Note from the Attorney General's Office:

1962 Op. Att'y Gen. No. 62-3006 was modified by
1980 Op. Att'y Gen. No. 80-043.

3006

TOWNSHIP HAS NO RIGHT TO GRANT A PERSON OR FIRM THE RIGHT TO PLACE UTILITY FACILITIES IN RIGHT OF WAY OF TOWNSHIP ROADS—A MUNICIPAL PUBLIC UTILITY FACILITY LOCATED IN THE RIGHT OF WAY OF A HIGHWAY MAY BE REQUIRED TO RELOCATE OUTSIDE THE HIGHWAY AT THE EXPENSE OF THE UTILITY—§5547.03 R.C.; OPINION 835 OAG 1959; §5595.02, R.C.; 715.34, R.C.

SYLLABUS:

1. A township has no specific statutory authority to grant a person, firm, or corporation the right to place utility facilities in the right of way of a township road, and where such facilities do occupy a township road, it is at the mere aquiescence the township rather than under a grant of a franchise within the purview of Sections 5547.03 and 5515.02, Revised Code.

2. Where municipally owned public utility facilities located in the right of way of the highway, not by virtue of a franchise, interfere with the proposed improvement of the highway, the utility may be required under the provisions of Section 5547.03, Revised Code, in the case of a highway not a part of the state highway system, and under the provisions of Section 5515.02, Revised Code, in the case of a highway which is a part of the state highway system, to relocate such facilities outside of the bounds of the highway, at the expense of the utility.

Columbus, Ohio, May 18, 1962

Hon. E. S. Preston, Director, Department of Highways
Ohio Departments Building, Columbus 15, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"'Your formal written opinion on the following described question of law is respectfully requested.

"During September, 1958, during the construction of a section of U. S. Route 25 in Warren and Montgomery Counties, Ohio, it was necessary for the Miamisburg Power and Light Company to relocate its facilities located outside of the limits of any municipal corporation, but within the right of way of a county road, formerly a township road at the time such facilities were originally constructed.

"The Miamisburg Power and Light Company is owned exclusively by the City of Miamisburg, and its facilities, which were relocated by their own forces, were entirely outside the corporate limits of Miamisburg within the right of way of a County road.

"This utility company indicated that it would not move its facilities from the highway right of way unless the State of Ohio would agree to pay the cost incurred, or demonstrate that the company is legally obligated to pay the cost of such removal and relocation of its facilities. Further, the utility company stated that their facilities were placed in the said county highway right of way by an agreement with the Township Trustees when the road was a township road, and that agreement made no mention of payment of the costs in the event it became necessary to remove and relocate its said facilities.

"To date the Department of Highways has received three (3) billings from the Miamisburg Power and Light Company requesting reimbursement from the State of Ohio for costs incurred by it in removing and relocating its facilities which were previously located either wholly or in part within the said county highway right of way.

"The Department of Highways has submitted a request to the Bureau of Public Roads, United States Department of Commerce, for Federal reimbursement of the costs of the removal and relocation of the said utility facilities in the event the State of Ohio is obligated to reimburse the utility company for such costs expended by it.

"Attached hereto are copies of two letters from the said Bureau of Public Roads, dated December 1, 1958, and December 2, 1959, respectively, stating, in substance, that no reimbursement will be made until or unless the constitutional or legal authority of the State of Ohio to incur such expense has been established by pertinent citations of authorities, including statutes and pertinent court decisions relied upon by the State of Ohio, together with copies of any Ohio Attorney General's opinions on the subject matter.

"For the purpose of clearly establishing the obligation of the State of Ohio, if any, to reimburse the Miamisburg Power and Light Company for costs incurred in removing and relocating its

facilities as aforesaid, your formal written opinion is deemed necessary, and, in addition, it is requested that you furnish any additional professional advice which you may conclude will be required to substantiate the position the State of Ohio ought to take on this matter as the result of your opinion."

