Michigan Infrastructure & Transportation Association

September 14, 2016

County Road Association of Michigan
417 Seymour Avenue, Suite 1
Lansing, Michigan 48933

Michigan Municipal League
P.O. Box 1487
1674 Green Road
Ann Arbor, Michigan 48106

Dear Public Owner Agency:

The Michigan Infrastructure and Transportation Association (MITA) has conducted exhaustive research on the issue of whether the owner of a public works project may contractually obligate its contractor to locate and to be responsible for moving underground facilities that conflict with the new public works.

Based on the attached White Paper, it is MITA's position that apart from limited exceptions the responsibility for underground facility locating and relocation is with the owner of the facility and at its expense. Any such specification or contractual provision that seeks to shift that responsibility to a contractor is legally invalid, impractical, and inequitable.

We strongly suggest that you advise your Engineering Department and all Consulting Engineers that do work for you to cease and desist from including these types of provisions in any future contract specifications. We also request that you immediately issue an addendum that deletes these types of provisions from the contract specifications for projects you currently have under contract for construction.

It is MITA's intention to use any and all means necessary, legal or legislative, to end the use of these inappropriate and invalid contract provisions. If you have any questions related to our requests or intent in this matter, please do not hesitate to contact us.

Sincerely,

Glenn J. Bukoski, P.E.
Vice President of Engineering Services

cc: ACEC of Michigan
MITA Membership

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It is Improper and Illegal to Shift the Utility Companies' Costs to Contractors

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It has long been recognized—for well over a century in Michigan and throughout the United States—that the burden, cost, and risk of moving underground utilities when necessitated by public works projects is on the utility companies. That is, when new construction mandates that underground utilities be moved, the utility companies that own those underground facilities must pay and bear the cost to move them. Recently, however, consulting engineers have drafted project specifications abandoning that prudent policy. MITA members have raised several examples of contract specifications for public projects they have encountered that mandate the *contractor*, not the utility company, is responsible for relocating all existing underground facilities it encounters in its scope of work, regardless of whether such utilities are shown on the plans or not. These specifications, though they vary in detail, generally state that such work will be incidental to major items of construction. There is no pay item for utility relocation; the contractor is merely expected to include the cost of relocation in its bid, yet remain competitive in its pricing.

These specifications are wrong from a practical and pragmatic standpoint, wrong from an equitable standpoint, and worse yet wrong from a legal standpoint. Except in limited circumstances, the moving of these underground facilities should remain—as it always has been—the responsibility of the facility owners at their own expense. Any attempts to shift that burden would be struck down and municipalities should abandon the practice.

I. THE HISTORICAL COST ALLOCATION TO MOVE UNDERGROUND UTILITIES

A utility company generally acquires its right to locate its underground facilities in a public road or right-of-way by permission granted by the State or a municipality. The Michigan Constitution, specifically Const 1963, art 7, § 29, grants local governments the right to reasonable control of the highways, streets, alleys and other public places of the local government. Article 7, § 29 of the 1963 Michigan Constitution provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracts, conduits or other utility facilities, *without the consent of the duly constituted authority of the county, township, city or village*; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government. (emphasis added).

Consistent with this Constitutional authority, the Michigan Legislature passed Public Act No. 368 in 1925. Regarding relocating the facilities of privately-owned public utilities within public rights-of-way because of a public works project, 1925 PA 368, §§ 13-15; MCL 247.183-185 apply. MCL 247.183 authorizes public utilities to enter upon, construct and maintain telegraph, telephone, and power lines, sewers, and similar facilities, upon any public road. Before the work installing the utilities may commence, the utility "shall obtain the consent" of the governing body of the city, village, or township through or along which these lines are to be constructed. [1] These governing bodies may permit this work to proceed by virtue of an easement, franchise, plat, or other grant. Regardless of the means by which the utility came to be located beneath a municipality's streets, the utility company may use, but does not hold fee title in, the land on which it places its facilities.

