



Police Power over Streets

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

Sincerely,

The University of Tennessee
Municipal Technical Advisory Service
1610 University Avenue
Knoxville, TN 37921-6741
865-974-0411 phone
865-974-0423 fax
www.mtas.tennessee.edu

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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].

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