

December 20, 2018

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870

SYLLABUS:

2018-034

1. A county engineer shall include in the plans and specifications for a road improvement project, as required by R.C. 153.64(A)(3), the name, address, and telephone number of each owner of an underground utility facility that does not subscribe to a protection service, even if the owner is a private owner of a single family residence that is served by the underground utility facility.
2. A county engineer satisfies the requirement in R.C. 153.64(B)(3) to include in the plans and specifications of a road improvement project a “telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service,” by including in the plans and specifications any telephone number belonging to the owner, regardless of whether the telephone number is assigned to a landline telephone.



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OPINION NO. 2018-034

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870

Dear Prosecutor Baxter:

We have received your request regarding the responsibilities of a county engineer under R.C. 153.64. R.C. 153.64 imposes various rights and responsibilities upon public entities, contractors, and owners of underground utility facilities, to protect underground utility facilities during the construction of public improvements. *See* R.C. 153.64(A)(1) (defining “public improvement”); R.C. 153.64(A)(3) (defining “underground utility facilities”). R.C. 153.64(B)(1) through (5) confer upon a “public authority,” as that term is defined in R.C. 153.64(A)(2), various duties related to the location and marking of underground utility facilities in the area in which the public authority plans to construct the public improvement. R.C. 153.64(B)(3) requires the public authority to include “in the plans and specifications for such improvement, ... the name, address, and telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service.” *See also* R.C. 153.64(A)(4) (defining “protection service”).

In this instance, the county engineer is preparing plans and specifications for a road improvement project. You ask whether R.C. 153.64(B)(3) requires a county engineer to include in the plans and specifications for the road improvement project the name, address, and telephone number of an owner of an underground utility facility if the owner is a private owner of a single family residence that is served by the underground utility facility. If so, you ask how the county engineer is to comply with the requirement to provide a telephone number for the owner under R.C. 153.64(B)(3) if the owner’s residence does not have a landline telephone.

The Meaning of “Owner” Under R.C. 153.64(B)(3)

Your first question asks whether R.C. 153.64(B)(3) requires a county engineer to include in the plans and specifications for the road improvement project the name, address, and telephone number of an owner of an underground utility facility if the owner is a private owner of a single family residence that is served by the underground utility facility. Pursuant to R.C.

153.64(B), a “public authority,” as that term is defined in R.C. 153.64(A)(2), “is required to contact the owners of ... underground utility facilities for the location of existing underground utilities within” the area in which a public improvement is planned to be constructed “and then include the same on the project plans and specifications.” *United Tel. Co. of Ohio v. Williams Excavating, Inc.*, 125 Ohio App. 3d 135, 145, 707 N.E.2d 1188 (Allen County 1997). For the purpose of R.C. 153.64, a “[p]ublic improvement” means any construction, reconstruction, improvement, enlargement, alteration, or repair of a ... highway, ... road, street, alley, ... and all other structures ... of any nature by a public authority.” R.C. 153.64(A)(1). Any project contemplating improvement to a road by a public authority is a “public improvement” within the meaning of R.C. 153.64(A)(1).

R.C. 153.64(A)(2) defines a “public authority” to include, among other things, “a county, township, ... or other political subdivision,” R.C. 153.64(A)(2)(a), “[a]ny public agency, authority, board, commission, instrumentality, or special district of ... a county, township, ... or other political subdivision,” R.C. 153.64(A)(2)(b), or “[a] designer as defined in [R.C. 3781.25] who is acting on behalf of any entity described in division (A)(2)(a) or (b) of this section,” R.C. 153.64(A)(2)(c). R.C. 3781.25(G) defines “designer” to mean “an engineer ... or other person who develops plans or designs for real property improvement or any other activity that will involve excavation.” A county engineer is an elected county official, and therefore an “instrumentality” of a county. *See* R.C. 315.01 (providing for the election of a county engineer); Ohio Ethics Comm’n, Advisory Op. No. 76-006, 1976 Ohio Ethics Comm. LEXIS 41, at *6 (recognizing that the office of the county engineer “is an instrumentality of a county”). A county engineer is responsible for “prepar[ing] all plans, specifications, details, estimates of cost ... for the construction, maintenance, and repair of all ... roads ... and other public improvements, except buildings, constructed under the authority of any board within and for the county.” R.C. 315.08; *see also* R.C. 5541.03 (application by township trustees for road improvement); R.C. 5551.05 (railway rights of way); R.C. 5553.02 (authority of a board of county commissioners to locate, alter, or vacate roads); R.C. 5559.02 (authority of a board of county commissioners to “improve by grading, draining, paving, constructing storm sewers, sidewalks, curbs, and gutters, any road”); R.C. Chapter 5573 (township road improvement); 2012 Op. Att’y Gen. No. 2012-029, at 2-248. Therefore, a county engineer responsible for preparing plans and specifications for a road improvement project, or “public improvement,” as defined in R.C. 153.64(A)(1), may qualify as a “public authority” under R.C. 153.64(A)(2)(b) or (c).

