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MUNICIPAL CORPORATION HAS DUTY TO RELOCATE OR REMOVE WATER PIPES IN COUNTY HIGHWAY OUTSIDE CORPORATION LIMITS—COUNTY COMMISSIONERS MAY CAUSE SUCH WORK TO BE DONE—RIGHT AND DUTY OF SUCH COMMISSIONERS TO RECOVER FROM MUNICIPALITY. §§4501.04, 5547.03, R.C.

SYLLABUS:

1. The provisions of Section 5547.03, Revised Code, relative to the duty of a corporation having installed water pipes in a county highway, to relocate or remove them, are applicable to a municipal corporation owning water lines in a county highway located outside the corporation limits of the municipal corporation.

2. Upon default or refusal of a person, partnership or corporation, which has installed water pipes in a county highway, to relocate or remove them as required under the provisions of Section 5547.03, Revised Code, the county commissioners may cause the same to be done, using any moneys available for highway purposes—including funds distributed to the county pursuant to Sections 4501.04 and 5735.27, Revised Code.

3. Where, pursuant to the provisions of Section 5547.03, Revised Code, a municipal corporation fails or refuses to relocate or remove water pipes placed by it in a county highway, where the same constitute obstructions to the improvement of such highway, the county commissioners may cause such work of relocation or removal to be done, and it is the right and duty of such commissioners to recover from such municipality, by appropriate action if necessary, the cost of doing such work.

Columbus, Ohio, September 25, 1959

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

I have before me your communication requesting my opinion and reading as follows:

“The County Engineer of Cuyahoga County in making improvements of county highways, has been confronted with the problem of determining from what source or sources shall come the funds required for relocating municipally owned or municipally operated water lines and appurtenances occupying such highways. The problem involves, among other things, the question as to whether or not the county commissioners may, under R.C. 5547.03 or otherwise, compel municipal corporations using

or occupying county highways to relocate their water lines when such lines are found by the county commissioners and the county engineer to be obstructions in the way of a county highway improvement.

“Therefore, your opinion is requested on the following questions:

“1. In a case in which a municipality owns or operates water lines which use and occupy a county highway which lies within the same municipality, within other municipalities, and within townships, under and by virtue of a franchise legally granted or other than by virtue of a franchise legally granted, do the county commissioners have the right to direct said municipalities and townships to relocate the water lines which are found by the commissioners and the county engineer to be an obstruction to a planned county highway improvement?

“2. In the event that the answer to Question No. 1 is ‘No’, or in the event that the municipalities or townships so using and occupying the county highway, under a franchise or other than by virtue of a franchise, fail to relocate such water lines, does the county have the right or the duty, to make changes in water lines, water mains and appurtenances where such changes are necessary to permit the reconstruction of the county highway without destroying water service?

“3. If the county has such a right or duty to make such water line changes what funds may be used to defray the cost of the work?

“4. May the motor vehicle license and gasoline tax distributed to counties under the provisions of R.C. 4501.04, 5735.23 5735.27 be used for the relocation of water lines, water mains and appurtenances in connection with the improvement of a county highway?

“5. If the motor vehicle license and gasoline tax may be used in the first instance to finance such water line relocation, is this the end of the solution of the financing problem or are the county commissioners then required to seek reimbursement from the municipalities and townships which are using and occupying such county highways with water lines, water mains and appurtenances?”

Your first and second questions are so worded that they admit of the possibility of the contemplated road improvement being on a county road located within a city or village. Ordinarily, since the provisions of Section 723.01, Revised Code, give municipalities complete control of, and responsibility for all highways within their limits, improvement of

a municipal street becomes a municipal problem strictly. However, there is a provision in Section 5557.02, Revised Code, permitting the county commissioners to construct a road improvement "into, within or through a municipal corporation." But this can only be done, "when the consent of the legislative authority of such municipal corporation has been first obtained." Certainly, if this procedure is followed, all matters such as municipal water pipes blocking the improvement will have been resolved by agreement.