Although a utility company may use the public way because it serves a public interest, the utility company's interest in the public way is subordinate to the public's enjoyment of it.[2] Courts have long held a utility company may locate its lines within the public right-of-way as a use secondary to the use by the public.[3] By extension, the majority of courts clearly state responsibility for relocating existing utilities conflicting with a new public works project rests upon the owner of the utility.[4]

The U.S. Supreme Court held that "[u]nder the traditional common-law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities."[5] This was merely a reiteration of the Supreme Court's previous holding nearly a century before that held that a gas company had to move its underground utilities in a public right-of-way at its own expense, because that company "did not acquire any specific location in the streets; it was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that change in location be made."[6]

This common law rule has almost universally been followed throughout the country. One article has noted that "the common law rule that utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities is remarkably well-established."[7] It was further noted that "[t]he U.S. Supreme Court approved it in 1905, reaffirmed it in 1983, and almost every state in the nation has adopted it."[8] This analysis noted that the law that utility companies bear the costs for moving their utilities in the public right-of-way is "nearly universal."[9] And rulings by courts throughout the nation for well over a century affirm this.[10]

II. UNDER MICHIGAN LAW, COSTS TO RELOCATE UNDERGROUND FACILITIES THAT CONFLICT WITH A PUBLIC WORKS PROJECT MUST BE BORNE BY THE UTILITY

Michigan courts have long followed the rule that the "common law states that utilities must pay for relocating their facilities."[11] In *City of Pontiac v Consumers Power*,[12] the Michigan Court of Appeals stated the general rule in utility relocation cases:

> Relocation costs must be borne by the utility if necessitated by the city's discharge of a governmental function, whereas the expenses must be borne by the city if necessitated by its discharge of a proprietary function. Whether the utility has located its transmission facilities by virtue of an easement, franchise, plat, or other grant is irrelevant; all are treated identically.

A city has two classes of powers—the one legislative, public, governmental, in the exercise of which it is sovereign and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality.[13] Under these rules, a municipality exercises its governmental functions when it undertakes a public works project. If it becomes necessary to change the location of underground facilities to accommodate the new public work, the relocation costs must be borne by the utility.

In Michigan this line of reasoning has been applied to the situation where a city desired to change the existing grade of a road and requested a trolley car company to remove parts of its railway ties,[14] or where constructing city sewers necessitated the removal of utility poles,[15] or where constructing a sewage treatment facility required the relocation of a utility's equipment.[16] In each case it is significant to note that the courts found that the right of the utility to use the public road was subordinate to that of the municipality's proposed use. In these cases the activities of the cities which necessitated a relocation of a utility's equipment were found to be for a public purpose—or a governmental function—and the utility was responsible for the relocation costs.

In 1981, prior to constructing the Detroit People Mover, the state's Attorney General was asked who would have to bear the cost to relocate private utilities in the public right-of-way. Attorney General Frank Kelly issued an Opinion of the Attorney General that concluded: "Privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improving of their facilities located within public rights-of-way . . . ."[17] The Attorney General cited the Michigan statutes regarding Highway Obstructions and Encroachments that state that nothing in the statutes that permit utilities to use the public rights-of-way should be "construed to grant any rights whatsoever to any public utilities . . . ."[18] Because the utilities "obtain no property rights in a road right-of-way when it places equipment there," it followed that "maintenance of the equipment is subject to the paramount right of the public to make use of the right-of-way."[19] Thus, "[w]hen some other use of the right-of-way arises, the utility must bear the expense of removing its own equipment."[20] The Court of Appeals later confirmed this opinion.[21] This was always the accepted rule in Michigan.

Unfortunately, our state Supreme Court recently added some confusion to this issue by abrogating those earlier Michigan cases that had followed this general rule and replaced it with the rule that "[a] municipality may regulate 'highways, streets, alleys, and public places' *to the degree such regulations are consistent with state law*." Thus, if a state law conflicts with a city ordinance, then the state law will prevail. If, however, there is no state law on point, the city can still exert "reasonable control" to regulate its rights-of-way. While this raised some confusion as to the general common law regarding utilities, that case is not directly on point because no known state statute expressly addresses responsibility for costs for moving of utilities already

underground for the benefit of the public's use of the rights-of-way.[22] Therefore, the general rule noted above continues to determine the issue.

Recently, the Michigan House of Representatives proposed a bill that would affect who had to pay to move underground utilities. That bill, introduced in 2015, did not pass and is not governing law, but the fact it was proposed is instructive. The bill attempted to legislatively shift the costs of such relocation by mandating state and local agencies give advanced notice to the utility companies whenever new construction or work would necessitate those utilities being moved.[23] If the municipality did not give that notice, then the municipality would have to pay half (50%) of the expenses to move the utilities. Conversely, by implication, if notice was properly given, the cost to relocate remained with the utilities.

