

IN THE COURT OF COMMON PLEAS, LICKING COUNTY, OHIO

THE BOARD OF TOWNSHIP TRUSTEES :
SHARON TOWNSHIP, :

Plaintiff, :

-vs- :

Case No. 11 CV 60

JAMES ZEHRINGER, DIRECTOR :
OHIO DEPARTMENT OF AGRICULTURE, :

Judge Branstool

Defendant. :

MOTION OF DEFENDANT TO DISMISS COMPLAINT

Now comes Defendant, James Zehringer, Director of the Ohio Department of Agriculture (“ODA”), by counsel, and moves the Court pursuant to Civil Rule 12(B)(1) and (6) for an Order dismissing the Complaint for lack of legal standing by Plaintiff and for failure to state a claim upon which relief may be granted.

The reasons supporting this Motion are set forth in the following Memorandum in Support.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General



JAMES R. PATTERSON (0024538)
Assistant Attorney General
8995 East Main Street
Reynoldsburg, OH 43068
614.728.6430
JPatterson@agri.ohio.gov
Attorney for Defendant

MEMORANDUM IN SUPPORT

For the reasons set forth below, Plaintiff lacks legal standing to pursue this matter and the Complaint fails to allege any cause of action against Defendant upon which relief may be granted. Even if one accepts all of the factual allegations of the Complaint as true for the purpose of this Motion, the Complaint nevertheless fails as a matter of law. Accordingly, the Complaint should be dismissed with prejudice pursuant to Ohio Civil Rule 12(B)(1) and (6).

A. Plaintiff lacks legal standing

Plaintiff seeks a declaratory judgment to the effect that the administrative rules governing the installation and use of anhydrous ammonia tanks are “unreasonable in light of [ODA’s] statutory obligation under R.C. 905.40”, and an injunction restraining ODA from allowing the use of any anhydrous ammonia tanks on any Ohio farms under the current rules. As explained below, Plaintiff lacks legal standing with regard to all of the issues raised in the Complaint.

Plaintiff is the Board of Township Trustees for Sharon Township in Medina County, Ohio. It is well-settled in Ohio that such boards may exercise only those powers that are expressly granted to them by the legislature. See 1988 Ohio Op. Atty Gen. 88-088 [copy attached].

Townships are authorized to participate in litigation. R.C. 503.01. This does not, however, alter the fact that a township must still have statutory authority for the subject matter of any specific litigation that it initiates. As the Ohio Attorney General noted, “The general power to sue... is necessarily limited to those matters arising from the statutorily expressed or implied scope of authority of the board of township trustees.”

1988 Ohio Op. Atty Gen. 88-088. As the Attorney General noted, the Ohio Supreme Court explicitly addressed this issue in *State ex rel. Schramm v. Ayres* (1952), 158 Ohio St. 30: “[T]ownships are creatures of the law and have only such authority as is conferred upon them by law. Therefore, the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred upon them by law.” *Id.* at 33.

The Complaint is devoid of any reference to any statutory basis for Plaintiff’s involvement in this dispute. Plaintiff asserts that the residents of Sharon Township have a right “to be free of nuisances which substantially affect their health, safety, and welfare”. Plaintiff fails, however, to identify any statutory mandate for a board of township trustees, as opposed to a private litigant, to initiate litigation on such a theory.

Plaintiff’s entire case rests upon the assumption that a board of township trustees has general authority over the health and welfare of the township’s residents. This theory was expressly considered by the Ohio Attorney General in a formal opinion and found to be legally incorrect. See 1992 Ohio Op. Atty Gen. 92-063 [copy attached]. In that opinion, the Attorney General found that a board of township trustees had no authority to expend funds for a hydro-geologist to determine whether the relocation of a business near the township boundary would have any harmful effects on the township’s aquifer or residents. In that case, as here, the legal impediment was the lack of any explicit statutory authority on the part of the township trustees to pursue such a course of action.

Because Sharon Township has not adopted limited home rule government pursuant to R.C. 504.01, it does not possess the statutory authority to exercise home rule powers under R.C. 504.04. Rather, it must rely upon the general provisions governing

townships set forth in R.C. Chapter 503, and the enumerated powers of township trustees contained in R.C. Chapter 505. A review of these chapters demonstrates that they are devoid of any authority to pursue the claims set forth in the Complaint.

