

Whose Road is it Anyway?

by Gary L. Dove

If you are like me, whether driving for work or on that all-too-infrequent and short vacation, you take the roads you are on for granted. As long as the commute is smooth and the road is free from potholes and work crews, you probably don't give a moment's thought to whose road you are on. That may not be the case if you are late for a court appearance or meeting because of a lane closure, or lose a part of your car in a pothole. While a tardy appearance is probably excused and not worth pursuing, vehicle damage may be another story. One of my partners recently learned just how expensive replacement wheels can be. Determining if someone should have to pay for that new wheel or who you should complain to about the unannounced lane closures seems like a perfect project for that new summer law clerk. Before you know it you have a memo nearly as long as a *Laches* article to read.

Control of and Responsibility for Roads

Your clerk's first step was to check the State Constitution, finding two provisions. The first says the Legislature may pass laws for counties and townships to construct and maintain highways.¹ Under the second,² the right to reasonable control of highways is constitutionally recognized in and reserved to all counties, townships, cities and villages. While you also note that public utilities are given the right to use the highways, they cannot do that without the consent of the county, township, city or village, and may even need a franchise. You think to yourself that parlaying this constitutional control into a duty that was breached should be workable, regardless of who actually caused that pothole to come into existence (it appeared to have grown from a recent saw cut across the pavement). There is also a statute which allows telephone, power and other public utility companies to construct and maintain improvements upon, over, across or under the roads with the prior consent of the city, village or township.³

Although you knew that governmental immunity could be a problem with your claim, you also wanted to know how thorough this clerk would be on a real project. Not to worry. The memo tells you about the statute,⁴ and an exception for defective highways that allows recovery for property damages caused by the government's failure to keep a road in reasonable repair.⁵ You go on to learn that in addition to perfecting your claim with a written notice,⁶ you must be able to show that the responsible government knew or should have known of the pothole.⁷

The memo concludes with the clerk's apology for not being able to go any further with the project. Seems you forgot to tell him/her what part of which road you were on. With the knowledge of what needs to be done, you stop at the city hall on the way back to the office. Within minutes of reporting to a clerk the reason for your visit, you hear that the city knew about your pothole (and several others) and was intending to get them fixed after collecting from the telecommunications company that cut the pavement to install its underground conduit. Apparently, the city is at the end of its budget year and did not anticipate and provide funds for the needed repairs. You also hear that it is that same company's contractors (they have more than one) that are randomly closing lanes throughout the city to finish the system and that they never let the city know when and where they will be next. No wonder the drive has been such a pain lately.

The Michigan Telecommunications Act (MTA)

Upon asking to see the company's franchise, the clerk tells you that although they are doing business throughout the city, the attorneys said a franchise could not be required, and that under the "MTA" the city could be fined \$1,000 to \$20,000 per day if it didn't let the company install its lines. Not being a municipal or telecommunications attorney, you have no idea what this MTA is. Your law clerk didn't say anything about it and you are certain that it has nothing to do with an old Kingston Trio song. The city clerk does not know you are an attorney so there is no risk of embarrassment when you ask, "What is the MTA?" The response: The Michigan Telecommunications Act.

After scratching out your damage claim and leaving it with the city clerk, you return to the office, curious as to how the Legislature was able to apparently restrict and limit local government constitutional authority and control over highways. With the research clerk off filing and serving a late mediation summary and exhibits for tomorrow's hearing (not on your case, of course), you pull the MCLA Word Index and without too much difficulty locate the Michigan Telecommunications Act.⁸ You find the MTA, which originally had a sunset date, took effect January 1, 1992,⁹ was extended and extensively amended in 1995,¹⁰ with those exorbitant fines the city clerk told you about being real under an amendment that took effect July 17, 2000.¹¹ You also

discover that the fines for subsequent offenses are doubled to \$2,000 to \$40,000 per day, and that violators of the MTA can be ordered to pay economic loss damages, attorney fees and actual costs of a complaining telecom provider.¹² With all of those remedies and penalties being within the jurisdiction of the Michigan Public Service Commission (MPSC)¹³ and assessable after nothing more than notice and hearing,¹⁴ you begin to appreciate how the MTA may have changed a local government's approach to its control of the roads.

