defined a public utility as follows:

> "....We think that the term 'public utility' means every corporation, company, individual, association of persons, their trustees, lessees, or receivers, that may own, control, or manage, except for private use, any equipment, plant or generating machinery in the operation of a public business or utility. Utility means the state or quality of being useful. Was this plant one useful to the public? If so, it was a public utility...."

That a county must obtain the consent of a city in whose streets pipes are to be laid was recognized in *Oakland County Drain Commissioner v. City of Royal Oak* (1943), 306 Mich. 124. The court found valid a contract for the construction and maintenance by Oakland County of a sewer in the City of Detroit, despite the fact that the county had not obtained a franchise from the city, for the reason that the county did not intend to carry on any local sewage business within the city. The court pointed out, however, that Article VIII, Section 28 of the 1908 Constitution, similar for the purpose of this discussion to Article VII, Section 29 of the 1963 Constitution, required the consent of the city for the laying of the sewer pipes, but that such consent had been secured through a contract executed by the Detroit Common Council. 306 Mich., at pages 144-145.

The Michigan Supreme Court has specifically held that various municipal corporations, such as cities and water districts, must obtain the consent of any other municipal corporation whose streets are to be used for the laying of water pipes. In *Bay City Plumbing & Heating Co. v. Lind, supra,* it was held that Bay City had no right to run a water pipe through Bangor Township to reach a source of water supply, without first obtaining consent from the township. The court rejected the argument that the Constitution and statutes specifically authorizing the city to operate its facilities outside its corporate limits obviated the need for the township's consent.

In *Somerville v. Landel Metropolitan District* (1954), 340 Mich. 483, 489-490, the court said that despite the language of Article VIII, Section 23 of the 1908 Constitution, similar to Article VII, Section 24 of the 1963 Constitution, which provides that a city has the right to own and operate either within or without its corporate limits public utilities for the supplying, selling and delivering of water, the City of Lansing had no right to furnish water to residents of Lansing township, without first obtaining a franchise from the township and consent of the township to the laying of pipes in the township's streets, citing *Bay City v. Lind, supra.*

In *Township of Lansing v. City of Lansing* (1959), 356 Mich. 338, the court affirmed the order of the trial court enjoining the Landel Metropolitan District from continuing to provide water service to a certain portion of Lansing township, where Landel had been providing such service pursuant

to a contract with the township, but had not obtained a franchise therefrom. The court rejected the argument of Landel that its charter, approved by the voters of Lansing township, specifically authorizing Landel to provide water service throughout Lansing township, constituted a franchise. The court, at pages 345-348, distinguished the power "to be" for the purposes outlined, as opposed to the power "to do" and "the right to use public streets and alleys." Although Landel, like Wayne County, had the corporate power to lay pipes throughout its territory and conduct a water business therein, exercise of that power was contingent upon securing the requisite franchise to transact a local business and consent to the laying of pipes in the streets.

A city's power under Article VII, Section 29 of the 1963 Constitution is not limited to the reasonable regulation of the manner in which its streets are to be used for the installation of public utility facilities; a city may absolutely prohibit the use of its streets for such purpose, at least where such prohibition is not arbitrary and unreasonable. McQuillan states:

> ". . .where it is provided that the consent of the municpality [sic] must be obtained before the streets can be used, a municipality has power to refuse to allow a public service company to use its streets, and its authority is not limited to a reasonable regulation of the method of using the streets. . . ."[1]

It was stated in O.A.G. 1926-28, page 103, January 24, 1927, that the village of Royal Oak could not lay a water main through the villages of Ferndale and Pleasant Ridge for the purpose of bringing water from Detroit, even though such water main would be laid entirely within a State highway, without obtaining the consent of such municipalities. The then Attorney General did add that "the villages may not, however, arbitrarily refuse to grant this permission nor can they impose unreasonable conditions to such grant," citing *Maybury v. Mutual Gas-Light Co.* (1878), 38 Mich. 154. The *Maybury* case, however, merely held that an information in the nature of quo warranto would not lie to oust a gas company from its franchise to lay gas pipes through the streets of Detroit, the proper remedy being the ordinary legal remedies. By way of dicta, the court observed that "the law contemplates that permission will not be unreasonably refused or unreasonably burdened," in construing the gas company incorporation statute which authorized gas companies to lay pipes through the streets of municipalities "with the consent of the municipal authorities of said city, town, or village *under such reasonable regulations as they may prescribe.*" (Emphasis supplied)

It was stated in *Union Township v. City of Mt. Pleasant* (1968), 381 Mich. 82, 90, that a county or township cannot "arbitrarily and unreasonably" refuse to consent to the laying by a city of a water pipeline in a county road which runs through a township, citing *Maybury v. Mutual Gas-Light Co., supra,* and O.A.G. 1926-28, page 103, *supra.* The specific holding of the court was, however, that plaintiff township was entitled to an injunction against the laying of a water line by defendant city in a county road passing through the township, where the city failed to obtain