Moreover, the injunctive relief sought by Plaintiff in this case – an order restraining ODA from allowing the continued use of anhydrous ammonia storage tanks on any farms in Ohio – vastly exceeds any possible connection with Sharon Township or its residents. Thus, even if Plaintiff had any statutory authority to contest the approval of the tank referenced in the Complaint (which it does not have), it would still lack legal standing to seek the sweeping prohibition demanded in the prayer for relief.

B. The Complaint fails to state a claim upon which relief may be granted.

Apart from the lack of legal standing by Plaintiff, the Complaint must be dismissed for the additional reason that it fails to state any claim upon which relief may be granted. Plaintiff's case fails as a matter of law because it rests entirely upon the facially incorrect assertion that ODA has a statutory duty to regulate anhydrous ammonia tanks under R.C. 905.40.

R.C. 905.40 reads in its entirety as follows:

The director of agriculture **may** promulgate, adopt, and enforce uniform rules:

(A) Governing the storing and handling of fertilizers;

(B) For safety in the design, construction, location, installation, or operation of equipment for storing, handling, transporting, and utilizing anhydrous ammonia, aqueous ammonia, or other solutions for use as agricultural fertilizers;

(C) To prohibit the reselling or reuse of such containers without authorization by the owner thereof;

(D) Requiring that guaranteed analysis be stated in a form other than that defined in section R.C. 905.31 of the Revised Code when another form will not impose an economic hardship on manufacturers, distributors, and users of fertilizer by reason of conflicting labeling requirements among the states.

[Emphasis added]

As is apparent from the plain language of the statute itself, the director of agriculture is permitted *but not required* to adopt administrative rules governing the storage of anhydrous ammonia for agricultural use. The Ohio Supreme Court has considered the meaning of the term “may” in similar statutes on numerous occasions, and has consistently held that the word “may” creates optional authority, whereas the term “shall” creates a mandatory duty. See, e.g., *State ex rel. City of Niles v. Bernard* (1978), 53 Ohio St.2d 31, 34; *National City Bank v. Beyer* (2000), 89 Ohio St.3d 152,159.

The clear distinction between the permissive “may” and the mandatory “shall” is apparent in many of the statutes governing ODA’s affairs. In every case in which ODA is *required* to adopt rules, the General Assembly has always used the unambiguous term “shall” to create a rulemaking duty on the part of the director. For example, ODA is required to adopt rules governing concentrated animal feeding facilities [R.C. 903.10], meat inspection [R.C. 918.05], pesticide applicators [R.C. 921.16], and civil penalties for auctioneers [R.C. 4707.19(B)]. In each of the above statutes, the legislature used the mandatory term “shall”.

Indeed, the contrasting terms “may” and “shall” are routinely used by the General Assembly with great precision. R.C. 924.52, establishing the powers and duties of the Ohio grape industries committee, is an excellent example of this. R.C. 924.52(A), which defines the authority of the committee, delineates what the committee “may” do. R.C. 924.52(B), which imposes duties upon the committee, explicitly defines what the committee “shall” do. The distinction could not be any clearer.

In this case, the entire Complaint rests upon a house of cards which is incapable of standing as a matter of law. Even if one temporarily concedes every factual allegation in the Complaint, as Civil Rule 12(B)(6) requires, the anhydrous ammonia rules adopted by ODA cannot fail any statutory duty under R.C. 905.40 for the simple reason that no such duty exists.¹

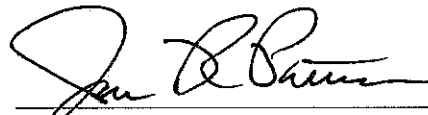
Notably, the Complaint does not assert that ODA has deviated in any way from the regulations currently in place for anhydrous ammonia tanks. On the contrary, the Complaint takes issue only with the “reasonableness” of the rules themselves under R.C. 905.40. Since, as the above analysis demonstrates, the rules enacted by ODA do not violate any statutory requirements, Plaintiff’s entire case must fail on this basis.

