

FORMAL OPINION

April 25, 1978

RUSSELL H. MULLEN, *Acting Commissioner*
New Jersey Department of Transportation
1035 Parkway Avenue
Trenton, New Jersey 08625

FORMAL OPINION NO. 4—1978

Dear Commissioner Mullen:

You have asked whether the New Jersey Department of Transportation must receive site plan approval from municipalities for the location of auto transformer substations being constructed as part of the reelectrification of lines of the former Erie Lackawanna Railway Company under a project authorized by the New Jersey Transportation Bond Act of 1968, L. 1968, c. 126, as supplemented (hereinafter "Bond Act"). The project calls for the reelectrification of railroad lines through 37 municipalities and requires, as an integral part, the construction of 16 electrical substations of various types. With few exceptions, the 16 substations are each to be located in different municipalities. Location generally is mandated by considerations such as the source and availability of utility power, the length of track a station must serve, the electrical load to be handled, the proper distribution of power, the proximity to other substations and budget limitations. All substations are to be constructed on property acquired by the State for that purpose.

The New Jersey Supreme Court has addressed the issue of State immunity from local land use regulation on several occasions, concluding that "... state agencies are generally immune from the zoning ordinance provisions of a municipality." *Berger v. State*, 71 N.J. 206, 218 (1976); *Rutgers v. Piluso*, 60 N.J. 142, 153 (1972). See also *Town of Bloomfield v. N.J. Highway Authority*, 18 N.J. 237 (1955). The decisions hold that the existence of immunity in a particular case is to be determined from legislative intent. They set forth the key criteria to be examined in making that determination: 1.) The nature and scope of the instrumentality seeking immunity; 2.) the kind of function or land use involved; 3.) the extent of the public interest to be served thereby; 4.) the effect local land use regulation would have upon the enterprise concerned; and 5.) the impact upon legitimate local interests. 71 N.J. at 218. When viewed in light of the above criteria, the legislative history and factual circumstances surrounding this project make it clear that the Department of Transportation is immune from local land use regulation.

The Department of Transportation was established by the Legislature as a principal department in the executive branch of state government with broad powers to develop and promote programs for efficient and economical transportation services on a statewide basis with special emphasis to be given to the preservation and improvement of commuter railroads. N.J.S.A. 27:1A-1 *et seq.* In furtherance of these objectives, the Legislature enacted, and the people approved at a general election, the Bond Act "for the purpose of capital expenditure for the cost of providing an improved public transportation system for the State." The Bond Act specifically reserved \$200,000,000 of the proceeds from the sale of bonds for the

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improvement of mass transportation facilities and appropriated all proceeds from the sale of bonds to the Department of Transportation for the purposes set forth in the Act. "Improvement of mass transportation facilities" was defined to include "the development, acquisition by purchase, lease or otherwise, the construction, reconstruction, improvement, rebuilding, relocation, renewal, establishment or rehabilitation of mass transportation facilities . . ." as well as "the acquisition of all property rights-of-way, easements and interests therein as shall be necessary for the improvement of mass transportation facilities." The Bond Act further declared that it "is in the public interest that these essential transportation facilities and equipment be provided in the shortest possible time, thereby saving on the anticipated increased construction costs as well as providing a safer, more adequate transportation system." By L. 1968, c. 424, the Legislature appropriated a portion of the bond sale proceeds for various mass transportation projects, including the reelectrification of the Erie Lackawanna and authorized and directed the Commissioner of Transportation "to take such steps as shall be necessary to implement and carry out the program authorized by the New Jersey Transportation Bond Act of 1968. . . ."

The foregoing leaves little doubt that the Department of Transportation, in implementing the reelectrification project is, in the words of the Supreme Court in *Rutgers*, "an instrumentality of the State performing an essential governmental function for the benefit of all the people of the State. . . ." 60 N.J. at 153. As such, the Legislature would not intend that it be subject to restriction or control by local land use regulation. "Indeed" the Court continued, "such will generally be true in the case of all state functions and agencies." 60 N.J. at 153. Moreover, where, as in this case, municipal land use regulation would temporarily delay, and could permanently thwart, a state-wide project of general public benefit which the Legislature has directed be completed in the shortest possible time, the legislative intent to immunize the State agency responsible for the project is apparent. As stated by the Court in *N.J. Turnpike Authority v. Sisselman, et al.*, 106 N.J. Super. 358, 366 (App. Div. 1969) *cert. den.* 54 N.J. 565 (1969),* "To hold otherwise would delay, disrupt, fragmentize and possibly defeat completion of this necessary public project, an extensive project passing through several municipalities." After citing several cases in support of the proposition that the Turnpike Authority and similar agencies are immune from local zoning and planning regulations, the Court explained, "The rationale of these cases is that legislatively created agencies, authorized by the superior governmental authority of the State, may not be subjected to rules and regulations of local governing boards and agencies, in the absence of clear language subjecting the state-created agencies

*The case held that where the Legislature expressly authorized the building of a highway spur by the Turnpike Authority, that agency was not required to refer the project to the local planning board for review and recommendation under N.J.S.A. 40:55-1.3, the source of N.J.S.A. 40:55D-31 in the present Municipal Land Use Law. It is important to note that neither N.J.S.A. 40:55D-31 nor any other provision of the Municipal Land Use Law, N.J.S.A. 40:55D-1 *et seq.*, specifically subjects the Department of Transportation to local jurisdiction.

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to the jurisdiction of local boards.”

Finally, there appears to be no local interest which, when compared to the overwhelming evidence in support of immunity, would lead to the conclusion that the Legislature intended the Department of Transportation to be subject to local land use regulation in connection with this project. It must be emphasized, however, that legitimate local interests may not be arbitrarily disregarded. “And at the very least, even if the proposed action of the immune governmental instrumentality does not reach the unreasonable stage for any sufficient reason, the instrumentality ought to consult with the local authorities and sympathetically listen and give every consideration to local objections, problems and suggestions in order to minimize the conflict as much as possible.” *Rutgers v. Piluso, supra*, 60 N.J. at 154. This, in fact, is being done by the Department of Transportation. A series of public meetings have been held to explain the project and its impact to affected communities. Technical meetings with municipal engineers and administrators have been held to discuss the planned location of substations and possible alternatives. Furthermore, an environmental impact assessment is being prepared which will address itself to potential noise, aesthetic and land use impacts of the project and will include a discussion of suggested alternative locations for substations. The assessment will be distributed to all affected municipalities for comment and a public hearing will follow. Only after the above procedure is complete will a final decision be made.

In view of the above, you are advised that the Department of Transportation, in proceeding with the Erie Lackawanna reelectrification project is immune from local land use regulations.

Very truly yours,
JOHN J. DEGNAN
Attorney General

By: KENNETH S. LEVY
Deputy Attorney General

JOHN CLEARY, *Director*
Office of Cable Television
Board of Public Utilities
101 Commerce Street
Newark, New Jersey 07102

May 16, 1978

FORMAL OPINION NO. 5—1978

Dear Director Cleary:

You have requested an opinion as to whether ownership of a cable television system by a municipality is permissible under the Cable Television Act. For the following reasons, you are advised that a municipality may own and operate a cable television system.