

OPINION NO. 80-043

Syllabus:

1. Pursuant to R.C. 5547.04, the approval of the board of county commissioners is required prior to the installation of pipes,

tubing, conduits, poles, or wires in the right-of-way of township roads within the county. In granting such approval, the county may impose any condition it deems necessary to protect the easement and maintain or restore the roadway.

2. Pursuant to R.C. 1723.01, R.C. 4933.01, and R.C. 4951.12, the permission of the board of township trustees is required prior to the installation of facilities in the right-of-way of township roads in the circumstances specified therein--respectively, the installation of pipes, tubing, conduits, and wires by a company organized for a purpose described in R.C. 1723.01; the laying of conductors by a company organized for the purpose of supplying gas, water, or sewage disposal services for the township as described in R.C. 4933.01; and the installation of a street railway by a company authorized for that purpose as described in R.C. 4951.12.
3. A board of township trustees has the authority pursuant to R.C. 5571.16 to adopt a resolution requiring any person to secure a permit from the board of township trustees before any excavation is made in a township road.
4. A board of township trustees may, when granting permission for the installation of facilities in township roads pursuant to R.C. 1723.02, R.C. 4933.01, R.C. 4951.12, or R.C. 5571.16, impose upon any company installing facilities pursuant to one of these sections any restrictions reasonably necessary for the restoration of the road right-of-way and maintenance of the facilities installed.
5. If the permission of township trustees is required under R.C. 1723.02, 4933.01, 4951.12 or 5571.16 prior to the installation of facilities in a township road, such requirement is in addition to the requirement of approval of the board of county commissioners pursuant to R.C. 5547.04. If no township approval is required pursuant to such sections, then the board of county commissioners may on its own authority authorize the installation of facilities in a township road. (1962 Op. Att'y Gen. No. 3006, p. 368 modified.)
6. When the necessary county approval and, if required, township approval are granted for the placing of facilities in a township road, the consent of the abutting landowners or appropriation proceedings are unnecessary if the grant is for a public purpose and a purpose incidental to public travel.

To: James R. Unger, Stark County Pros. Atty., Canton, Ohio
By: William J. Brown, Attorney General, August 14, 1980

I have before me your request for my opinion wherein you ask the following questions:

1. Does Section 5547.04 of the Ohio Revised Code (or any other Revised Code Section) authorize a board of county commissioners to permit the installation of utility facilities in the right-of-way of township roads?
2. If the answer to the above question is yes, then what type of interest such as easements, permits, licenses, may be granted?
3. What conditions or regulations in regard to the maintenance or restoration of the roadway and utility lines may be imposed by the board?

4. If such installations are permitted, is the consent and/or involvement of the board of trustees of the township in which the road is located required?

According to the information supplied in your letter, a corporation engaged in oil and gas drilling wishes to install its gas transmission lines within the right-of-way of a township road. The corporation has approached both the county commissioners and the township trustees to grant it a right-of-way or license to install oil and gas pipelines in highways designated as township roads. You have advised the township, in accordance with 1962 Op. Atty Gen. No. 3006, p. 368, that a township has no specific statutory authority to grant a person, firm, or corporation the right to place utility facilities in the right of-way of a township road. You question whether, pursuant to R.C. 5547.04, the board of county commissioners may permit the proposed installation of facilities in township roads.

R.C. 5547.04 provides, in pertinent part:

No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highridges on the state highway system and the bridges and culverts thereon. (Emphasis added.)

The threshold question, with respect to the foregoing provisions of R.C. 5547.04, is whether the emphasized words, "any highway," refer to highways designated as township roads.

R.C. 5535.01 sets out the classification of "the public highways" in this state, and divides them into three classes: state roads, county roads, and township roads. State roads are the "roads and highways on the state highway system." R.C. 5535.01(A). County roads are those roads established as part of the county road system pursuant to R.C. Chapter 5541. R.C. 5535.01(B). Township roads "include all public highways other than state or county roads." R.C. 5535.01(C). Thus, under the classification established by the General Assembly, it is apparent that the term "highway" is meant to encompass all types of roads—state, county, and township. I conclude, therefore, that the words, "any highway" in R.C. 5547.04 encompass all roads, including township roads, except for those specifically excepted, namely, state roads.¹

The next question is whether pipes or conduits in a township road are obstructions within the bounds of a highway for purposes of R.C. 5547.04. "Obstruction" is not defined for purposes of R.C. Chapter 5547 or any other chapter of Title 55 and its intended meaning is not readily apparent.

