

December 17, 2024

The Honorable Nicholas A. Adkins  
Madison County Prosecuting Attorney  
59 North Main Street  
London, Ohio 43140

SYLLABUS:

2024-006

1. A county engineer lacks unilateral authority to permit broadband installations within the right-of-way along county roads.
2. A board of county commissioners may enter into agreements with private broadband providers to permit the installation of broadband infrastructure within the right-of-way, subject to the terms of easement deeds and competitive bidding requirements.
3. A board of county commissioners and a county engineer may only charge a reasonable fee for actual administrative and inspection costs related to broadband installation within the right-of way.



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December 17, 2024

OPINION NO. 2024-006

The Honorable Nicholas A. Adkins  
Madison County Prosecuting Attorney  
59 North Main Street  
London, Ohio 43140

Dear Prosecutor Adkins:

You have requested an opinion regarding:

1. Does the county engineer have the authority to permit installations within the road right-of-way to a private broadband provider not registered with the PUCO?
2. If the county engineer does have that authority, is the engineer's office required to permit the installations, with conditions, so long as it does not incommode the public use of the right-of-way?
3. If the county engineer does have the authority, but is not required to permit said installations, is the engineer's office (or the county commissioners) allowed to charge a fee beyond

actual administrative and inspection costs for the permittee's ongoing use (as a private broadband provider) of the road right-of-way? Can proceeds from that fee be used to compensate property owners for use of their property, road maintenance, or other related issues as determined by the county commissioners?

4. Can the board of county commissioners enter into an agreement with a private broadband provider allowing for the use of the right-of-way for broadband installations?

Before answering your questions, there are two important preliminary matters to note:

First, broadband services are not classified as public utilities under Ohio law. R.C. 4905.02(A)(5)(b) and 4905.042; *see Greater Fremont, Inc. v. Fremont*, 302 F.Supp. 652, 659-660 (N.D. Ohio 1968) (because the FCC regulates certain services, the state is preempted); *see also* Public Utilities Commission of Ohio, *Telecommunications Overview*, <https://puco.ohio.gov/utilities/telecom/resources/telecom-overview> (accessed Dec. 16, 2024) [https://perma.cc/3BPG-H42Q]; <https://www.fcc.gov/general/universal-service> (accessed Dec. 16, 2024) [https://perma.cc/727G-9X9P] (FCC regulates broadband). Consequently,

the Public Utilities Commission of Ohio (PUCO) does not have jurisdiction over broadband services. *See* R.C. 4905.02(A)(5)(b), 4905.05, and 4905.06. Because the questions make clear that the entity involved is not a public utility, the statutory authority and procedure for public utilities is inapplicable to the matter described in the request.

Second, Ohio's public highways are classified as state, county, and township roads. R.C. 5535.01. In addition, county and township roads located within municipal corporations are classified as streets. *See* 2006 Ohio Atty.Gen.Ops. No. 2006-051, at 2-490. I understand that you are primarily concerned with the installation of fiber-optic cables along county roads, so this opinion will not address laws unique to state highways, township roads, or municipal streets. *See generally* R.C. 5535.08.

## I

As background for the request, you have informed me that there are multiple easements along the course of the roadways to which your question pertains but, in general, the easements are generic in form. The easements do not contain provisions regarding the installation of utilities; however, the easements have long been interpreted as permitting the installation of utilities within the road right-of-way. In many places, gas, water, sewer, and other

utilities have already been installed in the road right-of-way.

The actual language of the easements could contain limits on the use of the rights-of-way; but that does not seem likely to be the case if they are generic in form. *See* 1980 Ohio Atty.Gen.Ops. No. 80-039, at 2-164 (“Hence, if the county’s or township’s easement is limited to road purposes, the county or the township is without authority to permit a use that is not included in the easement for road purposes”). But, “in the absence of specific language to the contrary, the easement holder ‘is entitled to vary the mode of enjoyment and use of the easement by availing himself of modern inventions if by doing so he can more freely exercise the purpose for which the grant was made.’” *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, L.L.C.*, 138 Ohio App.3d 57, 67 (4th Dist. 2000) (quoting *Ohio Oil Gathering Corp., II v. Shrimplin*, 1990 Ohio App. LEXIS 3160, \*4 (5th Dist. July 23, 1990)).