The fact this bill was proposed underscores that the burden to pay to move underground utilities is still understood to be on the utility companies. One summary of the proposed bill stated that "[u]nder Michigan law, when a utility's facilities are within the right-of-way by permit, the highway agency typically does not pay for relocation. The department or a local road agency only pays for utility relocation when the utility has an easement or actual ownership of the property on which the facilities are placed."[24] This is because "[w]hile highway agencies typically do not pay for utility relocation costs, except under circumstances described above, utilities typically do not pay for occupying public highway rights-of-way. Utilities benefit from this free use of the public right-of-way that otherwise would be very costly to purchase."[25]

In other words, the utility companies are able to place their underground facilities in the right-of-way for free, because it benefits both the company and the public. This benefit, however, comes at a cost and a risk: if the underground lines need to be moved, this will happen at the cost of the utility companies so long as there is no conflicting state law or regulation on point. As the United State Supreme Court explained over 110 years ago, the City cannot "contract away" the control of its streets because that control is essential the health, safety and well-being of the community; whatever right the utility acquired to locate buried facilities beneath municipal streets is subject to future regulations as might be required in the interest of public health and welfare and the utility bears the attendant cost.[26] The municipality, therefore, bears no cost for the moving of those lines when it orders the utility companies to do so for the public good.

There is, then, no reason for a municipality to voluntarily assume responsibility for moving conflicting utilities, and then contractually shift this burden and cost of moving the lines to third-party contractors. Worse, such provisions could have negative consequences on those very municipalities and their citizens. These unintended consequences make such provisions that much more unwise.

III. The Negative Consequences and Poor Public Policy of Shifting the Costs from Utility Companies to the Municipality or to Contractors

The negative consequences of such cost-shifting provisions are easy to imagine. First, the municipalities gain nothing by shifting this burden from the utility companies to itself or the contractors who work on its projects. These costs were already paid for, so any cost-shifting

provisions will only lead to higher costs for public works projects, and increase municipality liability risks.

Contractors who bid on these projects will of necessity include the anticipated costs to move these utilities into their bids on these projects. This will lead to higher costs that the municipalities must pay to the contractors, but for no new additional benefit—which means more taxpayer dollars being spent, but with no additional benefit to the taxpayers being realized. Meanwhile, other contractors will not even bid on projects that contain such contract provisions, largely because such risks and costs are not quantifiable—it is difficult to price an unknown. If the contractor must include a large contingency to cover the unknown, the contractor risks the actual costs being greater. Moreover, a large contingency will undoubtedly price the contractor out of contention, and therefore it would be better to spend the time and money to bid better defined work elsewhere. The result will be to decrease competition for the work which increases the costs for those projects. There is no benefit to the municipality or taxpayers, but there could be both a harmful financial and exclusionary effect on contractors.

Under these provisions, the utility companies are essentially given a present at the taxpayers' expense. It has already been noted that utility companies enjoy the free use of the right-of-ways in turn for carrying the risk their utilities may have to be moved. Now, they receive the benefit with no accompanying risk. Additionally, it has been recognized (and simple economics necessitates) that the cost that the utility companies bear to relocate their utilities is included in their operating expenses within the rates they charge all of their customers and end-users.[27] So in effect, the end-users (those same taxpayers paying for the new public works projects) are already paying that cost, yet now the city resident-taxpayer would be forced to pay those costs again for higher bid prices from contractors. Needlessly spending public improvement dollars, particularly when such funds are scarce, is imprudent. The municipalities gain nothing, the tax payers are harmed, small business contractors could face drastic impacts, yet the utility companies get a bonus. Moreover, by assuming responsibility and oversight for utility relocation, municipalities expose themselves to potential liability if the facilities are not properly relocated.

In this light, it is easy to see these contract provisions are bad policy. Such cost-shifting mandates also happen to be illegal and unenforceable. Precedent and a new look at some old laws shows us that if such provisions were challenged in court, they likely would not be upheld. It was primarily for these reasons that the proposed bill in 2015 was ***not*** adopted.

IV. Such Cost-Shifting Specifications are Likely Illegal and Would be Held by Courts to be Void and Unenforceable

A. Mandating Contractors to Bear the Cost of Undisclosed Utilities is Contrary to Michigan Law and Public Policy

While it is important to note that the type of cost-shifting contract provisions we are discussing here are not uniform and differ from municipality to municipality, many of the provisions mandate that contractors are responsible for the cost to relocate all existing underground facilities, regardless of whether or not such facilities are shown on the contract

plans and specifications. That is, the contractor must pay to relocate those underground utilities whether they are known or unknown.