It is fundamental that the intent of the legislature in enacting a particular statute is primarily determined from the language of the statute itself. Stewart v. Trumbull County Bd. of Elections, 34 Ohio St.2d 129, 276 N.E.2d 676 (1973). In the instant case the language of the above-quoted provision does not make clear what was meant by the word "obstruction." Other portions of R.C. 5547.04 do, however, give some indication of what was meant by the word "obstruction" in that section.

¹The framework of Title 55 is such that the state has control over state roads, counties have control over county roads, and townships have control over township roads. Hence, there would be a basis for construing "any highway" in R.C. 5547.04 as referring only to county roads. See generally 1980 Op. Atty Gen. No. 80-040. However, because the General Assembly has by the express language of R.C. 5574.04 qualified "highway" to mean all highways except those in the state system, it is impossible to infer that township roads were also excepted.

That part of R.C. 5547.04 which precedes the portion of R.C. 5547.04 quoted above provides:

The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.

By first obtaining the consent and approval of the board of county commissioners, obstructions erected prior to July 16, 1925 in highways other than roads and highways on the state highway system or bridges or culverts thereon, may be permitted to remain, upon such conditions as the officials may impose, provided such obstructions do not interfere with traffic or with the construction or repair of such highways. (Emphasis added.)

This part of R.C. 5547.04 makes clear that an "obstruction" is not limited to something that interferes with the flow of traffic on the highway or with the construction or repair of the highway. The last part of R.C. 5547.04 quoted above allows certain "obstructions" to remain in the highways, provided "such obstructions do not interfere with traffic or with the construction or repair of such highways." Moreover, R.C. 5547.04 makes clear that an "obstruction" may include an object which may "obstruct" the view of drivers at curves or intersections.

In putting these parts of R.C. 5547.04 together, it becomes clear that the General Assembly intended that the word "obstruction" have a very broad meaning. In order to give effect to this intention of the General Assembly, it appears that "obstruction" must be defined so as to include virtually any object within the bounds of a highway that has been "placed" or "erected" there. In other words, an "obstruction" is any object that has the potential of interfering with the highway easement. An object could interfere with the easement without hindering the flow of traffic or the construction or maintenance of the highway. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location.

Applying this meaning of "obstruction" to the instant case, it is clear that pipes and conduits, etc., in a highway right-of-way constitute "obstructions." These pipes may be laid along a substantial portion of the road. There is no doubt that unless the pipes are laid in a manner approved by the county commissioners,² the pipes have the potential of interfering with future construction and maintenance of the road. This conclusion is confirmed by R.C. 5547.03, which expressly states that pipes, conduits, etc., occupying any part of a highway may constitute "obstructions." Moreover, R.C. 5547.03 makes clear that pipes, conduits, etc., may constitute obstructions even where such pipes, conduits, etc., have been installed pursuant to a "franchise legally granted." I conclude, therefore, that a company wishing to lay pipes in a township road is subject to R.C. 5547.04. Thus, the approval of the board of county commissioners is required, pursuant to R.C. 5547.04, prior to the installation of facilities in the right-of-way of a township road within the county. As discussed below, however, there are instances in which such approval is not sufficient, but the permission of the township is also required.

Your fourth question addresses the role of township trustees in the approval of the installation of facilities in the right-of-way of a township road. I will begin consideration of this question by reexamining the conclusion reached by my predecessor in 1962 Op. No. 3006 with respect to the authority of a township to permit the use or occupation of township roads. That opinion found express statutory authority for the power of a county, R.C. 5547.03, the state, R.C. 5515.02, and a municipal corporation, R.C. 715.34, to permit a utility to use or occupy roads, but no such authority for townships. The opinion did not, however,

²It is the county engineer's expertise that controls the construction and maintenance of township roads. See, e.g., R.C. 5515.05, 5543.02 and 5575.07.

take note of the provisions of R.C. Chapter 1723, which may be applicable to the company you have described.

R.C. 1723.01 provides, in part:

If a company is organized . . . for transporting natural or artificial gas, petroleum, coal or its derivatives, water, or electricity, through tubing, pipes, or conduits, or by means of wires, cables, or conduits; for storing, transporting, or transmitting water, natural or artificial gas, petroleum, or coal or its derivatives, or for generating and transmitting electricity; then such company may enter upon any private land to examine or survey lines. . . and may appropriate so much of such land, or any right or interest therein, as is deemed necessary.