The purposes of the MTA¹⁵ reflect a legislative intent to deregulate and encourage competition in the provision of telecommunication services. However, there is no stated intention to restrict or limit local government control and authority of highways. Turning to the definitions, you discover that "a telecommunication service is not a public utility service."¹⁶ Eventually, you find Article 2A. Local Units of Government, consisting of four sections, all added to the MTA in 1995.¹⁷ A reading of those sections, which does not take long, reveals the following:

- Governments are basically required to grant permits for access to and ongoing use of road right-of-ways to providers of telecommunication services.¹⁸
- In reviewing and approving a telecom provider's access to and use of right-of-way, the government is recognized as having authority to ensure and protect the health, safety and welfare of the public. There is no statutory

limitation on this authority or the manner in which it is to be exercised.¹⁹

- Governments are required to approve or deny a provider application for an access permit within 90 days. A permit application is not defined.²⁰
- That a right-of-way access permit may not be unreasonably denied.²¹
- Government, as a condition of a permit, can require a bond in an amount that does not exceed the reasonable cost to ensure restoration of the road right-of-way during and after the telecom provider's use.²²
- Government can impose other conditions on a permit, limited to the telecom provider's access and use of the right-of-way.²³
- Fees or assessments in connection with a right-of-way permit must be non-discriminatory and are not to "exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider."²⁴ You have no idea what the quoted language actually means and find no help in the definitions or other provisions of the MTA.

Application and Enforcement of the MTA

With no annotations of court decisions to look at, you bring your academic enlightenment to a close, still curious about the impact of the MTA on government control of the highways. With another non-billable project for your research clerk, or a phone call to a municipal or telecom attorney, you would learn:

- According to decisions of the Wayne County Circuit Court that are on appeal to the Michigan Court of Appeals, the restrictions and limitations on fees under the MTA do not violate the State constitutional provision that gives control of the roads to local governments and annual right-of-way maintenance costs charged to a telecom provider can be limited to \$500.²⁵
- That in its first case under the MTA, the MPSC ordered a city to pay a \$10,000 fine for failing to act on a permit application within the 90 days allowed by the MTA.²⁶ The MPSC also found that the fees charged by the municipality violated the MTA, indicating that a required reasonable relationship between costs incurred and the provider's usage of the right-of-way had not been shown. In doing so, a professionally prepared municipal methodology for computing and assessing the costs to a local unit of government in maintaining the right-of-ways, developed by an organization known as PROTEC,²⁷ was found to be deficient. The MPSC did not rule on challenges to various non-monetary terms and conditions of the city's proposed franchise/permit, passing on the opportunity to provide much-needed guidance and leaving those claims to support future complaints. The \$10,000 fine was a considerable mitigation of those recommended by the Administrative Law Judge of \$5,000 per day,²⁸ which for the 194 days from the first violation to the date of that recommendation, would have been

\$970,000! Not surprisingly, rather than risk reinstatement of those fines and pursuit of economic loss damages being allowed on appeal, the city paid the \$10,000 fine.

- In a second case brought before the MPSC by the same telecom provider, the city issued its permit within the time allowed by the MTA, but was still fined \$20,000 for violations that were found based on the language and conditions of the permit.²⁹ Even though the case arose prior to the amendment to the MTA authorizing the assessment of costs and attorney fees, the MPSC ordered the city to pay them and, deviating from its first decision, recognized the right of the telecom provider to file and attempt to pursue a separate MPSC complaint for economic losses. Finally, the MPSC assessed an ongoing fine of \$1,000 per day from the date of its opinion and order until the community issued a permit that did not violate the MTA, saying, "With this action the Commission places all municipalities on notice that it will impose daily fines in all future cases involving an unjustified failure to issue a permit as required by the MTA (Act)." In this second case, the violations included the city's failure to specify the actual monetary amount of the fees in favor of the statutory language (fixed and variable costs etc.) and, most incredibly, the city's requirement of final engineering drawings for the proposed improvements.
- There is a third case now pending before the MPSC which, based on allegations of failure to act within 90 days, excessive/discriminatory fees and illegal permit/franchise conditions, seeks all of the penalties and remedies (daily fines, economic loss damages, costs and attorney fees) authorized by the MTA, as amended.³⁰
- That under the banner of the MTA and its potential penalties, certain telecom companies routinely object to permit terms, conditions and fees that have been accepted and agreed to by others, demanding proof and documentation of the studies they claim must have been conducted for the local government to properly charge even the most nominal of fees.
- A collaborative process with participation by telecom providers, local governments and other persons interested in issues pertaining to access to and use of public rights-of-way for telecommunications facilities was ordered and has been commenced by the MPSC.³¹ This process is discussed in a companion article.
- The MPSC consists of three members appointed by the governor,³² who, in his most recent State of the State speech, is reported to have analogized local government right-of-way control and fees to stop lights and expensive tollbooths on the information highway, referring to local governments as "broadband bandits."
- Appeals of MPSC decisions under the MTA are not to the circuit court for the county in which the affected road and local government are located. Rather, they are to the Michigan Court of Appeals where the appellant has the burden of proof to show by clear and satisfactory evidence that the order of the MPSC complained of is unlawful or unreasonable.³³