C. Conclusion

For all of the foregoing reasons, the Complaint must be dismissed.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

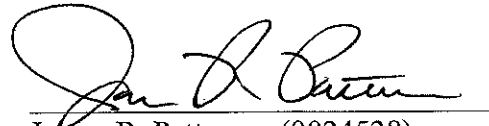


JAMES R. PATTERSON (0024538)
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Attorney for Defendant

¹ Although the Complaint makes no mention of it, R.C. 905.44 also creates rulemaking authority on the part of the director of agriculture with regard to R.C. 905.31 through 905.50. However, this section is likewise of no use to Plaintiff’s argument, as it also uses the permissive term “may” instead of the mandatory “shall”.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the parties listed below by ordinary U.S. Mail on this 8th day of February, 2011.


James R. Patterson (0024538)

Parties Served:

Tom J. Karris, Esq.
Assistant County Prosecutor
72 Public Square, Third Floor
Medina, OH 44256
Attorney for Plaintiff

*1988 Ohio Op. Atty Gen. 421; 1988 Ohio Op. Atty Gen. No. 88;
1988 Ohio AG LEXIS 98, **

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO

OPINION No. **88-088**

1988 Ohio Op. Atty Gen. 421; 1988 Ohio Op. Atty Gen. No. 88; 1988 Ohio AG LEXIS 98

December 27, 1988

CORE TERMS: township, residents, quality of life, legal counsel, prosecuting attorney, necessarily implied, annexation, litigate, empowered, significant interest, expenditure, opposing, contest, oppose, general power, authority of law, statutorily, authorize, borders, authority conferred, scope of authority, express authority, county prosecutor, legal adviser, negatively, abatement, invested, zoning, political subdivision, statutory authority

SYLLABUS:

[*1]

1. Absent authority based on statute, a board of township trustees is not empowered to contest proposed actions that are of significant interest to the residents of the township or which the residents consider contrary to the "quality of life," whether those actions occur within or outside of the township.
2. A county prosecutor acting pursuant to R.C. 309.09 may represent a board of township trustees only when the board of township trustees is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
3. Additional legal counsel permitted by R.C. 309.09 may be employed to represent a board of township trustees only when the board is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
4. A board of township trustees may disburse township funds only by clear authority of law.
5. Absent authority based on statute, a board of township trustees is not empowered to contribute township funds to private groups opposing actions which may affect the township or its residents.

REQUESTBY:

ANTHONY J. CELEBREZZE, [*2] JR., Attorney General

OPINION:

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street, Fifth Floor
Columbus, Ohio 43266-0040

I have before me your request for my opinion, concerning the expenditure of public funds by boards of township trustees. Your letter indicates concerns about expenditures for attorney fees, litigation costs, and contributions to private groups opposing proposed actions which may adversely affect a township's residents. Specifically, you ask:

May a board of township trustees properly expend township funds to contest proposed actions

which they deem to be of significant interest to the residents of the township, or which they consider to be contrary to the "quality of life" within the township, notwithstanding an apparent lack of express statutory authority for the trustees to so act?

You have also questioned whether such expenditures are permitted if the objectionable proposed activity lies outside of the township even though it may affect township residents.

A board of township trustees may exercise only those powers granted by the General Assembly. Powers not expressly conferred may be exercised only if they are necessarily implied from **[*3]** a statutorily granted power. The Ohio Supreme Court has articulated the rule:

It is settled that neither the township nor its trustees are invested with the general powers of a corporation; and hence the trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them.

Trustees of New London Township v. Miner, 26 Ohio St. 452, 456 (1875). See also *Hopple v. Trustees of Brown Township*, 13 Ohio St. 311 (1862); 1981 Op. Att'y Gen. No. 81-103. The Ohio Supreme Court has also succinctly framed the proper inquiry to be considered when there is no statutory prohibition against an act, as: "[T]ownships are creatures of the law and have only such authority as is conferred upon them by law. Therefore, the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred upon them by law." *State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630, 632 (1952).

