Zoning statutes are enabling acts authorizing local communities to adopt comprehensive zoning plans. See 1943 PA 183, MCLA 125.201 *et seq.*; MSA 5.2961(1) *et seq.*; 1943 PA 184, MCLA 125.271 *et seq.*; MSA 5.2963(1) *et seq.* Zoning acts have been upheld as a valid exercise of the police power. *Gordon* v *City of Warren Planning & Urban Renewal Commission*, 29 Mich App 309, 326-327; 185 NW2d 61, 69 (1971), aff'd 388 Mich 82; 199 NW2d 465 (1972). Proprietors are required to comply with both the Subdivision Control Act, *supra*, and local zoning ordinances.

FRANK J. KELLEY,
Attorney General.

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CABLE COMMUNICATIONS SYSTEMS: State and local governmental authority in relation to cable communications systems.

Local governmental units have authority to grant cable television franchises even in the absence of specific legislation relating to cable television.

Under current law it is permissible for home rule cities to own and operate cable television systems.

Within current state laws it is permissible for several units of local government to collaborate in writing a franchise for a cable communications system.

Within existing federal regulations, broad areas of regulatory authority may be assumed by state government.

Opinion No. 4808 April 25, 1974.

Honorable Stanley F. Rozycki
State Senator
State Capitol
Lansing, Michigan

In letters to this office, you have asked my opinion on the following questions:

1. Do local governmental units have authority to grant cable television franchises in the absence of specific legislation relating to cable television?
2. Under current law is it permissible for home rule cities to own and operate cable television systems?
3. Within current state laws is it permissible for several units of local government to collaborate in writing a franchise for a cable communications system?
4. Within existing federal regulations, what specific areas of regulatory responsibility over cable broadcasting can be assumed by the state?

I. Overview

From small beginnings, as a method of bringing clear television reception to mountainous regions, cable television has grown to the point where it

can confidently be predicted that it will become one of the major communication systems of the future. The history and potential of cable were recently described by Mr. William Ralls of the Michigan Public Service Commission in the following terms:

> "In 1952, when the cable television industry was only three years old, there were 70 operating systems serving a total of 14,000 subscribers. Today there are more than 2,800 systems serving 6.5 million subscribers. Besides growing rapidly, cable television has evolved technologically. At first it was a simple arrangement for bringing a good television signal into a home that received a poor one or none at all. It was called, 'Community Antenna Television,' which both described the service and supplied the acronym CATV by which it still is widely known. Now cable television is a versatile broad-band communications system that can provide a subscriber with many more channels than there are programs to fill them.
>
> "The Sloan Commission on Cable Communications estimates that as many as six out of ten American homes will have cable television by 1980. If that's so, cable television could provide quite a variety of services to a significant proportion of the nation—improved program reception, additional programming of all sorts, and public access to TV channels.
>
> "The last category includes channels for political candidates, city councils, schools, ethnic minorities, the handicapped and almost anybody with a need or desire to communicate. Conventional over-the-air television doesn't provide much of this kind of programming and when we open the access to mass-communications, we truly spread 'power to the people.'
>
> "This aspect of cable is only the beginning of the potential of a true 'wired nation.' The technology has reached a point where, if the demand arose, a cable system could bring into the home not only conventional television signals but also facsimile services and access to data processing equipment; cable could bring to every home two-way broad-band communications that can provide a whole galaxy of new services.[1] If,

[1] The Federal Communications Commission has noted the following uses as a partial list of potential cable communications services:

> "[F]acsimile reproduction of newspapers, magazines, documents, etc.; electronic mail delivery; merchandising; business concern links to branch offices, primary customers or suppliers; access to computers; e.g., man to computer communications in the nature of inquiry and response (credit checks, airlines reservations, branch banking, etc.), information retrieval (library and other reference material, etc.), and computer to computer communications; the furtherance of various governmental programs on a Federal, State, and municipal level; e.g., employment services and manpower utilization, special communications systems to reach particular neighborhoods or ethnic groups within a community, and for municipal surveillance of public areas for protection against crime, fire detection, control of air pollution and traffic; various educational and training programs; e.g., job and literacy training, pre-school programs in the nature of 'Project Headstart,' and to enable professional groups such as doctors to keep abreast of developments in their fields; and the provision of a low cost outlet for

as has been proposed, cable television is linked to communications satellites, separate cable systems could be cheaply and flexibly interconnected in regional, national and international networks." William R. Ralls, "Cable Television: The Information Utility," p 4-5.

