



THE OPENING AND CLOSING OF MUNICIPAL STREETS IN TENNESSEE AND SELECTED LEGAL POTHOLES AND PATCHES IN BETWEEN

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MTAS

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I. INTRODUCTION

Few municipal functions touch as many people, involve as much expense, and generate as much public concern and controversy as municipal streets. But the law governing how municipal streets are created and closed, and a multitude of other issues that arise over the use of those streets, is not generally well known by many public officials and citizens. For that reason, this publication analyzes the law governing a number of questions that apply to municipal streets in Tennessee, including

- What are municipal streets?
- What are the ways municipal streets are created?
- Is a municipal street that has been platted but never constructed still a street?
- What does a municipality “own” when a street is created?
- What is the difference between a municipality’s governmental powers and its proprietary powers over its streets, and why does it matter?
- Are municipalities liable for their dangerous and defective streets?
- What right do utilities have to put their pipes, wire, and other utility infrastructure in the streets, and what happens to such rights when streets are closed?
- Are utilities required to obtain a franchise from the municipality as a condition of their use of municipal streets?
- Under what conditions can utilities be made to remove their facilities from municipal streets and who pays for the utility relocation?
- How is the width of municipal streets determined?
- How do municipalities close streets?
- How much discretion do municipalities have in closing streets?
- Must municipalities give notice to other governmental agencies or property owners that they intend to close a street?
- Who owns municipal streets after they are closed?
- What right do abutting and other property owners have to use closed streets?

This publication is designed for use by both attorneys and “laymen.” To that end, it has been kept as simple as possible without neglecting important legal principles on the subject. Cases supporting legal principles in the publication are, with a few obvious exceptions, cited in full each time they appear.

II. STATUTORY DEFINITIONS OF STREETS

The words “streets,” “roads,” and “highways” are often used interchangeably in conversation, and even in some statutes and various legal treatises on streets. In addition, those individual terms may



vary from statute to statute and overlap in some. Probably the most accurate description of the word “street” is found in *Tennessee Code Annotated* (T.C.A.) § 54-4-201, which establishes the state street aid program:

(3) “street” includes streets, highways, avenues, boulevards, publicly owned rights-of-way, bridges, tunnels, public parking areas or other public ways dedicated to public use and maintained for general public travel lying within a municipality’s corporate boundaries...

For the purpose of municipal planning regulations under T.C.A. Title 13, Chapter 3, a “Street” or “streets” means and includes streets, avenues, boulevards, roads, lanes, alleys, and other ways [T.C.A. § 13-4-301(3)].

T.C.A. § 55-8-101 contains the “Rules of the Road” for the operation of motor vehicles in Tennessee, and defines both “street” and “highway” as “the entire width between boundary lines of every way when any part thereof is open to the use of the public for purposes of vehicular traffic.” [subsections (22) and (61)] In addition, it defines “sidewalk” as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines, intended for use of pedestrians.”

The Tennessee Governmental Tort Liability Act, provides that

(a) Immunity from suit of a governmental entity is removed for any injury caused by a defective, unsafe, or dangerous condition of any street, alley, sidewalk or highway, owned and controlled by such governmental entity. “Street” or “highway” includes traffic control devices [T.C.A. § 29-20-203].

T.C.A. Title 1, Chapter 3, contains rules of statutory construction for words for the application of the Code. The word “street” is not defined therein, but T.C.A. §1-3-105, provides the following: “As used in this code, unless the context otherwise requires”

(11) “Highway” includes public bridges and may be held equivalent to the words “county way,” “county road” or “state road.”

(27) “Road” includes public bridges and may be held equivalent to the words “county way,” “county road” or “state road.”

III. CREATION OF MUNICIPAL STREETS BROAD MUNICIPAL DISCRETION

Generally, property owners have little legal voice in the location, establishment, construction, and abandonment of city streets, and the courts will not interfere with municipal decisions in those areas absent fraud or a clear abuse of discretion [*Georgia v. Chattanooga*, 4 Tenn. App. 674 (1927); *Brimer v. Municipality of Jefferson City*, 216 S.W.2d 1 (1948); *Swafford v. City of Chattanooga*, 743 S.W.2d 174 (Tenn. Ct. App. 1987); *W. G. Wilkins v. Chicago, St. Louis & New Orleans Railroad Co.*, 110 Tenn. 423 (1903); *Sweetwater Valley Memorial Park v. City of Sweetwater*, 372 S.W.2d 168 (1963); *Cash & Carry Lumber Company, Inc. v. Olgiati*, 385 S.W.2d 115 (1964)].

It has also been held that municipalities have the discretion as to what forms of public travel are permissible within a right-of-way. In *Blackburn v. Dillon*, 225 S.W.2d 46 (Tenn. 1946), the width of the right-of-way easement was clearly 40 feet, but the city had the discretion within that easement to determine what forms of public travel were allowed (in this case a sidewalk).



METHODS OF CREATION

It is said in *Henry County v. Summers*, 547 S.W.2d 247, 250 (Tenn. App. 1976) that

Unless a passageway has been created a public way in some manner known to the law, such as by act of the public authorities, or the express dedication by the owner, or by an implied dedication by means of the use by the public and acceptance by them with the intention of the owner that the use become public, or by adverse user for a period of 20 years continuously creating a prescriptive right, it is not a public way [At 250].

There are apparently six “manners of creation” known to the law.

1. **County roads automatically become city streets upon the incorporation of the city or by annexation of territory into the city.** [See 64 C.J.S., *Municipal Corporations*, Section 1661; *Jordan v. City of Cleveland*, 255 S.W. 377 (1922).]
2. **Streets designated by the state as state highways, or constructed by the state or any political subdivision of the state, are city streets.**

T.C.A. Title 54, Chapter 5, gives the Tennessee Department of Transportation the authority to construct state highways, including interstate highways, through municipalities, or to designate existing city streets as part of the state highway system. It has the sole discretion over the selection of streets that become state highways. [Especially see T.C.A. §§ 54-5-201 et seq.]

In either case, state highways running through municipalities are simply municipal streets over

which state traffic is routed, and the municipality retains its police powers over such streets. [See *Collier v. Baker*, 27 S.W.2d 1085 (1930); *Brimer v. Municipality of Jefferson City*, 216 S.W.2d 1 (1948); *Paris v. Paris-Henry County Utility District*, 340 S.W.2d 885 (1960)]. While a county or other political subdivision of the state can own easements for various purposes within a municipality, any street constructed by a county or other political subdivision of the state inside a municipality, or any county or other political subdivision property inside a municipality generally opened to public travel, is a municipal street [*Callahan v. Middleton*, 292 S.W.2d 501 (Tenn. App. 1954), *Rutherford County v. Murfreesboro*, 309 S.W.2d 778 (Tenn. 1957); *Thompson v. Memphis*, 66 S.W. 990 (Tenn. 1934); *Brimer v. Municipality of Jefferson City*, 216 S.W.2d 1 (Tenn. 1948)].

T.C.A. §§ 54-5-207–54-5-210 provide for the acquisition of land by a municipality (at the expense of the state) for the purpose of the development and construction of interstate connections. But T.C.A. § 55-5-210 provides that even where the municipality fails in that job, “nothing in §§ 54-5-207–210 shall be construed as otherwise changing the character or legal status of streets in any way and the distinctions heretofore made in this code between streets and highways are continued in full force and effect.”

3. **Formal dedication and acceptance.** This method contemplates a formal offer, and a public acceptance of, the dedication. [See *Smith v. Black*, 547 S.W.2d 947 (Tenn. App. 1977)]. It is also said in 10A McQuillin, *Municipal Corporations*, Section 33.30, that one of the ways that shows intent to dedicate land to public use is “recitals in a deed in which the rights of the public are recognized.” For that



reason, formal dedication and acceptance of streets includes their formal purchase.

A statutory method for the formal dedication and acceptance of subdivision streets is found in T.C.A. §§13-4-301 et seq. It is provided in T.C.A. § 13-4-104 that whenever the planning commission has adopted the plan of the municipality (or any part thereof)

- “[N]o street...or other public way...” shall be constructed or authorized until its location and extent have been approved by the planning commission; unless
- The governing body of the municipality overrides the disapproval of the planning commission by a vote of a majority of its entire membership.

