

April 16, 2002

Municipal Home Rule and the Public Right-of-Way

On April 1, 2002 the Franklin County Court of Common Pleas issued an important decision relating to local control and regulation of public streets and rights-of-way. As you may know, in 1999 the Ohio Legislature adopted a bill proffered by utility interests designed to strip local governments of most of their authority over their own streets and public rights-of-way. The Court declared this law unconstitutional in its entirety because the statute was enacted in violation of the Ohio Constitution, which requires that state legislative enactments consider only one subject at a time (“Single Subject Rule”). The right-of-way law was adopted as a “rider” to the state’s 855-page omnibus budget bill passed that year.

More importantly, the Court found most of the provisions of this law unconstitutional on other grounds as well: 1) because they violate the Home Rule rights of municipalities, and 2) because the statute itself was passed not with any legitimate regulatory purpose, but for the express purpose of denying cities their constitutional rights. In brief, the court found that ownership and management of local streets and public right-of-way is a matter of local self-government protected by the Ohio Constitution, and that municipalities have a constitutional right to own and to reasonably control and regulate their own property (which includes the public right-of-way) without interference from the Legislature.

Specifically, the Court found that:

- 1) Municipalities have a constitutional right to manage local public rights-of-way and to regulate the installation, maintenance and operation of utility equipment in the public right-of-way.
- 2) Municipalities have a constitutional right to obtain compensation on behalf of their residents for private, profit-making use of the public right-of-way by utility companies, and to protect themselves via local regulations from the damages, costs and other impacts associated with private utility uses of the right-of-way.
- 3) Municipalities have a constitutional right, as owners of the land used for streets and public rights-of-way, to convey such rights to others for utility uses (i.e., franchise). The municipality’s exercise of this right by reasonably granting or denying consent to use the public right-of-way for utility uses cannot be invaded by the Legislature without a valid statewide concern. The Court found that statewide concerns identified in prior decisions (termination of utility service and rate regulation in noncompetitive markets, and some issues relating to intercity and interstate utility service) may still apply, but that no additional statewide concern existed which would justify the wholesale elimination of local control attempted by the Legislature in 1999.

Supporters of utility companies have already introduced legislation to re-enact this draconian law. As expressed by the Court itself, this law eliminates your city’s right to protect your public rights-of-way “from becoming lumpy strips of patchwork tar and asphalt, under a vast network of overhead wires, lined by utility, telephone, and wireless phone poles, not to mention sheds, fenced off utility compounds, switch

boxes, satellite receivers, and any other new eyesore that next year's technology, or clever opportunism, might devise." If your community is concerned at all about its appearance, or is concerned about the costs incurred by your general fund as a result of uncontrolled use of your streets and public rights-of-way, you should make your opinions known to your representatives in Columbus as soon as possible.

Further, communities wishing to preserve their residents' investment in public infrastructure may wish to act upon this recent validation of local rights by proactively adopting right-of-way standards in advance of any new legislation from the Ohio General Assembly. As you may recall, the 1999 law "grandfathered" pre-existing right-of-way use standards, and this particular provision of the law was found to be reasonable and non-arbitrary by the Franklin County Court.

If you would like information on any of the above subjects, please feel free to contact any of the following Walter & Haverfield attorneys.

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