

OPINION NO. 81-077**Syllabus:**

A board of township trustees may require a cable television company to enter into a contract with the township pursuant to R.C. 505.91 prior to the time that the company begins construction within the unincorporated area of the township if the area to be serviced by the cable television company contains five hundred or more potential subscribers. (1973 Op. Att'y Gen. No. 73-002, overruled.)

To: David E. Lightliser, Licking County Pros. Atty., Newark, Ohio
By: William J. Brown, Attorney General, December 4, 1981

I have before me your request for my opinion in response to the following two questions:

1. R.C. 505.91, in part, provides as follows:

A board of township trustees, or an agent designated by the

board, may enter into a contract with a cable television company with respect to the establishment or operation of a cable television system in the unincorporated area of the township if the area proposed to be served by the cable television company includes at least five hundred potential subscribers (emphasis added).

Does the word "establishment" or the word "operation" or do both words, allow a board of township trustees to require a cable television company to seek and obtain permission from the board of township trustees prior to the time a cable television company begins to construct a cablevision system within said township?

2. If the answer to #1 above is "no", does your Opinion 73-002 remain unchanged? Opinion 73-002 concluded that:

. . .a corporation engaged in the cablevision business need not obtain authority from a township before beginning construction of its system within the township.

As you note in your letter, I concluded, in 1973 Op. Att'y Gen. No. 73-002, that "[a] corporation engaged in the cablevision business need not obtain authority from a township before beginning construction of its system within the township." This opinion, however, was issued prior to the enactment of R.C. 505.91. Am. Sub. H.B. No. 352, 113th Gen. A. (1979) (eff. Oct. 9, 1979). Your first question, therefore, requires a reexamination of the conclusion reached in Op. No. 73-002 in light of this new enactment.

R.C. 505.91 reads as follows:

A board of township trustees, or an agent designated by the board, may enter into a contract with a cable television company with respect to the establishment or operation of a cable television system in the unincorporated area of the township if the area proposed to be served by the cable television company includes at least five hundred potential subscribers.

Prior to entering into any contract with a cable television company, the board or agent shall conduct at least one public hearing on the proposed contract to receive the comments of interested persons. The board or agent shall give at least fourteen days' notice of the time and place for the hearing and for any subsequent meeting or proceeding of the board or agent at which the proposed contract will be considered or acted upon. Notice shall be both:

(A) By certified mail, return receipt requested, to the superintendent of each school district all or a part of which is within the unincorporated area of the township;

(B) By publication in a newspaper of general circulation in the township and by other means where appropriate.

Any fees which the township collects in connection with a contract with a cable television company shall be deposited in the township general fund.

This section and sections 505.90 and 505.92 of the Revised Code do not apply to any cable television system which is distributing signals to paying subscribers in the unincorporated area of a township prior to October 1, 1979, except that a township which had a written agreement with a cable television company prior to that date may enter into a contract pursuant to this section and sections 505.90 and 505.92 of the Revised Code on substantially the same terms as the prior written agreement. This section and sections 505.90 and 505.92 of the Revised Code shall not be interpreted to be a legislative

determination that any contract entered into prior to the effective date of these sections is invalid or unenforceable.

In order to arrive at a conclusion as to whether R.C. 505.91 permits a board of township trustees to require a cable television company to seek the board's permission prior to the time it begins construction within the township, one must first examine the exact nature of the "contract" referred to in that section.

Several recent cases by the Summit County Court of Appeals have dealt with contracts between cable television companies and boards of township trustees. Although these cases do not address the specific question posed by your request, several aspects of the cases are nonetheless useful. In Warner Amex Cable Communications, Inc. v. Haulauer, No. 10018 (Ct. App. Summit County June 3, 1981), and Warner Amex Cable Communications, Inc. v. France, No. 10019 (Ct. App. Summit County June 3, 1981), the appellant cable television company sought judicial relief from the townships' respective decisions not to enter into contracts with Warner. The court noted in France that there was no obligation incumbent upon the township involved in that case to enter into an agreement with any particular cable television company or companies. Rather, the court treated such contracts as benefits to be granted to the successful applicant or applicants at the discretion of the board of township trustees. Clearly, the court and the parties involved viewed the awarding of a contract as a prerequisite to the operation of a cable television company within the unincorporated area of a township.

This interpretation of the contract provided for in R.C. 505.91 finds support in the language of the statute itself. R.C. 505.91 requires that "[a]ny fees which the township collects in connection with a contract with a cable television company shall be deposited in the township general fund." The expectation that a township will derive revenue from a contract with a cable television company indicates that the township is providing something of benefit to the company, such as a right to operate. Such fees would not result from a contract in which the township was seeking to acquire services which the cable television company could provide. Rather, in the latter instance, the township would be expending funds. See generally 1979 Op. Att'y Gen. No. 79-095 (board of county commissioners may, as agent for board of township trustees, contract with a cable television company as provided in R.C. 505.91).

In addition, R.C. 505.91 contains a "grandfather clause" which exempts from the contractual requirement any cable television company "distributing signals to paying subscribers in the unincorporated area of a township prior to October 1, 1979," unless the township had a written agreement with the company prior to that date. The purpose of such a clause is, of course, to exempt already established businesses from compliance with subsequent regulations. If R.C. 505.91 were not regulatory in nature, there would be no need for such an exemption.

On the basis of recent court decisions and relevant provisions of R.C. 505.91, I conclude that a township may require the contract provided for by that statute as a prerequisite to the operation and establishment of cable television service within the unincorporated area of a township. Thus, a board of township trustees, pursuant to R.C. 505.91, may require that a cable television company gain the board's permission, in the form of a contract, prior to the time the company begins construction within that township "if the area proposed to be served by the cable television company includes at least five hundred potential subscribers."

With regard to your second question, since I have concluded that current statutory law compels a conclusion contrary to that reached in Op. No. 73-002, that opinion must be overruled.

Therefore, it is my opinion, and you are advised, that a board of township trustees may require a cable television company to enter into a contract with the township pursuant to R.C. 505.91 prior to the time that the company begins construction within the unincorporated area of the township if the area to be serviced by the cable television company contains five hundred or more potential subscribers. (1973 Op. Att'y Gen. No. 73-002, overruled.)