This violates Michigan law. For starters, Michigan has passed a Differing Site Condition statute to cover these very issues.[28] That statute mandates that on public improvement projects in excess of $75,000, if a contractor finds subsurface or latent physical conditions that differ materially from those indicated in the improvement contract, and those conditions cause an increase or decrease in the cost or additional time needed to perform the contract, and so long as the proper notice provisions are followed, then an "equitable adjustment shall be made and the contract modified in writing accordingly."[29] This is a complicated way to say a simple thing: if a contractor encounters undisclosed conditions that materially differ from those shown on the plans and specifications, it can obtain additional compensation to deal with those conditions.

But the cost-shifting provisions do the opposite. These provisions state that even if the contractor encounters undisclosed utilities not in the original plans—that is, it encounters site conditions that differ materially from those in the contract documents—it is not entitled to any additional compensation. This squarely contradicts the Differing Site Condition statute.

Exculpatory clauses and disclaimers as to the accuracy of the subsurface conditions represented in contract documents are not enforceable because they violate the public policy embodied in the Differing Site Condition statute.[30] If the contractor encounters conditions in the field that differ materially from the contract plans, the Legislature has determined that the governmental owner assumes the risk that the construction may cost more. The owner is then required to equitably adjust the contract sum (and time, if necessary) when, for instance, undisclosed utilities conflict with the work and cause the contractor to incur greater costs. Following that logic, the portion of the specifications that requires a contractor to locate and to move even *undisclosed* utilities at its own expense is contrary to the Differing Site Conditions statute, and would likely be ruled unenforceable in those situations.

Similarly, the fact that contractors are expected to pay for the cost of moving even undisclosed utilities is contrary to the policy rationale behind the newly amended Miss Dig Act. That act, amended in 2013, provides the notification system shall establish reasonable procedures for design ticket notification to facility owners of requests for project design or planning services to determine the type, size, and general location of facilities during the planning and design stage of a construction or demolition project. [31] When a municipality or its consulting engineer pulls a design ticket, a facility owner is either to provide its drawings or records that show the location of its facilities or, if it has no such drawings or records, to mark its facilities.[32] This is to happen *before* the plans for the project are designed. Yet, cost-shifting provisions that mandate that contractors are responsible for moving even undisclosed underground utilities is contrary to this public policy, passed by the legislature, that mandates that any such underground utilities be disclosed! It potentially exculpates the utility companies and the municipality from ensuring the underground facilities are located prior to planning, and improperly shifts that burden (and the cost for not following the act) to the contractor. Moreover, a City or its Project Engineer may be tempted to short change the location effort the Act requires, relying instead upon the contractor to locate these utilities. This places the contractor and the City residents at risk from gas main

explosions, electrocutions, and other calamities that are avoided through diligent location of underground facilities before work commences.

Such provisions should be deemed unenforceable as contrary to Michigan law,[33] and under the theory of the *City of Taylor* case noted above that only permits cities to govern their rights-of-way "*to the degree such regulations are consistent with state law.*"[34]

B. Such Cost-Shifting Provisions are in Violation of the Competitive Bid Process

Nearly every Michigan municipality has adopted an ordinance mandating public works contracts be awarded by a competitive bid process to the lowest responsive and responsible bid. Yet, as detailed in Section III, these cost-shifting provisions will lead to an *increase* in bid prices and project costs. For those communities that are mandated to follow such a competitive bid process, these cost-shifting provisions violate those laws.

Although there is no known Michigan case law on point, a Florida court has looked at this issue.[35] In that case, the Florida Supreme Court held that a public contract for a sewer system was void because the task and price of relocating utilities was included in the description of the work being bid. The court held that the "city of Tampa was . . . not authorized directly or indirectly to burden itself or its citizens with the cost of removing and replacing the water pipes, gas pipes, telegraph, telephone and electric light poles, drains, or conduits, or railway tracks that might necessarily have been interfered with in laying its sewers in the streets."[36]

The Court held this contract provision was improper because the municipality had to award contracts for public works to the lowest bidder, and any contract made in violation of that requirement was illegal and null and void. "The purpose and intent of the law in requiring such contracts to be let or awarded to the lowest responsible bidder for the work is to secure the public improvement at the lowest reasonable cost to the taxpayers."[37] Incorporating into the bid specifications any unauthorized and unnecessary conditions, such as paying to move the utilities, "will necessarily and illegally increase the cost of the work," and therefore "is not a letting of such contract to the lowest bidder . . . ."[38] This "will render the contract illegal and void."[39]

Just as noted above in Section III, the court noted that "bidders for the work, being advised in advance that they would be required to bear the cost of such removal and replacement, would increase their bids sufficiently to cover such cost, thereby casting an unauthorized and illegal burden upon the taxpayers, and defeating the purpose and object of the law in having the contracts for such work awarded to the lowest responsible bidder."[40]

