

subdivision, or should in the future a new political subdivision be created and want to set up a pension fund, would they have to that first year put in funds sufficient to take care of past service? If not, how would past service funds be accumulated?

“CHAIRMAN MARTIN: Mr. Van Dusen.

“MR. VAN DUSEN: The answer, Mr. Chairman, to Mr. Shackleton’s first question is no, they would not have to immediately fund past service benefits. They would have to put in enough to currently fund current service benefits. . . . The only constitutional requirement would be the current funding of current service benefits.

“MR. SHACKLETON: If they did not properly take care of the past service then, where would your contractual obligation come out?

“MR. VAN DUSEN: *An employee who continued in the service of the public employer in reliance upon the benefits which the plan says he would receive would have the contractual right to receive those benefits, and would have the entire assets of the employer at his disposal from which to realize those benefits.*” (emphasis added)

1 Official Record, Constitutional Convention 1961, p 774

The Constitution may not be “commonly understood” to impose a substantial obligation upon the state without direct language to that effect. Nowhere in Const 1963, art 9, § 24 and the accompanying Address to the People is the state specifically, or by necessary implication, charged with being the ultimate guarantor of local government retirement program funding and benefits. It is, therefore, my opinion that the state is not ultimately liable for funding or paying the benefits of local government retirement programs.

FRANK J. KELLEY,
Attorney General.

760810.6

DRAINS AND DRAINAGE: Authority of county drain commissioners to remove obstructions.

A county drain commissioner may remove naturally growing or planted obstructions that impair the operation of a drain.

If an object located on private property extends into a right-of-way obtained for drainage purposes, the drain commissioner may remove the obstruction.

A county drain commissioner may not go beyond the boundaries of a drainage right-of-way to remove trees or shrubbery located upon the unencumbered portion of a feeholder’s land although the commissioner may enter adjacent property to make a survey in connection with drainage work that is authorized.

If trees or shrubs on adjacent property are damaged in the course of removing an obstruction to a drainage right-of-way, costs incurred in effecting necessary and reasonable restoration may not be imposed upon the owner of the adjacent property; such expenditures are to be paid from the fund specified in 1956 PA 40, § 196.

Opinion No. 5070

August 10, 1976.

Honorable Bobby D. Crim
Speaker of the House
State Capitol Building
Lansing, Michigan 48901

You have requested my opinion on the following questions:

1. "Can a County Drain Commissioner remove trees or shrubbery naturally growing or planted upon a drain easement or right-of-way which obstructs an established drain?"
2. "Can a County Drain Commissioner remove trees or shrubbery from a drain easement, or right-of-way, which are creating an obstruction to an established drain which have been placed therein as share or ornamentals by the servient property owner?"
3. "Can a County Drain Commissioner require the removal of trees or shrubbery growing upon servient property adjacent to an easement or right-of-way and which are obstructing an established drain?"
4. "Can a County Drain Commissioner, if the property owner refuses, go beyond adjacent property and remove trees or shrubbery obstructing an established drain?"
5. "Can a County Drain Commissioner clean out or route out obstructed established drains, thereby causing damage, injuring or killing shade trees or ornamentals located outside of the right-of-way easement for an established county drain in the manner as stated hereinbefore?"
6. "Can a County Drain Commissioner, complying with statutory provision, charge to a property owner costs incurred in removing obstructions to an established county drain in the manner as stated hereinbefore?"

The governing statutory provision concerning obstructions in drains is 1956 PA 40, § 421; MCLA 280.421; MSA 11.1421, which states:

"Whenever any person shall obstruct any established drain, it shall be the duty of the commissioner to cause such obstruction to be removed. Any lessening of the area of a drain, which area shall be a cross section of the drain, shall be deemed to be an obstruction. The person causing such obstruction shall be liable for the expense attendant upon the removal thereof, together with the charges of the commissioner, and the same shall be a lien upon the lands of the party causing or permitting such obstruction, and all of the expense shall by the commissioner be reported to the board of supervisors, together with the report of his doings in the premises, and by said board ordered spread upon the land of the offending party, should the same remain unpaid: Provided, That the offending party causing such obstruction shall be given a notice in writing of at least 5 days to remove such obstruction. This provision as to obstruction of any drain shall not apply where the obstruction was caused by natural causes but the owner of the stock who shall permit his horses, cattle, pigs and other stock to obstruct any drain by tramping it in shall be deemed to be the party causing such obstruction. Nothing contained in this section

shall in any way impede or bar the right of any person to make criminal complaint under any existing law for any obstruction of a drain." (emphasis supplied)

The Drain Code also contains two other relevant statutory provisions which pertain to the power of drain commissioners to remove obstructions. 1956 PA 40, § 196, *supra*, states in pertinent part:

"(1) An annual inspection may be made of all drains laid out and constructed under this act. . . . In the case of county drains, such inspection shall be made by the drain commissioner, or a competent person appointed by him. . . . Whenever such inspections disclose the necessity of expending money for the maintenance and repair of any drain in order to keep it in working order, the drain commissioner, in the case of a county drain, . . . may without petition expend an amount not to exceed in any 1 year \$800.00 per mile or fraction thereof or 2% of the original cost of the drain and 2% of extensions thereof for maintenance and repair of any drain. Whenever it shall be found necessary by the drain commissioner . . . to expend funds in excess of \$800.00 per mile or fraction thereof or 2% of the original cost of the drain and 2% of extensions thereof in any 1 year for maintenance and repair of any drain, such additional amounts shall not be expended until approved by not less than 50% of the total number of legislative bodies of all such public corporations, within or partly within the drainage district.

