

Note from the Attorney General's Office:

1973 Op. Att'y Gen. No. 73-002 was overruled by
1981 Op. Att'y Gen. No. 81-077.

OPINION NO. 73-002

Syllabus:

A corporation engaged in the cablevision business need not obtain authority from a township before beginning construction of its system within the township.

To: Daniel T. Spidler, Wood County Pros. Atty., Bowling Green, Ohio
By: William J. Brown, Attorney General, January 10, 1973

I am in receipt of your request for my opinion, which asks the following question:

Must a corporation engaged in the cablevision business obtain prior authority from a township before construction may begin?

Townships only possess the powers and privileges which are delegated to or conferred upon them by statute. Yorkavitz v. Board of Township Trustees, 166 Ohio St. 349 (1957). See also 52 O. Jur. 2d, Section 6, and cases cited therein. Thus, if a township has the power to regulate the construction of a cablevision system, such power must have been delegated to it by the General Assembly.

Upon examination of the statutes pertaining to townships, it appears that the only statute under which a township could possibly regulate a cablevision corporation is R.C. 519.02, which concerns township zoning. R.C. 519.02 reads as follows:

For the purpose of promoting the public health, safety, and morals, the board of township trustees may in accordance with a comprehensive plan regulate by resolution the location, height, bulk, number of stories, and size of buildings and other structures, including tents, cabins, and trailer coaches, percentages of lot areas which may be occupied, set back building lines, sizes of yards, courts, and other open spaces, the density of population, the uses of buildings and other structures including tents, cabins, and trailer coaches, and the uses of land for trade, industry, residence, recreation, or other purposes in the unincorporated territory of such township, and for such purposes may divide all or any part of the unincorporated territory of the township into districts or zones of such number, shape, and area as the board determines. All such regulations shall be uniform for each class or kind of building or other structure or use throughout any district or zone, but the regulations in one district or zone may differ from those in other districts or zones.

However, R.C. 519.21, which excepts public utilities from regulation by a board of township trustees or a board of zoning appeals, reads, in part, as follows:

Sections 519.02 to 519.25, inclusive, of the Revised Code confer no power on any board of township trustees or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, and no zoning certificate shall be required for any such building or structure.

Such sections confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business.

Thus if a cablevision corporation qualifies as a public utility for purposes of R.C. 519.21, it is not subject to regulation by a township under R.C. 519.02.

In Opinion No. 71-029, Opinions of the Attorney General for 1971, I held that a corporation organized to provide a water system to its members was a public utility under R.C. 519.21. In that Opinion, I relied upon the definition of "public utility" laid down by the Ohio Supreme Court in Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246 (1924), which reads as follows:

To constitute a 'public utility', the devotion to public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be the acceptance by the utility of public franchises or calling to its aid the police power of the state.

Motor cargo carriers have been held to be public utilities under this definition. Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Op. 257 (1953); Freight, Inc. v. Board of Township Trustees, 107 Ohio 288 (1958). My predecessor also held that a water tower was part of a public utility and therefore immune from township regulation under R.C. 519.02. Opinion No. 69-165, Opinions of the Attorney General for 1969. See also Opinion No. 70-097, Opinions of the Attorney General for 1970.

A cablevision corporation falls clearly within the definition of "public utility" set forth in the Southern Ohio Power Co. case, supra, because its service is available to the public generally and indiscriminately. Therefore a cablevision corporation is not subject to regulation by a township under R.C. 519.02. Since a township has no other statutory power to regulate such corporations, I must conclude that a cablevision corporation need not obtain authority from a township before beginning construction of its system within the township.

In Greater Fremont, Inc. v. Fremont, 302 F. Supp. 652 (1968), the court held that a cablevision corporation was not a "public utility." However, that case can be distinguished from the instant situation because the court was defining "public utility" for purposes of article 18, Section 4, Ohio Constitution. The meaning of "public utility" changes somewhat with the statute in which it is used. Opinion No. 71-029, supra, and Motor Cargo, Inc. v. Board of Township Trustees, supra, in which the court, referring to R.C. 519.21, made the following statement:

It seems quite evident that the meaning of public utility as used in this statute cannot be determined from its use in other statutes for the reason that it is limited in each instance.

In specific answer to your question it is my opinion, and you are so advised, that a corporation engaged in the cablevision business need not obtain authority from a township before beginning construction of its system within the township.