You have advised that in Madison County, the easements were executed long ago and well before the advent of broadband internet. However, the age of the easements does not determine whether installation of broadband is permitted. The Supreme Court of Ohio has previously observed: “The complexities of modern life have produced uses of highways which would have been unheard of at

the time many easements for public highways were granted.” *Ziegler v. Ohio Water Service Co.*, 18 Ohio St.2d 101, 106 (1969). And “[a]bsent contrary evidence, ‘the court should presume that the parties contemplated that normal development would result in some changes in the mode of use of the easement, even if it were unlikely that the parties anticipated the specific developmental changes.’” *Andrews v. Columbia Gas Transmission Corp.*, 544 F.3d 618, 624 (6th Cir. 2008) (quoting *Crane Hollow*, 138 Ohio App.3d at 67). “The rights of an assignee of an easement for highway purposes can be no greater than the rights of the original grantee, but in addition to the primary purpose of such easement for the convenience of public travel there are secondary purposes” that are permitted, and “the abutting landowner has no right to interfere.” 1980 Ohio Atty.Gen.Ops. No. 80-039, at 2-167; *Friedman Transfer & Constr. Co. v. Youngstown*, 176 Ohio St. 209, 211 (1964).

As a consequence, the installation of fiber-optic cable within a right-of-way, pursuant to existing roadway easements, does not necessarily constitute an added burden to the servient estate and could qualify as a permitted “secondary purpose,” which does not require additional compensation to the owners of the dominant tenement. *See Ziegler* at 106 (“We therefore hold that the construction of water pipes in real property, for which an easement for highway

purposes has been given, is not an added burden on such land, for which the owner must be compensated”); *see also* 1980 Ohio Atty.Gen.Ops. No. 80-039, at 2-167 (providing a non-exhaustive list of permitted secondary purposes that includes “sewers, drainage, and water mains”); *see also Centel Cable Television Co. v. Cook*, 58 Ohio St.3d 8, 12 (1991) (After reviewing the easement language, the Ohio Supreme Court found that “the stringing of coaxial cable by a television company along an easement owned by a public utility constitutes no additional burden on the owner of the servient estate”).

It is important to note that “[i]f a county permits another entity’s use of its rights of way, the use must constitute a public purpose.” *Sandy v. Rataiczak*, 2008-Ohio-6212, ¶14 (7th Dist.). While I cannot opine on whether broadband installation is a “public purpose” in all cases, “[t]here is a presumption that, when a county grants permission to use its road easements under R.C. 5547.05, it is done with a public purpose.” *Id.*

“Because the Attorney General cannot determine the property rights of a person or entity under an instrument creating an easement[,]” I cannot review particular easements for the purpose of concluding what they permit. 2010 Ohio Atty.Gen.Ops. No. 2010-027, at 2-198, fn. 2. Thus, I am not able to

opine on whether a private company may install broadband within the right of way of any road in Madison County under the terms of the easements held by the county. *See* 1980 Ohio Atty.Gen.Ops. No. 80-043, at 2-183 (“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 . . . to lay pipes, wires, conduits, and the like”).

## II

Questions one and two pertain to the duties and powers of a county engineer. As a creature of statute, a county engineer has “only those powers explicitly granted to him by statute or as may be necessarily implied in order to accomplish the exercise of an express power.” 2021 Ohio Atty.Gen.Ops. No. 2021-009, Slip Op. at 1; 2-34, quoting 2017 Ohio Atty.Gen.Ops. No. 2017-008, Slip Op. at 5; 2-65. Although the county engineer plays an essential role in the construction and maintenance of roadways, there is no statutory authority for a county engineer to unilaterally permit broadband installations by a private broadband provider within the right-of-way. *See generally* R.C. Ch. 5543; R.C. Ch. 315; R.C. 5547.03; R.C. Ch. 5552; and R.C. Ch. 5573. It logically follows that a private person or company cannot compel the county engineer to permit the installation.