Other courts, not specifically relying on competitive bid process laws, have likewise held such cost-shifting provisions are not enforceable. The New York Court of Appeals (New York's highest court) held that New York City could not assess property taxes on its taxpayers to reimburse a gas company for expenses incurred in removing and replacing gas lines that had to be moved when the street grade was changed.[41] As the court held, the utility "company took the risk of their location and should be required to make such changes as public convenience or security requires, and at its own costs and charge."[42] The Supreme Court of Maine likewise held

that reimbursement to a utility company for relocating its utilities was unconstitutional because the costs were already the utility companies' to bear.[43] The court's reasoning was that where a utility company has no right to be reimbursed for moving its facilities, it conversely means that the municipality has no authority to reimburse them for such acts, absent express legislative authority.

C. Such Provisions Are Arguably Unconstitutional and in Violation of Express Michigan Legislation.

Beyond the common-law and common sense arguments above, municipalities attempting to force such provisions upon contractors may face even bigger challenges. Such cost-shifting provisions could arguably be unconstitutional. Article 7 of the Michigan Constitution enumerates the general authority and limits of that authority of local governments.[44] Subject to authority granted in the Constitution, local governments derive their authority from the legislature.[45] Michigan courts have held that "local authorities can exercise those [powers] only which are expressly or impliedly conferred, and subject to such regulations or restrictions as are annexed to the grant."[46] In other words, municipalities can only do what the state says they can.

The state grants municipalities the right to control their rights-of-way. Art. 7, § 29 of the state Constitution states that the "the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."[47] The key, however, is the limiting term "reasonable control." "Reasonable control" has been defined as "such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the state itself with reference thereto."[48] These utility relocation provisions contravene laws passed by the state.[49] Such provisions, therefore, are not "reasonable."[50]

Similarly, such provisions arguably conflict with the Home Rule City Act. This series of statutes provide municipalities with their authority and rights vis-à-vis the state. One such statute grants local municipalities the power to pass "any act ***to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants*** . . . ."[51] But as noted above, these cost-shifting provisions do ***not*** advance the interests of the cities that utilize them, they ***impair*** the good government and prosperity of the municipality, and are actually a ***detriment*** and additional burden on its inhabitants. Because the municipalities have no authority to enact an act that would have the same effect as these contractual provisions, they should not then be able to simply include them in contracts to the same negative impact.[52]

Conclusion

Utility companies that utilize public rights-of-way to place their underground facilities bear the burden and cost of moving those facilities when necessary, and shifting those costs away from those utilities is a detriment to the municipalities and its taxpayers and a benefit solely to the utility companies. Such contract provisions will have negative consequences with no additional benefit. And based on existing Michigan law and policy, the nearly universal common law throughout the nation, and even under Michigan's own constitutional and statutory

authority granted to the municipalities, such provisions should be struck down as unenforceable, null, and void.