Likewise, T.C.A. § 13-4-307 provides that once the subdivision platting jurisdiction of the municipal planning commission attaches, a municipality “shall not...accept, lay out, open, improve, grade, pave, or light any street, or lay or authorize water mains or sewers or connections to be laid in any street within the municipality, unless”

- The street has been accepted or opened as or has otherwise received the legal status of a public street prior to the attachment of the planning commission’s subdivisions jurisdiction; or,
- The street corresponds in its location and lines with a street shown on a subdivision plat approved by the planning commission or with a street plat made and adopted by the commission; or
- The municipal governing body locates and constructs a street or accepts a street, provided

that it first submits the ordinance or other measure for the location and construction, or acceptance of the street, to the planning commission for its approval, and if it is disapproved by the planning commission, receives the vote of a majority of the entire membership of the municipal governing body.

4. **Implied dedication and acceptance.** This conduct of the landowner and of the municipality is weighed to determine whether a street has been dedicated and accepted under this method. It is said in *Roger v. Sain*, 679 S.W.2d 450 (Tenn. App. 1984), that

It has long been established that private land can be implicitly dedicated to use as a public road. [Citation omitted.] When an implied dedication is claimed, the focus of the inquiry is whether the landowner intended to dedicate the land to a public use. [Citations omitted.] The proof on the issue of intent to dedicate may be *inferred from surrounding facts and circumstances, including the overt acts of the owner* [Citation omitted] [At 452-53] [Emphasis is mine].

Citing an earlier case that quoted from Elliot on Roads and Streets, Section 92, the Court continued

Among the factors which indicate an intent to dedicate are the landowner opens a road to public travel [Citations omitted.]; acquiescence in the use of the road as a public road, [Citations omitted.]; and the fact that the public has used the road for an extended period of time. [Citations omitted.] While dedication is not dependent on duration of the use, extended use is a circumstance tending to show an intent to dedicate. [Citations omitted.] *Finally,*



an intent to dedicate is inferable when the roadway is repaired and maintained by the public [At 453].

It was also said in *Reeves v. Perkins*, 590 S.W.2d 233, (Tenn. App. 1973) that, “Dedication may arise from the failure of the owner to object to user by the public. A highway may be established in this manner” [At 234-35]. In that case a certain landowner erected a fence at both ends of a road. The county road commissioner argued that the road was a public road. Holding in favor of the road commissioner, the court pointed to proof from witnesses in the area and county highway department commissioners and employees that

...establishes the road has been in existence and used by anyone who wished to use it since the 1920s. The use included foot travel, horseback, wagon, automobile and pick-up trucks. No owner of the property ever fenced off either of the two ends of the road nor did any previous owner object to or restrict the use of the road. A former county highway commission and some county highway department employees testified that the county had graded and ditched the road several times since 1939. One witness traveled the road in a pick-up truck about two or three years prior to the suit.

The road was used by plaintiff Huber Patty while a Star Route mail carrier in 1926 because it was the better road from Sardis to Lexington [At 234-35].

The abutting landowner never objected to the use of the road during that period.

Apparently there may also be a formal dedication and an implied acceptance of a street easement.

The approval and recording of a subdivision plat does not constitute acceptance of the subdivision streets, but probably does constitute formal dedication of the streets. *If the city fails to formally accept the dedication, its conduct in the use of the street may constitute implied acceptance.* [See *Smith v. Black*, 547 S.W.2d 947 (Tenn. App. 1977); *Hackett v. Smith County*, 807 S.W.2d 695 (Tenn. App. 1990); *West Meade Homeowners Association v. WPMC*, 788 S.W.2d 365 (Tenn. App. 1989).]

Some of the acts that indicate implied acceptance of the street on the part of the city include tolerance of common use by the public, construction and maintenance by city and other utilities of installations in the street, listing on an official street map, use of the street by school buses, law enforcement agencies, and absence of the street from the tax rolls and special assessments. [See *State ex. Rel. Matthews v. Metro. Gov't of Nashville*, 679 S.W.2d 946 (Tenn. 1984); *Hackett v. Smith County*, 807 S.W.2d 695 (Tenn. App. 1990); *West Meade Homeowners Association v. WPMC, Inc.*, 788 S.W.2d 365 (Tenn. App. 1989).]

In *State ex rel. Matthews v. Metro. Government of Nashville*, 679 S.W.2d 946 (Tenn. 1984), a bank obstructed Printers' Alley with garbage cans and dumpsters, and the owner of an abutting building asked for a writ of mandamus requiring the police to remove those obstructions, arguing that it was a public alley. The Tennessee Supreme Court upheld the issuance of the writ of mandamus by the trial court, reasoning that the alley had been accepted by the city. In this case little beyond public use and the city's utility location supported the Court's determination that the alley was a public alley.

Not surprisingly, there is little direct proof of the extent of public use of the alley in



the years immediately following the offer of dedication in 1881. The alley has been used by pedestrians to go between Fourth Avenue and Printers' Alley for many years. The alley appears in atlases dated 1889, 1908, and 1928. Although not specifically labeled as a public alley on those atlases, it is shown in a manner, which is consistent with its status as a public alley. The reasonable inference to be drawn from the facts and circumstances above is that public use of the alley was significant in the early years following dedication. That public use constitutes a public acceptance of the offer of dedication. Our conclusion derives support from the proof relating to the use of the alley by the public and the treatment of the alley by the Metropolitan Government in subsequent years.

Pedestrians have continued to use the alley as a walkway. Although many of the pedestrians are from the J.C. Bradford Building, some are from the Ambrose Building and others are not associated with either building. Vehicles have made use of the alley to make deliveries and to park.

There is no proof in the record that the Metropolitan Government has done any maintenance work on the alley. However, the proof clearly establishes that in other respects the city has treated the alley as a public alley. In 1965, the city passed an ordinance adopting an "Official Street and Alley Acceptance and Maintenance Map" which shows the alley as Public Alley No. 17. In addition, no taxes have been assessed on the property. The Department of Public Works gave the Nashville Electric Service permission

to locate a utility vault underneath the alley [At 949].

No specific time limit triggers an implied dedication. In *Nicely v. Nicely*, 232 S.W.2d 421 (Ct. App. 1949), an implied dedication arose from five years use, along with other circumstances, including road grading with public funds. In *Payton v. Richardson*, 356 S.W.2d 289 (Tenn. App. 1962), the Court declared that, "*The manner of its use is more material than the length of time the use has continued*" [At 291].

A landowner's grant to a small number or certain class of travelers of a right to use his land as a passageway generally will not constitute a grant of an implied dedication. It is said in 11A McQuillin, *Municipal Corporations*, Section 33.32, that

...If the user by the public does not exclude the owner's private rights, such user will ordinarily be regarded as merely permissive and a mere permissive use of property by third persons in connection with a private use of the property for the same purposes does not usually show an intent to dedicate. Thus, an intent to dedicate is not shown by the act of the owner of land in establishing a private way for his or her own convenience or for the convenience of his or her customers, even though the way is also used by the public generally without objection by the owner. Similarly, an intention to dedicate will not be inferred from the public's use of railroad company's land if that use is consistent with the public use for which the railroad company holds the property.

5. **Prescription.** A street easement arises by prescription when a person, including



a government, uses another person's land as a street openly and notoriously under a claim of right for an uninterrupted period of 20 years. It is said in *Morgan County v. Goans*, 198 S.W. 69 (Tenn. 1917), that, "Twenty years' adverse possessor will establish a right-of-way either in the public or in private persons" [At 69]. The claim of right and acceptance of the street by the government can be shown by public maintenance of the street. [Also see *Callahan v. Town of Middleton*, 292 S.W.2d 501 (Tenn. Ct. App. 1954); *Morgan County v. Goans*, 138 Tenn. 381, 198 S.W. 69 (1917); *City of Knoxville v. Sprankle*, 9 Tenn. App. 218 (1928); *Lewisburg v. Emerson*, 5 Tenn. App. 127 (1927).]

In *Morgan County v. Goans*, 198 S.W. 69 (1917), a road ran from the main Wartburg Road to Ms. Goan's place through Duncan's land. There was evidence to show that the road had been in existence since 1884, and had been traveled by the public since that time as a matter of right. The county had never maintained the road, but its use by the public for more than 20 years was sufficient to create a prescriptive public right in the road.

