

(Cite as: 1992 WL 159769, \*4 (Ohio App. 8 Dist.))

intrusive than perhaps any other category of property regulation." *Id.* at 44. Justice Marshall continued that "we do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property." *Id.*

The Supreme Court did not find the New York statute unconstitutional, but remanded the case for a determination as to compensation due the property owner.

Because we find that no contradictory federal or state law exists that would preempt Section 14 of Ordinance 1981-88 of the Codified Ordinance of the City of North Royalton, we find that Cablevision, as a licensed franchise, must be permitted to install its cable television service in the Gross apartments in circumstances authorized by Ordinance 1981-88, Section 14, provided proper compensation is paid to Gross. The amount of compensation should be determined by the trial court.

Based upon the foregoing, we conclude that Cablevision's first assignment of error is not well taken with regard to its claim of eminent domain power under R.C. 4931, but is well taken with regard to its license under the Codified Ordinances of the City of North Royalton, to provide cable television service to any lawful tenant who requests such service, provided that compensation is paid to the landowner.

### III.

For its second assignment of error, Cablevision contends that the trial court erred in granting Gross's motion for summary judgment because there are genuine issues of fact regarding whether easements dedicated for compatible uses exist on Gross's property, enabling Cablevision to deliver its cable television services, pursuant to Section 621(a) of the Cable Communications Policy Act of 1984.

\*5 Cablevision raises two arguments under this assignment of error. First, Cablevision

asserts that the Cable Act authorizes it to enter upon Gross's property, including the interior units of the buildings, to provide cable television service, by using easements that are dedicated for compatible uses. Cablevision points out that telephone, electric, gas and satellite television services may qualify as compatible easements. Second, Cablevision argues that there are genuine issues of material fact as to whether such easements exist on Gross's property.

The issues raised in Cablevision's first theory have been recently and thoroughly analyzed by both the Eleventh and Third Circuit Courts of Appeals. In *Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund, VI, LTD.* (1992), 953 F.2d 600, the Eleventh Circuit Court of Appeals held that Section 621(a) of the Cable Act does not authorize a cable television company to access private, non-dedicated easements which may exist so that particular utilities can access the interiors of multi-unit apartment buildings. *Id.* at 609. Rather, Section 621(a) authorizes access only to dedicated utility easements. *Id.* The court interpreted "dedicated" to mean recorded on a plat with the appropriate governmental authority. *Id.*

In reaching this decision in *Cable Holdings*, the court relied primarily upon two provisions of Section 633 of the Cable Act which Congress omitted from the final draft. The omitted provisions parallel those of Section 14 of North Royalton Ordinance 1981-88. Section 633 would have allowed a cable television company to access apartments in a multi-unit building, where there was a tenant request for service, and where the landowner was properly compensated. The legislative history of the cable act, which the *Cable Holdings* court adopted, and which is more fully set forth in *Cable Investments, Inc. v. Woolley* (1989), 867 F.2d 151, indicates Congress's intent to not regulate this area on a federal level.

In *Cable Investments, Inc. v. Woolley*, supra, the Third Circuit Court of Appeals succinctly found that: "The deletion of section 633 in the final version of the Cable Act, the



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transfer of some of its provisions to section 541 but not those provisions detailing the factors to be considered in arriving at just compensation for a taking, the deletion of any reference to multi-unit buildings, and the statements of the congressmen approving and decrying the deletion of section 633 lead ineluctably to the conclusion that Congress made a considered decision that the Cable Act should not give cable operators the right to impose their service on owners of multi-unit dwellings who choose not to use them."

The decisions in Cable Holdings and Woolley are directly in line with several other recent federal decisions. See *Cable Assoc. v. Town & Cty. Management Corp.* (E.D.Pa.1989), 709 F.Supp. 582; *Media General Cable v. Sequoyah Condominium Council* (E.D. Va.1990), 737 F.Supp. 903; *Uacc-Midwest, Inc. v. Edward Rose and Sons*, No. 1-90-CV-383 (E.D. Mich. May 22, 1990).

\*6 Cablevision's interpretation of the Cable Act of 1984, which would allow a cable television company unlimited access to multi-unit apartment buildings is unsupported by the Act itself, and the weight of federal authority on the subject. We adopt the views and holding of Cable Holdings and Woolley and apply them to the matter, sub judice.