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[1] MCL 247.183. Similarly, utilities must first obtain consent from County Road Commissioners before they may construct underground utilities under a county road, and from State Highway Commissioner before installing utilities under a state road. MCL 247.184.
[2] MCL 247.185.
[3] A very thorough and rich resource on the history of underground utilities and their rights in relation to the municipalities and states that grant them their franchise can be found in Michael L. Stokes, *Moving the Lines: The Common Law of Utility Relocation*, 45 Val. U. L. Rev. 457 (2011), which was referenced for this piece.
[4] The franchise agreements will often be silent on the subject, but any claims, objections, or other actions taken in order to defend against the type of cost-shifting specifications being discussed here should start with a review of the specific franchise agreement in question.
[5] *Norfolk Redevelopment & Hous. Auth. v. Chesapeak & Potomac Tel. Co.*, 464 U.S. 30, 35, 104 S. Ct. 304 (1983).
[6] *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 461, 25 S. Ct. 471 (1905).
[7] Stokes, at 501.
[8] *Id.*
[9] *Id.*
[10] *See, e.g., In re Deering*, 93 N.Y. 361 (1883); *Anderson v. Fuller*, 41 So. 684 (Fla. 1906); *Nat'l Water-Works Co. v. City of Kansas*, 28 F. 921 (W.D. Mo. 1886); *Columbus Gaslight & Cake Co. v. City of Columbus*, 33 N.E. 292 (Ohio 1893); *First Nat'l Bank of Bos. v. Me. Tpk. Auth.*, 136 A.2d 699 (Me. 1957) ("the fundamental common law right applicable to franchises in streets is that a utility company must relocate its facilities in the public streets when changes are required by public necessities"); *N. States Power Co. v. Fed. Transit Admin.*, 358 F.3d 1050, 1053 (8th Cir. 2004) (calling the common law utility-relocation rule "undisputed precedent"); *City of Auborn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (noting that the rule has been followed in virtually every jurisdiction).
[11] *See City of Taylor v. DTE*, 475 Mich. 109, 124, 715 N.W.2d 28 (2006) (Kelly, J., dissenting) (citing numerous cases from the past century).
[12] *City of Pontiac v. Consumers Power Co.*, 101 Mich. App. 450, 453, 300 N.W.2d 594 (1980), *lv. den.* 410 Mich. 908 (1981).
[13] *Boerth v. Detroit City Gas Co.*, 152 Mich. 654, 116 N.W. 628 (1908).
[14] *Detroit v. The Fort Wayne & E. Ry. Co.*, 90 Mich. 646, 51 N.W. 688 (1892).
[15] *Detroit Edison Co v. Detroit*, 332 Mich. 348, 51 N.W.2d 245 (1952).
[16] *Michigan Bell Telephone Co v. Detroit*, 106 Mich. App. 690, 308 N.W.2d 608 (1981), *lv. den.* 414 Mich. 869 (1982). See also, *Consumers Power Co. v. Costle*, 468 F. Supp. 375 (E.D. Mich. 1979).
[17] OAG, 1981-1982, No. 6004, p. 436 (Oct. 30, 1981).
[18] *Id.*, citing Mich. Comp. Laws § 247.183-185.
[19] *Id.*
[20] *Id.* The Attorney General's Opinion also cited the long-standing Michigan case law cited above, and ultimately determined that "It is my opinion, therefore, that privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improvement, if any, of their facilities located within public rights-of-way necessitated by" public works construction.
[21] *Detroit Edison Co. v. Southeastern Michigan Transp. Auth.*, 161 Mich. App. 28, 410 N.W.2d 295 (1987), overruled by *City of Taylor v. Detroit Edison Co.*, 475 Mich. 109 (2006).
[22] *City of Taylor v. Detroit Edison Co*, 475 Mich 109, 715 N.W.2d 28 (2006). There the court analyzed a Michigan Public Service Commission ("MPSC") rule governing the responsibility for costs to "underground" electric lines that were previously on overhead polls, *id.*, but there is no similar rule that deals with lines already underground in need of relocation. Moreover, that rule only applied to electric lines, and not other utilities. And because there is no statutory state law directly on point, this raises the question of whether or not the generally accepted common law is considered a "state law" for purposes of this analysis. And because the Supreme Court's reasoning hinged on the fact that the common-law rules were promulgated before the MPSC passed its regulations, arguably those common-law rules that do not conflict with MPSC regulations could still govern. Unfortunately, *City of Taylor* may have raised more questions than it answered. *See, generally, id.* at 135 (Kelly, J., dissenting) ("And it is now unclear whether the common law in this area is abrogated in all situations or just in some situations."); *see also Mayfield*