The appropriation referred to in R.C. 1723.01 must be made in accordance with R.C. 163.01-.22, and, insofar "as the rights of the public therein are concerned," R.C. 1723.02 provides:

[T]he director of transportation or other state official having supervision or control as to state roads, the board of county commissioners as to county roads, the board of township trustees as to township roads, and the legislative authority of municipal corporation as to streets and alleys in their respective jurisdictions, may grant to such companies, subject to such regulations and restrictions as such public officials prescribe, the right to lay such tubing, pipes, conduits, poles, and wires therein. (Emphasis added.)

I am unable to state, from the information in your letter, whether the corporation concerned would be a company organized for the purpose of storing, transporting, or transmitting petroleum or gas. An examination of the company's articles of incorporation and actual business operations certainly would be advisable. However, assuming that the company falls within the purview of R.C. 1723.01, the township trustees have express authority to grant the company the right to install its pipes pursuant to that section. Such authority would be meaningless if approval from the county commissioners pursuant to R.C. 5597.04 were sufficient to authorize the installation. I conclude, therefore, that, in addition to county approval, permission of the township trustees must be granted before a company described in R.C. 1723.01 installs any facilities in a township road right-of-way.

1962 Op. No. 3006 also failed to consider R.C. 4933.01, which authorizes a township to permit a company organized for the purpose of supplying gas, water, or sewage disposal services for a township to lay conductors in the streets of the township and to regulate such activity, and R.C. 4951.12, which authorizes public authorities in charge of or controlling highways to permit companies incorporated for the purpose of owning or operating street railways to occupy and use the highways for their tracks. Since these provisions do not seem to be relevant to the operation you have described, I mention them only briefly herein, as statutes which expressly allow townships to authorize certain other uses of their roads.

Hence, with respect to the companies described in R.C. 1723.01, 4933.01 and 4951.12, townships have express authority to approve the installation of any facilities in a township road right-of-way. 1962 Op. No. 3006 is modified to that extent. Therefore, with respect to companies described in R.C. 1723.01, 4933.01 and 4951.12, I conclude that township approval, in addition to county approval pursuant to R.C. 5547.04, is required before such companies may install any facilities in a township road right-of-way.

In addition to the above-cited sections that give townships express authority to approve the installation of certain facilities, there is other authority in Title 55 that would enable the township to require a company to seek its approval before

placing any facilities in the township road right-of-way. R.C. 5571.16 provides in pertinent part:

The board of township trustees may, by resolution, require any person, firm or corporation to obtain a permit before making any excavation in a public highway within its jurisdiction. The board may, as a condition to the granting of such permit:

- (A) Require the applicant to submit plans indicating the location, size, type, and duration of the excavation contemplated;
- (B) Specify methods of excavation, refilling, and resurfacing to be followed;
- (C) Require the use of such warning devices as it deems necessary to protect travelers on the highway;
- (D) Require the applicant to indemnify the township against liability or damage as the result of such excavation;
- (E) Require the applicant to post a deposit to bond, with sureties to the satisfaction of the board, conditioned upon the performance of all conditions to such permit. (Emphasis added.)

Hence, the township trustees may, by resolution, require any corporation to obtain a permit before making any excavation in a public highway within the township's jurisdiction. If such a resolution is in effect, it would appear to apply to a company undertaking a project of the sort you have described as some excavation would of necessity take place in order to install the pipes and conduits in the township road. The use of the word "may" in R.C. 5571.16 makes clear that the township's authority to become involved in the process under this section is permissive. Thus, if the township desires to become involved in the approval process for installation of any sort of facilities in a township road, R.C. 5571.16 provides the township the authority to do so. See also R.C. 5571.09 (authorizing trustees to maintain any suit involving any injury to any township road); R.C. 5571.10 (imposing upon township trustees in their official capacities liability for their failure to carry out their official duties).

Where county commissioners and, if necessary, township trustees grant the right to lay pipes and the like in township roads pursuant to the provisions discussed above, the question remains whether the company must still have the consent of the abutting landowners, by lease or otherwise, to lay such pipes, wires, or conduits, or if consent is not given, must institute proceedings by eminent domain. In 1980 Op. Att'y Gen. No. 80-039, I discussed the circumstances under which a grant of the use of a highway easement will or will not constitute an additional taking of property for which compensation to the abutting landowner must be paid. Where the use of the easement is incidental to its purpose for public travel, and where the use is for a public purpose, no added burden is placed upon the property. The primary purpose of a highway easement is for the convenience of public travel, but in addition thereto, there are other purposes, "secondary in nature, such as sewers, drainage, water mains, and these are always subordinate to the principal use, to wit, public travel." Freidman Transfer & Construction Co. v. City of Youngstown, 176 Ohio St. 209, 211, 198 N.E.2d 661, 663 (1964).