Conclusion

While none of your newly acquired knowledge about the MTA has weakened your claim for damages against the city for the condition of its road, you have a new appreciation for why local governments may not want to put themselves on the cutting edge with their permitting decisions for telecom companies. You may even wonder about the fairness of the highway exception to governmental immunity, which must have been based on a local government's ability to actually control the right-of-way, without outside influences over which it has no practical control. With the huge financial penalties authorized, threatened and being assessed, and the uncertainty as to what local governments may do under the MTA, you understand why municipalities might take a passive approach to the exercise of their constitutional authority and control of the roads.

With municipal right-of-way control subject to after-the-fact review by one of the threatening entities (the MPSC), under a set of rules that disregards the presumptions in favor of municipal decision-making and has little relationship to the local conditions at hand, you are hard pressed to think of that road as the city's when it comes to your replacement wheel. You call the city and withdraw your claim, thankful you do not practice municipal right-of-way law and thinking that maybe the phrase "information highway" is no longer just a reference to the Internet. Whose road is it anyway?

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Footnotes

- 1 Const 1963, Art 7, §16.
- 2 Const 1663, Art 7, §29.
- 3 MCL 247.183; MSA 9.263.
- 4 MCL 691.1407; MSA 3.996(107).
- 5 MCL 691.1402; MSA 3.996(102).
- 6 MCL 691.1404; MSA 3.996(104).
- 7 MCL 691.1403; MSA 3.996(103).
- 8 MCL 484.2101 et seq.; MSA 22.1469(201) et seq.
- 9 1991 PA 179.
- 10 1995 PA 216.
- 11 2000 PA 295.
- 12 MCL 484.2601; MSA 22.1469(601).
- 13 MCL 484.2201; MSA 22.1469(201).
- 14 MCL 484.2601(1); MSA 22.1469(601)(1).
- 15 MCL 484.2101; MSA 22.1469(201).
- 16 MCL 484.2102(dd); MSA 22.1469(102)(dd).
- 17 MCL 484.2251 to 484.2254; MSA 22.1469(251) to MSA 22.1469(254).
- 18 MCL 484.2251(1); MSA 22.1469(251)(1).
- 19 MCL 484.2251(2); MSA 22.1469(251)(2).
- 20 MCL 484.2251(3); MSA 22.1469(251)(3).
- 21 MCL 484.2251(3); MSA 22.1469(251)(3).
- 22 MCL 484.2251(3); MSA 22.1469(251)(3).
- 23 MCL 484.2252; MSA 22.1469(252).
- 24 MCL 484.2253; MSA 22.1469(253).
- 25 *TCG Detroit v. City of Dearborn*, Wayne County Circuit Court No. 98-803937 CK.
- 26 *In re Coast To Coast Telecommunications, Inc. v. City of Birmingham*, MPSC Case No. U-12354.
- 27 Michigan Coalition to Protect Public Rights-of-Way from Telecommunications Encroachments.
- 28 Proposal For Decision in MPSC Case No. U-12354.
- 29 *Coast To Coast Telecommunications, Inc. v. City of Rochester*, MPSC Case No. U-12462.
- 30 *In re Metromedia Fiber Network Services, Inc. v. City of Dearborn*, MPSC Case No. U-12797.
- 31 *In re Coast To Coast Telecommunications, Inc. v. City of Birmingham*, MPSC Case No. U-12354.
- 32 MCL 460.1; MSA 22.13(1).
- 33 MCL 484.2203(7); MSA 22.1469(203)(7), MCL 462.26; MSA 22.45.