September 28, 1994

OPINION NO. 94-061

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park, Second Floor
Mansfield, Ohio 44902

Dear Prosecutor Mayer:

You have requested an opinion concerning the maintenance and repair of township storm sewers along township roads. By way of background, you state that:

> Pursuant to Ohio Revised Code Section 5571.02 a board of township trustees [is] responsible for maintaining ditches and storm sewer systems along the roadway. Storm sewers are designed based on road surface area and surrounding land runoff. As homes are built homeowners tend to bring downspouts, sump pumps, and leach beds into the storm sewer lines. As a result the storm lines are beyond capacity and the storm water backs up into homes causing extensive damage.
>
> It is clear that the township trustees must prevent the wrongful obstruction of any ditch along, upon, or across a public highway pursuant to O.R.C. Section 5589.06. However, the homeowners are not necessarily "obstructing" the ditch, drain or watercourse but merely adding a line into the storm sewer.

In light of this background, you ask:

1. Is the township responsible to repair and replace any damaged storm sewer pipes which were placed there by the homeowners?

2. Are the homeowners violating Section 5589.06 or any other section of the O.R.C. when they connect into the township storm water system?

3. What are the responsibilities of the township if the storm water backs up into homes due to the fact that the storm water lines are beyond capacity?

A Township Is Not Responsible for the Repair of a Storm Sewer Pipe Installed by a Homeowner to Carry Water from His Property to a Township Storm Sewer Pipe

Your first question asks whether a township must repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe. Since a township is a creature of statute, it may proceed with the repair of a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe only if it is so authorized by statute. *See Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875); *Schultz v. Erie County Metro. Park Dist. Bd.*, 26 Ohio Misc. 68, 69, 269 N.E.2d 72, 73 (C.P. Erie County 1971).

As stated in your letter, 1981 Op. Att'y Gen. No. 81-039 determined that "[t]he duty to clean and repair storm sewers falls on the political subdivision responsible for the cleaning and repair of the ditches and culverts which comprise the storm sewer." *Id.* (syllabus, paragraph four); *see also* R.C. 5535.01; R.C. 5535.08; R.C. 5543.02; R.C. 5571.01; R.C. 5571.02. Op. No. 81-039, however, addresses a question that is fundamentally different from the one posed by your request. Op. No. 81-039 concerned the allocation of responsibility for the cleaning and repairing of storm sewers installed by a township to carry off drainage from township roads. In this regard, the opinion states that a township's duty to maintain its road or highway system includes providing for the drainage of that highway. Further, since storm sewers that handle road drainage are part of the highway system, a township must clean and repair the storm sewers that run along its roads. Op. No. 81-039 at 2-159. Thus, Op. No. 81-039 concluded that a township's duty to clean and repair storm sewers is concomitant to its duty to maintain its road system.

Inasmuch as the storm sewer pipes with which you are concerned have not been installed by the township, and are not necessary to the drainage of the township roads, authority on the part of the township to repair the storm sewer pipes cannot be implied from the various provisions set forth in R.C. Title 55 (roads, highways, and bridges) that address the responsibilities of a township to maintain and repair its road and highway system. Moreover, there is no specific statutory provision requiring a township to repair storm sewer pipes that have been installed by a landowner on private property. *See generally* 1958 Op. Att'y Gen. No. 2775, p. 579 (syllabus, paragraph three) (a township is not authorized "to construct drains or sewers to carry off surplus water except to the extent incidental to and necessary in the improvement of a township road"). Therefore, a township is not required to repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe. *Cf.* 1982 Op. Att'y Gen. No. 82-025 (syllabus) ("[a] property owner who, in order to provide an approach to his property, places a culvert in a preexisting ditch which is part of a public highway is responsible for the maintenance of that culvert").

The Water Diversion Prohibition of R.C. 5589.06

Your second question asks whether a homeowner who installs a storm sewer pipe to carry water from his property to a township storm sewer pipe violates R.C. 5589.06 or any other provision

of the Revised Code.[1] R.C. 5589.06 states:

> *No person shall wrongfully* obstruct any ditch, drain, or watercourse along, upon, or across a public highway, or *divert any water from adjacent lands to or upon a public highway*. Whenever the township highway superintendent learns of any obstruction of any ditch, drain, or watercourse along, upon, or across a public highway, or diversion of any water from adjacent lands to or upon a public highway, he shall notify the board of township trustees, which shall cause written notice thereof to be personally served upon the person, firm, or corporation, or upon any agent in charge of the property of the person, firm, or corporation causing such obstruction or diversion. Notice may be served by a constable of the proper township or any person authorized and deputed therefor by the board of township trustees, and shall describe and locate said obstruction or diversion and direct its immediate removal. If the person, company, or corporation does not within five days from the receipt of written notice proceed to remove such obstruction and complete the removal within a reasonable time, the township highway superintendent, upon the order of the board of township trustees, shall remove the obstruction. The expense incurred shall be paid in the first instance out of any money levied, collected, and available for highway purposes and shall then be collected from the person, company, or corporation by civil action by the board of township trustees, and paid into the highway fund of the township. (Emphasis added.)

