

OPINION NO. 74-073

Syllabus:

1. A county may grant to groups listed in R.C. 307.09 the right to dig in county-owned real estate and may charge a fee for that privilege.

2. To the extent that R.C. 4931.03 and 4933.14 authorizes telegraph, telephone and electric light and power companies to construct lines and fixtures beneath highways outside the limits of a municipal corporation, such companies are exempt from all permit fees except those charges necessary to cover the cost of enforcing the county's regulations under R.C. 4931.03.

To: Joseph Loha, Jefferson County Pros. Atty., Steubenville, Ohio
By: William J. Brown, Attorney General, August 30, 1974

I have your request for my opinion regarding permit fees for excavation in county owned property and county highways and right-of-ways for burying cables, pipes and other facilities. Your question reads in part as follows:

"May a Board of County Commissioners, by resolution, charge a fee for the privilege of digging in County-owned real estate, roads or right-of-ways to persons, firms or corporations wishing to place their facilities in above-described property interests?

"If your answer to the above question is in the affirmative, please advise if public utilities such as telegraph, telephone and electric light and power companies are exempt from such digging permit fees under Section 4931.03 and 4933.14 Ohio Revised Code."

R.C. 307.09 enumerates the expressed powers that the county commissioners have over county owned real estate. It grants the commissioners power, subject to specified restrictions, to sell or lease county real estate not needed for public use. In addition, R.C. 307.09 gives county commissioners the power to grant leases, rights, or easements to certain listed organizations "upon such terms * * * as the board deems for the best interests of the public."

R.C. 307.10 then provides the procedure for granting such a right or easement. It states in pertinent part that:

"Such board, by resolution adopted by a majority of the board, may grant leases, rights, or easements to municipal corporations and other governmental subdivisions or to privately owned electric light and power companies or natural gas companies or telephone or telegraph companies for purposes of rendering their several public utilities services in accordance with such section without advertising for bids. When such grant of lease, right, or easement is authorized, a deed or other proper instrument therefor shall be executed by the board."

Thus, a board of county commissioners may by resolution grant a governmental subdivision or one of the listed public utilities the right to dig in county real estate and may, pursuant to R.C. 307.09, determine an amount to be charged for such privilege.

However, if a firm or corporation requesting to dig in county-owned real estate is not one of those listed in R.C. 307.09, then the commissioners may not accede to such a request even though that organization is willing to pay a charge or fee for the privilege. A county, as an agent of the state, is a creature of statute, and has only those powers expressly provided or necessarily implied by statute. State, ex rel. Stanton v. Andrews et al., 105 Ohio St. 489, 494 (1922); State, ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); Board of County Commissioners of Portage County v. Gates, 83 Ohio St. 19, 30 (1910); Opinion No. 74-024, Opinions of the Attorney General for 1974; Opinion No. 73-103, Opinions of the Attorney General for 1973. In this case a county has only been empowered to grant rights and easements to specifically enumerated groups. Therefore, there is no authority under R.C. 307.09, et seq., to grant rights or easements to groups not included within those provisions. Such an interpretation would be consistent with the well established maxim expressio unius est exclusio alterius, that is, the mention of one thing implies the exclusion of another. State, ex rel. Boda v. Brown, 157 Ohio St. 368, 372 (1952); State, ex rel. Alden E. Stilson and Associates, Ltd. v. Ferguson, 154 Ohio St. 139 (1950).

Your second question is whether public utilities, such as telegraph, telephone and electric light and power companies would be exempt from digging permit fees by virtue of R.C. 4931.03 and R.C. 4933.14.

R.C. 4931.03 reads:

"A telegraph company may, subject to such reasonable regulations as the board of county commissioners prescribes, construct telegraph lines, and fixtures necessary for containing and protecting them, beneath the surface of any public highway outside the limits of a municipal corporation, but shall not incommode the public in the use of such highway."

The rights granted to telegraph companies by the above Section are extended to telephone companies and electric light and power companies by R.C. 4931.11 and R.C. 4933.14 respectively. Likewise all three types of utilities may pursuant to R.C. 4931.01, along with R.C. 4931.11 and 4933.14, construct lines and supporting fixtures upon and along public roads and highways provided they do not incommode the public in the use of the roads and highways. These utilities then derive their right to install lines and fixtures from the state pursuant to various provisions in R.C. Chapter 4931. and R.C. Chapter 4933.

It should be noted that R.C. 4931.03 applies to the installation of underground lines and fixtures only along public highways outside the limits of a municipal corporation. Within municipal corporations R.C. 4931.20 and R.C. 4931.24 apply to require the consent of the municipal corporation prior to the construction of any underground lines or fixtures. R.C. 4931.08 provides that a municipal corporation and a telegraph company agree on the mode of use of land appropriated for use by the company, but

denies a municipal corporation the right to demand or receive compensation for the use of a street, alley or public way, beyond what is necessary to restore the pavement to its former state of usefulness. However, R.C. 4931.20, which deals with underground lines and fixtures within a municipality contains no such provision.

