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Bar Beat

Frozen Water Lines: Who is Responsible?

Most cities and villages across New York are not experiencing the bone-chilling temperatures the northeast weathered during the winter of 2015. Nevertheless, the issue of frozen water lines remains a topic of much discussion among municipal leaders. Last winter's unrelenting stretch of freezing temperatures froze water lines that had never frozen before. As a result, some municipalities were faced with the dilemma of how to legally address the situation of when a resident requests the municipality to thaw their privately-owned waterline.

Overview

Municipal water systems are a network of public and privately owned water lines, running underneath public and private property. Consequently, it is quite common for there to be confusion as to who is responsible for maintaining particular lines, especially in older municipalities with aging systems that date back decades, if not centuries.

Water lines that run from a resident's home, across their private property, and then hook into the municipal system's main line are commonly referred to as "lateral" lines. Municipal water mains are most commonly situated under a public street or in a municipal right-of-way, although that is not always the case. It is not uncommon in older municipalities to discover "unique" situations when

working with municipal water lines.

As a general rule, private homeowners are responsible for the lateral line located on their private property which extends from their home and connects to the municipal water main, while the municipality is responsible for the water main which is owned by the municipality and located on public property or in a public easement.

The question that came to the forefront during last winter's arctic cold when an unprecedented number of privately owned water lines froze was "Does a municipality have the authority to enter private property and thaw private water lines?"

At least a few municipalities in the State have taken ownership of the laterals after acquiring the necessary

property rights to the laterals and the land where the laterals have been laid. However, this is not the norm and this article addresses the most common scenario where the municipality does not have an ownership interest in the lateral water lines.

The Constitutional Prohibition Against Giving Gifts

Every discussion of municipal work on lateral water lines must begin with New York State Constitution, Article VIII, Section 1 which prohibits a municipality from gifting public resources to individuals and entities without receiving fair and adequate consideration. The purpose of the State Constitution's anti-gifting provision is to "curb raids on the public purse for the benefit of favored individuals or enterprises furnishing no benefit."¹

interpreting Article VIII, Section 1, the Office of the State Comptroller has concluded that, as a general rule with few exceptions, municipalities are prohibited from expending public money "for the benefit of private parties unless it is in furtherance of a proper municipal purpose and is undertaken pursuant to a statutory obligation or properly authorized contract under which the municipality received fair and adequate consideration."² The Office of the State Comptroller (OSC) has further opined that a "village may not provide maintenance for privately owned water and sewer lines at village expense because the expenditure of public moneys therefor would constitute a gift in violation of the State Constitution."³

In rare instances, OSC has found that "[i]t would not contravene Article VIII, Section 1 to "expend municipal moneys in connection with private property if it is determined that the expenditure furthers a proper municipal purpose and only incidentally benefits private owners."⁴ The Office of the State Comptroller further reasoned that "it is well established that an incidental private benefit will not invalidate a project which has as its primary object a proper public purpose."⁵

When analyzing whether a municipality may do work on lateral lines, the municipality must ensure that the overarching objective is to advance a proper public purpose. This point is illustrated in OSC Advisory Opinion 1990-4 which reaffirmed a previous opinion that concluded a "village could, pursuant Village Law §4-412, dredge a pond located on private property if the pond serves an integral part of the village's drainage system and the undesirable conditions in the pond are attributable to its use as a part of the drainage system." In reaching that conclusion, the Opinion makes clear that the pond was an important component of the municipal drainage system and the private benefit of dredging a private pond was merely incidental to the overarching public benefit.

In another opinion, OSC found that, where a village "determined that the leakage of sewage onto the village street presented an urgent health hazard and the correction of the problem could not await attempts by the village to have the matter rectified by the owner(s) of the pipe or those persons legally responsible for the maintenance thereof,"⁶ then "the village was justified in repairing the pipe even though it is privately owned."⁷

