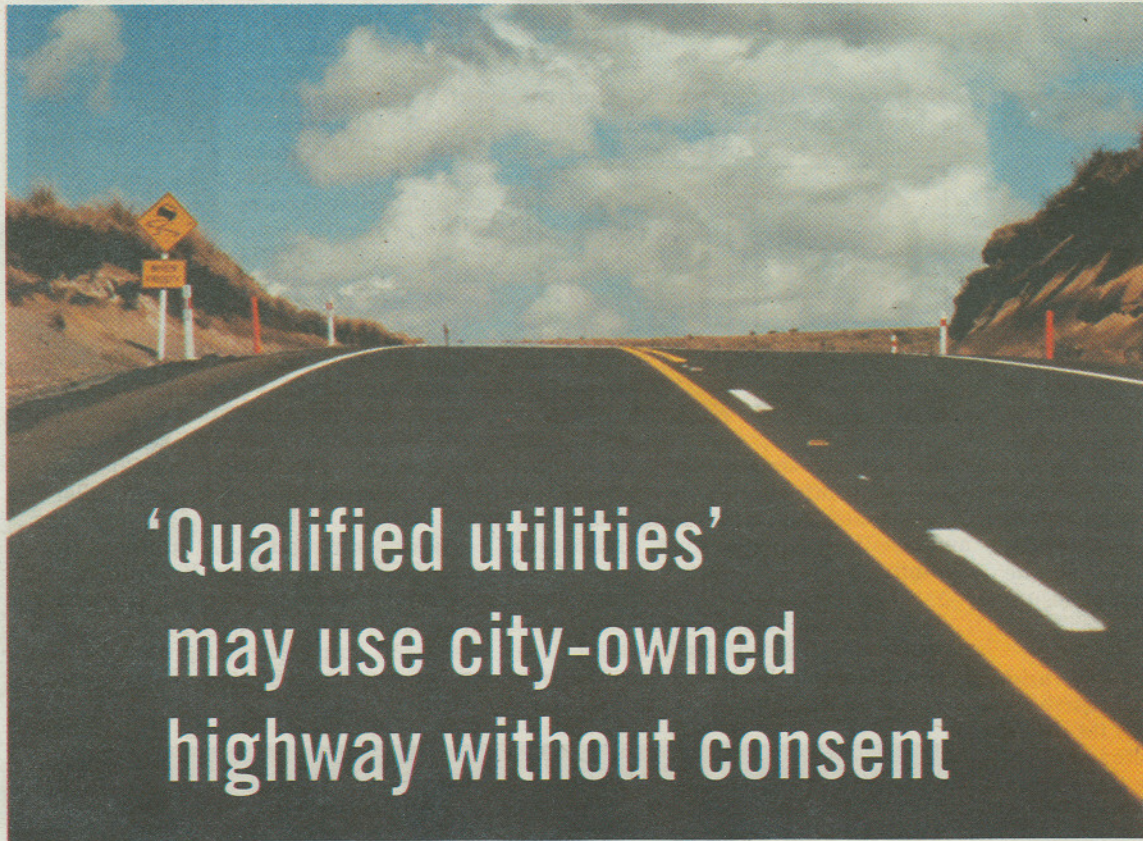


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**'Qualified utilities'  
may use city-owned  
highway without consent**

## Michigan Court of Appeals — Municipal Law

By Melissa P. Stewart, Esq.

*If at first you don't succeed, try, try again.*

At least, that seems to be the lesson gleaned from a line of cases involving an ongoing dispute between the City of Lansing and Wolverine Pipe Line Company.

The cases stem from a 2000 application filed by Wolverine with the Michigan Public Service Commission (PSC) requesting permission to reroute a mid-Michigan liquid petroleum pipeline into the right-of-way of Highway I-96.

Because a portion of the pipeline would fall within Lansing, Wolverine also sought the city's consent. But, Lansing rejected Wolverine's proposal after concluding that "the proposed pipeline (1) would disparately impact minority populations, (2) constitute an unreasonable risk to ground and surface water, (3) constitute an unreasonable risk to person and property, and (4) that the city lacked the resources to mitigate a catastrophic pipeline failure."

Nevertheless, Wolverine continued with its PSC application — eventually securing approval for the project.

However — despite garnering the state's consent — Wolverine's

battle was far from over, because Lansing next filed the first in a long line of lawsuits against the utility company.

Alleging that Wolverine had a statutory obligation to obtain its consent before it could apply to the PSC, Lansing argued that the utility company was barred by MCL 247.183 from constructing its pipeline based on approval from the PSC alone.

The Court of Appeals and the Michigan Supreme Court agreed — but only to a point.

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# Statute gave utility right to use highway despite city's objections

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That is, both courts found that while Wolverine didn't necessarily have to obtain permission from Lansing first, it did have to secure it at some point prior to building its pipeline on the city's land.

But in the year that followed, the

court enjoin Wolverine from using its streets for the construction of the pipeline without its consent.

When the trial court upheld the statute, Lansing again brought its claims to the Court of Appeals, contending that "the trial court erred when it broadly interpreted MCL 247.183(2) to remove the need for qualified utilities to obtain the consent otherwise required" by the constitution.

