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Legal Issues Involving Streets

Dear Reader:

The following document was created from the MTAS website (mtas.tennessee.edu). This website is maintained daily by MTAS staff and seeks to represent the most current information regarding issues relative to Tennessee municipal government.

We hope this information will be useful to you; reference to it will assist you with many of the questions that will arise in your tenure with municipal government. However, the *Tennessee Code Annotated* and other relevant laws or regulations should always be consulted before any action is taken based upon the contents of this document.

Please feel free to contact us if you have questions or comments regarding this information or any other MTAS website material.

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Legal Issues Involving Streets

Reference Number: MTAS-665

Municipalities Usually Do Not Own Streets

Municipalities usually do not own their streets in the sense of owning the underlying fee. There is a presumption that the abutting property owners own the underlying fee to the center line of the street, and the municipality has only a transportation easement or right-of-way across the property for the use of public travel. [See *Hamilton County v. Rape*, 47 S.W. 416 (1898); *Patton v. Chattanooga*, 65 S.W. 414 (1901).] However, property acquired by the state or any of its political subdivisions for interstates and controlled access highways must be acquired in fee simple. T.C.A. § 54-16-104.

Police Power over Streets

Reference Number: MTAS-811

The power to control streets and highways rests primarily in the state, which power the legislature can delegate to municipalities. [See *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (1938).] Generally, a municipality must exercise the police power delegated to it by the legislature in the manner directed by the legislature [*Nichols v. Tullahoma Open Door*, 640 S.W.2d 13 (Tenn. Ct. App. 1982)].

It has been held that "very broad powers of regulation, and wide discretion, in the exercise of the police power, are held to be vested in municipalities in touching the use of its streets." [See *Steil v. City of Chattanooga*, 152 S.W.2d 624, 626 (Tenn. 1941).] It has also been held that the courts will not interfere with the exercise of that discretionary power except in the case of fraud or clear abuse of power. Those police powers also extend to state highways running through cities. [See *Collier v. Baker*, 27 S.W.2d 1085 (1930); *Blackburn v. Dillon*, 225 S.W.2d 47 (Tenn. 1949).]

It is also the law generally that where private activities near, as well as in, a street right-of-way pose a hazard to street traffic, a municipality can prohibit or regulate that activity. Indeed, the police power generally pertains to the right of a municipality to impose restrictions on the use of private property through reasonable laws and ordinances that are necessary to secure the safety, health, good order, peace, comfort, protection and convenience of the state or a municipality. That right is broad and well-established [*S & P Enters, Inc. v. City of Memphis*, 672 S.W.2d 213 (Tenn. Ct. App. 1983); *Rivergate Wine & Liquors, Inc. v. City of Goodlettsville*, 647 S.W.2d 631 (Tenn. 1983); *Penn-Dixie Cement Corporation v. Kingsport*, 225 S.W.2d 270 (Tenn. 1949); *Miller v. Memphis*, 178 S.W.2d 382 (Tenn. 1944)].

An important distinction is made in *City of Paris v. Paris-Henry County Public Utility District*, 340 S.W.2d 885 (Tenn. 1960), between the authority a franchise gives a public utility over municipal rights-of-way and the authority a municipality has under its police powers to control the conditions of the exercise of that franchise. In that case the question was whether a utility district could make excavations in the city's streets without complying with the city's ordinance governing such excavations. The city had by ordinance 295 granted to the utility district a franchise to lay, construct and maintain its gas lines under the city's streets. Following the utility district's failure to restore streets it had excavated for that purpose, the City of Paris, by ordinance 316 required any person making a street excavation to obtain a permit and pay a permit fee to the city.

The utility district argued that ordinance 316 was unconstitutional and an impairment of a contract under Article I, § 20, of the *Tennessee Constitution* ("No man's…property [shall be] taken, or applied to public use, without the consent of her representative, or without just compensation being made thereof.") The basis of its argument was that ordinance 295 provided that utility district's agreement to the contract would be the consideration and "in lieu of all other fees, charges and licenses which the City might impose for the rights and privileges herein granted." The Court rejected the utility district's argument.

It was true, said the Court, that when the utility district accepted the franchise, it became binding upon the city, and that the franchise gave the utility district the right to use the city's streets to install its pipes, and that the *contract right* created by the franchise could not be revoked or impaired by the city. However, continued the Court, the utility district's right was

…subject to regulation by the City, acting in its governmental capacity under the policepower, delegated to it by the State, to regulate and control its streets for the public health and safety. Such power is broad and cannot be limited by contract [Citations omitted].