"(2) In case the fund belonging to the drain is not sufficient to pay for any work authorized by this section, the drain commissioner of the drainage board shall reassess the drainage district therefor according to benefits received, which reassessment shall be made and spread upon the city or township tax assessment roll within 2 years from the completion of the inspection work, and in case the total expenditure is more than \$800.00 per mile or fraction thereof or 2% of the original cost of the drain and 2% of extension thereof, all freeholders subject to assessment shall be notified of such assessment by publication in a newspaper of general circulation within the drainage district and by first class mail to each person whose name and address appears upon the last city or township tax assessment roll as owning land within the drainage district. An affidavit of mailing shall be made by the drain commissioner or chairman of the drainage board which shall be conclusive proof that the notices required by this section were mailed. The failure to receive such notices by mail shall not constitute a jurisdictional defect invalidating a drain proceeding or tax, if notice by publication as required by this section were complied with. Whenever an emergency condition exists which endangers the public health, crops or property within their respective districts, the drain commissioner or the drainage board may expend funds for any work contemplated in this chapter subject to the limitations provided in this section for maintenance and repair."

The impact of this section of the Drain Code is to remove any distinction between natural obstructions and man-made obstructions, thus author-

izing the drain commissioner to alleviate any existing obstructions, and expend such designated assessments as may be necessary to complete the task.

The final applicable provision pertinent to this response is 1956 PA 40, § 85, *supra*, which states that:

"The owner of any land over, through or across which a district has acquired a right of way for the construction and maintenance of an open or covered drain by grant, dedication, condemnation or otherwise, may use the land occupied by such right of way in any manner not inconsistent with the easement of the district. Any use of the right of way which will interfere with the operation of the drain or will increase the cost to the district of performing any of its work thereon is deemed to be inconsistent with the district's easement. Any landowner who violates any of the above provisions shall be subject to the penalties provided in section 421 of this act." (emphasis added)

By this section, the owner of any land over, through or across which a drain is located may not use his property in a manner inconsistent with the easement of the district. In the event the owner does not use his land in an inconsistent manner, the commissioner must utilize the powers noted in 1956 PA 40, § 421, *supra*.

Having cited the provisions of the Drain Code pertinent to the issues posed by your letter, the response can be presented.

Your first question asks:

"Can a County Drain Commissioner remove trees or shrubbery naturally growing or planted upon a drain easement or right-of-way which obstructs an established drain?"

I am of the opinion that 1956 PA 40, § 196, *supra*, provides that when such naturally growing or planted obstructions impair the operation of the drain, it is within the power of the county drain commissioners to alleviate the obstruction.

The second question asks:

"Can a County Drain Commissioner remove trees or shrubbery from a drain easement, or right-of-way, which are creating an obstruction to an established drain which have been placed therein as shade or ornamentals by the servient property owner?"

It is fundamental that a right-of-way is deemed to encompass such use of the land at or beneath the surface as will make the easement effective. *Platt v Ingham County Road Commission*, 40 Mich App 438, 198 NW2d 893 (1972). The party who enjoys an easement is entitled to maintain it so that it is capable of the use for which it was given. *Carlton v Warner*, 46 Mich App 60, 207 NW2d 465 (1973). Thus, to maintain an efficient flow of water through the drainage system, the drain commissioner must be accorded the power to remove such trees or shrubs as are determined to constitute an obstruction to the free flow of sewage. Additionally, by the language in 1956 PA 40, §§ 85 and 421, remedial action is required by either the property owner or the commissioner to alleviate such an impediment to proper drainage.

Question number three asks:

“Can a County Drain Commissioner require the removal of trees or shrubbery growing upon servient property adjacent to an easement or right-of-way and which are obstructing an established drain?”

Ownership of a fee entitles one to full and free use and enjoyment of the premises. *Gunn v Delhi Twp*, 8 Mich App 278, 154 NW2d 598 (1967). A rightful claim to an easement for drainage purposes restricts one's fee ownership to the extent of the easement taken for the benefit of the public to be used for sewage disposal. *Gunn, supra*. Where the rightful use of the easement, here being for drainage purposes, is interfered with, such that the result of the harm will be inflicted upon the public health, the commissioner may act to protect the public interest and remove such obstructions as may be said to be causing a hazard. It appears from the situation posed that the object responsible for the obstruction, while located on private property, had extended out into the area of the right-of-way obtained for drainage purposes. If such is the case, clearly, since the owner of an easement is said to have all rights incident or necessary to the proper enjoyment of it, the drain commissioner has a legal responsibility to affirmatively respond, and restore the endangered drainage area to its full capacity. Where a real and substantial harm to the public is demonstrated, then 1956 PA 40, § 421, *supra*, would become operative, allowing the feeholder five days to take the necessary action, before the commissioner removes such obstruction.