Under the facts, the municipal utility company has removed its facilities from the right of way of the road, and the question is whether the utility should be reimbursed for costs of removal.

Two sections of law deal specifically with removal of structures located in the right of way of a highway and constituting interference with an improvement of such highway, at the expense of the owner of the structures. Section 5547.03, Revised Code, deals with any highway, other than the state highway system, and reads as follows:

"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.

"Persons, partnerships, or corporations occupying any part of a highway, bridge, or culvert, under and by virtue of a franchise legally granted, shall relocate their properties within the bounds of such highway, bridges, or culverts when in the opinion of the county engineer, they constitute obstructions or interfere with the construction, improvement, maintenance, or repair of such highways, bridges, or culverts, or the use thereof by the traveling public.

"If, in the opinion of the engineer, such persons, partnerships, or companies have obstructed any such highway, bridges, or culverts, or if any of their properties are, in his opinion, so

> located that they do or may interfere with the proposed improvement, maintenance, or repair the board shall notify such person, partnership, or corporation directing the removal or relocation of the obstruction or property, and, if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board may do so by employing the necessary labor. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person, partnership, or corporation, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person, partnership, or corporation by civil action by the state on the relation of the board."

Section 5515.02, Revised Code, deals with a road or highway on the state highway system. It gives the director of highways power similar to that granted the board of county commissioners under Section 5547.03, *supra,* to order facilities of individuals, firms and corporations which are obstructions in the highway to be removed from the highway.

In my Opinion No. 835, Opinions of the Attorney General for 1959, page 543, I held in the first paragraph of the syllabus as follows:

> "The provisions of Section 5547.03, Revised Code, relative to the duty of a corporation having installed water pipes in a county highway, to relocate or remove them, are applicable to a municipal corporation owning water lines in a county highway located outside the corporation limits of the municipal corporation."

In said Opinion No. 835 I quoted the statement appearing in 28 Ohio Jurisprudence, page 100, reading:

> "In the acquisition, maintenance and operation of public utilities, such as lighting, power and heating plants, and waterworks, municipalities act in their private or proprietary capacity. * * *"

In accord with my reasoning in Opinion No. 835, and under the rule set forth in the Ohio Jurisprudence citation, I am of the opinion that the provisions of Section 5547.03 and of Section 5515.02, *supra,* apply to the removal of facilities of a municipal corporation utility precisely as

though such facilities had been installed by any person, firm, partnership, or a corporation of another character.

The facts as given are not entirely clear as to the nature of the road in question. In all probability, it was a county road which was improved by the director of highways as a part of the state highway system in cooperation with the county. It appears, however, that whether it comes within the provisions of Section 5547.03, *supra,* as not within the state highway system, or within the provisions of Section 5515.02, *supra,* as within the state highway system, the questions of law are the same.

Under both sections, if the obstruction occupies the highway other than by virtue of a franchise, said obstruction must be removed from the bounds of the highway at the expense of the utility. (Except that the county, under Section 5547.03 may allow relocation within the bounds of the highways.)

Under both sections, if the obstruction occupies the highway by virtue of a franchise, the relocation at the expense of the utility is to be within the bounds of the highway.

The facilities in this case were moved outside of the bounds of the highway.

In the instant case, the utility states that its facilities were placed in the highway when it was a township road, and that such was done by agreement with the township trustees. Since the facts as given do not refer to a written agreement in this regard, I will assume that none exists. The question then is whether the utility occupied the highway under a franchise within the purview of the two sections here involved.

As to a franchise, the pertinent language of Section 5547.03, *supra,* reads:

"* * * * * * * * *

> "Persons, partnerships, or corporations occupying any part of a highway, bridge, or culvert, under and by virtue of a franchise legally granted, shall relocate their properties *within the bounds of such highway,* * * *

"* * * * * * * * *

(Emphasis added)

The pertinent language of Section 5515.02, *supra,* reads as follows:

"* * * * * * * * *

"All individuals, firms, or corporations so occupying any road or highway on the state highway system or the bridges or culverts thereon, under and by virtue of a franchise or permit granted and in force, shall relocate their properties and all parts thereof *within the bounds of such road,* highway, * * *

"* * * * * * * * *."