In contrast a public utility need not obtain the consent of county commissioners before they may install facilities outside municipal corporations pursuant to R.C. 4931.01 and R.C. 4931.03. With respect to underground lines and fixtures R.C. 4931.03 merely provides that the authority of a telegraph company is "subject to such reasonable regulations as the board of county commissioners prescribes."

Thus the sole power that county commissioners have over the aforementioned public utilities is the power to provide reasonable regulations as to the placing of the underground facilities. Because the General Assembly has granted telegraph and telephone companies, as well as electric light and power companies, the right to install lines and fixtures along and beneath county highways without the consent of counties, the commissioners may not promulgate regulations that demand compensation for the use of the county highways.

On this point I would refer you to Zanesville v. Zanesville Telegraph and Telephone Co., 64 Ohio St. 667 (1901), in which the court discussed the nature of the right granted by Revised Statutes 3461-1 (R.C. 4931.01) and a municipality's interest in "the mode of use" of such right under Revised Statutes 3461 (R.C. 4931.08). The Court said at p. 81:

"* * * That right, as has been seen, is granted to the company directly by the legislature, and it is not made to depend upon any consent or agreement on the part of the municipality. It is only the mode of such use that becomes the subject of agreement or judicial determination. The power of eminent domain residing in the state, it has been held, under our present constitution, is committed to the control of the general assembly by the grant of legislative power, and it may be exercised by that body directly, or by agencies like private corporations, in such manner, under such conditions, and through such tribunals having capacity to receive the jurisdiction, as may be, by legislative enactment provided; subject, however, to the constitutional requirement that the property taken be for a public use, and to the constitutional guaranty of compensation for private property so taken. A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature. Lewis on Eminent Domain, Section 119. * * *"

This rationale appears equally applicable to a county's authority under R.C. 4931.03. That is, the county's power to promulgate regulations is limited to regulations reasonably designed to insure that the lines shall not be constructed so as to incommode the public in the use of the roads. As such the county would have no authority to require compensation or consideration for the privilege of digging

along the roads, where that right has already been granted by the General Assembly pursuant to R.C. 4931.01 and R.C. 4931.03.

However, it does appear that the county commissioners would have implied authority to charge fees to cover costs incident to the implementation of regulations under R.C. 4931.03. Specifically they could charge fees necessary to cover the cost of inspection designed to insure compliance with these regulations.

In a somewhat analogous situation my predecessor held in Opinion No. 7442, Opinions of the Attorney General for 1956, page 833, that under R.C. 307.37, which authorized the adoption of building regulations in unincorporated areas of a county, the commissioners could require the payment of a fee in an amount reasonably designed to cover the cost of inspection by a county building inspector pursuant to R.C. 307.38. While there was no specific provision for such fees he reasoned that the power to charge necessary fees was implied by the power to regulate and inspect. This basic rationale of implied authority has been subsequently reaffirmed in Opinion No. 1462, Opinions of the Attorney General for 1960, page 398; Opinion No. 2955, Opinions of the Attorney General for 1962, page 288; Opinion No. 73-116, Opinions of the Attorney General for 1973, and Opinion No. 74-023, Opinions of the Attorney General for 1974. See also Prudential Co-Operative Realty Company v. Youngstown, 118 Ohio St. 204 (1928), and Opinion No. 7111, Opinions of the Attorney General for 1956, page 667, on which my predecessor relied in Opinion No. 7442, supra.

There is some uncertainty as to the applicability of this rule to various governmental boards and agencies, and the courts have on occasion ruled that a particular board had no implied authority under its regulatory power to require the payment of a fee to cover the cost of inspections. See Cooperative Pure Milk Assn. v. Board of Health, 20 Ohio App. 2d 109 (1969), and Brunner v. Rhodes, 95 Ohio App. 259 (1953).

However, in the Cooperative Pure Milk Assn. case supra, the court at p. 113 in finding against such implied authority appeared to limit its holding to the facts at hand, while acknowledging the "undeniable cogency" of the "generally recognized rule", applied earlier in Prudential Co-Operative Realty v. Youngstown, supra, that the right to impose regulations on an enterprise carries with it a right to impose a reasonable fee to cover the cost of enforcement.

Therefore, in the absence of determinative case authority on the situation in question, I am inclined to follow the rationale of my predecessor in Opinion No. 7442, supra, in concluding that a board of county commissioners may charge a reasonable fee to cover the cost of inspections necessary to implement regulations promulgated pursuant to R.C. 4931.03.

In specific answer to your questions, it is my opinion and you are so advised that

1. A county may grant to groups listed in R.C. 307.09 the right to dig in county-owned real estate and may charge a fee for that privilege.

2. To the extent that R.C. 4931.03 and 4933.14 authorizes telegraph, telephone and electric light and power companies to

construct lines and fixtures beneath highways outside the limits of a municipal corporation, such companies are exempt from all permit fees except those charges necessary to cover the cost of enforcing the county's regulations under R.C. 4931.03.