For clearer analysis, I will address the fourth question out of order. Having determined that a county engineer lacks authority to unilaterally permit installation of broadband installation within the right-of-way of a county road, we turn to whether the *board of county commissioners* has authority to permit a private broadband provider to install fiber-optic cables in the road right-of-way through an agreement.

The board of county commissioners “is the representative and guardian of the county, having the management and control of its property and financial interests, and has exclusive and original jurisdiction over all matters pertaining to county affairs, except in respect to matters the cognizance of which is exclusively vested in some other officer or person.” *Dall v. Cuyahoga Cty. Bldg. Com.*, 24 Ohio Dec. 9, 11 (C.P. 1913); *accord Levy Court v. Coroner*, 69 U.S. 501 (1865). Courts have consistently held that the board of county commissioners has general contracting authority for the county. *Am. Fedn. of State, Cty. & Mun. Emps. v. Polta*, 59 Ohio App.2d 283, 286 (6th Dist. 1977) (“It is the province of the board of county commissioners to make contracts for the county, and no other officer can bind the county by contract, unless by reason of some express provision of law”); *see also* 1977 Ohio Atty.Gen.Ops. No. 77-093, at 2-314 (noting that the county sheriff and board of county commissioners may act “in concert” even though the

contracting authority at issue resides with the county commissioners). While the county engineer supervises the construction, maintenance, and repair of county roads, the board of county commissioners possesses the necessary authority to approve such projects, including the installation of fiber-optic cables in the county roads' rights-of-way. See R.C. 315.08, 5535.01, 5543.01, and 5543.09; see also 2021 Ohio Atty.Gen.Ops. No. 2021-009, Slip Op. at 3-4; 2-35 to 2-36 (The board of county commissioners, not the county engineer, has "final-say authority").

R.C. 5547.05 allows the board of county commissioners to permit a private company to install broadband within the road right-of-way, subject to the requirements and limitations of the statute. In relevant part, the law states:

With respect to any portion of any highway in any county, or bridges or culverts thereon, which is not owned in fee simple by the county, the board of county commissioners of such county may grant the right to use any portion thereof in perpetuity or for such period of time as it shall specify, including areas or space on, above, or beneath the surface, together with rights for the support of buildings or structures constructed or to be constructed thereon or therein,

provided that it shall determine and enter its determination on its journal, that the property made subject to a permit to use is not needed by the county for highway purposes.

If the county owns the fee simple estate rather than an easement or other lesser interest in “any lands owned by such county and acquired or used for highways, bridges, or culverts, or owned by such county in connection with highways or as incidental to the acquisition of land for highways,” the county may convey its entire interest or any lesser interest, “or permit the use of [the land], for such period as it shall determine,” if the property “is not needed by the county for highway purposes.” R.C. 5547.05, ¶1.

However, “[a]ll such conveyances or grants or permits to use shall be made with competitive bidding as required by section 307.10 of the Revised Code, except that competitive bidding shall not be required if such conveyance, grant, or permit to use is to be made to” another public entity. R.C. 5547.05, ¶5; *see also* 2008 Ohio Atty.Gen.Ops. No. 2008-023 (a board of county commissioners cannot transfer ownership of property that is no longer needed for highway purposes without following the competitive bidding procedures in R.C. 307.10).

Thus, the county commissioners possess sufficient general authority to permit installations within the right-of-way, absent any restrictions in the deed granting an easement to the county. In most cases, installation of a fiber-optic cable within the right-of-way places no additional burden on the servient estates. Furthermore, the installation of broadband qualifies as a technological advancement that courts have deemed permissible under an existing easement even if the easement drafters did not contemplate such advancement. Although the easement is not broadband cable or facility-specific, it seems clear that the board of county commissioners, rather the county engineer, possesses the authority to permit the installation.