Cablevision's second argument under this assignment of error has substantially more merit. Since under the Cable Act of 1984, Cablevision may access "easements which are dedicated to compatible uses," it is a material issue of fact whether there are such easements on the Gross property, whether they are "dedicated" and whether they are compatible for use by cable television. The legal meaning of the phrase is adequately set forth in *Cable Holdings*, supra. The Gross's motion for summary judgment, however, does not adequately set forth a factual basis sufficient to support the trial court's ruling. Material issues of fact remain as to whether there are other utility easements on the Gross property, and whether they are dedicated.

For these reasons we find that Cablevision's

second assignment of error is not well taken with regard to its interpretation of Section 521(a) of the Cable Communications Policy Act of 1984, but is well taken with regard to their argument that material issues of fact remain.

The decision of the trial court is reversed and this cause is remanded for further proceedings consistent with this opinion.

MATIA, C.J., and PATTON, J., concur.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof, this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Ohio App. 8 Dist., 1992.  
*Cablevision of Midwest, Inc. v. Gross*  
1992 WL 159769 (Ohio App. 8 Dist.)  
END OF DOCUMENT



NOTICE: RULE 2 OF THE OHIO SUPREME  
COURT RULES FOR THE REPORTING OF  
OPINIONS  
IMPOSES RESTRICTIONS AND  
LIMITATIONS ON THE USE OF  
UNPUBLISHED OPINIONS.  
CENTEL CABLE TELEVISION  
COMPANY of OHIO, INC.,  
Plaintiffs-Appellees,

v.

Donald E. COOK, et al., Defendants-Third  
Party Plaintiffs-Appellants,

v.

The DAYTON POWER AND LIGHT  
COMPANY, Third Party  
Defendant-Appellant.

Nos. 14-88-8, 14-88-10.

Court of Appeals of Ohio, Union.  
Sept. 27, 1989.

Civil Appeals from Common Pleas Court.

Allen, Howard, Yurasek & Merklin, David F.  
Allen, Marysville, for appellants, Donald E.  
Cook and Rose Marie Cook.

Denis E. George, Dayton, for third party  
defendant-appellant, The Dayton Power and  
Light Company.

George E. Quatman III, Lima, for appellee,  
Centel Cable Television of Ohio, Inc.

OPINION

GUERNSEY, Judge.

\*1 These are separate appeals by the  
defendants-third party plaintiffs, Donald E.  
Cook and Rose Marie Cook, in Case No. 14-88-  
8, and the third party defendant, Dayton  
Power and Light Company, in Case No. 14-88-  
10, from a judgment of the Court of Common  
Pleas of Union County.

The action in the trial court was heard and  
decided on an agreed statement of facts  
which established the following facts  
specifically bearing on the issues raised on  
this appeal:

1. Plaintiff Centel does business as a cable  
television system receiving and

retransmitting television signals via cable  
lines, the lines here involved being located in  
Union County and attached to Dayton's  
electric utility poles.

2. Cooks are private individuals owning the  
real property on which Dayton's electric  
utility poles here involved are located.

3. Dayton is a public utility corporation as  
defined in R.C. 4905.02 and 4905.03(A) doing  
business in Union County as well as  
elsewhere.

4. On or about September 24, 1965, the Cooks  
granted to Dayton an easement across their  
property which is not a part of any public  
right of way, nor is it used or dedicated for  
public use, and the granting clause of which is  
in the following words:

" \* \* \* do hereby grant or convey unto said  
The Dayton Power and Light Company, its  
successors and assigns forever, a right of way  
and easement, subject to legal highways, for  
a line for the transmission and/or distribution  
of electric energy thereover, for any and all  
purposes for which electric energy is now, or  
may hereafter be used \* \* \* ."

5. On or about January 1, 1984, Dayton and  
Centel entered into a "Pole Attachment  
Tariff Agreement" which incorporated, as  
well, the terms and conditions of Dayton's  
PUCO Pole Attachment Tariff.

6. Sometime after January 1, 1982, [sic],  
Centel's subcontractor attached to the  
Dayton electric utility poles located on Cooks'  
property a strand of coaxial cable carrying  
electric transmission television signals. This  
cable has at all times here concerned carried  
such a signal. At the time of the installation  
the subcontractor damaged Cooks' property in  
the sum of \$500.00.

7. Cooks demanded that Centel remove its  
cable or pay compensation for same which  
Centel has refused to do, have not at any time  
given Centel permission or easement rights  
entitling Centel to enter their premises, and  
have consistently tried to prevent the



original installation and later repairs by Centel once they learned of Centel's presence on their property.