6. The laws of eminent domain, and other statutes. Land can be taken for streets under various laws of Tennessee that authorize the taking of land by public entities by eminent domain. [General state eminent domain statutes: T.C.A. §§ 29-17-201, 29-17-801; public works projects: T.C.A. § 9-21-107; streets: T.C.A. §§ 7-31-107–110; controlled access highways: T.C.A. § 54-16-104. In addition, most municipal private act, general law, and home rule charters include a broad power of condemnation. With respect to the general law charters, see T.C.A. § 6-19-101

(manager-commission); T.C.A. § 6-2-201 (mayor-aldermanic); and T.C.A. § 6-33-101 (modified city manager-council)].

It was held in an unreported case that where a municipality chooses to exercise its power of eminent domain under its charter, it must follow the formal procedures prescribed in the charter for the exercise of that power [*City of Johnson City v. Campbell*, 2002 WL 112311 (Tenn. Ct. App.)].

T.C.A. § 7-31-101 authorizes municipalities to construct streets in annexed areas.

The Tennessee Department of Transportation, and counties and cities, separately or by state-local agreements, are authorized to construct **industrial highways**. Counties and cities can apparently construct such highways inside, and in some cases outside, their boundaries. It is said in T.C.A. § 55-5-406(b), that

Notwithstanding § 54-5-406 [which limits state participation in the construction of industrial highways under the conditions set out therein], cities and counties within this state may and are hereby authorized to use any funds available to them for the construction and maintenance of industrial highways, roads, and streets within their boundaries or within, or adjacent to, or in close proximity to any industrial sites or parks owned or partially owned by them, or lands owned or held by them for industrial use, when, in the opinion of a majority of the members of the governing body of any city or county within this state, the same will facilitate industrial development or expansion.



However, under the doctrine that roads built in a municipality by the state or its political subdivisions are city streets, presumably industrial highways built by the state or a county within a municipality are also city streets.

CREATION OF ALLEYS AND SIDEWALKS GOVERNED BY SAME LAWS GOVERNING CREATION OF STREETS

An alley is a narrow street, and the establishment of public alleys and thoroughfares is governed by the same rules that apply to streets. [See *Lee v. Seiz*, 13 Tenn. App. 260 (1930); *Western Union Telegraph Co. v. Dickson*, 173 S.W.2d 714 (Tenn. App. 1941); *State ex rel. Matthews v. Metropolitan Government of Nashville and Davidson County*, 679 S.W.2d 946 (Tenn. 1984).]

IV. SELECTED LEGAL POTHoles AND PATCHES INVOLVING STREETS

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. § 54-16-204].

MUNICIPAL POLICE POWER OVER STREETS

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. [For a detailed



discussion on franchises in municipal streets, see **VI. FRANCHISES TO USE STREETS** in this publication.] 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 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 [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

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)].

MUNICIPAL TORT LIABILITY FOR UNSAFE AND DEFECTIVE STREETS

Tennessee municipalities are liable under the Tennessee Governmental Tort Liability Act for unsafe and defective streets and highways, "owned and controlled" by them, and when the particular municipality at issue has constructive or actual notice of the condition alleged to constitute an unsafe and defective street or highway [T.C.A. § 29-20-203]. [Also see *Swofford 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).]

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 *Tennessee Code*

Annotated, 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.

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 to 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 is 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.

V. RIGHT OF PUBLIC UTILITIES TO USE STREETS

GENERALLY

It has been held that both public and private utilities can use municipal streets to install and maintain their infrastructure without the permission of, or payment to, the *fee owner* of the street. [See *Frazier v. East Tennessee Telephone Co.*, 90 S.W.620 (1900); *Johnson v. Chattanooga*, 191 S.W.2d 175 (1945); *Pack v. Southern Bell Telephone & Telegraph Company*, 319 S.W.2d 90 (1958).] The reason is exemplified in *Pack v. Southern Bell Telephone & Telegraph*, above, in which the Court, citing a multitude of cases from both Tennessee and other states, said

Since 1905 under the holding in *Frazier v. East Tennessee Tel. Co.*, 115 Tenn. 416, 90 S.W. 620, 3 L.R.A., N.S. 323, Tennessee has been committed to the view that the use of public rights-of-way by utilities for locating their facilities is a proper highway use subject to their principal purpose as travel and transportation of persons and property...[At 792].

UTILITY RELOCATION

Generally, while public utilities have the right to use municipal streets, that right is always subordinate to the principal purpose of the streets, which is obviously travel. For that reason, where street improvements necessitate it, utilities can be made to remove their facilities from the public streets. Tennessee follows the common law rule that in the absence of a statute providing otherwise, public utilities must remove their facilities at their own expense [*Pack v. Southern Bell Tel. & Tel. Co.*, 387 S.W.2d 789 (1965); *State v. Southern Bell Tel. & Tel. Co.*, 319 S.W.2d 90 (1958) (cert. denied by U.S. Supreme Court, 359 U.S. 1011 (1959))];



Bristol Tenn. Housing Authority v. Bristol Gas Corp., 407 S.W.2d 681 (1966); *Metropolitan Development and Housing Agency v. South Central Bell Telephone Co.*, 562 S.W.2d 438 (Tenn. App. 1978)].

T.C.A. §§ 54-5-804 et seq. provides for the state's payment of the costs of utility relocation with respect to "public highways." The definition of "public highway" within the meaning of that statute is a state highway forming part of the state highway or interstate system, and includes municipal streets that are part of those systems [T.C.A. § 54-5-802(5)]. Eligibility for utility relocation reimbursement under T.C.A. § 54-5-804 hinges on the utility's compliance with certain provisions of that statute and of T.C.A. § 54-5-854(b), the latter of which generally relates to the timely removal of the utility's infrastructure. In addition, reimbursement is conditioned upon the costs of that statute being funded and appropriated by the General Assembly [Public Acts 2003, Chapter 86, §§ 3 and 4].

T.C.A. § 54-22-101, also creates a presumptive right-of-way width under certain conditions "[w]herever the state proposes to improve a section of an existing two (2) lane undivided *public road*. [Emphasis is mine.] In addition, that statute provides that the state is responsible for the relocation of both above ground and underground utilities located entirely within that presumptive right of way. However, T.C.A. § 1-3-105 defines the terms used in the T.C.A. The word "Road" "includes public bridges and may be held equivalent to the words 'county way,' 'county road,' or 'state road' [Subsection (27)]. For that reason, that statute probably does not apply to municipal streets. Nothing in the context of T.C.A. § 54-22-101 indicates that "public road" includes a municipal street. Indeed, an unsuccessful attempt was made

several years ago to amend that statute to add municipal streets to its coverage.

VI. FRANCHISES TO USE STREETS FRANCHISE NECESSARY?

A franchise has been defined as the "grant of a right or privilege by the sovereign power usually with respect to streets or highways primarily to enable the grantee to perform a public service or benefit..." and that, "It is everywhere agreed that the right to lay pipes in the public highways is itself a franchise" [*Johnson City v. Milligan Utility District*, 276 S.W.2d 748 (Ct. App. 1954); *Nashville Water Co. v. Dunlap*, 138 S.W.2d 424 (1940)]. It has also been expressly and impliedly held that a public utility must obtain a franchise to use a city's rights of way [*Knoxville v. Park City*, 130 Tenn. 626 (1914); *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931); *Franklin Light & Power Company v. Southern Cities Power Company*, 47 S.W.2d 86 (Tenn. 1932); *Holston River Electric Co. v. Hydro Electric Corp.*, 64 S.W.2d 509 (Tenn. 1933); *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (Tenn. 1938); *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941); *Patterson v. City of Chattanooga*, 241 S.W.2d 291 (Tenn. 1951); *Briley v. Cumberland Water Company*, 389 S.W.2d 278 (Tenn. 1965)].

STATE OR MUNICIPAL FRANCHISE?

The power to issue franchises in city streets resides in the state. The state can either grant franchises directly to public utilities, or it can delegate to its municipalities its power to grant franchises to public utilities [*Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (1931); *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (1938); *City of Memphis v. Postal Tel. Cable Co.*, 145 F. 602 (6th Cir. 1906)].



It is often difficult to determine whether a public utility's franchise has been granted by the state or by the municipality. It has been unsuccessfully argued by a privately owned utility that its state charter operated as a state-granted franchise [*City of Chattanooga v. Tennessee Electric Power Company*, 112 S.W.2d 385 (1938)].

Telephone and telegraph companies have extremely broad statutory rights to use public rights-of-way to install their lines and infrastructure under T.C.A. § 65-21-101. In addition, T.C.A. § 65-21-102 provides that

Any person or corporation organized for the purpose of transmitting intelligence by magnetic telegraph or telephone, or other system of transmitting intelligence the equivalent thereof, which may be invented or discovered, may construct, operate and maintain telegraph, telephone, or other lines necessary for the speedy transmission of intelligence, along and over public highways and streets of cities and towns...