R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement

the identity and location of the existing underground utility facilities located in the construction area as provided to the public authority by the owner of the underground utility facility and the name, address, and telephone number of each

owner of any underground utility facilities in the construction area¹ that does not subscribe to a protection service. (Footnote added.)

R.C. 153.64(A)(3) and (4) define the terms, “underground utility facility” and “protection service,” respectively.

A “protection service” is “a notification center” that “exists for the purpose of receiving notice from public authorities and ... other persons that plan to prepare plans and specifications for, or engage in, public improvements involving digging, blasting, excavating, or other underground construction activities.” R.C. 153.64(A)(4)(a). A protection service “distributes the information” it receives “to its members and participants,” R.C. 153.64(A)(4)(b), and “register[s] ... with the secretary of state and the public utilities commission,” R.C. 153.64(A)(4)(c). *See also* 11C Ohio Admin. Code 4901:1-1-02 (“[e]ach underground utility protection service ... shall register with the public utilities commission by supplying the information in the form set forth in ‘Appendix A’ to this rule and filing such form with the docketing division of the commission”). The Ohio Utilities Protection Service, for example, is a “protection service” as defined in R.C. 153.64(A)(4). *See generally* The Ohio Utilities Protection Service Website, available at <http://www.oups.org/> (last visited Dec. 18, 2018).

R.C. 153.64(A)(3) defines “underground utility facilities” as follows:

“Underground utility facilities” includes any item buried or placed below ground or submerged under water for use in connection with the storage or conveyance of water or sewage; or electronic, telephonic, or telegraphic communications; electricity; petroleum products; manufactured, mixed, or natural gas; synthetic or liquified natural gas; propane gas; or other substances. “Underground utility facilities” includes, but is not limited to, all operational underground pipes, sewers, tubing, conduits, cables, valves, lines, wires, manholes, and attachments, *whether owned by any public or private or profit or nonprofit person, firm, partnership, company, corporation, joint stock association, joint venture, or voluntary association*, wherever organized or incorporated, except for a private septic system in a single- or mulit-family dwelling utilized only for that dwelling and not connected to any other system. (Emphasis added.)

R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement, “the name, address, and telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection

¹ “‘Construction area’ means the area delineated on the plans and specifications for the public improvement within which the work provided for in the contract will be performed.” R.C. 153.64(A)(5).

service.” The term, “owner,” is not defined for the purpose of R.C. 153.64. Accordingly, pursuant to R.C. 1.42, we shall accord the term its common meaning. *See* R.C. 1.42 (“[w]ords... shall be read in context and construed according to the rules of grammar and common usage”).

Black’s Law Dictionary 1130 (7th ed. 1999) defines “owner” to mean “[o]ne who has the right to possess, use, and convey something.” As set forth in R.C. 153.64(A)(3), an “underground utility facility” includes facilities “owned by any public or private or profit or nonprofit person, firm, partnership, company, corporation, joint stock association, joint venture, or voluntary association, wherever organized or incorporated.” Accordingly, we construe the term “owner,” as used in R.C. 153.64, to mean any public or private or profit or nonprofit person, firm, partnership, company, corporation, joint stock association, joint venture, or voluntary association that has the right to possess, use, and convey underground utility facilities.

R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement “the name, address, and telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service.” Thus, R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement the name, address, and telephone number of each public or private or profit or nonprofit person, firm, partnership, company, corporation, joint stock association, joint venture, or voluntary association that has the right to possess, use, and convey underground utility facilities and that does not subscribe to a protection service.

You ask whether R.C. 153.64(B)(3) requires a county engineer to include in the plans and specifications for the road improvement project the name, address, and telephone number of an owner of an underground utility facility if the owner is a private owner of a single family residence that is served by the underground utility facility. The term “owner,” as used in R.C. 153.64, includes a private person who has the right to possess, use, and convey underground utility facilities and that does not subscribe to a protection service. Therefore, pursuant to R.C. 153.64(A)(3), a county engineer shall include in the plans and specifications for a road improvement project the name, address, and telephone number of an owner of an underground utility facility that does not subscribe to a protection service even if the owner is a private owner of a single family residence that is served by the underground utility facility.

In your letter, you ask whether R.C. 3781.27(E)(1) and R.C. 3781.25(C) affects our interpretation of “owner,” as that term is used in R.C. 153.64. R.C. 3781.25 through R.C. 3781.38 confer upon “utilities” “excavators,” “developers,” and “designers,” as those terms are defined in R.C. 3781.25, various responsibilities related to the operation and protection of underground utility facilities. *See* R.C. 3781.25(C) (defining “utility”); R.C. 3781.25(G) (defining “designer”); R.C. 3781.25(H) (defining “developer”); R.C. 3781.25(K) (defining “excavator”). R.C. 3781.27(E)(1), for example, requires a developer or designer planning a project that will require excavation to “include with the [project’s] plans the names, addresses, and telephone numbers of utilities with underground facilities at the excavation site.”