Townships in Ohio have been specifically empowered to participate in litigation. R.C. 503.01 states, **[*4]** in pertinent part: "Each civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It may sue and be sued, plead and be impleaded. . . ." It is thus clear that a township has a general power to sue. The general power to sue, however, is necessarily limited to those matters arising from the statutorily expressed or implied scope of authority of the board of township trustees. The Ohio Supreme Court has addressed the power of a board of township trustees to litigate a township "quality of life" issue in a case involving a petition for annexation of territory in the township to an adjacent municipal corporation. *In Re Appeal of Bass Lake Community, Inc.*, 5 Ohio St. 3d 141, 449 N.E.2d 771 (1983). The primary relevant statute authorizing litigation was R.C. 505.62, which at that time read:

A board of township trustees may enter into a contract with, and appropriate township general revenue fund moneys for the services of, an attorney to represent the township at annexation hearings before the board of county commissioners and upon any appeal of the board's decision pursuant to section 709.07 **[*5]** of the Revised Code.

The board of township trustees sought to participate in an appeal brought pursuant to R.C. Chapter 2506 (final decision of any agency of any political subdivision is subject to appeal to court of common pleas) by landowners whose annexation petition had been denied. The board of trustees opposed reversal of the denial of the petition. The court held that the township lacked standing to participate in the appeal and noted that it lacked authority to use legal counsel for such an appeal since no such authority was granted by statute. The court stated:

The language of this section [R.C. 505.62] clearly provides that the use of an attorney to represent the township upon an appeal is permitted solely when the appeal is pursuant to R.C. 709.07. That is not the present case. Appellee's appeal was taken under the authority of R.C. Chapter 2506, not as an R.C. 709.07 proceeding.

5 Ohio St. 3d at 143, 449 N.E.2d at 774. The court found that the general authority of R.C. Chapter 2506 was not sufficient to authorize the township to join in the appeal. The finding of a lack of authority to pursue an appeal is consistent with the *Ayres* test of determining

whether [*6] townships have authority conferred upon them by law.

The conclusion that the general power of a township to litigate is necessarily limited to those matters arising from its statutorily expressed or implied scope of authority is further compelled by the restriction on a township limiting use of legal counsel to matters in which the township's participation is authorized. The legal adviser and counsel for a township is the county prosecuting attorney. That duty, as well as authority for additional counsel, is contained in the express provisions of R.C. 309.09(A), which in relevant part, states:

Such prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems it advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for [*7] such legal services shall be fixed. Such compensation shall be paid from the township fund.

See also, e.g., R.C. 505.62 (containing statutory authority for obtaining legal counsel for specific legal concerns, specifically annexation). The duty of the county prosecuting attorney and the authority of a board of township trustees to hire additional legal counsel, however, is dependent upon the existence of the authority of the board of township trustees to participate in a legal controversy. 1988 Op. Att'y Gen. No. 88-066; 1966 Op. Att'y Gen. 66-061. The conclusion reached in Op. No. 66-061, at 2-101, was that

the trustees must have a duty to act themselves before they can properly retain special counsel to perform services relative to a controversy. In other words, in order for special counsel properly to be employed pursuant to [R.C.] Section 309.09, . . . his duties on behalf of the trustees directly must be related to and within the scope of "official capacity" of the board of trustees contemplated by that section. The *Miner* case [*Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875)] . . . limits such activities to those specifically granted [and] [*8] those necessarily implied from statute.

Op. No. 88-066 cited Op. No. 66-061 favorably and extended its application to prosecuting attorneys under R.C. 309.09 by stating:

In Op. No. 66-061 it was concluded that there was no authority for a board of township trustees to participate in an annexation proceeding. Implicit in that conclusion is the corollary rule that since the board had no authority to participate, the prosecuting attorney had no duty to represent the board.

See also 1985 Op. Att'y Gen. No. 85-014 at 2-57 (citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981)) ("a prosecuting attorney has a duty to provide representation to a county officer whenever that officer, in his official capacity, requires legal representation"); 1955 Op. Att'y Gen. No. 4734, p. 29, at 31 ("a board of education may employ counsel to represent it in any proceeding in which the board has a legitimate interest").