Based on the foregoing facts Centel filed its complaint against Cooks for declaratory judgment and injunctive relief to declare Centel's right to maintain and repair its transmission line attached to Dayton's power poles on Cooks' real property and to enjoin any interference therewith by Cooks. Cooks counterclaimed against Centel seeking a declaration against Centel's right to maintain and repair the cable, an injunction to enjoin Centel from entering upon their property, and \$10,000.00 property damage. They also asserted their third party claim against Dayton for declaratory judgment and for the \$10,000.00 damages which they alleged to have been incurred from Centel's entry on their property. Dayton counterclaimed against Centel denying that Centel has any right under Dayton's easement to enter Cooks' premises and praying that Centel be permanently enjoined from interfering with Dayton's business relationship with Cooks, that the Pole Attachment agreement be rescinded, that Centel be ordered to remove all of its attachments from Dayton's poles, and that Centel be required to indemnify Dayton for all costs associated with its defense of the Cooks' third party complaint.

\*2 Upon trial on the agreed statements of facts the lower court declared that Dayton had the right to apportion its rights under the easement granted it by the Cooks, reasoning that the Supreme Court would have so decided notwithstanding that the grant contained only the language, "its successors and assigns" and did not contain the additional words, "lessees and tenants," relied on by the Supreme Court in *Jolliff v. Hardin Cable Television Co.* (1971), 26 Ohio St.2d 103, reasoning that apportionability depends upon the intention of the parties and "defendants (Cooks) did not reserve any rights in said easement that could not be assigned by DP & L," and concluding "[t]herefore, this court is of the opinion that DP & L had the right to apportion its rights under this easement to

Centel." The court further concluded that the use by Centel "is similar to that granted in the easement and does not create an additional burden on the land of the original grantor," that *Loretta v. Teleprompter Manhattan CATV Corp.* (1982), 458 U.S. 417, 102 S.Ct. 3164, does not overrule *Jolliff*, since it is a "takings case" without compensation whereas this case is an "added burden case," nor does the enactment of R.C. 4905.71 reverse *Jolliff*. The court entered its judgment incorporating its decision and enjoining the Cooks from restricting or interfering with Centel in the use of the easement, rendering money judgment for \$500.00 in favor of Cooks and against Centel for damages caused by the subcontractor, dismissing the Cooks' third party complaint against Dayton, and dismissing Dayton's counterclaim against Centel.

This is the judgment from which the Cooks have appealed in Case No. 14-88-8 and from which Dayton has appealed in Case No. 14-88-10.

Cooks have assigned error of the trial court "by finding Centel (Plaintiff- Appellee) has a legal right to install, attach and maintain, its coaxial cable to Dayton Power and Light poles located upon Defendants-Appellants' Cooks' real estate."

Dayton has assigned that the trial court "abused its discretion and erred by finding that plaintiff, a Cable television company, has derived the right to enter defendants' premises by virtue of the terms of (1) the private easement and right-of-way granted in 1965 to third party defendant, a public utility, by defendants, and (2) the pole attachment agreement dated January 1, 1984 between plaintiff and third party defendant."

These assignments of error are equivalent, involving the same issues, and will be considered and disposed of together.

The *Jolliff* case, *supra*, expresses the current case law of Ohio as declared by the Supreme Court on the apportionability of easements granted to power companies over private



property. The case was in this court on appeal on questions of law and fact and, on the facts, this court rendered judgment denying apportionability. *Jolliff v. Hardin Cable Television Co.* (1970), 22 Ohio App.2d 49. Our judgment was reversed by the Supreme Court (26 Ohio St.2d 103) holding as to apportionability:

\*3 "1. An easement granted to a power company, 'its successors, assigns, lessees, and tenants to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires \* \* \* ' is, by its terms, apportionable, and the grantee of such easement may sub-lease an interest in the easement to a television cable company."

Thus recognizing apportionability to the Supreme Court went on to determine and hold in the second paragraph of its syllabus that the attachment by a lessee of the grantee of a television transmission cable to the grantee's telephone poles constitutes a use similar to that granted in the easement and does not create an additional burden on the land of the original grantor. In the view we hereafter take as to apportionability it is not necessary for us to consider any issue as to additional burden upon the servient estate. Compare *Bobart, Inc. v. Cable Communications Operations, Inc.*, (11/19/82), Allen County App. No. 1-82-8 (unpublished).