Those statutes appear to constitute a state-granted franchise for such companies to use municipal streets for the installation of their communications equipment. But *City of Memphis v. Postal Telegraph Cable Co.*, 145 F. 602 (6th Cir. 1906), appears to hold otherwise. There the Court rejected Postal's argument that various acts under which the city was vested with the "entire control" of its streets was superseded by Public Acts 1885, Chapter 66, Section 1 of which is presently codified as T.C.A. §§ 65-21-201-202. Although that act has been amended several times, it is substantially the same with respect to the broad powers it grants to telegraph and telephone companies to use municipal rights-of-way.

But in *Lewis v. Nashville Gas & Heating Co.*, 40 S.W. 409 (1941), the Court speaks at length on "conditional" franchises granted by the state. The question there was whether the city could charge the gas company a 5 percent franchise fee. Yes, answered the Court, under the city's *proprietary* powers. That was true because even though the gas company had a state-granted franchise, that franchise was conditioned upon the consent of the city, and the city's consent was subject to contractual bargaining between the city and the gas company.

The city was authorized by statute to prescribe the terms and conditions upon which the gas company might enter and establish its business. That, it appears, was done through negotiations with the gas company, and the obligation, voluntarily assumed by it, was not the result of the exercise of a governmental power, but of contract which both parties could make [Citation omitted], and the annual payments prescribed by Section 14 of the ordinance were compensation to be paid the city for the exercise of the *franchise, conditionally granted by the state, subject to assent of the city as the proprietor of its streets...* [At 412-413] [Citations omitted].

Franklin Light & Power Company v. Southern Cities Power Company, 47 S.W.2d 86 (1932), suggests that where a municipality has in its charter the authority to grant franchises in its streets to various public utilities, a utility desiring to provide its services inside the municipality must obtain the municipality's consent unless the utility can point to express statutory authority exempting it from obtaining such consent. There the City of Franklin had in its charter the power



...to grant the right of way over streets, alleys, avenues, squares, and other public places of said town, for the purposes of street railroads or other railroads, telephones, telegraphs, gas pipes, electric lights, and such other purposes as the board may deem property; provided that they shall not grant the exclusive right...to any person, company, or corporation for more than twenty years' and that no general law will be construed by implication to repeal this special enactment [At 87].

therein. However, the City of Chattanooga's charter provided that the city had the authority to

open, alter, widen, extend, establish grade or otherwise improve, clean, and keep in repair streets, alleys and sidewalks and to have the same done "and" to pass all ordinances not contrary to the constitution and laws of the state that may be necessary to carry out the full intent and meaning of this Act and to accomplish the purpose of their incorporation [At 388].

The Utilities Act of 1919 (presently codified at T.C.A. §§ 65-4-101 et seq.) gave the Public Service Commission [now the Tennessee Regulatory Authority] "general supervision and regulation of, jurisdiction and control over all public utilities, and also over their property, property rights, facilities and franchises, so far as may be necessary for the purpose of carrying out the provisions of this Act." But the Court rejected the utility's argument that the Utilities Act of 1919 extinguished the city's right to require a utility to obtain a franchise to use its streets. It reasoned that the statute giving the Public Service Commission power over utilities and utility franchises "...nowhere included or conferred the power to grant to a public utility the privilege of entering upon the territory of a municipality and there conducting its business without the consent of the municipality" [At 91].¹

Those charter provisions, held the Court, compelled the electric company to obtain from the City of Chattanooga a franchise before it could use the city's streets for its utility services. Indeed, it was said in that case that the city's power to grant franchises in its streets need not even be express:

While the charter did not in express terms delegate to the city general control over its streets and alleys, the powers in reference thereto were so numerous and sweeping as to be the equivalent of general control. This seems to be conceded by counsel for the city, for they say in their brief: "The charter of the City of Chattanooga, enacted in 1869, gave the city general control and supervision of its streets.

Furthermore, in *City of Chattanooga v. Tennessee Electric Power Co.*, 112 S.W.2d 385 (1938), the state granted a charter to an electric company to provide electric service in Hamilton County or any village

In the case of *American Car and Foundry Co. v. Johnson County*, 147 Ky. 69, 71, 143 S.W. 773, 774, quoted with approval by the Supreme Court of the United States in *Owensboro v. Cumberland Teleph. & Teleg. Co.*, 230 U.S. 58, 67, 33 S. Ct. 988, 991,

¹The definition of a "public utility" for the purposes of *Tennessee Code Annotated*, title 65, chapter 4, expressly excludes "any county, municipal corporation or other subdivision of the state of Tennessee." It also excludes a number of other governmentally owned utilities, [T.C.A. § 65-5-101 (a)(2)].



57 L.Ed. 1389, 1394, it appears that the county fiscal courts were given, by statute, “general charge and supervision of the public roads,” etc. Ky. St. Section 4306. Concerning the power resulting from the grant by the state to control streets or public highways, the court said

“The right to grant a franchise presupposes and is based upon the right of the authority granting the franchise to control the property over which is affected by it. For example, the fiscal court could grant a franchise authorizing the erection of poles along the highways of the county, as the fiscal court has control of the highways. And so municipal corporations may grant franchises to use the streets and public ways of a city.”

In *Humes v. Mayor of Knoxville*, 20 Tenn. 403, 1 Humph. 403, 34 Am.Dec. 657, it was held that a municipal corporation is the proprietor of the public streets, which are held in trust for the convenience of the citizens, and as such proprietor may grade and otherwise improve them. Under its charter, the City of Chattanooga had the general control and supervision of its streets, in trust, for the convenience of its citizens [At 388-89].

COUNTIES AND UTILITY DISTRICTS PROVIDING UTILITY SERVICE IN MUNICIPALITIES

T.C.A. § 5-1-118 gives counties authority to establish and operate utility systems, including sewer systems, through the device of permitting them by resolution to exercise certain powers given to municipalities under the general law mayor-aldermanic charter, including those contained in T.C.A. § 6-2-201(3) B(8), (10)B(13), (18), (19), (26), and (29). But there is no suggestion in that

statute that counties can establish sewer systems inside municipalities.

Counties are also authorized under T.C.A. §§ 5-16-101 et seq. to establish and operate “urban type public facilities,” including sewer systems. That authority extends to “any area or areas within their border” [T.C.A. § 5-16-101(a)]. Notwithstanding that language, it does not appear that the county has authority to extend sewer service within the corporate limits of a municipality without its permission. Upon the annexation or incorporation of territory, the annexing or incorporating municipality has the exclusive authority to provide the urban type public facilities in question and to take over such facilities. In addition, the county cannot extend any urban services type facilities within five miles of an existing municipality

...unless such incorporated city or town has failed to take appropriate action to provide a specified public service facility or facilities in a specified area or areas for a period of ninety (90) days after having been petitioned to do so by resolution of the county legislative body or other governing body... (T.C.A. § 5-16-111).

That statute appears to permit the county to provide the urban type public facility within five miles of the municipality and to its very doorstep upon the appropriate petition, but probably cannot be read broadly enough to permit the provision of such a facility within the corporate limits of the municipality without its consent.

T.C.A. § 7-51-401 provides that
“(a) Except as provided in § 7-82-302 [the Utility District Act] each county, utility district, municipality, or other public agency



conducting any utility service specifically including waterworks, water plants and water distribution systems, and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality, or public agency to customers desiring such service.”

but that

(c) No such county, utility district, municipality, or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service, so long as other public agency continues to render such service.

That statute authorizes the named political subdivisions, including counties, to extend their utility systems outside their boundaries. It can be argued that it implies that those political subdivisions have the authority to make such extensions into other political subdivisions, provided that the streets proposed for use contain no other utility lines belonging to another utility and already providing the utility service in question. But *Knoxville v. Park City*, 130 Tenn. 626 (1914), and *Franklin Light & Power Company v. Southern Cities Power Company*, 47 S.W.2d 86 (Tenn. 1932), require that a utility’s authority to extend its service *into* a municipality without that municipality’s consent be express authority. It is not enough that the statute authorizes the utility to extend its system *outside* its boundaries.