The Federal Communications Commission has recently acted to require that a two-way communication capacity be built into cable television systems. In its consideration of this point, the Commission stated:

"On review of the comments received and our own engineering estimates, we have decided to require that there be built into cable systems the capacity for return communication on at least a non-voice basis. Such construction is now demonstrably feasible. Two-way communication, even rudimentary in nature, can be useful in a number of ways—for surveys, marketing services, burglar alarm devices, educational feedback, to name a few." FCC, *Cable Television Service; Cable Television Relay Service,* 37 Federal Register 3252, 3270 (1972).

In these circumstances it is clear that the term "cable television" is already obsolete as a description of this technological phenomenon. The potential and, to some extent, the existing applications of cable communications technology extend far beyond anything ordinarily conveyed by the term "television," which has, by usage, become wedded to the relatively narrow concept of commercial broadcast production. For purposes of this opinion, the broader term "cable communications system" will consistently be employed in order to direct attention to the potential as well as the actual uses of cable.

II. Municipal Authority to Franchise

It is my conclusion that even without further legislation, local governmental authorities in Michigan have the authority to permit the development and, by means of a franchise agreement, to provide for the regulation of cable communications systems within their own geographical limits. The authority of cities and villages to adopt ordinances requiring franchises and to grant franchises is established by Const 1963, art 7, § 22 which states:

"Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

Under the home rule act, 1909 PA 279; MCLA 117.1 *et seq.;* MSA 5.2071 *et seq.,* these provisions are implemented and reiterated by Section 4j(3) which states that:

"Each city may in its charter provide:

"* * *

"For the exercise of all municipal powers in the management and control of municipal property and in the administration of the munici-

political candidates, advertisers, amateur expression (e.g., community or university drama groups) and for other moderately funded organizations or persons desiring access to the community or a particular segment of the community." FCC, *Cable Television Service; Cable Television Relay Service,* 37 Federal Register 3252 (1972), footnote 10.

pal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state." MCLA 117.4j(3); MSA 5.2083(3).

The obligation of cable communications companies to obtain franchises is also established by Const 1963, art 7, § 29 which provides:

> "No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government."[2]

[2] The question of whether or not a cable communication system is a public utility has never been squarely decided in Michigan. Some inference that it is may be drawn from orders entered by Federal District Court Judge Noel P. Fox in the case of *City of Lansing* v *Lamb Enterprises,* WD Mich, (CA 5855, 1971). In this case, although the municipality's ordinance was overturned on other grounds, Judge Fox declined to uphold defendant corporation's contention that it should not be required to seek a franchise to operate a cable television system from plaintiff city despite defendant's argument that it was not a public utility and therefore not included under the requirements of Const 1963, art 7, § 29.

A further indication of what systems are public utilities for purposes of Michigan constitutional law may be taken from the list of systems included under the jurisdiction of the Public Service Commission in the act establishing it, 1939 PA 3; MCLA 460.1 *et seq.;* MSA 22.13(1) *et seq.* This act, of course, long antedates the 1963 Constitution, and its provisions may be presumed to have had some effect on constitutional drafting. Section 6 of the act provides that the commission is vested with power to regulate all privately owned "public utilities, including . . . telephone, telegraph . . . and all public transportation and communication agencies other than railroads and railroad companies." 1939 PA 3, § 6; MCLA 460.6; MSA 22.13(6). A recent case has made clear that it is this listing which establishes the status of a particular industry as a public utility. *Northern Michigan Water Co* v *Michigan Public Service Commission,* 381 Mich 340; 161 NW2d 584 (1968).

At the present time, cable communications systems are required by federal regulation:

1. To engage in program origination (limited to systems having 3500 subscribers or more) 47 CFR 76.201(a).
2. To have two-way communication potential (limited to systems in major market areas) 47 CFR 76.251(a) (3).
3. To maintain a large number of channels available for public use, one of which must be available to the public on a nondiscriminatory basis 47 CFR 76.251(a) (4).