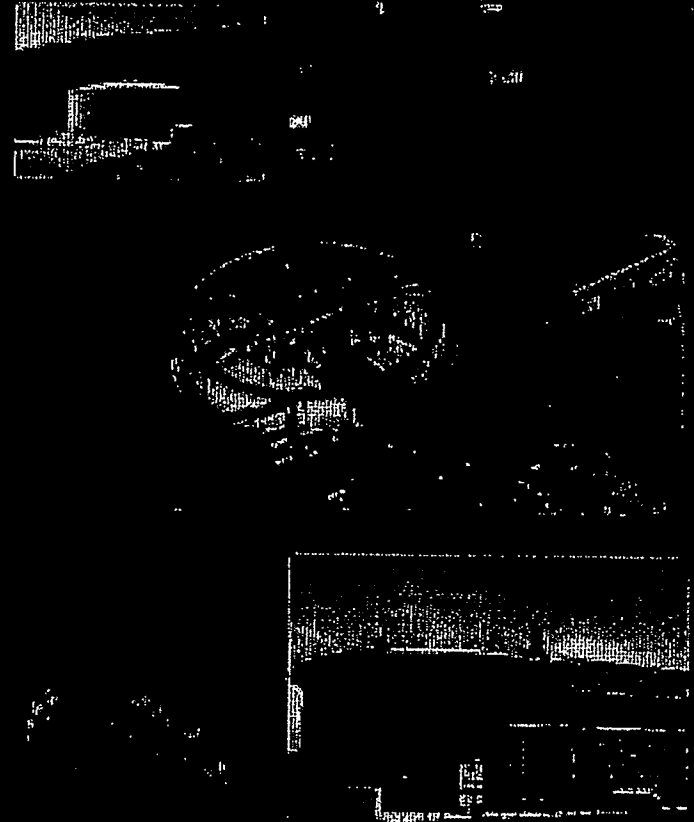
Villages

In addition to the narrowly tailored exceptions listed above, contained within the Village Law are two additional narrow exceptions that permit villages to enter onto private property and repair a private line that is in disrepair. First, Village Law § 4-414, authorizes villages to enter onto private property in the interest of public safety, health, comfort, and general welfare to perform necessary work to protect the public's safety, health, comfort,

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and general welfare. If a local law has been enacted, the village is permitted to recoup the cost of the work performed.⁸

The second exception to the general prohibition against doing work on private property can be found in Village Law § 11-1112(2) which authorizes villages to require "certain property owners to repair connecting water pipes on the owner's property."⁹ If the owner of the private line refuses to remedy the situation and fails to repair the line, the village may enter onto the private property and "make the repair and assess the cost back against the private property involved."¹⁰

Again, these exceptions are to be narrowly construed and used in the event of emergency situations that imperil overall public health and safety.

Cities

Cities are obligated to adhere to the same principles as outlined above regarding the State Constitution's prohibition against gifting municipal re-

sources. A city must also refer to its charter regarding any additional authority that may be contained within the charter.

Nevertheless, a city is also authorized to take emergency action if necessary. As with villages, the Office of the State Comptroller has opined that "where a defect in a private water or sewer line (or any other circumstance) creates an emergency condition which is an imminent threat to the public health or welfare, requiring immediate corrective action, then a municipality, in the exercise of its general police powers, may undertake repairs as necessary and appropriate to protect the public interest even though there is no express authority for such action in the form of a statute or local enactment."¹¹

Conclusion

Villages and cities are generally prohibited from entering private property to perform work on a private water line. However, in the specific situations highlighted above where the gen-

eral public's health, welfare and safety is at risk, there is limited authority for municipalities to enter and perform work on private property. It is strongly advised that municipalities consult with their legal counsel before committing municipal time and resources to any project on private property.

If you would like a copy of any of the opinions or cases cited in this article, please contact John Mancini, NYCOM Counsel at jmancini@nycom.org.

Endnotes:

1. *The Public's Property; The Constitution's Prohibition Against Gifts and Loans* (NYCOM Municipal Management Series 2010), P. 2.
2. 1990 Op. State Compt., 90-4. See also, 1982 Op. State Compt., 82-216.
3. 1982 Op. State Compt., 82-304.
4. 1990 Op. State Compt., 90-4.
5. *Id.*
6. 1982 Op. State Compt., 82-304.
7. *Id.*
8. *Id.*, See also, 1979 Op. St. Compt., 79-21.
9. 1979 Op. State Compt., 79-21.
10. *Id.*
11. 1982 Op. State Compt., 82-304.

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