A review of the relevant Revised Code chapters reveals no express authority for township trustees to contest proposed actions on the basis that such actions are deemed to be of significant interest to township residents or are considered by [*9] residents or the trustees to be contrary to the "quality of life" within the township. Numerous statutes do, however, authorize township involvement in particular types of situations that may negatively affect the quality of life. For example, R.C. 519.24 expressly authorizes a board of township trustees to institute injunction, mandamus, abatement, or any other appropriate action to remedy a prospective or existing violation of the township zoning code. R.C. 3745.08 authorizes a township trustee, as "[a]n officer . . . of a political subdivision, acting in his representative capacity" to file a verified complaint with the Ohio Director of Environmental Protection

regarding violation or threatened violation of antipollution laws, rules and standards, as well as conditions of licenses, permits, and variances. *See also, e.g.*, R.C. 505.85 (disposal of abandoned motor vehicles); R.C. 505.87 (abatement of nuisances including vegetation, garbage, refuse and debris); R.C. 505.86 (removal of unsafe buildings); R.C. 505.79 (collection of leaves); R.C. 505.17 (engine noise and parking regulations); R.C. 505.171 (drive-in theatre screen regulations); R.C. Chapter 519 (township zoning). **[*10]** The presence of express authority to litigate in specific instances indicates that in the absence of specific authority in other instances there is no authority to litigate. The rule of *expressio unius est exclusio alterius*, or the naming of a specific thing implies the exclusion of those not named, properly applies to the authority of a township to litigate because of the restriction on township powers enunciated by *Miner*, 26 Ohio St. 452 (1875); *Hopple*, 13 Ohio St. 311 (1862); and *Ayres*, 158 Ohio St. 30, 106 N.E.2d 630 (1952). *See generally Craftsman Type Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983); *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955). This opinion does not consider specific factual situations or whether applicable statutory authorization exists for township participation in those situations.

You also question the propriety of an expenditure to oppose objectionable activity occurring beyond township borders but impacting upon the "quality of life" in the township. Lacking the power to oppose such an action within its borders, a township is, likewise, not invested with the power to oppose an activity which **[*11]** occurs beyond its borders.

You also have asked whether a board of township trustees may make contributions from township funds to private groups opposing proposed actions which may adversely affect a township's residents. Public funds may be disbursed only by clear authority of law. *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916) ("authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise . . ."); Op. No. 88-066; Op. No. 81-103. While financial aid to other agencies or organizations, either private or governmental, is permitted for limited purposes, *see, e.g.*, R.C. 507.701 (community improvement corporations); R.C. 505.80 (promotion of tourism); R.C. 505.70 (to establish or operate federal programs), no general authority exists that permits contributions to private groups to oppose activity which may impact negatively on the "quality of life" in the township. I also note **[*12]** that since the board of township trustees is not permitted to do directly what the private group intends to do, circumvention of the limited authority of the township by contributing funds to such a group is also prohibited, absent statutory authority. *See City of Parma Heights v. Schroeder*, 26 Ohio Ops. 2d 119, 122, 196 N.E.2d 813, 816 (C.P. Cuyahoga County 1963) ("one cannot do indirectly what he cannot lawfully do directly"); 1986 Op. Att'y Gen. No. 86-036.

It is therefore my opinion, and you are hereby advised that:

1. Absent authority based on statute, a board of township trustees is not empowered to contest proposed actions that are of significant interest to the residents of the township or which the residents consider contrary to the "quality of life," whether those actions occur within or outside of the township.
2. A county prosecutor acting pursuant to R.C. 309.09 may represent a board of township trustees only when the board of township trustees is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
3. Additional legal counsel permitted by R.C. 309.09 may be employed **[*13]** to represent a board of township trustees only when the board is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.

- 4. A board of township trustees may disburse township funds only by clear authority of law.
- 5. Absent authority based on statute, a board of township trustees is not empowered to contribute township funds to private groups opposing actions which may affect the township or its residents.