Taking these factors into account, it seems beyond question that such systems

The predecessor of this provision in the Constitution of 1908 (Const 1908, art 8, § 28), which was similar to the present provision in all relevant respects, was interpreted by the Michigan Supreme Court in *City of Kalamazoo* v *Circuit Judge,* 200 Mich 146; 166 NW 998 (1918) to grant the units of local government the authority to impose conditions on public utilities desiring local franchises as a part of their contract negotiations even though they may not have the authority to impose such rates and conditions by a direct exercise of governmental authority. In so ruling, the Court therein said:

> "That the want of power to legislatively fix a rate does not prevent the execution of a contract, is illustrated by the case of *City of Nobles-ville* v. *Improvement Co., supra,* where it is said:
>
> > 'That the city had no power to regulate the rates of its licensee makes no difference. It had the power to contract. And the power to regulate as a governmental function, and the power to contract for the same end, are quite different things. One requires the consent only of the one body, the other the consent of two. In this instance the city acted in the exercise of its power to contract, and it is therefore entitled to the benefits of its bargain.'
>
> "In *City of St. Mary's* v. *Hope Natural Gas Co., supra,* it was held that the city might, in the control of the use of its streets, prescribe conditions including the fixing of rates for gas, and might contract therefor, even though it possessed no governmental power to fix rates." *City of Kalamazoo* v *Circuit Judge,* 200 Mich 146, 159-160 (1918).

More recently the Court has reiterated this position.

> "Primarily the authority to fix rates for public utilities is a governmental power vested in the legislature. The legislature may delegate it to municipalities but only in express terms or by necessary implica-

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must be considered "communication agencies," and "public utilities" within the meaning of the relevant statutory and constitutional provisions.

It should also be noted that in *TV Pix, Inc* v *Taylor,* 304 F Supp 459 (DC Nev, 1968) aff'd *per curiam* 396 US 556 (1970) it was held that cable television operations are sufficiently of a naturally monopolistic character and so affected with the public interest that regulation of such businesses as public utilities does not violate Fourteenth Amendment protections. In addition, constitutional objections to state regulation of cable communications systems based on a theory of federal pre-emption were rejected. Denying a claim that state regulation was an unconstitutional interference with federal authority over interstate communications under the Communications Act of 1934, the Court relied on *Head* v *New Mexico Board,* 374 US 424; 83 S Ct 1759; 10 L Ed 2d 983 (1963) for the proposition that state regulation is valid so long as federal power remains "dormant and unexercised."

The FCC has now, of course, issued extensive regulations dealing with certain aspects of cable television systems (47 CFR 76.1 *et seq.*) but in such a way as to acknowledge and encourage local regulation of cable systems as public utilities. See 47 CFR 76.13(a) (3).

Under these circumstances, I must conclude that (a) there is no bar to state regulation of cable communications systems as public utilities and (b) such systems are public utilities within the meaning of Michigan constitutional and statutory provisions.

tion. Section 28 does not delegate such power to cities and villages. *City of Kalamazoo* v. *Kalamazoo Circuit Judge,* 200 Mich. 146, 161.

> "The authority of municipalities over rates, resulting from section 28, is a wholly different power. From the fact of control of streets, whether under statute or Constitution, there arises an implied power to fix reasonable rates as a condition of the use of the streets. This, in turn, carries the power to contract for rates, at least for a reasonable time." *City of Niles* v *Michigan Gas & Electric Co,* 273 Mich 255, 263; 262 NW 900, 903 (1935).

I therefore conclude that these cases support the proposition that local governmental units may, as an exercise of their authority to enter into contractual agreements with local utilities, impose conditions on cable communications systems seeking local franchises.

The policy behind these constitutional provisions is reflected by the home rule act which states among other things that:

> "Each city may in its charter provide:
>
> "For the use, regulation, improvement and control of the surface of its streets, alleys and public ways, and of the space above and beneath them;" MCLA 117.4h(1); MSA 5.2081(1) . . .
>
> and
>
> "For the use, by others than the owner, of property located in streets, alleys and public places, in the operation of a public utility, upon the payment of a reasonable compensation to the owners thereof;" MCLA 117.4h(2); MSA 5.2081(2).

It should also be noted that Const 1963, art 7, § 34 requires that any provision of the constitution or of law providing for restriction on the activities of municipalities shall be construed liberally in favor of the existence of municipal authority. The section states:

> "The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution."

In addition, it will be noted that under Const 1963, art 7, § 29, counties, townships, cities and villages are guaranteed the reasonable control of their streets and public places and it is provided that no public utility system (a term which we hold includes cable communications systems) may be constructed or begin doing business within the boundaries of these governmental authorities without their consent.

III. Municipal Ownership of Cable Communications Systems

We now confront the question of whether or not Michigan home rule cities have the authority, not only to franchise but also to own, operate and maintain cable communications systems.