The rationale of the Supreme Court in arriving at the conclusion in *Jolliff* as to apportionability is expressed by Justice Corrigan in the following words, p. 106:

" 'Although we are referred in the briefs to the rules of construction governing easements in gross, we are bound first to examine the deeds in question to ascertain whether the language employed therein is capable of an interpretation which will resolve the issue presented. As stated in *Hinmann v. Barnes* (1946), 146 Ohio St. 497, 508, ' "if the intention of the parties is apparent from an examination of the deed 'from its four corners,' it will be given effect

regardless of technical rules of construction.' "

"We therefore must study the deeds to see if the language used casts light on the question of the apportionability of the easements granted therein.

"In the deeds, the grantors conveyed to Ohio Power, ' \* \* \* its successors and assigns forever, a right of way and easement with the right, privilege and authority to said party of the second part [Ohio Power], its successors, assigns, lessees, and tenants to construct, erect, operate and maintain a line of poles and wires for the purpose of transmitting electric or other power, including telegraph or telephone wires \* \* \* ."

"The crucial words of the grants which are determinative of the intention of the grantors are 'successors, assigns, lessees, and tenants.' (Emphasis added.) The words 'lessees and tenants' indicate, particularly, that it was clearly intended by the parties to the grants that Ohio Power could lease some portion of its interests to third parties. Such language ('its \* \* \* lessees' obviously means 'its \* \* \* sub-lessees,' in the absence of any restrictive definition of 'lessee' in the easements--and there is none) is open to no other interpretation.

"In view of that clearly expressed intention, we find it unnecessary to employ rules of construction in interpreting the easements in question. We merely note the standard found in 5 Restatement of the Law, Property, 3053, Section 493b, that: ' \* \* \* Where it [easement in gross] is created by conveyance, apportionability depends upon the intention of the parties to the conveyance.' That intention here, as expressed in the language of the easements, is that the easements are apportionable and we so hold."

\*4 In the case before us we have not been cited to, nor do we find any, language in the deed of easement as to lessees or tenants or any language comparable thereto to show any intent that the easement conveyed by Cooks be apportionable. As heretofore noted the grant here was "unto said The Dayton



Power and Light Company, its successors and assigns forever, a right of way and easement, subject to legal highways, for a line for the transmission and/or distribution of electric energy thereover, for any and all purposes for which electric energy is now, or may hereafter be used." In *Jolliff* the Supreme Court gave no bearing in the issue of apportionability to the fact that the grant there included the words "successors, assigns," nor do we. Those words, in our opinion, are significant only to assure that the whole of the rights of Dayton under the easement, and not a mere portion thereof, may pass to an assignee of Dayton during Dayton's continued existence or pass to a successor of Dayton should Dayton's existence be terminated. In our opinion, the intention of the parties, as expressed in the language of the easement document, is that the easement be not apportionable, and we so hold.

In that the conveyance of the easement by Cooks to Dayton involved only a private easement over private land Dayton's rights thereunder, as well as the subsequent rights claimed by Centel, as opposed to the rights of the Cooks, became fixed as of the date when the deed of easement was executed, and were not, and could not, be enlarged by the terms of any pole attachment agreement between Dayton and Centel or by any Pole Attachment Tariff to which Dayton was subject and to which Centel became subject by reference thereto in the pole attachment agreement.

Similarly, Cooks' private property rights in this respect could not be diminished by legislation subsequently adopted. Indeed, in our opinion the provisions of R.C. 4905.71 prescribing that certain public utilities shall permit under certain conditions the attachment of "any wire, cable, facility, or apparatus to its poles," etc., "by any person or entity other than a public utility that is authorized and has obtained, under law, any necessary public or private authorization and permission to construct and maintain the attachment," do not enlarge the rights of the public utilities or the entities so permitted to attach as against private property owners, but serve, instead, to protect the rights of those

private property owners by requiring their authorization before attachment is effected. Thus, though such legislation implements public policy by providing for permission to instrumentalities, such as cablevision companies, to attach their cables to existing utility poles that public policy affects only the rights between the utility and the attaching instrumentality and does not purport to determine or affect private property rights dependant upon agreement between the real property owner and its grantee. Thus, the provisions of R.C. 4905.71 are not pertinent to our decision as to apportionability.

\*5 Similarly, the Cable Television Act, Public Law 98-549, enacted by Congress in 1984, and cited by Centel, dealing with the right of a cable television company to utilize existing easements has reference only to "public rights-of-way" and is not applicable here.

Having determined that the easement of Dayton here involved is not apportionable we conclude that the assignments of error of the appellants in both appeals are well taken requiring reversal and remand for further proceedings including:

1. A declaratory judgment in response to Centel's complaint and Cooks' cross-complaint and third party complaint declaring the easement rights of the parties, or lack thereof, consistent with this opinion.
2. An injunction in favor of the Cooks and against Centel as prayed for in Cooks' cross-complaint.
3. A denial of any injunction against Cooks in favor of Centel.
4. A redetermination of the damage issue raised by Cooks in their cross-complaint and third party complaint.
5. A redetermination of all issues raised by Dayton against Centel.

