

OPINION NO. 71-029**Syllabus:**

A corporation organized not for profit for the purpose of providing for the construction, maintenance and operation of a water system to serve its members, membership being open to all within its service territory, is a public utility within the purview of Section 519.21, Revised Code, and its property used in such service is exempt from the provisions of a township zoning code.

To: Henry E. Shaw, Jr., Delaware County Pros. Atty., Delaware, Ohio
By: William J. Brown, Attorney General, June 7, 1971

Your request for my opinion reads as follows:

"Is a non-profit Ohio corporation, organized for the purpose of providing for the construction, maintenance, and operation of a water system to serve its membership, which membership is open to all citizens of seven townships in Delaware County, Ohio, a public utility within the purview of Section 519.21 of the Ohio Revised Code?"

The statutory provisions controlling township zoning appear in Sections 519.01 to 519.25, Revised Code. Section 519.21, Revised Code, which permits certain exemptions including public utilities, reads, in pertinent part, as follows:

"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."

In Section 4905.02, Revised Code, a public utility is defined in the following terms"

"As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code, 'public utility' includes every corporation, company, copartnership, person, or association, their lessees, trustees or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated by any municipal corporation and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code."

The definitions in Section 4905.03, Revised Code, include the following:

"As used in sections 4905.01 to 4905.64, inclusive of the Revised Code:

"(A) Any person, firm, copartnership, voluntary association, joint stock association, company or corporation, wherever organized or incorporated is:

"(B) A water-works company, when engaged in the business

of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

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Of course, Sections 4905.02 and 4905.03, supra, pertain specifically to the regulation of public utilities, and the fact that a corporation comes under the regulation of the Public Utilities Commission does not necessarily render it a "public utility" for all other purposes. Motor Cargo, Inc. v. Board, 67 Ohio L. Abs. 315 (1953). However, the Supreme Court has provided a definition which is generally applicable and which is controlling in this case. In Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246 (1924), the Court said:

"To constitute a public utility, the devotion to public use must be of such a 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."

In reliance on this definition, motor freight companies have been held exempt from township zoning provisions, since their service is available to the public generally and indiscriminately. Freight, Inc. v. Board of Township Trustees, 107 Ohio App. 288 (1958); and Motor Cargo, Inc. v. Board, supra. Similarly, my predecessor gave his opinion that the water works of the City of Galion was exempt from such zoning regulations. Opinion No. 69-165, Opinions of the Attorney General for 1969.

The test which was evolved from these decisions is founded on the idea that "public use" means service to individuals in general, without restriction or selection, to the extent of the capacity of such utility. A restriction of service to members of a cooperative was considered in Ohio Power Co. v. Attica, 23 Ohio St. 2d 37 (1970). In this case, the articles of incorporation of the North Central Power Company revealed that it was originally organized to sell electrical power to its members only, and membership was conditioned upon payment of a fee. The articles were later changed to permit sale of electrical power to nonmembers. The Supreme Court held that a nonprofit corporation organized to manufacture, distribute and sell electrical power, either on a membership or non-membership basis, is a public utility. But the basis of the Court's decision was that, although the power company on a membership plan could not be compelled to provide service, it appeared to be implicit in the purpose for which the company was organized that it had always had an obligation to make membership available to consumers within the area of its operation and could not unreasonably or arbitrarily refuse an applicant membership.

In the case you have posed, membership in a nonprofit corporation is open to all citizens of seven townships in Delaware County and the corporation is engaged in rendering water service to its members. Within the doctrine of Ohio Power Co. v. Attica, supra, such company is a public utility.

In specific answer to your question, it is my opinion and you are advised that a corporation organized not for profit for the purpose of providing for the construction, maintenance and operation of a water system to serve its members, membership being open to all within its service territory, is a public utility within the purview of Section 519.21, Revised Code, and its property used in such service is exempt from the provisions of a township zoning code.