It must first be determined whether or not a cable communications system is a structure sufficiently affected with the public interest that its con-

struction may be said to constitute a public purpose for which expenditures may properly be made by public agencies.

The leading recent case on the question of what enterprises may be considered public purposes is that of *Gregory Marina* v *City of Detroit,* 378 Mich 364, 396; 144 NW2d 503, 516 (1966), in which it was reiterated that the determination of what is or is not a public purpose is primarily a legislative question with which the courts will not interfere except in cases of abuse. In arriving at this conclusion, the Court quoted from American Jurisprudence as follows:

> "What is a public use is not capable of absolute definition. A public use changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication. The courts as a rule have attempted no judicial definition of a public as distinguished from a private purpose, but have left each case to be determined by its own peculiar circumstances. Generally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporations, the sovereign powers of which are used to promote such public purpose. The phrase 'municipal purpose,' used in the broader sense, is generally accepted as meaning public or governmental purpose as distinguished from private. The modern trend of decision is to expand and liberally construe the term 'public use' in considering State and municipal activities sought to be brought within its meaning. The test of public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.
>
> *"The determination of what constitutes a public purpose is primarily a legislative function, subject to review by the courts when abused, and the determination of the legislative body of that matter should not be reversed except in instances where such determination is palpable and manifestly arbitrary and incorrect."* 37 AM Jur, Municipal Corporations, § 120, p 734, 735. *Gregory Marina* v *City of Detroit,* 378 Mich 364, 396; 144 NW2d 503, 516 (1966) (Emphasis added by the Court).

It should be apparent in view of the greater variety of public benefits and services which might be derived from a properly constructed cable communications system that such a system could serve the public interest and convenience, at least as importantly as a yacht basin, the use at issue, and approved by the Court, in the previously cited case.

It has already been observed (see footnote 2) that "communication agencies" have been declared public utilities under Michigan law and that many factors indicate the logic of including cable communications systems within that term. These same factors are, of course, relevant to the question of whether or not the public construction of a cable communications system could be said to fulfill a public purpose. Moreover, as Justice Cooley has observed:

> "Necessity alone is not the test by which the limits of State authority

> in this direction are to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely needful to the continued existence of organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." *People v Salem,* 20 Mich 452, 475 (1870).

The doctrine that works for which public expenditures are made must serve a public purpose is embedded in Const 1963, art 3, § 6 which provides:

> "The state shall not be a party to, nor be financially interested in, any work of internal improvement, nor engage in carrying on any such work, except for public internal improvements provided by law."[3]

The qualification that any internal improvement in which the state is interested or engaged must be a "public" internal improvement gives constitutional force to the public purpose doctrine considered in the preceding pages.

Of course, public ownership of a system is itself an important determinant of whether or not an expenditure is made for a public purpose. Justice Cooley suggests that taxes imposed to construct public works which will be owned by the state are, of necessity, imposed for a public purpose;

> "Where the State itself is to receive the benefit of the taxation, in the increase of its public funds or the improvement of its public property, there can be no doubt of the public character of the purpose." *The People ex rel The Detroit and Howell Railroad Co* v *The Township Board of Salem,* 20 Mich 452, 492 (1870).

Moreover, as we have seen, it has been repeatedly recognized that the question of whether an expenditure is made for a public purpose is primarily a legislative one, properly dealt with in the course of the appropriation process. *Gregory Marina* v *City of Detroit, supra.*

Taking these authorities into account, I conclude that there can be no objection to public development of a cable communications system under the public purpose doctrine as it exists at common law (see *People* v *Salem, supra*) or as it is reiterated in Const 1963, art 3, § 6.

We now pass to the question of whether construction and maintenance of such a system by a home rule city may be considered to be "authorized by law" under the same constitutional provision.

Research by this office has revealed no specific reference to any such

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[3] It is well established that this language includes both the State and local units of government. *Attorney General, ex rel Barbour* v *Pingree,* 120 Mich 550, 560; 79 NW 814, 818 (1899), 2 Official Record, Constitutional Convention of 1961, p 2310.

It should be noted that the prohibitions of Article 3, section 6 do not extend to projects financed by revenue bonds [*City of Gaylord* v *Beckett,* 378 Mich 273, 291; 144 NW2d 460, 465 (1966)] or to other projects of a self-liquidating character undertaken by public corporations. *Advisory Opinion re Constitutionality of PA 1966,* No 346; 380 Mich 554, 583; 158 NW2d 416, 429 (1968).

authority either in the constitution or in the statutes. The home rule act does state that:

> "Each city may in its charter provide:
>
> "For the acquisition . . . of the following improvements including the necessary lands therefor, viz.: . . . electric light and power plants and systems, gas plants and systems, waterworks plants and systems, sewage disposal plants and systems, market houses and market places, office buildings for city officers and employees, public works, and public buildings of all kinds; and for the costs and expenses thereof;" MCLA 117.4e(1); MSA 5.2078.