Legal Topics:

For related research and practice materials, see the following legal topics:
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Governments > Local Governments > Duties & Powers
Governments > Local Governments > Finance

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1992 Ohio Op. Atty Gen. 260; 1992 Ohio Op. Atty Gen. No. 63;
1992 Ohio AG LEXIS 72, *

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO

OPINION No. 92-063

1992 Ohio Op. Atty Gen. 260; 1992 Ohio Op. Atty Gen. No. 63; 1992 Ohio AG LEXIS 72

December 29, 1992

CORE TERMS: township, hire, verified, empowered, residents, harmful, expend, necessary implication, hydro-geologist, authorize, aquifer, public water, self-government, debris, relocation, testing, site, quality of life, solid waste, variance, value of real property, hazardous waste, air pollution, demolition, infectious, violating, abatement, pollution, nuisance, removal

SYLLABUS:

[*1]

1. Absent authority based on statute, a board of township trustees is not empowered to take action to improve, or to prevent injury to, the "quality of life" of residents of the township. (1988 Op. Att'y Gen. No. **88-088**, approved and followed.)

2. No statute, either expressly or by necessary implication, authorizes a board of township trustees to expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township; therefore, a board of township trustees is not empowered to take such action.

REQUESTBY:

LEE FISHER, Attorney General

OPINION:

The Honorable Mathias H. Heck, Jr.
Montgomery County Prosecuting Attorney
Dayton-Montgomery County Courts Bldg.
301 West Third Street, 5th Floor
Dayton, Ohio 45402

You have asked whether the Board of Trustees of Madison Township may expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business would have any harmful effects on the aquifer or the population of the township. The [*2] township in question includes both an incorporated area (the City of Trotwood) and an unincorporated area. Near the township, in the City of Dayton, is a parcel of land on which a particular business may be relocated. There are concerns that the operations of this business may cause an environmental or health risk to the population of the surrounding area; the specific concern is that damage may be done to the aquifer and, consequently, to the water supply.

Townships Have Only the Authority Granted by Statute

A board of township trustees is created by statute and has only the powers that are granted by statute, either expressly or by necessary implication. See, e.g., *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875) ("[township] trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those

granted, in order to enable them to perform the duties imposed upon them"). Like other statutorily-created entities, a board of township trustees may expend money only upon a clear and distinct grant of statutory authority. *See, e.g., State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921). **[*3]** The test for determining whether a township may take particular action has been expressed by the Ohio Supreme Court, as follows: "[T]he question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred upon them by law." *State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630, 632 (1952).

A board of township trustees has express authority to hire experts for certain specified purposes. *See, e.g.,* R.C. 9.36 (a board of township trustees may contract for the services of fiscal and management consultants to aid it in the execution of its powers and duties); R.C. 503.01 (a board of township trustees may employ competent appraisers to advise it of the value of real property that it owns or proposes to acquire, or expert witnesses to testify to the value of real property in an appropriation proceeding). The board of township trustees also has authority over certain aspects of the well-being of its residents. *See, e.g.,* R.C. 505.12 and 505.27 (a board of township trustees may provide for solid waste facilities; the site must be approved by the board of health, and other approvals may be **[*4]** required); R.C. 505.17 (a board of township trustees may regulate engine noise and vehicle parking); R.C. 505.37 (a board of township trustees "may establish all necessary rules to guard against the occurrence of fires and to protect the property and lives of the citizens against damage and accidents" and may provide firefighting equipment and water supply); R.C. 505.75 (a board of township trustees may adopt and enforce a building code for single-family, two-family, and three-family dwellings); R.C. 505.86 (a board of township trustees may provide for the removal or repair of buildings that have been declared unsafe); R.C. 505.87 (a board of township trustees may provide for the abatement or removal of vegetation, garbage, refuse, and other debris from land in the township if the debris constitutes a nuisance). There is, however, no statute that either expressly or by necessary implication authorizes a board of township trustees in the circumstances you have described to hire a hydro-geologist to study the possible impact of the siting of a business in a location outside the township.