Ordinances 295 and 316 were talking about two different fees, declared the Court:

The fees for permits under ordinance 316, however, are not "fees, charges or licenses" imposed by the City, for any "rights or privileges" granted by ordinance 295. The latter class of "fees," etc., were a matter of contract, or rather were forbidden by the contract, between Defendant and the City acting in its *proprietary capacity*. *Lewis v. Nashville Gas & Heating Co.*, 162 Tenn. 268, 40 S.W.2d 409.

But the former class of fees, fees for permits under ordinance 316, are exacted by the City, acting in its governmental capacity, as an incident to its enforcement of police power regulation, and were not, and could not be, controlled or limited by contract [At 889] [Citations omitted] [Emphasis is mine].

The Court also held ordinance 316 to be a valid police power regulation, reasoning that

Such right [of the utility district to use the city's streets under the franchise], was subject to regulation by the City, *acting in its governmental capacity under the police power*, delegated to it by the State, to regulate and control its streets for the public health and safety. Such power is broad and cannot be limited by contract [At 888] [Citations omitted] [Emphasis is mine].

The fee imposed by ordinance 316 was also reasonable, declared the Court: "It is not shown that these fees will amount to more than the cost of enforcing this police regulation. 'Mathematical nicety is not exacted in cases where a license fee is charged as an incident to the enforcement of a police power ordinance' " [At 889] [Citations omitted].

The question of whether a police power regulation is reasonable requires a two-prong test: First, the regulation must bear some relationship to a legitimate interest protectable by the police powers; second, the regulation may not be unreasonable or oppressive [*Rivergate Wine and Liquors, Inc., v. City of Goodlettsville*, above].

Status of Unopened Streets

Reference Number: MTAS-714

West Meade Homeowners Association v. WPMC, 778 S.W.2d 365 (1989), indicates that the formal dedication and acceptance of a street may occur without the actual construction of a street. There a recorded plat showed Cornwall Drive to run between two certain lots on WPMC's property. However, the paved portion of Cornwall Drive ended in a cul-de-sac that left an intervening space between the cul-de-sac and WPMC's property upon which no street had been built, but which showed up on the plat as a dedicated right-of-way. WPMC wanted to develop its property and to use the intervening space as an ingress and egress to the development. WPMC argued that the City of Nashville had accepted the right-of-way. *The City of Nashville, itself joined the developer in arguing that the city had accepted the right-of-way.* The Homeowner's Association argued that the right-of-way on the plat between the cul-de-sac and WPMC's property had not been accepted by the city or had since been abandoned.

The Court held in favor of WPMC, agreeing that the city had accepted the right-of-way in dispute. It reiterated the well-settled law that establishment of a right-of-way requires both a dedication and acceptance. The dedication in this case was undisputed; it appeared on the recorded plat. A dedication could be formally or informally accepted, and in this case the city had at least informally accepted it, declared the Court, reasoning that

The evidence of public acceptance in the present record is similar to that relied upon to find public acceptance in *Matthews*. The disputed portion of Cornwall Drive is included on the "Official Street and Alley Acceptance and Maintenance Map." In addition, no taxes have been paid on the right-of-way and the Nashville Electric Service has erected and maintained utility poles within the right-of-way. In *Matthews* this evidence was sufficient for the court to find public acceptance of an offer of dedication and we believe that it is sufficient to make the same finding in this case [At 366].

There had been no abandonment of the right-of-way by the city, concluded the Court, because the Nashville Electrical Service used it for its utility poles.

Presumably, the same rule applies to rights-of-way reflected on county road maps where territory is incorporated or annexed by a municipality.

But it does not necessarily follow that the public has a right to use a street that has been dedicated and accepted but upon which no construction of a “street” has actually occurred. The Court in *West Meade Homeowners Association v. WPMC*, 778 S.W.2d 365 (1989) pointed out in reply to the homeowner’s association demand for an injunction to stop WPMC’s development that the municipal planning commission had the sole and exclusive power to approve or disapprove subdivision plats for real estate developments, and that before a subdivision could be developed on WPMC’s property, the Metropolitan Planning Commission had to approve a subdivision plan. No such application had been approved or even made. For that reason the demand for an injunction was premature. While the Court did not mention the disputed part of Cornwall Drive in connection with the plat, apparently if that part of Cornwall Drive was to be used as a street it would have been required to appear on the plat of the development. In addition, a municipality has the right to determine what kind of public travel is permitted on its streets [*Blackburn v. Dillon*, 225 S.W.2d 46 (1946)].