In my opinion nothing is to be derived from the fact that in the home rule act the legislature used the general term "public works" and did not list cable communications systems. Such systems did not, of course, exist at the time the act was passed, and it may well have been anticipated by the legislature that the use of the general term would allow for the fact that:

> "A public use changes with changing conditions of society, new appliances in the sciences, and other changes brought about by an increase in population and by new modes of transportation and communication." *Gregory Marina* v *City of Detroit, supra,* 364 Mich at 396.

It will be noted that the home rule act at MCLA 117.4e; MSA 5.2078, provides for the construction and maintenance of "public works . . . of all kinds." We are therefore led to a consideration of whether or not a cable communications system may be considered a "public work" since if it is a "public work" within the terms of the home rule act, it may be considered a "public improvement authorized by law" within the terms of Const 1963, art 3, § 6.

Some indication of the type of systems sufficiently affected with a public purpose for their construction to constitute a public work may be derived from various sources. These would include:

1. "Facilities for supplying . . . light, heat, power, sewage disposal and transportation . . ." (Const 1963, art 7, § 24).
2. "Parks, boulevards, cemeteries, hospitals and all works which involve the public health or safety" (Const 1963 art 7, § 23).
3. A "city hall, police stations, fire stations, boulevards, streets, alleys, public parks, recreation grounds, municipal camps, public grounds, zoological gardens, museums, libraries, airports, cemeteries, public wharves and landings upon navigable waters, levees and embankments, watchhouses, city prisons and work houses, penal farms, institutions, hospitals, quarantine grounds, electric light and power plants and systems, gas plants and systems, waterworks plants and systems, sewage disposal plants and systems, market houses and market places, office buildings for city officers and employees, public works, and public buildings of all kinds." (MCLA 117.4e(1); MSA 5.2078).
4. "Housing facilities; garbage disposal plants; rubbish disposal plants; incinerators; transportation systems (including all plants, works, instrumentalities and properties used or useful in connec-

> tion therewith); sewage disposal systems (including all sanitary sewers, combined sanitary and storm sewers, plants, works, instrumentalities and properties used or useful in connection with the collection, treatment, and/or disposal of sewage and/or industrial wastes); water supply systems (including all plants, works, instrumentalities and properties used or useful in connection with obtaining a water supply, the treatment of water and/or the distribution of water); . . . automobile parking facilities . . . yacht basins; harbors; docks; wharves; terminal facilities; elevated highways; . . . community buildings; public wholesale markets . . . stadiums; convention halls; auditoriums; dormitories; hospitals; buildings devoted to public use; parks; recreational facilities; reforestation projects; aeronautical facilities; and marine railways" [MCLA 141.103(b); MSA 5.2733(b)].

None of these lists is intended to be entirely exclusive. The constitutional provisions must be read in connection with Const 1963, art 7, § 22 which provides "No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section." The home rule act in its use of the general term "public works . . . of all kinds" and the revenue bond act in its inclusion of "instrumentalities . . . useful in connection with" the named facilities both have a clearly open ended quality.

Nevertheless, to do justice to the concept of limitation inherent in the inclusion of such lists in the constitutional provisions and statutory sections cited above, as well as to the concept of adjustibility indicated by the use of open ended terms, courts would ordinarily turn to the legal maxim of *ejusdem generis* which signifies that:

> "In the construction of laws, wills, and other instruments, . . . where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned." *Blacks Law Dictionary,* 4th ed, p 608.

A cable television system bears a close resemblance in design and function to many of the public works specifically mentioned in the provisions above cited. It has, like systems for the distribution of water and electricity, an essential monopoly characteristic in its very nature since it is not reasonable to expect duplicate systems to be constructed which would allow the homeowner to choose freely between them on the basis of service or cost. It is potentially an instrument of vast importance to public education, in which respect it closely resembles museums and libraries. A cable television system can be used to monitor and meter the operation and provision of services by other municipal systems such as water, sewage disposal and electricity, in which event it could be considered a "work used or useful in connection with" these services. With the federally imposed requirement of public service channels available for governmental, educational and "public rostrum" purposes, such a system will serve many of the same civic functions as are presently served by community buildings, stadiums, convention halls and

auditoriums. Federally required two-way communication potential will make cable communications systems available for the placing of orders for goods and services, a function presently served by public markets.