Judgment reversed and cause remanded.



Not Reported in N.E.2d  
(Cite as: 1989 WL 111980, \*5 (Ohio App.))

Page 5

BRYANT and MILLER, JJ., concur.

J. THOMAS GUERNSEY, J., retired, of the Third Appellate District, was assigned to active duty pursuant to Section 6(C), Article IV, Ohio Constitution.

Ohio App.,1989.  
Centel Cable Television Co. of Ohio, Inc. v.  
Cook  
1989 WL 111980 (Ohio App.)  
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1992 U.S. Dist. LEXIS 8738 printed in FULL format.

HERITAGE CABLEVISION OF CALIFORNIA, INC., Plaintiff, v. J.F. SHEA COMPANY, INC., a Nevada corporation, d/b/a SHEA BUSINESS PROPERTIES; SHEA HOMES, a California corporation; COAST CABLE PARTNERS II, a California partnership; A&M HOMES, a California corporation; WORTHING COMPANIES, a California corporation; ALTAMONT ENTERPRISES; ROY W. HUMPHREYS, an individual; and FLOYD R. LOEW, an individual, Defendants.

No. C-90-20073-WAI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

1992 U.S. Dist. LEXIS 8738

May 21, 1992, Decided  
May 21, 1992, Filed

DISPOSITION: [\*1] DENIED

JUDGES: INGRAM

OPINIONBY: WILLIAM A. INGRAM

OPINION: ORDER

#### I. Background

On February 20, 1992, this court denied the parties' cross-motions for summary judgment. On April 15, 1992, the court granted plaintiff's motion for leave to file its Amended and Supplemental Complaint. Also on April 15, 1992, the court remanded a similar action (case No. 91-20872) which was brought by defendant Coast Cable Partners II to state court.

On February 24, 1992, defendants filed a motion for modification and/or clarification of the preliminary injunction. The matter was heard on April 27, 1992, at 10:30 A.M. and subsequently taken under submission.

#### II. Arguments

In the court's preliminary injunction order filed June 4, 1990, the court enjoined defendants from:

1. Taking any action to interfere with plaintiff's installation of cable television facilities in the River Oaks and Silver Creek developments, including installation in the interior of buildings; or
2. Taking any action to prevent plaintiff from operating a cable television system in the River Oaks and Silver Creek developments.

Defendants are seeking modification of the preliminary injunction in three respects.

First and foremost, defendants argue that [\*2] the preliminary injunction should only enjoin Shea from interfering with plaintiff's access to public service easements ("PSEs") in Silver Creek. The relevant PSE is a common trench located in the street where television cable is laid. Shea argues that it has negotiated a private agreement with Coast Cable to provide the in-home wiring for cable service in Silver Creek. Thus, defendants argue, there is no easement on the private lots, let alone no PSE, and therefore, plaintiff has no right to enter the private lots to install cable.

Second, defendants also request the court to modify the preliminary injunction as it is applied to the River Oaks development to protect defendants from mechanics' lien claims from subcontractors employed by plaintiff to install its equipment in River Oaks. Specifically, defendants are concerned about the possibility that plaintiff's subcontractors who are working at River Oaks may not be paid by plaintiff and might then seek to attach a mechanics' lien to the property at River Oaks and force defendants to initially answer damage claims which result from plaintiff's failure to compensate its own contractors or subcontractors. Defendants ask the court to [\*3] relieve defendants of the possible attachment of mechanics' liens in the River Oaks development.

Also, defendants allege that due to the high competition among electricians working at River Oaks, some "salting," or sabotaging of other electrician's work is occurring. They request that the court mandate the use of only one electrician, chosen by defendants, to work on the River Oaks development.

#### 1. The Easement Modification

The court denied both parties' motions for summary judgment, primarily because there is a material triable fact over whether or not interior easements exist at the developments at issue. Thus, it seems that defendant is trying to achieve through this motion for modification of the preliminary injunction what it couldn't achieve through its motion for summary judgment. Defendant is self-conscious of this criticism and states early on in its memorandum that it "will not address this issue [of whether any interior easements were granted to Coast Cable]. Rather, Shea Homes will demonstrate that by virtue of plaintiff's own arguments, plaintiff is not entitled to a continuance of the preliminary injunction outside the PSEs at Silver Creek."