Question number four asks:

“Can a county drain commissioner, if the property owner refuses, go beyond adjacent property and remove trees or shrubbery obstructing an established drain?”

As noted by the court in *Gunn, supra*, at page 288: “. . . Whatever authority the County Drain Commissioner had under CLS 1961, § 280.422 (Stat Ann 1960, Rev § 11.1422) to consent to construction of the sewer in the cross-section of an established county drain cannot extend to consenting to encroachment on plaintiff's land.” Consequently, it is my opinion that the drain commissioner is without authority to go beyond the limits of the drainage right-of-way for the purpose of removing trees or shrubbery located upon the unencumbered portion of the feeholder's lands. This is not to be construed as limiting the drain commissioner's right to go upon the adjacent property for the purpose of examining the same, or making surveys in connection with drainage work which is authorized by 1956 PA 40, § 432, *supra*.

"Whoever, after the drain commissioner has given notice by first class mail, that the drain commissioner, drainage board or their agents will go upon lands for any purpose hereinafter set forth, to the owner of the land whose name appears on the last city or township tax assessment roll, at the address shown on the roll, and if no address appears thereon no notice need be mailed to such person, wilfully prohibits, prevents or obstructs the drain commissioner, drainage board or their agents from going upon lands either within or outside of the district for the purpose of examining the same or making surveys in connection with the work of the drain commissioner or drainage board, or wilfully prohibits, prevents or obstructs the drain commissioner or drainage board of a district, their agents, employees or contractors from going upon the right of way of the district with their servants, tools, machinery, instruments and other equipment for the purpose of constructing, reconstructing, repairing or maintaining the work of the drain commissioner or drainage board is guilty of a misdemeanor."

Question number five asks:

"Can a County Drain Commissioner clean out or route out obstructed established drains, thereby causing damage, injuring or killing shade trees or ornamentals located outside of the right-of-way easement for an established county drain in the manner as stated hereinbefore?"

This question involves the commissioner's authority to maintain the county drainage system by removing obstructions within the right-of-way, and, in so doing, inflict damage to trees or shrubs located solely upon private property. As previously noted, a right-of-way is deemed to encompass such use of the land at or beneath the surface as will make the easement effective. *Platt, supra*. In view of the applicable statutory provisions, as well as general legal principles, the drain commissioner is permitted to so act, so long as the cleaning or routing out of such overgrowth occurs solely within the right-of-way. In such a situation, he is acting clearly within the scope of his authority in maintaining the drain in a proper conditions, as required by law.

Finally, you ask:

"Can a County Drain Commissioner, complying with statutory provision, charge to a property owner costs incurred in removing obstructions to an established county drain in the manner as stated hereinbefore?"

The answer is dependent upon the party responsible for such obstruction and the location thereof. 1956 PA 40, § 421, *supra*, is operative where a private person is responsible for the interference. However, if the obstruction has clearly come into existence after transfer of the area to the commissioner for drainage purposes, then § 196 would apply. Additionally, if the location of the obstruction is located solely upon private property, adjacent to the drainage district, any costs incurred in effecting such necessary and reasonable restoration, such that the drain is returned to its original condition, may not be taxed upon the feeholder. Rather, expendi-

tures for such necessary repairs may only come out of the fund specified in 1956 PA 40, § 196.

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760811.1

OFFICERS AND EMPLOYEES: Scope of authority.

LICENSES: Lack of authority to grant.

RESIDENTIAL BUILDERS AND MAINTENANCE AND ALTERATION CONTRACTORS: Applicant's experience as alternative to written examination.

Public officers may only exercise powers conferred upon them by law and persons dealing with them are charged with knowledge of the extent of their authority.

Where a statute permitted an applicant for licensure as a residential maintenance and alteration contractor to submit proof of having been engaged in the business of contracting for building and alteration work for 5 years as an alternative to a written examination, experience acquired in the state in violation of the act may not be considered.

Opinion No. 5069

August 11, 1976.

Beverly J. Clark, Director
Department of Licensing and Regulation
1033 S. Washington Avenue
Lansing, Michigan 48926

You have requested my opinion as to whether the doctrine of equitable estoppel would prevent action by the Department of Licensing and Regulation to revoke Residential Builders and Maintenance and Alteration Contractors' licenses improperly issued under 1965 PA 383; MCLA 338.1501 *et seq*; MSA 18.86(101) *et seq*. You are specifically concerned with instances in which persons were issued a license without examination and without filing proof of five years experience gained prior to the effective date of the act.¹

The general rule is that estoppel does not lie against the state. As stated at 1 ALR 2d 340:

"The doctrine of equitable estoppel, or, as it is otherwise called, estoppel in pais, has no application to the government of the United States, a state, a municipal corporation or other governmental agencies."

And at 1 ALR 2d 360 it is stated:

"The doctrine of estoppel will not be applied against any governmental agency such as a commission or a board acting in its public capacity."

¹ 1965 PA 383, § 4(4). The provision exempting persons with five years experience from taking a written examination was deleted from the act by 1975 PA 250.