Tort Liability for Unsafe and Defective Streets

Reference Number: MTAS-715

Tennessee municipalities are liable under the Tennessee Governmental Tort Liability Act when they have actual or constructive knowledge of a defective, unsafe or dangerous condition on a street or highway "owned and controlled" by them. T.C.A. § 29-20-203. [Also see *Swafford v. City of Chattanooga*, 743 S.W.2d 174 (Tenn. Ct. App. 1987); *Baker v. Seal*, 694 S.W.2d 948 (Tenn. Ct. App. 1984); *Bryant v. Jefferson City*, 701 S.W.2d 626 (Tenn. Ct. App. 1985); *Fretwell v. Chaffin*, 652 S.W.2d 948 (Tenn. Ct. App. 1984); *Johnson v. EMPE, Inc.*, 837 S.W.2d 62 (Tenn. Ct. App. 1992); *Dailey v. Bateman*, 937 S.W. 2d 927 (1996), appeal denied.] Whether a condition of a governmentally-controlled street, outlet, sidewalk or highway is defective, unsafe or dangerous for purposes of removing governmental immunity is a question of fact. *Cornell v. State*, 118 S.W.3d 372 (2003).

The Tennessee Governmental Tort Liability Act does not define the dimensions of a "street" or "highway," except to say that it includes "traffic control devices thereon." However, a "street" and a "highway" within the meaning of T.C.A., Title 55, Chapter 8, which contains the state law for the rules of the road, are the same: "the entire width between the boundaries lines of every way when any part thereto is open to the use of the public for purposes of vehicular travel." T.C.A. §§ 55-8-101(21) and (60). Assuming that the definition of streets and highways is probably the same for the purposes of the Tennessee Governmental Tort Liability Act as it is for T.C.A., Title 55, Chapter 8, these definitions appear to include the entire street right-of-way.

In a 2006 decision (*Moseley v. McCanless*, 207 S.W.3d 247 (2006), the Tennessee Court of Appeals removed Metropolitan Nashville’s governmental immunity where the city had notice of numerous complaints over the years of overgrown vegetation and seven crashes at an intersection. A motorist was injured when a vehicle allegedly failed to stop at a stop sign and pulled out in front of him. Evidence showed that the stop sign was 33 feet from the intersection and the public was not warned about limited sight distance prior to accident at issue. Plaintiff lost hearing, memory, concentration, motor speed, and dexterity. Plaintiff was awarded $293,200 in damages, for which Metropolitan Nashville was held 35 percent proportionally liable. Clearly, a city should take action once it has actual or constructive notice of a dangerous condition.

“Constructive notice” of dangerous condition on street or highway is information or knowledge of fact imputed by law to person, although he may not actually have knowledge, because he could have discovered fact by proper diligence and his situation cast upon him duty of inquiring into it. *Kirby v. Macon County*, 892 S.W.2d 403 S.W.2d 403 (1994).

Once a traffic control device is installed, failure to maintain it (or to complete its installation) may result in liability when a defective, unsafe, or dangerous condition is created. *Burgess v. Harley*, 934 S.W.2d 58 (1996), appeal denied.

Apparently there is no reported case under the Tennessee Governmental Tort Liability Act involving damage to a motorist or pedestrian arising from a condition on private property entirely outside the boundary of the street right-of-way. But governments have been held liable for damages arising from such conditions in a significant number of cases in the United States [3 A.L.R.2d 6; 98 A.L.R.3d 101; 45 A.L.R.3d 875; 3 A.L.R.4th 770; 60 A.L.R.4th 1249; 95 A.L.R.3d 778; 100 A.L.R.3d 510; 54 A.L.R.2d 1195; 52 A.L.R.2d 689; 57 A.L.R.4th 1217; 19 A.L.R.4th 532]. The same is true with respect to

pedestrians in Tennessee in cases that pre-date the Tennessee Governmental Tort Liability Act, but that probably still apply to the application of that Act to streets as well as sidewalks.

