

# Protecting Your Municipal Streets from Utility Cuts and Substandard Repairs

By Kevin J. Best, Esq.



**D**oes your municipality have an ordinance that regulates how and when utility companies and other entities or contractors enter into the rights-of-way to make repairs or improvements to their systems? Does your city or town give utilities and other companies an unfettered right to cut or dig in your roadways to do work? Every municipality is authorized to pass regulations and collect reasonable fees to ensure their streets and sidewalks are properly restored by anyone who wishes to make cuts or improvements within the rights-of-way, including the unimproved portion of the rights-of-way and the air space immediately above the rights-of-way.

I will use the statute governing natural gas companies as an example. Section 7-102 of the *Annotated Code of Maryland's* Public Utilities Article expressly requires a gas company to obtain the consent of the **governing body** of the municipal corporation before laying any gas pipe under the roadways or

other public ways of any municipal corporation of the State to transmit natural gas or artificial gas. This means that if the governing body has not delegated this power to one of its officials or the charter specifically states otherwise, the public utility must obtain approval from the full council or commission before proceeding.

If somehow the public utility merely obtains permission from the chief executive officer (i.e., the mayor, burgess or president) or a town employee, but fails to get the governing body's approval, the so-called permit is null and void or what the law technically refers to as an *ultra vires* act. The Court of Appeals of Maryland has long held that: "[i]t is a fundamental principle of law that all persons dealing with the agent of a municipal corporation are bound to ascertain the nature and extent of his authority." *Kent County Planning Inspector v. Abel*, 246 Md. 395, 228 A.2d 247 (Md., 1967) (citing *Gontrum v. Mayor and City*





*Council of Baltimore*, 182 Md. 370, 375, 35 A.2d 128, 130 (1943)).

A public utility or other permittee who expends resources and commences work cannot later claim that it detrimentally relied on an improperly issued permit and that the municipality must nonetheless honor it. The Court of Appeals also held in the Abel case that "[a] permit thus issued without the official power to grant does not, under any principle of estoppel, prevent the permit from being unlawful nor from being denounced by the municipality because of its illegality. In the issuance of permits pursuant to the ordinance at bar, the municipality was not acting in any proprietary capacity nor in the exercise of its contractual powers, but in the discharge of a governmental function through its public officers of limited authority, and the doctrine of equitable estoppel cannot be here invoked to defeat the municipality in the enforcement of its ordinances because of an error or mistake committed by one of its officers or agents which has been relied on by the third party to his detriment. ***Everyone dealing with the officers and agents of a municipality is charged with knowledge of the nature of their duties and the extent of their powers, and therefore such a person cannot be considered to have been deceived or misled by their acts when done without legal authority.***" *Id.* at 401. (emphasis added)

The referenced statute, particularly applicable to gas companies found in the Public Utilities Article and Article 23A, §2(33), further allows the governing body of a city or town to adopt reasonable regulations and conditions for laying gas pipe, including regulations requiring gas companies to refill and repave any roadway under which the pipe is laid, and to establish and collect reasonable fees and charges for the franchises, licenses, or permits authorized by law to be granted by a municipal corporation.

Most of the public utilities and telecommunications companies in this State are entitled by a franchise agreement to use the public rights-of-way to provide various services such as electric, water, sewer, gas, and cable TV to name a few. A valid franchise agreement, however, does not negate the need for a construction permit unless the franchise agreement or some other law states otherwise. As part of the permitting process, the municipality may require that the permittee pay fees for the size or extent of the disturbance (e.g., \$2.00 per linear foot), an additional fee for cuts to roadways that are relatively new, as well as a fee to defray the cost of hiring an engineering firm to review the plans and inspect the work to ensure the proper materials



and workmanship are actually used to restore the street and that the fill materials are properly compacted in accordance with the specifications referenced in the ordinance and/or the permit.

Typically a utility will be allowed to use either a temporary patch using hot mix asphalt instead of cold patch or permanent restoration standards including proof of compaction to be tested by an independent laboratory. A thorough street ordinance governing utility cuts may also include a provision that limits when work may occur (e.g., the time of day and not on holidays) and include a legal duty to provide proper lighting, barricading, traffic control plans, control of dust and debris, and other safety measures that the municipality may require. Other provisions may include proof of insurance, bonding, and indemnification and holding the municipality harmless from all damages resulting from accidents which may result from construction operations.

Numerous studies have concluded that streets with utility cuts experience decreases in service life by as much as 50% or more. In recent years, the General Assembly has slashed state-shared revenues for highway maintenance. Municipal officials should, therefore, carefully review their ordinances and regulations to ensure they are adequately protecting their municipal streets from utility cuts and substandard repairs that leave hazards to pedestrians and the traveling public, and further degrade the lifespan of municipal streets. ■

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