Twp. v. Detroit Edison Co., 2016 WL 3020802 (Mich. App. May 24, 2016) (holding that a utility "is not exempt from every statute or rule other than those administered by the PSC.").
[23] HB 5016 (2015).
[24] Legislative Analysis of Relocation of Broadband Facilities: Government Notice, Dec. 17, 2015, found at: http://www.legislature.mi.gov/documents/2015-2016/billanalysis/House/pdf/2015-HLA-5016-54894936.pdf, last viewed by author on September 8, 2016.
[25] *Id.*
[26] *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460-462, 25 S. Ct. 471, 473-474 (1905).
[27] *Norfolk, supra* at 42.
[28] Mich. Comp. Laws § 125.1592.
[29] *Id.*
[30] *See, e.g., Gleason Constr. Co., Inc. v. Cascade Charter Twp.*, 2001 U.S. Dist. LEXIS 4373 (W.D. Mich. Mar. 23, 2001) ("overly expansive exculpatory clauses will not be upheld").
[31] Mich. Comp. Laws § 460.726a.
[32] MCL 460.726a(3).
[33] *See, e.g., Rental Prop. Owners Ass'n of Kent Cty. v. Grand Rapids*, 455 Mich. 246, 566 N.W.2d 514 (1997) ("The enactment and enforcement of ordinances related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws.").
[34] *City of Taylor*, 475 Mich. at 121.
[35] *Anderson v. Fuller*, 41 So. 684 (Fla. 1906).
[36] *Id.* at 688
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* In that case, the court allowed a taxpayer to bring a complaint to "restrain the paying out of public moneys upon void and unauthorized contract." *Id.*
[41] *In re Deering, supra.*
[42] *Id.* at 362.
[43] *First Nat'l Bank of Bos. v. Me. Tkp. Auth.*, 136 A.2d 699, 717 (Me. 1957).
[44] Mich. Const. 1963, art. 7.
[45] Mich. Const. 1963, art. 7, §§ 1, 17, and 21.
[46] *City of Kalamazoo v. Titus*, 208 Mich. 252, 262, 175 N.W. 480 (1919); quoting 1 Cooley, Constitutional Limitations (7th ed.), pp. 163, 264 *et seq.*
[47] Mich. Const. 1963, art. 7, § 29.
[48] *People v. McGraw*, 184 Mich. 233, 238, 150 N.W. 836 (1915).
[49] *See* Differing Site Condition Statute, Mich. Comp. Laws § 125.1592; Miss Dig Act, Mich. Comp. Laws § 460.726a.
[50] Arguably, a municipality is not exerting "reasonable control" over its rights-of-way by merely shifting costs from a party that bears that burden to a party that doesn't. Because the municipalities ultimately are the parties that pay to move these underground facilities through its payment to the contractors, such provisions arguably *cede* and *surrender* the municipalities' reasonable control of its public spaces by giving that control to the utility companies.
[51] Mich. Comp. Laws § 117.4j(3).
[52] Both the Constitution and the Home Rule statutes limit municipal regulatory authority to areas of "municipal concern," meaning those that bear "real or substantive relation to the public health, morals, safety, or general welfare of the municipality." *Austin v. Older*, 283 Mich. 667, 674, 278 N.W. 727 (1938); *Kalita v. Detroit*, 57 Mich. App. 696, 703, 226 N.W.2d 699 (1975). It is hard to see how a simple cost-shifting provision has any relation to the public health, morals, safety or general welfare of the municipality. And if the municipalities could not legally pass a resolution to that effect, they should not be permitted to unilaterally include such provisions in their contracts either.

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6004

October 30, 1981

METROPOLITAN TRANSPORTATION AUTHORITY:

Payment of costs of the relocation, extension or improvement of utility facilities located within public rights-of-way

UTILITIES:

Costs incurred by privately-owned public utility in the relocation, extension or improvement of facilities within public rights-of-way

Costs incurred by municipally-owned public utility in the relocation, extension or improvement of facilities within public rights-of-way

Privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improving of their facilities located within public rights-of-way necessitated by a downtown people mover and light rail system project to be installed by the Southeastern Michigan Transportation Authority, but the Authority is responsible for the costs of extension of service by the utility for such people mover and light rail system projects.

The Southeastern Michigan Transportation Authority must pay the costs of relocating, extending or improving municipally-owned public utility facilities located within the streets of the municipality necessitated by the construction of a downtown people mover and light rail system projects.

Honorable David A. Plawecki

Senate Majority Floor Leader

The Capitol

Lansing, Michigan

The Metropolitan Transportation Authorities Act, 1967 PA 204, Sec. 6(c); MCLA 124.406; MSA 5.3475(106), grants the Southeastern Michigan Transportation Authority (SEMTA), a public benefit agency and instrumentality of the state, the right to reasonable use of the spaces

and areas over, under and upon public streets and highways in order to carry out its statutorily imposed responsibilities.

You have informed me that SEMTA has proposed a downtown people mover for the central business district of the City of Detroit, with a light rail system traveling through the Cities of Detroit and Highland Park in Wayne County, and the Cities of Ferndale, Pleasant Ridge and Royal Oak in Oakland County.

You have also stated that in order to accommodate construction of the light rail and people mover projects, both public and privately-owned public utilities will be requested to extend and/or relocate their facilities, and additionally, municipal codes may require improvement of those facilities which connect or are adjacent to those facilities which must be relocated.

You have, therefore, requested my opinion on whether SEMTA or the public and privately-owned public utilities are responsible for bearing the costs which the utilities may incur in connection with the relocation, extension or improvement of the utilities' facilities necessitated by the SEMTA downtown people mover and light rail projects.

In considering the question posed, a distinction must be made between the relocation, extension or improvement costs incurred by municipally-owned public utilities and the relocation, extension or improvement costs, if any, incurred by privately-owned public utilities.