T.C.A. §§ 7-34-101 et seq. authorizes municipalities, including both counties and cities, to construct various “public works,” including sewer systems [T.C.A. § 7-34-102], but also declares that, “[n]o municipality shall construct public works

wholly or partly within the corporate limits of another municipality except with the consent of the governing body of such other municipality” [T.C.A. § 7-34-105].

Municipalities, including counties and cities, are also authorized to establish and operate electric systems under T.C.A. § 7-52-101 et seq. and to transfer to the utility board any sewage works that it “now or hereafter” owns and operates. But that statute provides that the municipality has the power to “[a]cquire, improve, operate and maintain within and/or without the corporate or county limits of such municipality, and within the corporate limits of any other municipality, *with the consent of such other municipality*, an electric plant...”

T.C.A. § 5-1-113 appears to give counties broad general authority to enter into “contractual relations” with municipalities lying within their boundaries, to “conduct, operate or maintain, either jointly or otherwise, desirable and necessary services or functions.” They also have the power to “contract and be contracted with” under T.C.A. § 5-1-118(1). T.C.A. §§ 5-16-101 et seq. authorize counties to establish and operate urban type public facilities, including sewer systems. Section 5-16-109(a) gives the board, with the approval of the county legislative body, broad authority to enter into contracts with municipalities and other governments “for the furnishing of services and facilities within the purview of this chapter...”

Among the utility laws that give both cities and counties the authority to establish and operate sewer systems outside their territorial limits, T.C.A. §§ 7-34-101 et seq. obliquely permit both entities to provide sewer service in the other, by consent [T.C.A. § 7-34-105]. It is not clear whether the same is true under T.C.A. §§ 7-52-101 et seq. That statute specifically applies to electric systems,



but cities and counties may also transfer to the utility board various utilities, including sewer systems [T.C.A. § 7-52-111]. One of the powers of such utility boards is the power to extend *electric* service across city and county lines, with the consent of the city or county in question. That power may not apply to a sewer system operated by the utility board.

FRANCHISE FEES; POLICE POWER FEES

Paris v. Paris-Henry County Utility District, 340 S.W.2d 885 (Tenn. 1960), supports the proposition that municipalities can charge a franchise fee for the use of their streets by public utilities, as well as certain police power fees, the former of which are imposed under a municipality's proprietary, the latter under a municipality's governmental, powers. [For a detailed outline of this case see **IV. SELECTED LEGAL POTHOLES AND PATCHES INVOLVING MUNICIPAL STREETS: MUNICIPAL POLICE POWER OVER STREETS** in this publication.] An ordinance in that case gave the utility district a franchise to use the city's streets for the installation of its gas pipes, but did not provide for a franchise fee. The Court said that, the "*fees, charges, or licenses,*" referred to in that franchise, "*were a matter of contract, or rather were forbidden by the contract, between Defendant and the City acting in its proprietary capacity*" [At 889] [Emphasis is mine]. The Court cited for support *Lewis v. Nashville Gas & Heating Co.*, 40 S.W.2d 409 (Tenn. 1931).

In *Lewis v. Nashville Gas & Heating Co.*, Section 14 of the franchise agreement provided for the payment of 5 percent of Nashville Gas & Heating's revenues to the City of Nashville. After concluding that the city had authority in its charter to control its streets and regulate the granting of franchises, and that the statutes giving the Public Service Commission the power to regulate utilities did not supersede the city's right to require the utility to obtain

a franchise to use its streets, the Court discussed at length the nature and implications of franchises.

Under the statutes referred to, the gas company's franchise was dependent upon approval and consent of the municipal government and upon such terms and conditions as it might impose. The power to assent and impose conditions thus recognized by the Legislature carried with it the correlative right of the city to make terms and impose conditions [Citations omitted].

The annual payments which the gas company agreed to make to induce the city to let it in and to use then existing and subsequently extended streets were not exacted through the exercise of governmental power. The provision of Section 14 of the ordinance requiring these payments was the result of negotiations, culminating in a contract between the city acting in its corporate and proprietary capacity and the gas company exercising its power to contract.

One of the conditions which a municipal corporation can lawfully attach to the grant of a franchise is the payment of money; and the payment need not be such as imposed upon all others similarly situated, as in the case of a tax, or the equivalent of the cost of inspection and replacement, as in the case of a license fee imposed under the police power, but may be a definite sum arbitrarily selected, and if the company does not wish to pay it need not accept the franchise...

The gas company having voluntarily obligated itself, as provided in Section 14 of Ordinance 155, the continued exaction of the payment thereunder violates no right



guaranteed by the State or the Federal Constitution [At 412-13].

[Also see *Nashville Gas & Heating Co. v. City of Nashville*, 152 S.W.2d 229 (Tenn. 1941).]

The franchise fee-police power fee distinction appears again in the unreported case of *City of Chattanooga v. BellSouth Telecommunications*, 2000 WL 122199 (Tenn. Ct. App.). There the City of Chattanooga adopted an ordinance imposing a franchise fee of 5 percent of the gross revenues of telecommunications companies using the city's streets. The Court, pointing to *Paris v. Paris-Henry County Utility District*, 340 S.W.2d 885 (Tenn. 1960), and other cases, declared that any fee charged by the city must rely upon the city's governmental (police power), rather than its proprietary, powers. The Court did not mention T.C.A. § 65-21-103, which authorizes municipalities to charge telegraph and telephone companies police power "rent," but declared that because two of the parties to the case already had a franchise (which apparently did not provide for a franchise fee) which were not subject to alteration, and because the city could not discriminate against the providers of telecommunications service, the city could not impose franchise fees upon any of the parties. The 5 percent franchise fee could not survive as a police power rent because it bore no relationship to the city's cost of regulating the telecommunications provider's use of the streets.

CABLE TELEVISION FRANCHISES

The Cable Television Act of 1977, found at T.C.A. § 7-59-101, expressly declares that

The governing body of *each municipality in each county in this state* has the power and authority to regulate the operation of any cable television company which serves

customers within its territorial limits, by the issuance of franchise licenses after public notice and showing the terms of any proposed franchise agreement and public initiation for fees and not inconsistent with any rules and regulations of the federal communications commission [Emphasis is mine].

Cable television providers must also obtain a franchise to use municipal streets to provide such services [T.C.A. §§ 7-59-101 et seq.; *James Cable Partners, L.P. v. City of Jamestown*, 818 S.W.2d 338 (Tenn. App. 1991)].

The Cable Television Act of 1977 provides that, "A county shall not issue a franchise within any municipality" [T.C.A. § 7-59-101(c)]. In addition, 1999 amendments to that Act provide that even electrical systems operating under the Municipal Electrical Plant Law of 1935, and that provide cable television services, must obtain a franchise "from the appropriate municipal governing body or county governing body" [T.C.A. § 7-59-102], and that

Nothing contained in this section shall be interpreted to limit the authority of the franchising authority to collect franchise fees, control and regulate its streets and public ways, or enforce its powers to provide for the public health, safety and welfare [T.C.A. § 7-59-102(k)].

That Act and its 1999 amendments undoubtedly speak of the "municipality" of the "county," and of the "franchising authority," respectively, as an incorporated municipality within a county, as the territory in the county excluding incorporated municipalities, and as the municipality when the cable television service is provided within a municipality, and as the county when the cable



television service is provided within a county outside an incorporated municipality.

LIMITING CHARACTER OF FRANCHISES

Changing terms of a franchise. Rights vest in the franchise holder during the life of the franchise. Generally, those rights cannot be impaired or revoked by the municipality [*City of Paris v. Paris-Henry County Public Utility District*, 340 S.W.2d 865 (Tenn. 1960)]. It is further said in *City of Chattanooga v. Tennessee Electric Power Company*, 112 S.W.2d 385 (Tenn. 1938), citing 12 R.C.L. 213, 214, that

The grant of a franchise to a public utility company is, according to the weight of authority, a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some limitation imposed by the general law of the state, or by the corporate powers of the municipality making the grant. If there be authority to make the grant, and it contains no limitation or qualification as to duration, the plainest principles of justice and right demand that it shall not be cut down, in the absence of some controlling principle of public policy [At 389-90].

Footnote 3 of *James Cable Partners, L.P., v. City of Jamestown*, 818 S.W.2d 338 (Tenn. Ct. App. 1992), declares that

Once an ordinance which grants a franchise is accepted and “all conditions imposed instant to the right performed, it ceases to be a mere license and becomes a valid contract, and constitutes a vested right.” 12 McQuillin, *Municipal Corporations* § 34.06. This contract once established has the

same status and effect as any other contract enforceable under the law [36 Am.Jur.2d Franchises § 6 (1968)].