At the risk of restating [\*4] the controversy, defendants assert that there is no interior easement. Back in 1990, when plaintiff sought its preliminary injunction, it stated:

"Plaintiff can rely on 47 U.S.C. § 541(a)(2) to gain access to utility easements and other easements dedicated to compatible uses, which is all it seeks." Where there are "no utility easements or other compatible easements which could be used by the city-franchised firm to enter . . . § 541(a)(2) would . . . not apply, as . . . [Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3rd Cir. 1989)] held."

Given this, defendant requests the court to modify its preliminary injunction to relieve defendant of the requirement to allow Heritage access outside the PSEs at Silver Creek. n1

-Footnotes-

n1 The Cable Investments case held that in order to qualify for access under 47 U.S.C. § 541(a)(2), an easement must be "publicly dedicated." Otherwise, 541(a)(2) would violate the takings clause. Recently, the Eleventh Circuit in Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., F.2d , 1992 U.S.App. Lexis 1641 (11th Cir. February 12, 1992), also interpreted the meaning of "dedicated" in § 541(a)(2) and similarly adopted the requirement of public dedication. However, it should be noted that Cable Holdings is arguable in direct conflict with two other Eleventh Circuit cases, and failed to cite any other easement co-use cases. A motion for reconsideration and/or en banc review has been filed in Cable Holdings.

- - - - -End Footnotes- - - - -

[\*5]

The defendants appear to be simply re-arguing that no interior easements exist. The bottom line is that the facts of the case have not changed since this court issued its preliminary injunction. At best, defendants can only argue that the law has changed. However, the law is in flux and there is no clear controlling authority which would require the court to modify its injunction order. Thus defendants' motion is more akin to one for reconsideration of the injunction.

A review of the parties' arguments and a re-reading of the court's preliminary injunction order leads the court to the conclusion that the motion to modify should be denied. Furthermore, based on each parties' arguments, the court is satisfied that the parties clearly understand the substance and spirit of the preliminary injunction; therefore, it needs no clarification.

## 2. Mechanics' Liens and Electrical "Salting"

Plaintiff effectively argues that 1) defendants' concerns are purely speculative, and 2) defendants are protected from "any damage" caused by plaintiff under 47 U.S.C. § 541(a)(2)(C), P 24 of the preliminary injunction order, as well as the posted \$ 2.5 million dollar bond.

### III. Conclusion [\*6]

Having considered the papers, submission, and arguments submitted by the parties, and good cause appearing, IT IS HEREBY ORDERED that defendants' motion for modification and/or clarification of the preliminary injunction is DENIED.

DATED: 5 21 92

WILLIAM A. INGRAM

United States District Judge

1990 U.S. Dist. LEXIS 18811 printed in FULL format.

HERITAGE CABLEVISION OF CALIFORNIA, INC., Plaintiff, v. J.F.  
SHEA COMPANY, INC., a NEVADA CORPORATION, dba SHEA BUSINESS  
PROPERTIES, et al., Defendants

No. C-90-20073-WAI

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA

1990 U.S. Dist. LEXIS 18811

May 24, 1990, Decided  
June 4, 1990, Filed

JUDGES: [\*1]

William A. Ingram, United States District Judge.

OPINIONBY: INGRAM

OPINION: PRELIMINARY INJUNCTION ORDER

This matter was heard by the court on March 26, 1990, upon this motion of plaintiff Heritage Cablevision of California, Inc. ("Heritage"), for a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure. This court, having considered the pleadings, declarations, memoranda of law, evidence and arguments of counsel, and being otherwise fully informed in the premises, concludes that Heritage is entitled to preliminary injunctive relief, and finds that:

1. Plaintiff Heritage is a Delaware corporation with its principle place of business in Santa Clara County, California. By way of Ordinance No. 22128 (effective date: January 17, 1986), the City of San Jose, California, granted to Heritage a nonexclusive franchise to use the City's public rights-of-way to provide cable television service to all City residents.

2. As used herein, "cable television service" refers to the type of programming service defined as "cable service" by Section 602(5) of the Cable Communications Policy Act of 1984, 47 U.S.C. Section 522(5).

3. Defendant J.F. Shea Company, Inc., is a Nevada corporation doing [\*2] business as Shea Business Properties ("Shea Business Properties").

4. Defendant Shea Homes is a California corporation and is a real estate developer who is involved in, among other projects, residential developments in San Jose called River Oaks and Silver Creek. The River Oaks and Silver Creek developments are planned to expand to over 3,000 residences, including condominiums and apartments.