R.C. 5547.03 and 5547.04 are also worth mentioning in this matter. R.C. 5547.04 states in relevant part: “No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridge or culverts thereon, any obstruction *without first obtaining the approval of the board* in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon.” (Emphasis added.) And the relevant part of R.C. 5547.03 states:

All persons, partnerships, and corporations using or occupying any part of a highway, bridge, or culvert with telegraph or telephone lines, steam,

electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, *other than by virtue of a franchise legally granted*, shall remove from the bounds of such highway, bridge, or culvert, their poles and wires connected therewith, or any and all tracks, switches, spurs, or oil, gas, or water pipes, mains, conduits, or other objects or structures when, in the opinion of the board of county commissioners, they constitute obstructions in any highway, other than the state highway system; or the bridges or culverts thereon, or interfere or may interfere with the proposed improvement of such highways, bridges, or culverts or the use thereof by the traveling public. *By obtaining the consent and approval of the board, such persons, partnerships, and corporations may relocate their properties within the bounds of such highways, bridges, or culverts in such manner as the board prescribes.* The giving of such consent and approval by the board does not grant any franchise rights. (Emphasis added.)

A prior Attorney General Opinion concluded that the word “obstruction” in R.C. 5547.03 and 5547.04 has a

broad meaning. Specifically, 1980 Ohio Atty.Gen.Ops. No. 80-043 found that “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.” *Id.* at 2-181. An “obstruction” “must be defined so as to include virtually any object within the bounds of a highway that has been ‘placed’ or ‘erected’ there.” *Id.* Because “obstruction” carries a broad meaning, “it is clear that pipes and conduits, etc., in a highway right-of-way constitute ‘obstructions.’” *Id.* Under this view, fiber-optic cable installed within a road right-of-way qualifies as an “obstruction” that requires the approval of the board of county commissioners under R.C. 5547.03 and 5547.04.

Ultimately, the board of county commissioners has the authority to control the use of county property, including rights to an easement in the county road right-of-way. Despite the lack of a specific statutory framework for fiber-optic cable installation along a road right-of-way, the general laws cited above appear to answer questions one and two of the request. They indicate that the county engineer lacks unilateral-permitting authority to allow a private company to install broadband within the road right-of-way. However, the board of county commissioners does have the authority to permit such installation, provided it follows competitive bidding requirements and any restrictions in the easement deeds.

## III

The third question relates to charging fees. When authority exists for a county to establish a permit system, the county may charge a reasonable fee to cover the cost of inspection and administration, even if no statutory scheme directly establishes the fee structure. 1986 Ohio Atty.Gen.Ops. No. 86-081, at 2-456. While no statute requires the permitting and inspection of fiber-optic cables, a county that adopts a permitting and inspection process may establish a fee structure to cover the administrative cost of permitting and inspecting. *See* 1986 Ohio Atty.Gen.Ops. No. 86-081.

I must note, however, that statutes limit what fees may be collected and, in fact, prohibit the collection of a fee that is not expressly allowed or tied to the type of purely administrative cost just mentioned. R.C. 325.36 (“No salaried county official, shall remit a fee or part thereof, or shall collect a fee other than that prescribed by law”); *see* R.C. 5552.08(B) (“A board of county commissioners or a board of township trustees, as applicable, may charge a permit fee not to exceed the actual cost of administering the permit”); *see also* R.C. 325.27. Thus, if the county collects a fee, there is no explicit authority for the county to expend the funds in a manner not tied to the administrative cost of permitting and inspecting the fiber-optic cables.

You have asked whether money collected from a permitting fee could be used to compensate property owners for the installation of fiber optic cable in the right-of-way. The question presumes that the property owners are entitled to compensation. However, in a similar context, the Ohio Supreme Court held in *Ziegler*: “the construction of water pipes in real property, for which an easement for highway purposes has been given, is not an added burden on such land, for which the owner must be compensated.” 18 Ohio St.2d 101, 106 (1969); *see also Shaffer v. Video Display Corp.*, 43 Ohio App.3d 49, 52 (3d Dist. 1988) (“We do not believe the installation of a television cable three-fourths of an inch in diameter, buried thirty inches below the land’s surface, is an additional or substantial burden on appellees’ property”); *Sandy v. Rataiczak*, 2008-Ohio-6212, ¶29 (7th Dist.).