The contractual nature of franchises severely limits the right of municipalities to charge franchise fees where there is no record in the initial or subsequent line of franchises that provide for such fees.

REGULATION OF FRANCHISES BY THE TENNESSEE REGULATORY AUTHORITY (TRA)

T.C.A. Title 65, particularly chapters 4 and 5, give the TRA extensive authority to regulate privately owned public utilities, and limited authority to regulate municipally owned public utilities. Tennessee municipal utilities are expressly excluded from the definition of “public utilities” for those purposes in T.C.A. § 65-4-101(a)(2). But the TRA’s regulation of municipal utilities comes through its right to regulate the relationship between public utilities and municipalities.

Franchise payments by a public utility for the use of municipal streets made after February 24, 1961, are, insofar as practicable, to be billed pro rata to the public utility’s customers [T.C.A. § 65-4-105(e)].

Franchises granted to any public utility by the state or any political subdivision must have the approval of the TRA, which must hold a hearing to determine whether the franchise is necessary for the public convenience [T.C.A. § 65-4-107]. T.C.A. § 65-4-201 prohibits a public utility from extending services to a municipality already being served by another utility unless it obtains a certificate of convenience.

A public utility can appeal to the TRA any order or regulation made by a municipality, and the TRA can resolve such an appeal [T.C.A. § 65-4-109].



VII. DETERMINING THE WIDTH OF MUNICIPAL STREETS

WIDTHS BASED ON PLATS, DEEDS, ETC.

Sometimes the width of street easements can easily be ascertained from a plat, deed, or other allied documents. That is probably most true of streets established by formal dedication and acceptance, by formal dedication and implied acceptance, and by eminent domain. However, often no such documents exist with respect to many street easements, particularly in the cases of implied dedication and acceptance and of prescription. Such documents as can be found in other cases do not usually specify the width of the easement.

The heavy weight of authority in the United States is that where there is an express grant of a street easement that does not specify its width, the width is determined by the intention of the parties to the grant, and that intention is determined from the facts and circumstances, sometimes including the use of the easement. Generally, the width determined by the courts is what is reasonable, convenient, and suitable [28 A.L.R.2d 253].

That also appears to be the rule in Tennessee. With respect to streets created by formal dedication and acceptance, it was said in *Town of Benton v. Peoples Bank of Polk County*, 904 S.W.2d 598 (Tenn. App. 1995), that “the object in all boundary cases is to find, as nearly as may be, certain evidence of what particular land was meant to be included for conveyance” [At 601]. It was also said in *Doyle v. Chattanooga*, 128 Tenn. 433 (1913), that

The execution of an official map by the city, showing the street offered to be dedicated to be such, has also been held to be evidence of an acceptance. [Citation omitted.] Where the dedication is clearly defined, as in this case by a registered map, *and the public user*

is of the whole, practically speaking, the presumption is that an act of acceptance of a part thereof is an acceptance of the whole [Citations omitted] [At 441].

WIDTHS BASED ON “USER”

With respect to the width of street easements acquired by user or prescription, it is said in 39 Am.Jur.2d *Highways, Streets and Bridges*, Section 63, that

As a general proposition, the width of a highway established solely by prescription or user is determined by the extent of such use... While there are cases which appear to recognize that a highway acquired by prescription or user does not extend beyond the beaten or traveled path, it is more generally held that the public easement is not necessarily confined strictly to the beaten or traveled path in every instance. In some cases the determination of the width of a highway acquired by prescription or user rests upon whether or not a particular width is necessary for the convenience of the public... Ditches along the side of a highway acquired by prescription or user are generally regarded within the boundaries of a highway.

It is likewise said in 10A McQuillin, *Municipal Corporations*, Section 39.29, that

The extent of the prescriptive easement, it is held, is governed entirely by the extent of the user. The boundary of a public highway acquired by public use is a question of fact to be determined by the appropriate finder of fact. This is to say, that the extent of a street or alley acquired by prescription is generally limited to the portion actually used.



But 10A McQuillin, *Municipal Corporations*, 30.22, also says, that

It has been held that the width of a prescriptive easement is not limited to that portion of the road actually traveled, and it may include the shoulders and the ditches that are needed and have actually been used to support and maintain the traveled portion.

76 A.L.R.2d 535 says that the width of street easements established by prescription is determined by the extent of use. It also appears to conclude that generally the width of such easements includes not only the traveled portions of the street, but also such adjacent land reasonably necessary for public travel as determined by the peculiar circumstances of the case in question, and such additional land as might be needed for repairs and improvements. It also points to cases holding that the easement includes drainage ditches and waterways.

Finally, 10A McQuillin, *Municipal Corporations*, Section 30.03 says that, "Street, in a legal sense, usually includes all parts of the way—the roadway, the gutters and the sidewalks."

However, it was said in *Blackburn v. Dillon*, 225 S.W.2d 46 (Tenn. 1946), that "[t]he term street in ordinary legal signification includes all parts of the way, roadway, gutters and the sidewalks." In that case the width of the street easement in that case was clearly 40 feet, and the only question was whether the city had the authority to build a sidewalk within that easement as a form of public travel, but the proposition that the width of the "street" includes the roadway, gutters and sidewalks appears to apply to street width in general.

WIDTHS BASED ON STATUTES

In *Ludwick v. Doe*, 914 S.W.2d 522 (Tenn. Ct. App. 1996), the Court pointed to the definitions of "street" and "highway" in T.C.A. § 55-8-101(60) and (21). The definition of both terms is the same: "the entire width between boundary lines of every way when any part thereof is open to the use of the public for purposes of vehicular traffic." For that reason, concluded the Court

It is obvious from these definitions that the concept of a 'street' or 'highway' contemplates an area that is wider than the part used for the "purposes of vehicular traffic." It should also be noted that neither definition is tied to a paved area. We believe that when the definitional language is given its 'ordinary and usual meaning' read in the context of the definitions, the conclusion is inescapable that the legislature intended that the words 'street' and 'highway' would be synonymous with the full right of way. Thus a 'street' or 'highway' as those words are used in *Tennessee Code Annotated* 55-8-118 [which regulates passing on the right], refers to the part designated for vehicular travel by the public, any paved shoulder, any unpaved shoulder, and any remaining part of the right of way [Citing *State v. Mains*, 634 S.W.2d 280, 282 (Tenn. Cr. App.)] [At 525].

In *State v. Mains*, 634 S.W.2d 280 (Tenn. Cr. App. 1982), the Court considered the question of whether a defendant charged with vehicular homicide arising from drunk driving was on the "highway," when the homicide occurred off the paved portion of the roadway. The area in question was described by witnesses as a



‘pull-out place’ and was described by one officer as being two hundred to three hundred feet long and wide enough for two or three cars to park side by side. This officer also testified the area was part of the ‘state highway right of way.’

Pointing to the definition of “highway” in T.C.A. § 55-8-101(20) [now (21)], the Court declared that, “The word ‘highway’ is defined for the purposes of the drunken driving statute as: ‘The entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.’ [Note: the term “publicly maintained” was removed from the statute by Public Acts 1988, chapter 555.] Then the Court went on to determine what that width included.

The term ‘public highway’ has been described by our Supreme Court as ‘such a passageway as any and all members of the public have an absolute right to use as distinguished from a permissive privilege of using same.’ [Citations omitted.] Other states have held that the “shoulder” of a highway is included in the term ‘highway.’ [Citations omitted.] Interpreting a legislative definition similar to ours cited above, the North Carolina Supreme Court held that the statutory reference to the ‘entire width’ includes everything between the right of way lines of the ‘highway’ for statutory purposes [At 282].

Those definitions included the pull-off, concluded the Court.

T.C.A. § 54-5-202, declares with respect to the width of state highways in municipalities that

The streets so constructed, reconstructed, improved and maintained by the state shall be of such width and type as the department may think proper, but the width so constructed, reconstructed, improved and maintained shall not be less than eighteen feet (18’); and, in the case of resurfacing and maintenance, from curb to curb where curbs exist, or the full width of the roadway where no curbs exist.