With regard to the facilities of privately-owned public utilities being relocated, extended or improved from within public rights-of-way as a result of the SEMTA projects, 1925 PA 368, Secs. 13-15; MCLA 247.183-185; MSA 9.263-265, are applicable.

1925 PA 368, Secs. 13-15, supra, statutorily permits telegraph, telephone, power and other public utility companies and cable television companies and municipalities to construct and maintain utility facilities within public rights-of-way subject to the paramount right of the public to use such public rights-of-way, and as long as the facilities do not interfere with the public uses of the public rights-of-way. 1925 PA 368, Sec. 15; MCLA 247.185; MSA 9.265, specifically provides, in pertinent part:

> '[Nor] shall anything in this section or sections 13 and 14 be construed to grant any rights whatsoever to any public utilities or cable television companies whatsoever, nor to impair anywise any existing rights granted in accordance with the constitution or laws of this state, but shall be construed as a regulation of the exercise of all such rights.' (Emphasis provided.)

In a letter opinion addressed to Representative Scott dated March 21, 1973, reported in OAG, 1973-1974, p 229, 231, 1925 PA 368, Secs. 14-15, supra, were reviewed and it was stated:

> 'These sections make it clear that a utility obtains no property rights in a road right-of-way when it places equipment there. The maintenance of the equipment is subject to the paramount right of the public to make use of the right-of-way. When some other use of

> the right-of-way arises, the utility must bear the expense of removing its own equipment.' (Citation omitted.)

The same letter opinion noted, at p 229:

> 'It has been held that public utilities must pay the cost of removal and relocation of their facilities when necessitated by improvement by governmental entities in control of the site. Detroit Edison Co. v City of Detroit, 332 Mich 348 (1952). In Detroit Edison, the plaintiff, a privately-owned public utility, declined to pay the cost of the removal and relocation of its poles and lines necessitated by the defendant city's construction of a sewer system. The plaintiff argued that it erected its facilities under the easement rights given by private grants [dedication to the use of the public]. However, the Court disagreed. In its final remarks, the Court said:
>
> "We conclude that within the limited terms of the dedications here involved the city's right of control over and user in the designated strips are the same as in areas dedicated to the city for streets or alleys. This being so, it follows that, as plaintiff concedes under such circumstances, the expense of removing and replacing plaintiff's utility poles must be borne by plaintiff. . . .' (at p 354).'

In Consumers Power Co v Costle, 468 F Supp 375, 379 (1979), aff'd 615 F2d 1147 (1980), the federal district court noted:

> 'Although a utility does have a property interest in the exercise of its franchise, it has been held that the cost of moving or replacing equipment, even if caused by governmental action, must be borne by the utility. The easements granted to utilities are in trust for the public and not a grant of right to private individuals, New Orleans Gaslight Co., supra, 197 U.S. at 460, 25 S. Ct. 471; Detroit Edison Co. v. Detroit, 332 Mich. 348, 352-53, 51 N.W. 2d 245 (1952).'

It is my opinion, therefore, that privately-owned public utilities are responsible for bearing the costs which may be incurred in connection with the relocation or improvement, if any, of their facilities located within public rights-of-way necessitated by SEMTA's downtown people mover and light rail system projects.

As to extension of utility services to accommodate the needs of SEMTA's downtown people mover and light rail system projects, it is my opinion that the costs of extending the services of a privately-owned public utility within public rights-of-way must be borne by SEMTA pursuant to tariffs and rates approved by the Public Service Commission.

With regard to the facilities of municipally-owned public utilities, attention must be focused on Const 1963, art 7, Sec. 29, which provides:

> 'No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other

> utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.' (Emphasis supplied.)

1925 PA 368, Secs. 13-15, supra, recognizes the rights of municipalities set forth in Const 1963, art 7, Sec. 29, by requiring municipal consent to the use of its streets, alleys and public places.

1925 PA 368, Sec. 15, supra, provides that sections 13-15 shall not

> '[b]e construed to grant any rights whatsoever to any public utilities or cable television companies whatsoever, nor to impair anywise any existing rights granted in accordance with the constitution or laws of this state, but shall be construed as a regulation of the exercise of all such rights.'

It is patently clear from a reading of the above statute that 1925 PA 368, Sec. 15, supra, does not abrogate municipalities' constitutional rights to control their streets and operate municipally-owned public utility facilities therein.

It is my opinion, therefore, that SEMTA must pay the costs of relocating, extending or improving municipally-owned utility facilities located within its own streets necessitated by the construction of the downtown people mover and light rail projects within the limits of the municipality.

Frank J. Kelley

Attorney General