Accordingly, I will assume for the purpose of answering the questions which you have submitted, that the proposed road improvement is upon a county road outside the boundaries of the municipality whose pipes constitute an obstruction.

1. Your first question involves a consideration of Section 5547.03, Revised Code, which reads as follows:

"All persons, partnerships, and corporations using or occupying any part of a highway, bridge, or culvert with telegraph or telephone lines, steam, electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise legally granted, shall remove from the bounds of such highway, bridge, or culvert, their poles and wires connected therewith, or any and all tracks, switches, spurs, or oil, gas, or water pipes, mains, conduits, or other objects or structures when, in the opinion of the board of county commissioners, they constitute obstructions in any highway, other than the state highway system; or the bridges or culverts thereon, or interfere or may interfere with the proposed improvement of such highways, bridges, or culverts or the use thereof by the traveling public. By obtaining the consent and approval of the board, such persons, partnerships, and corporations may relocate their properties within the bounds of such highways, bridges, or culverts in such manner as the board prescribes. The giving of such consent and approval by the board does not grant any franchise rights.

"Persons, partnerships, or corporations occupying any part of a highway, bridge, or culvert, under and by virtue of a franchise legally granted, shall relocate their properties within the bounds of such highway, bridges, or culverts when in the opinion of the county engineer, they constitute obstructions or interfere with the construction, improvement, maintenance, or repair of such highways, bridges, or culverts, or the use thereof by the traveling public.

"If, in the opinion of the engineer, such persons, partnerships, or companies have obstructed any such highway, bridges,

of culverts, or if any of their properties are, in his opinion, so located that they do or may interfere with the proposed improvement, maintenance, or repair the board shall notify such person, partnership, or corporation directing the removal or relocation of the obstruction or property, and, if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board may do so by employing the necessary labor. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person, partnership, or corporation, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person, partnership, or corporation by civil action by the state on the relation of the board."

I call attention to the general language of the opening sentence of that section: "*all persons, partnerships and corporations.*" Your question may be reduced to this: Is a municipality a corporation within the purview of this section? It is to be noted that the statute in no way limits its provisions to *private* corporations, but its language is as clearly applicable to public as to private corporations. Also, the reasons which manifestly lie behind the enactment apply as well to pipes laid in the county road by one corporation as by the other. In either case, they are obstructions to the proposed improvement of the highways, and the county commissioners should have the right to have them moved or removed by, or at the expense of, the person or corporation responsible for them.

It has long been recognized that a municipality has two lives, (1) as a public or governmental body and (2) as a private or proprietary organization. In the comparatively early case of *Cincinnati v. Cameron*, 33 Ohio St., 336, it was held:

"* * *

"5. There is a distinction between those powers of a municipal corporation which are governmental or political in their nature and those which are to be exercised for the management and improvement of property. As to the first the municipality represents the state, and its responsibility is governed by the same rules which apply to like delegation of power. As to the second, the municipality represents the pecuniary and proprietary interests of individuals, and within the limits of corporate power, *the rules which govern the responsibility of individuals are properly applicable.*

"* * * (Emphasis added)

This case had to do with an obligation arising under a contract for construction of a city building. This case has been cited on the proposition above stated a great many times. See *Fowler v. Cleveland*, 100 Ohio St., 158; *Portsmouth v. Mitchell*, 113 Ohio St., 250; *Zangerle v. Cleveland*, 145 Ohio St., 347.

The principle was applied in *Portsmouth v. Mitchell*, 113 Ohio St., 250, where a city was held liable for allowing refuse to accumulate on a street thereby clogging a sewer, on the ground that, in the maintenance of its sewers, a municipality is acting in a proprietary capacity and liable for its negligence.

In 28 Ohio Jurisprudence, page 100, it is said:

“In the acquisition, maintenance and operation of public utilities, such as lighting, power and heating plants, and water-works, municipalities act in their private or proprietary capacity. * * *”

In *Zangerle v. Cleveland*, 145 Ohio St., 347, the question was as to the tax liability of the City of Cleveland on its transit system. The court held as shown by the 5th and 6th branches of its syllabus:

“5. A municipal corporation, by entering a field of private competitive business for profit, diverts itself of its sovereignty pro tanto, takes on the character of a private corporation and thereby forfeits its immunity from taxation.