VIII. CLOSING MUNICIPAL STREETS DISTINCTION BETWEEN CLOSING AND ABANDONING STREETS

It is said in 11 McQuillin, *Municipal Corporations*, § 30.182, that the distinction between abandonment of a street, and the closing or vacation of a street is that the former is accomplished by inaction, and the latter by a prescribed procedure. Some cases suggest that a city can abandon a street without the benefit of an ordinance. It is said in *Wilkins v. Chicago St. L. & N.O.R., Co.*, 75 S.W. 1026 (1903), that

It is also true that the city has the right to abandon a street, that is, its easement of way, which it holds in trust for the public, or for the public interest; and that upon such abandonment the fee reverts to the adjoining proprietors, if they own to the center of the street...[At 465].

[Also see *State v. Taylor*, 64 S.W. 766 (1901), and *Knoxville v. Sprankle*, 9 Tenn. App. 218 (1928).]

But none of those cases clearly say that a municipality can “abandon” a street by inaction. In *West Meade Homeowners Association v. WPMC*, 778 S.W.2d 365 (1989), WPMC sought to use as an ingress and egress from its development a platted street, only a portion of which had been



constructed, and which ended in a cul-de-sac. The homeowners association argued that the city had abandoned that portion of the platted street that had never been constructed. The court rejected that argument, pointing to certain evidence that the city had at least impliedly accepted that portion of the street. There is no hint in that case of how the court would have addressed the homeowners association abandonment argument had there been no such evidence.

The Tennessee courts appear to use the words “abandon,” “close,” and “vacation,” interchangeably with respect to streets. Most municipal charters prescribe a procedure for the passage of ordinances. There may be rare instances where a charter prescribes a special procedure for the passage of ordinances closing streets.

BROAD MUNICIPAL DISCRETION TO CLOSE STREETS

Generally, property owners have little legal voice in the closing of city streets, and the courts will not interfere with municipal decisions in those areas absent fraud or a clear abuse of discretion [*Georgia v. Chattanooga*, 4 Tenn. App. 674 (1927); *Brimer v. Municipality of Jefferson City*, 216 S.W.2d 1 (1948); *Swafford v. City of Chattanooga*, 743 S.W.2d 174 (Tenn. Ct. App. 1987); *W. G. Wilkins v. Chicago, St. Louis & New Orleans Railroad Co.*, 110 Tenn. 423 (1903); *Sweetwater Valley Memorial Park v. City of Sweetwater*, 372 S.W.2d 168 (1963); *Cash & Carry Lumber Company, Inc. v. Olgiati*, 385 S.W.2d 115 (1964)].

It is said in *Sweetwater Valley Memorial Park v. City of Sweetwater*, 372 S.W.2d 168 (1963), citing other cases, that

Authorities are abundant for the proposition that a municipal corporation being the state’s representative, may ordinarily vacate,

discontinue, or abandon its easement in a street or part thereof, whenever, by its proper board, found, to be unnecessary for public use [Citation omitted].

The rule appears to enjoy universal acceptance in this court as has been stated by this Court on numerous occasions [Citations omitted].

In the absence of an allegation of fraud or a manifest abuse of discretion, courts will not inquire into the motives of municipalities for vacating a public street [At 169].

The Court continued with a citation of 25 Am.Jur., *Highways*, Section 29, page 418:

The question of the necessity for closing a street or highway, as distinguished from the question of public purpose or use, belongs exclusively to the legislative department of the government. So, the province of the public authorities in whom the power to vacate is vested to determine when it shall be exercised, and their action in this regard will not be reviewed by the courts in the absence of fraud or a manifest abuse of discretion. The court cannot control or revise such discretion on the ground of inexpediency, injustice or impropriety... Ordinarily, the presumption is that a street or highway was vacated in the interest of the public and that its vacation was necessary for public purposes, and the burden of showing to the contrary will be upon the persons objecting to the proceedings [At 169].

The same court built on those principles in *Cash & Carry Lumber Company, Inc. v. Olgiati*,



385 S.W.2d 115 (1964), in which the City of Chattanooga closed one block of a city street. The property upon which the street lay reverted to an abutting stove works, which was apparently using the street for storage and other purposes. Relying on *Sweetwater*, above, the Court upheld the chancellor's denial of *Cash & Carry's* petition for an injunction prohibiting the city from closing the street. *Cash & Carry* had not alleged facts sufficient to make out a case of fraud. "None of the officials here involved have been charged in the bill with acts showing falsity, concealment, deceit, or perversion of the truth" [At 117-18]. Nor did the facts show a manifest abuse of discretion. The fact that the property would revert to, and benefit, the abutting property owner, did not in and of itself show an abuse of discretion or fraud.

Turning to the issue of inconvenience suffered by *Cash & Carry* in the closing of the street, the Court declared that

To reach complainant's property, it is apparent that some convenience will be sacrificed. No longer will complainant have a direct access for a distance of two blocks to Main Street. Instead, travelers will be forced to go over one block east or west and then down, increasing the distance to Main Street at most one block. However, there is no allegation that *reasonable* egress and ingress will be destroyed [At 118] [Emphasis is mine].

STREETS SHOULD BE CLOSED BY ORDINANCE

In *Wilkey v. Cincinnati, New Orleans & Texas Pacific Railway Company*, 340 S.W.2d 256 (1960), the Rhea County Chancery Court permanently enjoined the railroad and the city from closing a railway crossing on a certain street, which was barricaded on both ends of the crossing. However, it is clear that the

case would have gone the other way had the city closed the crossing by ordinance. The city had passed a *resolution* to close the crossing upon the completion by the state of an underpass several blocks away. After the underpass was completed, the *contractor* barricaded the crossing in accordance with its contract with the state for the construction of the underpass. The city's resolution and the contractor's barricade was not good enough, declared the Court.

...We cannot agree that the resolution in question obviates the need of an *ordinance* closing the crossing on West Second Avenue... It may well be, as both the State and the Railway company strongly insist, that it is necessary to close the crossing on West Second Avenue to promote the safety of the traveling public. If so, the responsibility for closing it remains with the local authorities [At 259].

In *Cash & Carry Lumber Company*, the Court distinguished *Wilkey*, explaining why the injunction against the closing of the railroad crossing in that case was an aberration.

Wilkey [citation omitted], cited by appellants for the proposition that no remedy at law exists is readily distinguishable and is not controlling. In the *Wilkey* case, the municipal government had failed to close the grade crossing by ordinance, and the Court of Appeals held that there had been no exercise of eminent domain, and that no damages would be recoverable; therefore, an injunction was the proper remedy.

In the instant case, the proper municipal authority has by ordinance abandoned the street in question. If complainant's property



has been thereby taken, the remedy is at law with an action for compensation [At 118] [Citing *Sweetwater*] [Emphasis is mine].

PLANNING COMMISSION APPROVAL REQUIRED TO CLOSE STREET

T.C.A. § 13-4-104 provides that after the planning commission has adopted all or a part of the plan for the city,

...the widening, narrowing, relocation, vacation, change in the use, acceptance, acquisition, sale or lease of any street or public way, ground, place, property or structure shall be subject to similar submission and approval [to the planning commission], and the failure to approve may be similarly overruled [by the municipal governing body].

OTHER PREREQUISITES FOR CLOSING STREETS

Unless a statute or charter provides otherwise, no notice need be given property owners of a municipality's intention to close a street [*Sweetwater Valley Memorial Park, Inc. v. Sweetwater*, 372 S.W.2d 168 (1963)]. There is no state law prescribing any special notice or other special procedures precedent to the closing of municipal streets. T.C.A. § 54-10-201 contains notice and other procedures for the closing of *county roads*. Apparently at least one trial court has held that those procedures apply to the closing of municipal streets. Such a holding is clearly wrong. However, because of the potential problems street closings can have, municipalities are advised to give reasonable and well-publicized notice to abutting property owners and other interested citizens of their intent to close a street. A municipality considering closing a street should also determine whether its charter contains provisions governing the closing of streets.

IX. SELECTED LEGAL POTHOLES AND PATCHES INVOLVING CLOSED STREETS OWNERSHIP OF CLOSED STREETS

Unless a city owns a fee simple in the land upon which the street sits, it has no further legal interest in the street following its abandonment. In *State v. Taylor*, 64 S.W. 766 (1901), the City of Union City by ordinance and deed conveyed one of its streets to a business. In declaring the conveyance ultra vires and void, the Court declared that

It is obvious under our law, that the ordinance and deed in question were ineffective to pass any portion of Washington Avenue to the intended vendees; first, because the corporation did not own the fee in the street, and secondly, because the easement which it did own was not subject to sale and conveyance. The corporation had only the right to use this street for street purposes. That was the extent of the dedication and the board had no authority to exceed its limits. The platting of territory and sale of the lots by the original owner in the manner hereto recited vested the city as such, but not otherwise in the municipality, and at the same time passed to the respective lot purchasers the ultimate fee to the soil to the center of the streets on which they severally abutted [Citations omitted]... So, the corporation had only an easement in Washington Avenue, and that, from its nature, was incapable of alienation and passage to an individual. Hence, to repeat what has already been remarked, the ordinance and deed relied on by the defendant were inoperative as to the fee because the corporation did not own it,



and as to the easement because it was not transferable [At 768].