### Outer limits

In a unanimous opinion authored by Judge Michael R. Smolenski and signed by judges Henry William Saad and Joel P. Hoesktra, the city was rebuffed.

Noting that the trial court acted properly when it broadly construed the statute in light of the state constitution, Smolenski went on to reject Lansing's suggestion that "municipalities have the absolute right to refuse to consent to the use of their streets by utilities."

Turning first to the language of the constitution itself, Smolenski explained that "the 'consent' clause of [art 7,] § 29 prohibits the use of 'the highways, streets, alleys or other public places of any county, township, city or village' by utilities for their facilities without the consent of the [municipality]."

withhold consent for use of its highways ... that consent cannot be 'refused arbitrarily and unreasonably.'

Smolenski next pointed out that a city "must exercise its authority to grant or withhold consent through its general power to adopt resolutions and ordinances relating to municipal concerns."

Taken together, the judge ruled, "[b]ecause a city's general authority to adopt resolutions and ordinances is subject to the constitution and law, and a city's general authority to grant or withhold consent to use its highways ... can only be exercised through an ordinance or resolution, it follows that a city's ability to grant or withhold consent is also subject to the constitution and laws."

As such, "the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29," Somlenski concluded. And, "MCL 247.183, as amended ... is not unconstitutional."

### No means 'maybe'?

Lansing City Attorney Brigham C. Smith blasted the decision, claiming it "threatens to relegate 'local control' from a longstanding legal principle to a quaint legal catch phrase."

According to Smith, "the constitution says what it means — and means what it says — [and] the constitution says that no public utility shall have the right to the use of the city streets without the consent of the city."

And, he told Lawyers Weekly, "under the constitution, 'no' means 'no.'"

As such, Smith and the City of Lansing are appealing the decision, hoping that intervention on the part of the high court will prevent the Court of Appeals' decision from "hav[ing] a profound impact not just on the relationship between local governments and utility companies, but on the relationship of local governments to the fabric of governance itself."

Meanwhile, Lansing lawyer James A. Ault — who wrote an amicus curiae brief on behalf of Consumers Energy Company

— suggested that the decision's impact will not be quite so far-reaching.

"The decision is technical, involving law that has a narrow application," he explained.

Even so, he praised Smolenski's "observation that the municipality must act reasonably regarding its decisions on local consent under the constitutional consent provision."

But whatever the ultimate impact of this latest decision, one thing is for certain according to all attorneys involved: The dispute between Lansing and Wolverine is far from over.

In fact, both Albert Ernst — who represents Wolverine — and Michael A. Nickerson — who represents the State of Michigan — declined to comment because an application for leave to appeal is currently pending before the Supreme Court.

The six-page decision is *City of Lansing v. State of Michigan, et al.*, Lawyers Weekly No. 07-62832.

*If you would like to comment on this story, please contact Melissa P. Stewart at (248) 865-3105 or melissa.stewart@mi.lawyersweekly.com.*

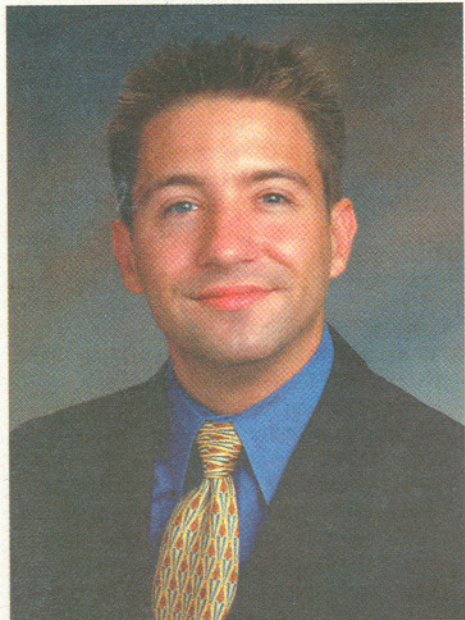
## Decision in a nutshell

**The Issue:** Is MCL 247.183 unconstitutional inasmuch as it allows "qualified utilities" to make use of a highway owned by a city without the city's consent?

**The Ruling:** No. The Court of Appeals said that a city's authority to grant or withhold consent is subject to "the constitution and laws." Therefore, the statute — which effectively curbs a city's right to withhold consent — is valid.

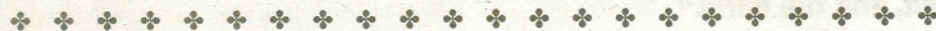
**The Impact:** Under certain circumstances, a utility company may use a municipality's land without its consent — even over its strenuous objections.

**The Case:** *City of Lansing v. State of Michigan, et al.*, Lawyers Weekly No. 07-62832



**"The constitution says what it means — and means what it says — [and] the constitution says that no public utility shall have the right to the use of the city streets without the consent of the city."**

— Lansing attorney Brigham C. Smith



Michigan Legislature stepped in and amended the statute to remove the consent requirement.

So, again, Lansing filed suit.

This time, it sought a declaration that the amendment improperly dispensed with a constitutionally mandated consent requirement. Moreover, it requested the

But, he continued, "although the consent clause is framed as a limitation on the activities of utilities, it is in effect a grant of authority to local units of government."

Moreover, the judge explained, the Michigan Supreme Court weighed in to rule that though § 29 seems to grant municipalities "absolute authority to grant or