For example, in *City of Knoxville v. Baker*, 150 S.W.2d 224 (Tenn. 1941), the question was whether the city was liable for injury to a pedestrian who voluntarily stepped off a sidewalk and tripped over a steel water cut-off rod projecting 18 inches above ground, but located 18-21 inches off the sidewalk and entirely upon private property. The Tennessee Supreme Court held the city not liable for the injury on the ground that when he was injured, the pedestrian was a voluntary trespasser on private property. But in doing so the Court rejected the city's argument that it was not liable because "its duty of keeping the street and sidewalk clear of obstructions extended only to the limits of the streets 'as made and used'; that it was under no duty to go upon private premises and remove the water cutoff or erect a barrier along the side of the walk to prevent persons from straying off the sidewalk and into a place of danger." The rule, declared the Court, is

that if an obstruction or excavation be permitted which renders the alley, street, or highway unsafe or dangerous to persons or vehicles—whether it lie immediately in or on the alley, street, or highway, *or so near it as to produce the danger to the passer at any time when he shall properly desire to use such highway,*—it is such a nuisance as renders the corporation liable.... [Emphasis is mine.]....A party bound to keep a highway in repair and open for the passage of the public in a city by night or by day, certainly cannot be held to perform that duty by simply keeping the area of the highway free, while along its edge there is a well or excavation undisclosed, into which the passer, *by an inadvertent step or an accidental stumble,* might fall at any time. [Citing *Niblett v. Nashville*, 59 Tenn. 684, 12 Heisk. 684, 686-689, 27 Am. Rep. 755.] [At 226-227.] [Emphasis the courts.]

The Court pointed to 25 Am.Jur., p.184, Section 531, for support:

As a general rule, the duty of a municipal or quasi-municipal corporation or of a private individual to guard excavations or other dangerous places or hazards and the resulting liability for failure to do so exists only when such places are substantially adjoining the way, or in such close proximity thereto as to be dangerous, under ordinary circumstances, to travelers thereon who, using ordinary care, or, as it is sometimes stated, where they are so located that a person walking on the highway might, by making a false step or movement, or be affected with a sudden giddiness, or by other accident, come into contact therewith. No definite rule can be laid down as to how far a dangerous place must be from the highway in order to cease to be in close proximity to it, but the question is a practical one, to be determined with regard to the circumstances of the particular case. In the determination of the question whether a defect or hazard is in such close proximity to the highway as to render traveling upon it unsafe, that proximity must be considered with reference to the highway 'as traveled and used for the public travel,' rather than as located, and the proper test for determining the necessity for a barrier or liability for injury, is whether the way would be dangerous to a traveler so using it rather than the distance from it of the dangerous object or place. The mere fact that the space adjoining the highway is unsafe for travel is not enough to impose such liability, and none exists, either on the part of the municipality or of the owner of the premises, if, in order to reach the danger, one must become an intruder or voluntary trespasser on the premises of another. The fact that the injury occurs on the adjoining premises does not necessarily preclude a recovery, however where the traveler is not a voluntary trespasser. Furthermore, if the traveler is forced to leave the highway in order to pass around an obstruction placed by the landowner, the latter is liable for injury resulting from a dangerous condition on his premises even though the condition was not in such close proximity to the highway as to render him liable under ordinary circumstances [At 226].

[Also see *Niblett v. Mayor of Nashville*, 59 Tenn. 684 (Tenn. 1874); *McHargue v. Newcomer & Co.*, 100 S.W. 700 (Tenn. 1906); *Chattanooga v. Evatt*, 14 Tenn. App. 474 (1932).]

As *City of Knoxville v. Baker* suggests, where a motorist suffers damage from an obstruction or an excavation entirely outside the street right-of-way, the question of the obstruction's or excavation's distance outside the street right-of-way is a practical one; there is no hard, fast rule. In that case the plaintiff was injured on private property when he voluntarily left a sidewalk of ample width and in good condition. However, reason dictates that generally, the nearer the excavation or other condition to the edge of the right-of-way in general, and to the traveled portion of the street in particular, the more likely it is that municipal liability will be found.

Many of the cases in which a municipality has been found liable for damages arising from motorists striking obstructions outside the boundaries of the street right-of-way involve dead end streets or sharp curves of which motorists were not warned as *they proceeded along the traveled portion of the roadway,* and other unusual conditions related to the nature and condition of the traveled portion of the

roadway. [See *Chattanooga v. Evatt*, 14 Tenn. App. 474 (1932).] Generally, it appears that to recover damages for striking an obstruction entirely outside the street right-of-way, the motorist must show that a defect or unsafe condition in the traveled portion of the street itself caused him to strike the obstruction.
