EASEMENTS

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Mr. Doug Bishop
City Manager
405 North Main Street
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Dear Doug,

You have asked about the legality of expending municipal funds to relocate sewer, water and gas mechanical equipment at the request of a property owner who wishes to backfill his property. The owner is requesting the City to raise manholes and gas regulators so that his land may be backfilled and developed. In my opinion, the relocation of sewer manholes and gas regulators should be undertaken by the municipality at the property owners' expense and no municipal funds should be expended on this private project.

On December 23, 1992, Ms. Jacquelyn Guthrie granted the City of Springfield a "permanent utility easement" across certain property in exchange for the City quitclaiming, to her, certain abandoned roadbed. The easement is silent as to who has the rights and responsibilities to maintain the property so that the access to utilities lying within the easement is not obstructed.

The Tennessee Court of Appeals, in Yates v. Metropolitan Government of Nashville and Davidson County, 451 S.W.2d 437, described what the ownership of an easement entails as follows:

> An easement does not consist of a quantity of land, but merely the privilege to pass over certain land....
> The holder of an easement has the right to use or alter the affected premises only as reasonably necessary for the use of the easement. Such holder has no right to exclude others from the use of or alteration of the premises **so long as there is no interference with the easement privilege....the holder of an easement could not be reasonably required to perform any... alterations upon the property over which the easement exists, unless such holder has made such ... alterations necessary by the manner of his use of the easement.** [Emphasis mine] Id., at 440-441.

Since the late 1800's, with the construction of the railroads, courts have consistently held that the owner of the land over which the easement runs may do anything with that property so long as such use doesn't interfere with the "enjoyment of the easement". The early cases, where this principle is expressed, concern the right of property owners to farm the land along the right-of-ways condemned by the railroads. In Southern Railway Co. v. Vann, 142 Tenn 76, 216 S.W. 727 (1919), the Tennessee Supreme Court said:

> As owner of the fee, subject to the easement, the grantor can subject the land to any use which he sees proper,but so as not to interfere with the use of the land by the railroad company for railroad purposes.

Here, the property owner desires to make use of her property which will interfere with the City's enjoyment with its utility easement. If the property is backfilled the City will be unable to access the mechanical systems necessary to maintain the continued operation of the sewer and gas system. Further, the alteration that will be necessary as a result of backfilling of this parcel is being made necessary by the property owner and, therefore should it is the financial responsibility of the property owner to restore the utilities to the condition they were prior to her conduct.

All municipal funds must be used for a public purpose to be constitutional under Article II, Section 29 of the Tennessee Constitution, which states:

> The General Assembly shall have power to authorize the several counties and incorporated towns in this State, to impose taxes for County and Corporation purposes respectively, in such manner as shall be prescribed by law...

Municipalities may spend public funds only on projects that promote a public purpose. McConnell v. City of Lebanon, 203 Tenn. 498, 314 S.W.2d 12 (1958); Smith v. City of Pigeon Forge, 600 S.W.2d 231 (Tenn. 1980).

While there is no hard and fast rule to determine what is and what is not a legitimate use of public funds, it is clear that there must be only incidental private benefits; the public at large must be the primary beneficiaries. The Pigeon Forge case involved the legality of an ordinance levying a one percent privilege tax on the gross receipts of all business conducted in the city. Seventy-five percent of the revenue would be spent to directly or indirectly promote tourism and the business community. The Tennessee Supreme Court said the ordinance left:

> ...the public at large with only the remote hope that it may derive some incidental benefit from the promotion of private business enterprises wherein neither it nor its representatives have any participation in management or profits. Pigeon Forge, 600 S.W.2d at 233.

In addition to the case law interpreting Article II, Section 29 of the Tennessee Constitution, there is an attorney general opinion that answers almost the same question you have asked. The Attorney General was asked whether the city superintendent that deals with buildings, maintenance, supervision of roads, water department, city streets, etc., could work on private property, build roads or bridges on private property, or use city equipment absent legislative authorization. The Attorney General had the following response:

> ...public equipment and other property paid for, and public officers and employees compensated, by public funds appropriated for public purposes from revenues derived by ...cities from taxes authorized by law cannot properly be donated or applied by a ...city officer to a private use. The end result would be a misapplication by such an officer of public funds, which we believe **would be official misconduct for which he might be removed from office if it were knowing or willful on his part.** OAG 84-166 (May 17, 1984).

In the opinion of the Attorney General, both paying for and performing the work on private property, such as the work you have been requested to perform, is not only an illegal expenditure but may amount to official misconduct on the part of the official(s) authorizing it. Unlike the factual situation described in the Attorney General Opinion, however, this property owner should not be allowed to alter the manholes and gas regulators or the systems could be damaged. If the property owner wishes to undertake this project at her expense, I believe the City will have to perform this work or, at least, directly supervise the work, after the property owner has compensated the City for time, labor and equipment.

I am including a copy of the attorney general opinion for your information. Thanks for asking MTAS to help.

With kind regards,

Leslie Shechter
Legal Consultant