(Emphasis added)

The word "franchise" is defined in Ballentine's Law Dictionary With Pronunciations, Second Edition, page 525, as:

"A right or privilege conferred by law; it is the privilege of doing that which does not belong to the citizens of the county generally by common right which constitutes the distinguishing feature of a franchise."

A grant from a sovereign power is essential to the creation of a franchise, but a franchise may be derived indirectly from the state through a duly designated agency (37 Corpus Juris Secundum, 158). In order to be able to grant a franchise, the agency granting must, of course, have the authority to do so. Section 5547.04, Revised Code, allows a board of county commissioners to permit use or occupation of public roads, and Section 5515.03, Revised Code, gives the director of highways like authority. As to a municipal corporation, Section 715.34, Revised Code, reads in part:

"Any municipal corporation may use, or by ordinance grant, for periods not exceeding twenty-five years, the use of its streets, avenues, alleys, lanes, and public places to lay pipes, conduits, manholes, drains, and other necessary fixtures and appliances under the surface thereof, to be used for supplying such municipal corporation and its inhabitants with steam or hot water, or both, for heat or power purposes, or both.

"* * * * * * * * *"

Regarding a township, however, I have not found a provision of law granting authority to a board of township trustees to permit a utility to use or occupy the right of way of a township road; and a township has only those powers expressly granted or reasonably implied.

Where there is any doubt as to the existence of a power, the doubt is resolved against it. (See *Jones* v. *Lucas County,* 57 Ohio St., 189;

State, ex rel. Locher v. *Menning,* 95 Ohio St., 97). And specifically speaking of a franchise, it is stated in 37 Corpus Juris Secundum, page 160:

> "A delegation of power to grant a franchise is strictly construed in favor of the public, and the agency to which the power is delegated has such powers, and only such powers, as are expressed or necessarily implied. The agent must act in accordance with the conditions prescribed by law, and must keep within the restricted authority which has been delegated, and a grant of a franchise is inoperative in so far as it may be in excess of such authority."

Lacking any specific authority to grant a franchise as in the instant case, a township does not, therefore, have such authority.

In the instant case, there is no evidence that the township attempted to grant a franchise to the company; and even if the township had agreed to the use of the highway by the utility as is claimed, such an agreement could not be considered to grant a franchise within the purview of the sections of law here involved, but would be a mere acquiescence of the township to such use.

Accordingly, I am constrained to the conclusion that the utility in question did not occupy the highway by virtue of "a franchise or permit granted and in force" or "under and by virtue of a franchise legally granted," and under either Section 5547.03 or Section 5515.02, Revised Code, whichever is applicable, the utility was required to, at its own expense, remove its facilities from the right of way of the road. It follows, therefore, that the state of Ohio is under no obligation to reimburse the utility company for costs expended in removing its facilities.

In conclusion, it is my opinion and you are advised:

1. A township has no specific statutory authority to grant a person, firm, or corporation the right to place utility facilities in the right of way of a township road, and where such facilities do occupy a township road, it is at the mere acquiescence of the township rather than under a grant of a franchise within the purview of Sections 5547.03 and 5515.02, Revised Code.

2. Where municipally owned public utility facilities located in the right of way of the highway, not by virtue of a franchise, interfere with the proposed improvement of the highway, the utility may be required

under the provisions of Section 5547.03, Revised Code, in the case of a highway not a part of the state highway system, and under the provisions of Section 5515.02, Revised Code, in the case of a highway which is a part of the state highway system, to relocate such facilities outside of the bounds of the highway, at the expense of the utility.

Respectfully,
MARK MCELROY
Attorney General