“6. A municipal corporation is engaged in a proprietary function in owning and operating a transportation system.”

It seems clear, therefore, that the provisions of Section 5547.03, *supra*, will apply to the removal of water pipes installed in a county highway by a municipal corporation precisely as though such pipes had been installed by any person, partnership, or a corporation of another character.

The only variation might grow out of the application of the final paragraph of that section, which contemplates that the expense incurred by the county in removing an obstruction in the street which interferes with a proposed improvement, may be certified to the county auditor for collection. This remedy could hardly apply where a municipality is the offender, but the statute clearly raises an obligation to pay, which could be enforced by the ordinary processes for collection of a debt. It is my opinion that the first two paragraphs of the section in question are sufficient, independent of the third, to raise an obligation on the part of the

author of the obstruction, which would give the county a right of recovery for reimbursement for its damage and expense.

2. The above discussion seems to me to cover your second question as well as the first.

3. Your third question is answered at least primarily by the provision contained in said Section 5547.03, Revised Code, where it is stated that, on default of the party responsible for the obstruction to remove it:

“* * * the board may do so by employing the necessary labor.

The expense incurred shall be paid in the first instance *out of any moneys available for highway purposes*, and not encumbered for any other purpose, * * *.” (Emphasis added)

4. You inquire whether funds arising from the vehicle license and gasoline tax distributed to counties may be used for relocation of the water lines in question. Section 4501.04, Revised Code, which relates to distribution of vehicle license tax, contains this provision:

“* * *

“The county portion of such funds shall be retained in the county treasury and shall be used for the maintenance, repair, constructions, and repaving of public streets, and maintaining and repairing bridges and viaducts, and for no other purpose.

“* * *

Such money is certainly “available for highway purposes” within the purview of Section 5547.03, *supra*.

As to the portion of the gasoline tax distributed to counties under Section 5735.23, Revised Code, you will observe that the county’s share is to be used “for the purpose of *maintaining and repairing* the county system of public roads,” but not for constructing road improvements. If I am correct in my understanding of your letter, viz: that you had in mind construction and not mere repair, then the conclusion must be that the moneys received in the distribution made under Section 5735.23, Revised Code, could not be used for removing the obstructing water pipes referred to.

As to the distribution under Section 5735.27, Revised Code, the purpose to which the county may devote its share is thus stated:

“* * * for the sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways.”

This provision clearly brings such moneys within the meaning of "moneys available for highway purposes."

5. In answer to your fifth question as to the duty of the county to seek reimbursement for moneys which they have advanced to remove obstructions from a county highway which interfere with the improvement thereof, it appears to me that—having performed a necessary service which it was the duty of another person or body to perform—the county has a clear right to reimbursement and, having that right, it is the duty of the county commissioners, as officers of the county, to assert it.

Accordingly, in specific answer to the questions which you have submitted, it is my opinion and you are advised:

1. The provisions of Section 5547.03, Revised Code, relative to the duty of a corporation having installed water pipes in a county highway, to relocate or remove them, are applicable to a municipal corporation owning water lines in a county highway located outside the corporation limits of the municipal corporation.

2. Upon default or refusal of a person, partnership or corporation, which has installed water pipes in a county highway, to relocate or remove them as required under the provisions of Section 5543.03, Revised Code, the county commissioners may cause the same to be done, using any moneys available for highway purposes—including funds distributed to the county pursuant to Sections 4501.04 and 5735.27, Revised Code.

3. Where, pursuant to the provisions of Section 5547.03, Revised Code, a municipal corporation fails or refuses to relocate or remove water pipes placed by it in a county highway, where the same constitute obstructions to the improvement of such highway, the county commissioners may cause such work of relocation or removal to be done, and it is the right and duty of such commissioners to recover from such municipality, by appropriate action if necessary, the cost of doing such work.

Respectfully,

MARK MCELROY

Attorney General