Perhaps most importantly, a cable communications system, properly constructed, has important applications in the field of public health and safety. Through it, diagnoses can be made of immobilized patients. Hospital-like supervision can be given to patients in their own homes. Municipal traffic flow can be supervised from a central location and quick response provided for accidents. High risk commercial establishments like banks and lonely areas of a city can be patrolled and surveilled without the actual attendance of an individual officer. These considerations alone may be enough to bring cable communications within the express provisions of Article 7, section 23 permitting cities to own and maintain "works which involve the public health or safety."

Indeed, the entire question of whether a cable television system may be considered to serve the public interest in an important enough way to qualify as a "public work" depends in large part upon the design of the system. Enough has been said, I think, to indicate that a cable communications system *can* be a public work but this determination turns on the extent to which the potential of such systems is realized by an individual city's plans. If it is contemplated that the system should do nothing more than bring additional commercially available television from distant locations, then it could truly be said that the public would have very little real need for the services of a CATV system. If, on the other hand, the public's interests are made paramount in the design of the system and the essentially recreational purposes served by commercial television become incidental to the development of a system designed to serve more serious public needs for the promotion of commerce, and the public health, safety, and education, then it is my opinion that nothing in the constitution or laws prevents a home rule city from engaging in the public development of a cable communications system.

It should be noted, of course, that the section of the home rule act on which I have relied in large part is permissive in nature. It states that a city may by charter provide for the construction and maintenance of "public works . . . of all kinds." A charter may assume all, part, or none of this power and, depending on the language of particular charter provisions, a particular city may or may not have the necessary breadth of authority in the field of public works.

IV. Collaboration by Units of Local Government

In answer to your third question, I would draw your attention to Const 1963, art 7, § 28 which provides:

> "The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or

with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.

"Any other provision of this constitution notwithstanding, an officer or employee of the state or any such unit of government or subdivision or agency thereof, except members of the legislature, may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service."

Pursuant to the home rule act (1909 PA 279 *et seq.*, as amended; MCLA 117.1 *et seq.;* MSA 5.2071 *et seq.*) and the Const 1963, art 7, §§ 22 and 29, Michigan local governmental units have the right and obligation to regulate and franchise cable communications systems. Under § 28 these are clearly among the powers which units may exercise in collaboration with each other.

The legislature has responded to the mandate of the constitutional provision by enacting 1967 PA Ex Sess 7; MCLA 124.501 *et seq.;* MSA 5.4088(1) *et seq.*, and 1967 PA Ex Sess 8; MCLA 124.531 *et seq.;* MSA 5.4087(1) *et seq.* See also 1951 PA 35; MCLA 124.1 *et seq.;* MSA 5.4081 *et seq.* (Copies of these acts are attached). They provide the framework within which such collaboration must be accomplished.

V. The Pattern of State and Federal Regulatory Jurisdiction

In response to your fourth question, it must be emphasized that many areas of uncertainty exist in relation to this matter which will only be clarified entirely by future judicial or congressional action. In general it may be stated, however, that the Federal Communications Commission has adopted a pattern of dual jurisdiction over cable television. This pattern is expressed procedurally in the requirement that:

"No cable television system shall commence operations or add a television broadcast signal to existing operations unless it receives a certificate of compliance from the Commission." 47 CFR, § 76.11(a).

and in the further requirements of Subpart C of the rules relating to Cable Television Service (47 CFR, § 76.31 *et seq.*) which are set out below:

"Subpart C—Federal-State/Local Regulatory Relationships § 76.31 Franchise standards.

(a) In order to obtain a certificate of compliance, a proposed or existing cable television system shall have a franchise or other appropriate authorization that contains recitations and provisions consistent with the following requirements:

(1) The franchisee's legal, character, financial, technical, and other qualifications, and the adequacy and feasibility of its construction arrangements, have been approved by the franchising authority as part of a full public proceeding affording due process;

(2) The franchisee shall accomplish significant construction within one (1) year after receiving Commission certification, and shall thereafter equitably and reasonably extend energized trunk cable to a substantial percentage of its franchise area each year, such percentage to be determined by the franchising authority;

(3) The initial franchise period shall not exceed fifteen (15) years, and any renewal franchise period shall be of reasonable duration;