Broadband installation in the county road right-of-way serves a public purpose if it improves internet access for local residents and businesses. While the burden on an easement is a question of fact, when an electric cooperative easement is used for broadband service, for example, R.C. 188.02 provides that “such use, apportionment, or sublease shall not be considered an additional burden on the servient estate.” Although R.C. Chapter 188 does not directly apply to the questions posed, it further supports the conclusion that



there is no need to provide additional compensation to the servient estate owner in this situation.

Ultimately, the question whether installation of broadband infrastructure is a “taking” that necessitates “just compensation” is a question of fact beyond my authority to determine. *See* U.S. Const., amend. V; Ohio Const., art. I, §§16 and 19. However, even if the county wishes to charge a fee to broadband installers and then compensate property owners using the collected fee, the county lacks a clear legal basis to do so. “All public property and public moneys, whether in the custody of public officers or otherwise, constitutes a public trust fund, and all persons, public or private, are charged by law with the knowledge of that fact. Said trust fund can be disbursed only by clear authority of law.” 1944 Ohio Atty.Gen.Ops. No. 7255, p. 694, at 697, citing *State ex rel. Smith v. Maharry*, Ohio 97 St. 272, paragraph 1 of the syllabus (1918). *See also* 2002 Ohio Atty.Gen.Ops. No. 2002-001, at 2-2 (“We are also mindful that any doubt as to the expenditure of public funds must be resolved against the expenditure”); 2017 Ohio Atty.Gen.Ops. No. 2017-002, at Slip Op. 3 (“when a governmental entity . . . enters into an agreement with, a private entity, care must be taken to ensure that there is no violation of Ohio Const. art. VIII, §4 (the state) and §6 (a county, city, town, or township), which impose restrictions upon the financial involvement of governmental

entities with private enterprises”). Therefore, I must answer question three in the negative.

#### IV

As a matter related to your questions, I would note several broadband expansion programs that may be relevant to your county and others. In 2021, the “Ohio residential broadband expansion grant program within the development services agency” was enacted. R.C. 122.401. The parameters of the program are set forth in R.C. 122.40 to 122.4077. “The Residential Broadband Expansion Grant has been created to help internet service providers with the cost of expanding into areas that lack service. The grants are designed to help with the infrastructure costs of the project and help build the networks that will otherwise serve Ohioans who currently cannot participate in the modern economy because of a lack of high-speed internet.” Ohio Department of Development, *Ohio Residential Broadband Expansion Grant Program* (Oct. 6, 2023), <https://broadband.ohio.gov/static/2023-10-6-Broadband-ORBEG-Round-2-Application-Guide-Final.pdf> (accessed Dec. 16, 2024) [<https://perma.cc/EUT3-CQK7>].

In addition, R.C. 191.02 establishes the “Ohio broadband pole replacement and undergrounding program within the department of development to advance the provision of qualifying broadband service

access to residences and businesses in an unserved area by reimbursing certain costs of pole replacements, mid-span pole installations, and undergrounding.” The parameters of the program are set out in Chapter 191 of the Revised Code. The Ohio Department of Development is currently administering the program and issuing reimbursement grants to eligible internet service providers. *BroadbandOhio Grant Opportunities*, <https://broadband.ohio.gov/grant-opportunities> (accessed Dec. 16, 2024) [https://perma.cc/2DDB-BZ46].

### Conclusion

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

1. A county engineer lacks unilateral authority to permit broadband installations within the right-of-way along county roads.
2. A board of county commissioners may enter into agreements with private broadband providers to permit the installation of broadband infrastructure within the right-of-way, subject to the terms of easement deeds and competitive bidding requirements.

3. A board of county commissioners and a county engineer may only charge a reasonable fee for actual administrative and inspection costs related to broadband installation within the right-of way.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large initial "D" and a long, sweeping tail on the "Y".

DAVE YOST  
Ohio Attorney General