5. Defendant A-M Homes is a California limited partnership involved as a developer in the River Oaks development.

6. Defendant Altamont Enterprises, Ltd. ("Altamont") is a California corporation and a developer involved in the River Oaks project.

7. Defendant Worthing Companies ("Worthing") is a California corporation and a developer involved in the River Oaks project.

8. Defendant Coast Cable is a California limited partnership. By way of Ordinance No. 23318 (effective date: December 22, 1989), the City of San Jose granted to Coast Cable a nonexclusive franchise to use the City's public rights-of-way in the River Oaks and Silver Creed areas for the provision of cable television service.

9. Defendant Floyd R. Loew ("Loew") is a General Partner of Coast Cable. Defendant Loew is also the General [\*3] Manager of Coast Cable.

10. Defendant Roy W. Humphreys ("Humphreys") is the President of Shea Homes. Defendant Humphreys is a General Partner of Coast Cable.

11. The River Oaks and Silver Creek developments are physically located within the incorporated city limits of the City of San Jose. River Oaks and Silver Creek are thus within Heritage's franchise area.

12. Development commenced first in River Oaks. The residential portions of River Oaks are being developed in four tracts which, for present purposes, will be called the "Shea Tract," the "A-M Tract," the "Worthing Tract," and the Altamont Tract." Each developer has recorded a "tract map" relating to its respective portion of the River Oaks development.

13. In each tract comprising River Oaks, all service facilities, including cable television, must be placed underground in "joint trenches."

14. Each developer has recorded a dedication instrument with its tract map regarding, inter alia, underground facilities. The dedication instruments read, in pertinent part, as follows:

We [as owners] hereby dedicate to public use easements for any and all public service facilities including wires, conduit, gas, water and heat mains, [\*4] and all appurtenances which is hereby delineated and designated a public service easements (PSE) excepting Public Service Easement" said easement to be kept open and free of buildings and structures of any kind except public service structures . . . .

15. Trenching activity has already commenced at River Oaks, especially in the A-M and Worthing Tracts. Even more trenching is planned for the near future. Heritage timely sought access to the new trenches and to all of the River Oaks development, but was denied access by the defendants. The defendants took the position that River Oaks was private property and that they had the right to exclude Heritage in favor of an exclusive arrangement with Coast Cable. Coast Cable has already installed facilities in sections of joint trenches which has been completed.

16. Coast Cable has entered into easement agreements and Cable Television Wiring Agreements with all developer defendants but Worthing. These agreements give Coast Cable, inter alia, "all rights, privileges, easements and rights-of-way which are reasonably necessary to enable [Coast Cable] to install its Facilities in the Development . . . ." Cable Television Wiring Agreement (between [\*5] Coast Cable and Altamont), para. 3 (dated January 26, 1990). Coast Cable has proposed the same agreement to Worthing. Worthing is also

planning for cable television, but is excluding Heritage.

17. Coast Cable's easement and wiring agreements cover the entirety of the interiors of the buildings at River Oaks to which they relate. For example, the Altamont agreement contains the following language:

[Coast Cable] agrees to install in the utility trenches or other areas as required by system design all facilities necessary to transmit the television signals to and within the dwelling units in the Development know as River Oaks .

Id., para. 1 (emphasis added). Similarly, the agreement states that:

The [developer] hereby grants to [Coast] all rights, privileges, easements and rights-of-way which are reasonably necessary to enable [Coast] to install its Facilities in the Development.

Id., para. 3. The Agreement further makes it clear that:

title to all the Facilities installed in the Development by [Coast] or [the developer] pursuant to this Agreement shall at all times be and remain vested in [Coast Cable].

Id. para. 5 (emphasis added).

Accordingly, [\*6] Coast Cable's easements and wiring agreements cover the interiors of the residential structures Coast will serve in River Oaks. Since Coast Cable will be installing cable television dissemination facilities, the easements, rights-of-way and pathways granted to Coast Cable relating to the interiors of the buildings have been dedicated to uses which are compatible with the uses proposed by Heritage. To the extent Worthing allows entry by a competitor other than Coast Cable, Worthing also has set aside compatible pathways which Heritage is entitled to enter.

18. Heritage has standard agreements with the electrical and telephone utilities which authorize it to attach its cables to support structures constructed by the utilities, including poles, duct, conduit and joint trenches.