(4) The franchising authority has specified or approved the initial rates that the franchisee charges subscribers for installation of equipment and regular subscriber services. No increases in rates charged to subscribers shall be made except as authorized by the franchising authority after an appropriate public proceeding affording due process;

(5) The franchise shall specify procedures for the investigation and resolution of all complaints regarding the quality of service, equipment malfunctions, and similar matters, and shall require that the franchisee maintain a local business office or agent for these purposes;

(6) Any modifications of the provisions of this section resulting from amendment by the Commission shall be incorporated into the franchise within one (1) year of adoption of the modification, or at the time of franchise renewal, whichever occurs first: *Provided, however,* That, in an application for certificate of compliance, consistency with these requirements shall not be expected of a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first; *And provided, further,* That on a petition filed pursuant to § 76.7, in connection with an application for certificate of compliance, the Commission may waive consistency with these requirements for a cable system that was not in operation prior to March 31, 1972, and that, relying on an existing franchise, made a significant financial investment or entered into binding contractual agreements prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever comes first.

(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds 3 percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of Federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program. The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first. [37 F.R. 3278, Feb. 12, 1972, as amended at 37 F.R. 13866, July 14, 1972]."

It will be noted that no statement is made in the above provisions about what level or levels of government are to act as the franchising or authoriz-

ing authority. The title of Subpart C makes this ambiguity explicit in its reference to Federal-State/Local Regulatory Relationships. In essence, the FCC takes no position on the question of what agency on the local level shall franchise or authorize cable television operations. The Commission leaves this to be determined as a matter of state law, merely requiring that the applicant demonstrate its compliance with the state requirements. 47 CFR, § 76.31(a).

Technically speaking, the state is free to impose on cable applicants by law whatever conditions it may deem appropriate in return for the authorization these operators will need in order to secure an FCC certificate of compliance and begin operation. As a practical matter, however, the FCC imposes limits on the state's discretion in this regard since an applicant may be denied an FCC certificate if the state has imposed requirements which do not conform to the standards established in 47 CFR, § 76.31 *et seq.* set out in the preceding page.

If, for example, state law required that cable television franchises be granted for periods of not less than 20 years, an operator might obtain such a franchise and obtain a certificate of compliance from the state but still never be able to obtain an FCC certificate of compliance and begin operations because his franchise violated the standard of 47 CFR, § 76.31(a) (3) providing that:

> "The initial franchise period shall not exceed fifteen (15) years . . . ."

Thus, the FCC standards operate as maximum and minimum restraints on the power of the state to impose conditions on operators in return for licensure. It must be recognized, however, that even within these limitations great latitude exists for development of state cable television policy. In relation to some matters, such as rates, the FCC has merely required that a determination be made by the franchising authority leaving the content of the determination either for negotiation or regulation by state law. 47 CFR, § 76.31(4). Such regulation might be accomplished either by the state assuming the role of franchising authority itself or by requiring that franchises issued by cities or other political subdivisions be approved by the state. Nothing in the FCC regulations or other applicable federal law prohibits this approach and, in fact, many states have already adopted statewide regulatory schemes.[4] Such regulation has been upheld in a case affirmed by

[4] "States regulating cable television services under State-wide utility-type statutes are *Alaska,* Ala. Stats., Tit. 42, Chap. 05, Sec. 761 (see also Capital Cablevision, Inc., Dkt. V-71-77 (1971)); *Connecticut,* Conn. Gen. Stats., Chap. 289, Sec. 16-330 *et seq.; Hawaii,* Rev. Stats., Chap. 269 (see also the Opinion of the Attorney General of Hawaii No. 69-29, Dec. 2, 1969, CCH Utilities Law Reporter 21, 206); *Illinois,* Ill. Rev. Stats. Chap. 111-2/3, Sec. 10-3(b); *Massachusetts,* Chap. 1103, Acts of 1971 creating a new Chap. 116A, Mass. Gen. Laws; *Nevada,* Nev. Rev. Stats., Sec. 711.010 et seq; *New York,* Chap. 28, McKinney's N.Y. Statutes, Executive Laws; *Rhode Island,* R.I. Gen. Laws, Sec. 39-19-1 et seq.; and *Vermont,* Vt. Stats. Ann., Title 30, Chap. 13." Stephen R. Rivkin, *Cable Television: A Guide to Federal Regulations;* The Rand Corporation 1973, p 63, footnote 9.

the United States Supreme Court. *TV Pix, Inc* v *Taylor,* 304 F Supp 459 (DC Nev, 1968) affirmed per curiam 396 US 556; 907S Ct 749; 24 L Ed 2d 746 (1970).