R.C. 3781.25(C) defines “utility” to “mean[] any owner or operator, or an agent of an owner or operator, of an underground utility facility, including any public authority, that owns or operates an underground utility facility.” *See also* R.C. 3781.25(B) (defining “underground utility facility” in the same manner as R.C. 153.64(A)(3)). “The owner of a single-family or two-, three-, or four-unit residential dwelling” is expressly excluded from the statute’s definition of “utility.” R.C. 3781.25(C)(1).

The definition and use of the term, “utility” in R.C. 3781.25-.38 does not affect our interpretation of “owner,” as that term is used in R.C. 153.64. The General Assembly defines the term “utility,” in R.C. 3781.25(C) specifically for the purpose of R.C. 3781.25 to R.C. 3781.38. Moreover, the term “utility” is not defined or used in R.C. 153.64, outside of its use in the phrase, “underground utility facility.” *But see* R.C. 153.64(D) (using the term “utility” to describe “underground utility lines”).

Furthermore, it is clear from the language of R.C. 3781.26(A) and R.C. 153.64(B)(3) that the General Assembly did not intend the terms “utility” and “owner,” as used in those respective statutes, to have the same meaning. R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement “the name, address, and telephone number of each *owner ... that does not subscribe to a protection service.*” (Emphasis added.) R.C. 3781.26(A) requires “[e]ach *utility* that owns or operates underground utility facilities” to “*participate in ... a protection service* that serves the area where the [underground utility] facilities are located.” (Emphasis added.) *See also* R.C. 3781.25(A) (defining “protection service” in the same manner as R.C. 153.64(A)(4)). A “utility,” as defined in R.C. 3781.25(C), is not an “owner ... that does not subscribe to a protection service,” as described in R.C. 153.64(B)(3). Therefore, it is clear that the General Assembly did not intend for the term “owner,” as used in R.C. 153.64(B)(3), to mean “utility,” as that term is defined in R.C. 3781.25(C).

Accordingly, in response to your first question, we conclude that a county engineer shall include in the plans and specifications for a road improvement project, as required by R.C. 153.64(A)(3), the name, address, and telephone number of each owner of an underground utility facility that does not subscribe to a protection service, even if the owner is a private owner of a single family residence that is served by the underground utility facility.

The Meaning of “Telephone Number,” As Used in R.C. 153.64(A)(3)

Your second question asks how the county engineer is to comply with the requirement to provide a telephone number for an owner under R.C. 153.64(B)(3) if the owner’s residence does not have a landline telephone. A landline telephone is “a telephone connected to” “a telephone system network connected by wires and cables underground or on poles” as opposed to “a kind of mobile radio telephone used in a cellular communications system,” or a “cellular telephone.” *Webster’s New World College Dictionary* 817, 241 (5th ed. 2014).

R.C. 153.64(B)(3) requires a public authority to include in the plans and specifications for a public improvement “the name, address, and telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service.” As set forth in the statute’s plain language, a public authority is required to include in the plans and specifications for the public improvement, the telephone number “of each owner,” not of each owner’s residence. *Id.* R.C. 153.64(B)(3) also does not require the telephone number to be assigned to a landline telephone. Thus, a telephone number of an owner, as described in R.C. 153.64(B)(3), may include any telephone number belonging to an owner, including a telephone number assigned to the owner’s cellular telephone.²

Accordingly, we conclude, in response to your second question, that a county engineer satisfies the requirement in R.C. 153.64(B)(3) to include in the plans and specifications of a road improvement project a “telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service,” by including in the plans and specifications any telephone number belonging to the owner, regardless of whether the telephone number is assigned to a landline telephone.

Conclusions

In sum, it is our opinion, and you are hereby advised that:

1. A county engineer shall include in the plans and specifications for a road improvement project, as required by R.C. 153.64(A)(3), the name, address, and telephone number of each owner of an underground utility facility that does not subscribe to a protection service, even if the owner is a private owner of a single family residence that is served by the underground utility facility.
2. A county engineer satisfies the requirement in R.C. 153.64(B)(3) to include in the plans and specifications of a road improvement project a “telephone number of each owner of any underground utility facilities in the construction area that does not subscribe to a protection service,” by including in the plans and specifications any telephone number belonging

² We recognize that in some instances, it may prove difficult for a public authority to obtain the telephone number of a private owner of an underground utility facility. R.C. 153.64(B)(3) does not specify the way in which a public authority shall obtain the telephone number of an owner for the purpose of including the number in the plans and specifications of a public improvement. “Absent a provision of law specifying how a particular duty is to be carried out, it is assumed that it may be performed in any reasonable manner.” 1983 Op. Att’y Gen. No. 83-057, at 2-235. Thus, the county engineer may use any reasonable means necessary to obtain a telephone number of an owner as required by R.C. 153.64(B)(3).

to the owner, regardless of whether the telephone number is assigned to a
landline telephone.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

MICHAEL DEWINE
Ohio Attorney General