Thus, whether there will be an additional taking for which compensation must be paid will depend upon the particular facts involved when a company is granted the right by the county and, if necessary, the township to lay its pipes, wires, conduits, and the like. If the purpose of the project is a public purpose and incidental to public travel, the landowner's consent, or in the absence of consent, an appropriation proceeding, is not necessary. If either factor is missing, the opposite conclusion is compelled.

Your second and third questions inquire as to the type of interests which may be granted, and the conditions or regulations in regard to the maintenance or restoration of the roadway and utility lines which may be imposed.

Pursuant to R.C. 1723.02, a board of township trustees may grant a company named in R.C. 1723.01 the right to lay pipes and conduits in township roads "subject

to such regulations and restrictions" as the board prescribes. This language has been construed as allowing great latitude for the discretion of the officers involved in making the grant. See Federal Gas & Fuel Co. v. City of Columbus, 96 Ohio St. 530, 118 N.E. 103 (1917) (construing R.S. 3878, a predecessor of R.C. 1723.02). It is my opinion therefore, that the township trustees may impose any reasonable conditions or regulations that they believe are necessary with regard to the restoration of the road and maintenance of the lines. The interest which may be given is, moreover, set out in R.C. 1723.02, which simply states that the utility may be granted the "right" to lay such tubing, pipes, etc. therein. The precise language used to convey that "right" must of necessity be determined by the parties and will be controlled by their intentions. It is fundamental, however, that a person cannot convey an interest or authorize a use which he does not own or have; hence, the township's authority to convey an interest is clearly limited to that extent.

R.C. 4933.01 provides township trustees similar authority with respect to companies described therein. R.C. 4951.12 and R.C. 5515.05 also provide similar authority to the township trustees with respect to street railway companies.

R.C. 5571.16 spells out in detail the restrictions the township trustees may impose as a condition to granting a company a permit pursuant to that section. Its provisions are set forth above.

Pursuant to R.C. 5547.04, no corporation may erect an "obstruction [within the bounds of a township road] without first obtaining the approval of the board [of county commissioners]." No restrictions have been imposed upon the authority of the county to grant or deny such approval. Hence, it is clear that the county has the authority to prescribe whatever conditions are reasonably necessary with regard to the maintenance or restoration of the roadway in granting approval for the erection of an obstruction pursuant to R.C. 5547.04. As noted above, the precise language used to grant the approval can best be determined by the parties concerned.

Accordingly, it is my opinion, and you are advised that:

1. Pursuant to R.C. 5547.04, the approval of the board of county commissioners is required prior to the installation of pipes, tubing, conduits, poles, or wires in the right-of-way of township roads within the county. In granting such approval, the county may impose any condition it deems necessary to protect the easement and maintain or restore the roadway.
2. Pursuant to R.C. 1723.01, R.C. 4933.01, and R.C. 4951.12, the permission of the board of township trustees is required prior to the installation of facilities in the right-of-way of township roads in the circumstances specified therein—respectively, the installation of pipes, tubing, conduits, and wires by a company organized for a purpose described in R.C. 1723.01; the laying of conductors by a company organized for the purpose of supplying gas, water, or sewage disposal services for the township as described in R.C. 4933.01; and the installation of a street railway by a company authorized for that purpose as described in R.C. 4951.12.
3. A board of township trustees has the authority pursuant to R.C. 5571.16 to adopt a resolution requiring any person to secure a permit from the board of township trustees before any excavation is made in a township road.
4. A board of township trustees may, when granting permission for the installation of facilities in township roads pursuant to R.C. 1723.02, R.C. 4933.01, R.C. 4951.12, or R.C. 5571.16, impose upon any company installing facilities pursuant to one of these

sections any restrictions reasonably necessary for the restoration of the road right-of-way and maintenance of the facilities installed.

5. If the permission of township trustees is required under R.C. 1723.02, 4933.01, 4951.12 or 5571.16 prior to the installation of facilities in a township road, such requirement is in addition to the requirement of approval of the board of county commissioners pursuant to R.C. 5547.04. If no township approval is required pursuant to such sections, then the board of county commissioners may on its own authority authorize the installation of facilities in a township road. (1962 Op. Att'y Gen. No. 3006, p. 368 modified.)
6. When the necessary county approval and, if required, township approval are granted for the placing of facilities in a township road, the consent of the abutting landowners or appropriation proceedings are unnecessary if the grant is for a public purpose and a purpose incidental to public travel.