R.C. 3745.08 does authorize an officer of a political subdivision of the state, acting in his **[*5]** representative capacity, to file with the Director of Environmental Protection a verified complaint:

alleging that another person has violated, is violating, or will violate any law, rule, standard, or order relating to air pollution, water pollution, solid waste, infectious wastes, construction and demolition debris, public water supply, or hazardous waste, or, if the person is in possession of a valid license, permit, variance, or plan approval relating to air pollution, water pollution, solid waste, infectious wastes, construction and demolition debris, public water supply, or hazardous waste, that the person has violated, is violating, or will violate the conditions of the license, permit, variance, or plan approval.

R.C. 3745.08(A). The issue raised by a verified complaint is not whether harmful effects may occur, but whether there is any violation of a law, rule, standard, order, license, permit, variance, or plan approval. A township trustee may submit a verified complaint pursuant to R.C. 3745.08. The verified complaint provisions do not, however, grant a township the authority to hire an expert for the purpose of supporting the allegations in a verified complaint. **[*6]** Rather, the responsibility for carrying out an investigation to determine whether a violation has occurred, is occurring, or will occur is placed upon the Director of Environmental Protection. *See* R.C. 3745.08. n1 *See generally, e.g.,* R.C. 6109.11, 6111.05.

n1 If a hearing is held on a verified complaint, the Ohio Environmental Protection Agency and the alleged violator are required to be parties. The person who filed the verified complaint may also participate as a party. R.C. 3745.08. Whether a township may hire experts if it chooses to

participate in such a hearing is not under consideration in this opinion. *See generally* 5 Ohio Admin. Code Chapters 3745-47 and 3745-49.

Townships Do Not Have General Authority Over the Health and Welfare of Their Residents

In the instant case, the facility in question is subject to regulation by the Ohio Environmental Protection Agency. *See, e.g.*, R.C. Chapter 3734. Various other entities have authority to regulate facilities that may cause harmful health effects or have a deleterious effect on ground water. *See, e.g.*, Ohio Const. art. XVIII, § 3 (municipal corporations); R.C. Chapter 3707 and 3709 (boards of [*7] health). *See generally, e.g.*, R.C. Chapter 3767 (abatement of nuisances); R.C. Chapter 6103 (a county's authority over public water supply); R.C. Chapter 6109 (the Ohio Environmental Protection Agency's authority over public water systems); R.C. Chapter 6111 (the Ohio Environmental Protection Agency's authority over water pollution control). The General Assembly has not, however, seen fit to grant a township general authority over the health and welfare of its residents. *See, e.g.*, 1991 Op. Att'y Gen. No. 91-070.

In 1988 Op. Att'y Gen. No. **88-088**, my predecessor considered whether a board of township trustees may "properly expend township funds to contest proposed actions which they deem to be of significant interest to the residents of the township, or which they consider to be contrary to the 'quality of life' within the township, notwithstanding an apparent lack of express statutory authority for the trustees to so act." Op. No. **88-088**, at 2-421. That opinion concludes that a board of township trustees is not empowered to take such action, whether the activity with which it is concerned occurs within or outside the township, unless there is authority based on [*8] statute. I concur in the analysis contained in that opinion.

As discussed above, there is no statute that either expressly, or by necessary implication, authorizes a board of township trustees to expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township. It follows that a board of township trustees is not empowered to take such action. n2

n2 Since the issuance of 1988 Op. Att'y Gen. No. **88-088**, the General Assembly has enacted R.C. Chapter 504, which permits a township, by the vote of its electors, to adopt "the limited self-government form of township government," under which a township exercises limited powers of local self-government and limited police powers. *See* R.C. 504.01. The township in question has not adopted the limited self-government form of township government, and this opinion does not address the question whether the additional authority available under R.C. Chapter 504 would permit a township that has adopted the limited self-government form of government to take the action in question. *See, e.g.*, R.C. 504.04.

[*9]

Conclusion

It is, therefore, my opinion, and you are advised, as follows:

1. Absent authority based on statute, a board of township trustees is not empowered to take action to improve, or to prevent injury to, the "quality of life" of residents of the township. (1988 Op. Att'y Gen. No. **88-088**, approved and followed.)
2. No statute, either expressly or by necessary implication, authorizes a board of township trustees to expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township;

therefore, a board of township trustees is not empowered to take such action.


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