It must also be noted that the entire scheme of federal regulation depends upon the use by the cable television system of broadcast signals.[5] It is entirely possible that in the future cable communications systems may exist which make no use of such signals and thus fall entirely outside the federal regulatory system. As to any such system, the state's jurisdiction would be exclusive.

The foregoing description of the opportunities available for state participation in regulation of cable television has treated federal regulations as if they were entirely valid in every respect. This is by no means certain and this uncertainty provides another compelling reason for the state to assert its authority and interest at an early date. One prominent observer states the situation in the following terms:

> "Finally, it is important to note that the question of FCC power to assume regulatory authority in nonbroadcast areas—while recently upheld in *Midwest Video* as a matter of broad federal authority—has by no means been finally clarified with respect to preemption of state and local roles. It is not at all certain that a court will perfunctorily construe FCC authority as blocking state powers to grant perpetual franchises or to impose rate-of-return regulation. Where such issues are clearly posed in a particular factual context, and the local viewpoint justified in terms of the full range of local considerations, judicial intervention may yet be available to stay or modify FCC rules—if conflict arises and federal statutory authority remains imprecise. It is surely pertinent to note that the FCC's jurisdiction over cable television under its present statutory mandate was judicially upheld by only one vote, and significant doubts were expressed by the four dissenters as to whether FCC initiative was within Congress's limited grant of statutory authority. Ultimately, Congress remains the final arbiter of its intentions in relationships between local franchise authorities and the FCC.
>
> "Thus, it would seem premature to conclude that whole fields of regulatory concern have been definitively preempted from local franchising authorities. It is rarely prudent to provoke controversy, but some state and local authorities may choose to view it as their responsibility—while attempting to live within federal guidelines—to seek as well as to devise independent policies in franchising and regulatory decisions that will promote the interests of their citizens. Such independent local determinations would be reflected in bargaining with cable operators, whose applications for federal certification could well

[5] Only a "cable television system" is required to obtain an FCC certificate of compliance before commencing operations [47 CFR, § 76.11(a)] and such systems are defined as "any facility that . . . receives . . . amplifies or . . . modifies . . . signals transmitting programs broadcast by one or more television or radio stations and distributes such signals by wire or cable to subscribing members of the public. . . ." 47 CFR 76.5(a).

be fashioned and substantiated to ensure that local purposes are served and confrontations over the essential meanings of the FCC's 'minimum' standards are avoided. Of course, full deference should be given to the FCC's recognition that its present regulations are 'interim.' But the launching of independent initiatives—possibly coordinated with other local franchising authorities—would ensure that local desires are vigorously pressed in negotiating with the FCC and the cable industry. Such a coordinated response to the FCC's regulations would inevitably contribute to shaping further federal policies in these areas." Rivkin, *supra,* p 77-78.

FRANK J. KELLEY,
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MENTAL HEALTH: Temporary Detention; Private psychiatric hospitals

A county jail cannot be used as a place of temporary detention for allegedly mentally ill persons unless such person displays homicidal or dangerous tendencies.

A private psychiatric hospital cannot be compelled to accept alleged mentally ill persons.

Opinion No. 4814 April 25, 1974.

Dale Ruohomaki
Prosecuting Attorney
Prosecuting Attorney's Office
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You have requested an opinion regarding temporary detention of allegedly mentally ill persons pursuant to MCLA 330.19; MSA 14.809. As you have noted, MCLA 330.19; MSA 14.809 provides three procedures for temporary detention: 1) By a judge pursuant to certificates from two legally qualified physicians; 2) By any peace officer with the approval of the prosecuting attorney; and 3) By the regularly-appointed official physician of the city or county. The questions that you have posed with regard to these procedures are as follows:

I. "Under which of the three procedures outlined can an alleged mentally ill person be detained in the county jail and under what circumstances?"

II. "Is it mandatory for the psychiatric unit of St. Mary's Hospital, Marquette, Michigan, a private hospital certified for the treatment of the mentally ill, to accept alleged mentally ill persons delivered to the hospital by a police officer, either pursuant to order of the court, authorization from the prosecuting attorney, or certification of the county physician?"

I.

MCLA 330.19; MSA 14.809 specifies the procedures for temporary detention of persons allegedly mentally ill. It also specifies the places where