19. Having been excluded from the subject developments, Heritage filed this action on February 8, 1990. After initial expedited discovery approved by this court, Heritage sought a preliminary injunction prohibiting the defendants from interfering with Heritage's right-of-access under Section 621(a)(2) of the 1984 Cable Act, 47 U.S.C., Section 541(a)(2) (herein after referred to as Section 541(a)(2)).

20. Section [\*7] 541(a)(2) provides, in pertinent part, as follows:

Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is [sic] within the area to be served by the cable system and which have been dedicated for compatible uses . . . .

Defendants claim that there is no implied private right of action to enforce the provisions of Section 541(a)(2). This court finds that such a private right of actions does exist. Centel Cable Television Co. of Florida v. Admiral's Cove

Assoc., Inc., 835 F.2d 1359 (11th Cir. 1988).

21. Under Section 541(a)(2) and the facts of this case, Heritage has a right to access all residents' structures in the River Oaks and Silver Creek developments in order to reach each dwelling unit. This right-of-access entitles Heritage to enter the joint trenches and public buildings. In short, on the facts of this case, Heritage is entitled to go wherever the service cables of cable competitors and the utilities are allowed to go. The court finds that Heritage has a reasonable likelihood of success on the merits in this case.

22. If Heritage is not allowed to exercise its right-of-access [\*8] at the early stages of construction, it will be irreparably harmed in various ways. The normal manner of constructing underground facilities is to avoid disruption by coordinating the trenching work at an early stage, before landscaping, paving and the like is installed. See, e.g., Centel Cable Television Co. of Florida v. Burg & DiVosta Corp., 712 F. Supp. 176, 177 (S.D.Fla. 1988). Then, once buildings begin to rise, prewiring in the interiors of walls is accomplished before wall panelling is fastened. If Coast Cable were allowed to install its facilities now -- at a lower cost and before actual residents arrive -- without a simultaneous entry by Heritage, Coast Cable would improperly obtain a number of competitive advantages. Coast Cable would have a lower cost of entry. Coast Cable would also have a head start in seeking subscribers if Heritage must delay installation of its facilities until after buildings are substantially completed. Moreover, residents might resent Heritage if, because of late entry, it disrupted the residents' quiet enjoyment, landscaping, wall panels, and the like. See e.g., Coast Cable TV Fund 14-A v. Property Owners Ass'n, 706 F. Supp. 422, 432-33 (D.Md. 1989). [\*9] Damage to Heritage's good will and business prospects, as well as damage to the competitive environment, could be substantial. See, e.g., id. On the other hand, allowing Heritage to enter now, simultaneously with Coast Cable, will foster the purposes of the 1984 Cable Act. Simultaneous entry will also advance the public interest.

23. In contrast to the irreparable injury likely to be suffered by plaintiff if its motion for preliminary injunction is denied, the defendants will not suffer any material harm if a preliminary injunction is granted. If Heritage can install its competing cable television facilities now, installation can be achieved quickly and efficiently, and will not cause defendants material delay or additional expense. If Heritage should ultimately not prevail on the merits, its cable can be abandoned or sold to the defendants if mutually agreeable. In any event, it is likely that the installation of Heritage's cable will not cause hardship for the defendants. The balance of hardships in this case tips strongly in plaintiff's favor.

24. If Heritage's installation of its light-weight coaxial cable does cause any damage, the 1984 Cable Act already provides a mechanism [\*10] for reimbursing the owner. 47 U.S.C. Section 541(a)(2)(C). Heritage is insured, has posted a \$ 50,000 bond with the City of San Jose under its franchise, and has been in business in San Jose for a number of years. The court will retain continuing jurisdiction over plaintiff, and can insure that Section 541(a)(2)(C) is honored, if its provisions become relevant.

25. A good and reasonable surety bond must be posted by plaintiff in the sum of \$ 2,500,000.00.

26. Any finding recited above which should be a conclusion of law, and vice versa, is hereby adopted as such.

WHEREFORE, this court hereby orders and adjudges that:

A. Plaintiff's motion for a preliminary injunction is GRANTED. Defendants, and each of them, are enjoined, during the pendency of this action, from:

1. Taking any action to interfere with plaintiff's installation of cable television facilities in the River Oaks and Silver Creek developments, including installation in the interiors of buildings; or
2. Taking any action to prevent plaintiff from operating a cable television system in the River Oaks and Silver Creek developments.

B. This preliminary injunction order is binding on the defendants, and each of them, and [\*11] each of their officers, directors, partners, agents, servants, employees, representatives, parents, subsidiaries, affiliates, owners and assigns, as well as upon all persons and entities in active concern or participation with defendants who receive actual notice of this order by personal service or otherwise.