Even though the conveyance was ultra vires and void, its effect “was, nevertheless, in legal contemplation, and, in fact, an abandonment of its easement in so much of Washington Avenue, and though through that abandonment the strip of ground in question ceased to be a part of the public street, and *by operation of law reverted to the owner of the ultimate fee*” [At 268].

It has been repeatedly said that, municipalities usually do not own the fee in land dedicated for streets [*Hamilton County v. Rape*, 47 S.W. 416 (1898); *Georgia v. Chattanooga*, 4 Tenn. App. 674 (1913); *State v. Taylor*, 74 S.W. 766 (1903)]. Generally, they have only easements in their streets, and abutting property owners are presumed to own the fee to the center line of the street [*Hamilton County v. Rape*, 47 S.W. 416 (1898); *Patton v. Chattanooga*, 65 S.W. 414 (1901)]. It is also said in *Rogers v. City of Knoxville*, 289 S.W.2d 868 (Tenn. 1955), that “[t]he generally accepted rule is that where a *right of way is condemned* [Emphasis is the Court’s] it reverts upon nonuser to the owner of the fee...” [At 873]. *Smokey Mountain Railroad Co.*, above, did not distinguish between rights-of-way taken by eminent domain from other rights-of-way, citing *Rogers* for the proposition that “[w]here a right of way is abandoned, it generally reverts upon non-user to the owner of the fee” [At 913]. [Also see *State v. Taylor*, 74 S.W. 766 (1903), and *Wilkins v. Chicago, St. L. & N.O.R., Co.*, 75 S.W. 1026 (1903).]

EFFECT OF STREET CLOSURE ON ABUTTING PROPERTY OWNERS

The closure or abandonment of a street does not affect any private rights abutting landowners

might have with respect to access to the easement [*Cartwright v. Bell*, 418 S.W.2d 463 (1967); *Stokely v. Southern Railway*, 418 S.W.2d 255 (1967); *Knierim v. Leatherwood*, 542 S.W.2d 806 (1976); *Jacoway v. Palmer*, 753 S.W.2d 675 (Tenn. App. 1987)].

However, it has been held that while a municipality has the near unfettered right to close a municipal street, the closing may be a compensable taking of property [*Sweetwater Valley Memorial Park v. City of Sweetwater*, 372 S.W.2d 168 (1963); *Cash & Carry Lumber Company v. Olgianti*, 385 S.W.2d 115 (1964)]. But minor inconvenience accruing to abutting property owners upon the closing of a street does not necessarily amount to a compensable taking. Under *Cash & Carry Lumber Company*, there had to be an allegation that “reasonable egress and ingress would be destroyed.” In *Sweetwater*, it is said that

It is well settled in this State and elsewhere that the *destruction or serious impairment* of a landowner’s right of ingress or egress is a taking of property for which compensation must be paid. [Citations omitted] Thus, if the closing of the northeast end of Anderson Street destroys or seriously impairs complainant’s right of ingress and egress, it may bring an action to recover compensation for this taking. See § 23-1423, T.C.A., and authorities cited thereunder. Such an action normally is known as inverse condemnation. [Citation omitted] But the complainant cannot enjoin the closing of a street [At 170] [Emphasis is mine].

Although the question of the inconvenience of the access in *Cash & Carry Lumber Company* related to the city’s discretion in the closing of the street, that case suggests that inconvenient access must



rise to the level of unreasonableness before it constitutes a taking.

UTILITIES OCCUPYING CLOSED STREETS

As far as can be determined, there is no statutory or case law in Tennessee, and little case law in other states, directly on the question whether a utility has the right to continue to occupy a street that has been vacated or closed. However, *Beadle v. Town of Crossville*, 7 S.W.2d 992 (1928), hints at the answer to the question in Tennessee. There the city closed First Street for the construction of a standpipe or reservoir for its waterworks.

Beadle argued that when the city closed First Street, the land automatically reverted to the abutting property owners, of which he was one, and that the city had no right to build such a facility on his property. The city had a right to close First Street, and the right to condemn the property to build a standpipe for its waterworks on that location, concluded the Court. The only remedy Beadle had, continued the Court, was a suit to recover damages for the taking of his land.

It is difficult to see why the remedy of a property owner as to a utility facility already in the ground when a street is closed would be any different than the remedy of a property owner as to a utility facility a city intends to place in the ground after the street is closed. In both cases the property having automatically reverted to the abutting or other actual owners, those owners would be entitled to payment for the taking of the land for utility purposes, in the latter situation for an inverse taking. It was also said in *Cash & Carry Lumber Co. v. Olgiati*, 385 S.W.2d 115 (1964), that

In the instant case, the proper municipality has by ordinance abandoned the street in question. If complainant's property has

thereby been taken, the remedy is at law in an action for compensation [*Sweetwater Valley Mem. Park v. Sweetwater*, supra, 372 S.W.2d at 170] [At 118].

That language appears to cover a situation where a city closes or vacates a street and leaves any utility infrastructure in the ground.

The law in other jurisdictions supports the theory that when a city closes or vacates a street, it cannot attach a condition that entitles the utility infrastructure to remain in the ground unless the city condemns a utility easement. The case of *re City of Altoona*, 388 A.2d 313 (Pa. 1978), held that when the city passes an ordinance vacating a street, a utility easement in the ordinance was void. The Court reasoned that

When the public right to use Kenyon Road was validly terminated by the City of Altoona, the property reverted automatically and simultaneously to the abutting owners. [Citations omitted] The abutting owners are entitled to their full reversionary interest which the City may not dilute by imposing upon the dedication a burden not bargained for or contemplated; the dedication of Kenyon Road was for the purpose of affording the public a right of passage not to benefit utility companies or their customers. Although an easement for utilities in and along Kenyon Road may not have been incompatible with its use as a roadway and would not have interfered with the rights of the owners of the underlying fee, as long as the roadway was in use, [citation omitted], there is no reason to suppose that the easement for utilities would be consistent with the purposes for which the land could now be used by the abutting owners after



the cessation of the dedicated use... In sum, we hold that when Altoona terminated the use for which the land was dedicated, it could not at the same time reserve the right to an ancillary use not stipulated for in the original dedication [Citations omitted] [At 316-17].

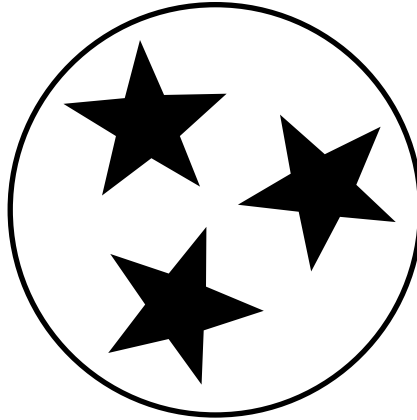
In accord are *Gable v. City of Cedar Rapids*, 129 N.W. 737 (Iowa 1911), *People ex rel. Greer v. City of Chicago*, 1154 Ill. App. 578 (Ill. 1910).

However, a city and a property owner abutting a street may be able to contract for the closure of a street in which the utility infrastructure would remain in the ground without compensation of the property owner by the city for the taking of the property. In *Knoxville Ice & Cold Storage Co. v. City of Knoxville*, 284 S.W.866 (1925), the Court upheld a contract under which provided for the city and a railroad to share the cost of the construction of

a viaduct over the railroad, and the city to close a street. The Court noted the provisions in the city's charter authorizing it to open and vacate streets, and to enter into contracts, and reasoned that

The city can certainly make a valid contract for the improvement of a street or the laying of a sidewalk. With equal certainty for a valuable consideration the city council could contract for the opening of a street when a street would be for a public purpose. For a like reason a contract for the abolishment of a street or a part thereof is valid when the contract is supported by valuable consideration and the abolishment is for a public purpose [At 153 Tenn. 536, 569].

The conditions under which such a contract would meet the "public purpose" test would undoubtedly depend upon all the facts in each case.



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