[1] McQuillan, Municipal Corporations, Vol. 12, 3rd Ed., § 34.19, p. 73.

the consent of the township to such use of the road. In *City of Detroit v. The Fort Wayne and Belle Isle Railway Company* (1893), 95 Mich. 456, the court said, in upholding a city ordinance requiring defendant street railway company to sell tickets on its cars:

> "The right of a municipality, under the statute, to refuse its consent to the operation of a street railway in its streets, is an absolute one, and its power, in the first instance, to impose conditions, is unlimited. The nature of the conditions imposed does not depend upon other grants of power. Respecting the imposition of further conditions after consent given, it is only necessary that the municipality keep within the scope of the reservation." 95 Mich., at page 460.

Thus, the court held that the city's prior grant to the railroad of the right to use the city's streets, pursuant to a statute prohibiting certain railroad companies from constructing their lines through the streets of any city without the consent of the city, in which grant the city reserved the right to make further rules, orders or regulations, authorized the city to make the regulation requiring sale of tickets on the cars.

Regardless of whether the city has legislative power to require a county to submit construction plans for approval, or charge permit and inspection fees against the county, it is clear that the city, having the constitutional right to give or withold its consent to the use of its streets, may condition its consent, as a matter of contract, upon the county doing these things. Thus, in *City of Mt. Pleasant v. Michigan Consolidated Gas Company* (1949), 325 Mich. 501, it was held that a home rule city has the power to fix reasonable rates as a condition to the use of its streets by a public utility, even though the city had no power to legislate with respect to public utility rates.

The city is not without power to contract with the county for the approval of construction plans and the payment of inspection and permit fees, merely because Act 98, P.A. 1913, as amended,[2] requires the county to certify the plans and specifications for the construction, alteration or improvement of any water system to the Michigan Department of Public Health and obtain a permit for the construction of the same.[3]

Although the county must comply with Act 98, *supra,* and the rules and requirements of the Michigan Department of Public Health pursuant thereto, there is nothing in Act 98 that would prevent the city from contracting for additional protection in connection with the construction of the county water pipes in harmony with the requirements of the Michigan Department of Public Health. See *Master Plumbers and Steamfitters Club v. City if Detroit* (1941), 298 Mich. 44, wherein it was held that the city of Detroit has the right to issue plumbing permits and exact fees for the issuance thereof, despite State statutes relating to the licensing of plumbers by the State. Of course, the Michigan Department of Public Health has no authority to require the city to permit the county to make use of the city's streets. See *Southfield Woods Water Company v. Commissioner of*

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[2] C.L. 1948 § 325.201 et seq., as amended by Act 219, P.A. 1949, M.S.A. 1956 Rev. Vol. § 14.411 et seq.

[3] Act 98, P.A. 1913, as last amended by Act 219, P.A. 1949, C.L. 1948 § 325.206, M.S.A. 1956 Rev. Vol. § 14.416.

State Department of Health (1958), 352 Mich. 597, wherein it was held that the Department of Health has no power or duty to approve or disapprove the lease of a well and pump site to a water company.

Therefore, it is my opinion that a county which operates a water system may not lay its pipes under or through city streets, without first obtaining the consent of the city; however, the city may not withhold such consent arbitrarily and unreasonably. The city may condition its consent to the use of its streets upon the county submitting the plans and specifications for the construction of the water line to the city for approval, the inspection of the work by city employees, and the payment of reasonable permit and inspection fees; such conditions, however, may not be imposed arbitrarily and unreasonably.

FRANK J. KELLEY,
Attorney General.

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RAILROAD CROSSING PROTECTION – COUNTY LOCAL ROADS – TOWNSHIP:

At a grade crossing between a railroad and a county local road located in a township, the County Road Commission is the highway authority solely and exclusively responsible for the maintenance of the highway and thus must bear equally with the railroad the cost of installing flashing-light installations. The township is not required to contribute any part of the cost of such installation.

No. 4651 September 25, 1968.

Mr. Donald A. Burge
Prosecuting Attorney
Kalamazoo County Building
Kalamazoo, Michigan 49006

You have requested my opinion on a question which you stated in your letter as follows:

> "Under Michigan law, are the costs of installing flasher signals at railroad grade crossings with local roads, other than the 50% of the costs required to be paid by the railroad, to be divided equally between the township wherein the crossing lies and county road commission?"

Your correspondence indicates that the flasher signals were ordered to be installed by the Public Service Commission under the provisions of § 8, Act 270, P.A. 1921, as amended; M.C.L.A. § 469.8; M.S.A. Vol. 16 § 22.768, and that the road is a county local road.

Section 8, Act 270, P.A. 1921, as amended, *supra,* provides in part:

> ". . . The cost of all flashing light installations and alterations or relocations of same shall be borne equally by the railway and highway authorities, and thereafter they shall be maintained by the rail-