A violation of R.C. 5589.06 constitutes a minor misdemeanor. R.C. 5589.99(B). R.C. 5589.06 thus prohibits a property owner from wrongfully diverting any water from adjacent lands to or upon a township road. *See* Op. No. 82-025 at 2-74 (where a property owner fails to remove an obstruction from a ditch along a township or county road, the township is required to remove the obstruction); 1949 Op. Att'y Gen. No. 869, p. 519 (a board of township trustees is responsible for removing obstructions from the ditches of both township and county roads).

Because you have stated that the homeowners in question are installing storm sewer piping to carry water from their property to a township storm sewer pipe that provides drainage from a township road, the homeowners are diverting water from adjacent lands to a township road. *See generally* Op. No. 81-039 at 2-156 ("[r]oadside ditches which handle the road drainage must be

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[1] Prior opinions of the Attorney General have noted that the Attorney General, as an executive officer, cannot determine the guilt or innocence of a particular individual since only the judiciary is vested with the authority to make such a decision. 1984 Op. Att'y Gen. No. 84-040 at 2-129; 1984 Op. Att'y Gen. No. 84-019 at 2-65 n.1; 1983 Op. Att'y Gen. No. 83-001 at 2-2. The Attorney General may only express an "opinion as to whether a given set of facts, if proven in court, could constitute a violation of a criminal statute." Op. No. 84-040 at 2-129; *accord* Op. No. 84-019 at 2-65 n.1; Op. No. 83-001 at 2-2. The discussion in the text that follows concerning R.C. 5589.06 is, therefore, rendered only for the purpose of the township's consideration in determining whether it should take further action in enforcing R.C. 5589.06.

deemed to be part of the highway system"). If the diversion of water to the township road by the homeowners is determined to be wrongful, the homeowners must remedy the situation, and if they fail to do so, the township may take action to remove the diversion. R.C. 5589.06; Op. No. 82-025 at 2-74.

Whether the diversion of water to the township road is wrongful requires the resolution of factual questions that can only be answered on a case-by-case basis. *See generally* 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three) ("R.C. 109.14 does not authorize the Attorney General to decide questions of fact by means of an opinion"). In this situation, a variety of factors would need to be taken into account. For example, the wrongfulness of any such diversion of water could depend on the extent of the diversion, the actual capacity of the storm sewer system to absorb it, and thus the extent of the damage, if any, that the diversion actually or potentially may be found to cause to the storm sewer system. Moreover, any such diversion obviously would not be wrongful if the township had explicitly approved it. In many instances, factual questions might also arise about whether the township had given its implicit approval to any such diversion of water by homeowners, if the practice were widespread and township officers or employees were aware of it. If in a particular instance the installation of a storm sewer pipe by a homeowner to carry water from his property to a township storm sewer pipe were determined to constitute a wrongful diversion of water to a township road, then the homeowner would be in violation of R.C. 5589.06.[2]

A Township is Legally Privileged to Make a Reasonable Use of Its Property

Your final question asks what are the responsibilities of a township if storm water backs up in homes due to the fact that the storm sewer system is beyond capacity. Resolution of this question requires an examination of the principles of law applicable to surface waters.[3]

McGlashan v. Spade Rockledge Corp., 62 Ohio St. 2d 55, 402 N.E.2d 1196 (1980), sets forth the rule of law in Ohio concerning the resolution of surface water disputes:

> In resolving surface water disputes, courts of this state will apply a reasonable-use rule under which a possessor of land is not unqualifiedly privileged to deal with surface water as he pleases, nor absolutely prohibited from interfering with the natural flow of surface waters to the detriment of others. Each possessor is legally privileged to make a reasonable use of his land, even though the flow of surface waters is altered thereby and causes some harm to others, and the possessor incurs

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[2] Research discloses that a homeowner who installs a storm sewer pipe to carry water from his property to a township storm sewer pipe is not in violation of any other statutory provision.

[3] "Surface waters are those waters which are diffused over the surface of the ground, derived from falling rains and melting snows or which rise to the surface in springs, and continue to be such until it reaches some well-defined channel." *Frost v. Bank One of Fremont*, 7 Ohio App. Unrep. 179, 182 (Sandusky County 1990).

> liability only when his harmful interference with the flow of surface water is unreasonable.

Id. (syllabus); *accord Frost v. Bank One of Fremont*, 7 Ohio App. Unrep. 179, 182 (Sandusky County 1990); *see Accurate Die Casting Co. v. Cleveland*, 2 Ohio App. 3d 386, 442 N.E.2d 459 (Cuyahoga County 1981). Thus, a township is legally privileged to make a reasonable use of its property and incurs liability only when its interference with the flow of surface water is unreasonable. *See generally Accurate Die Casting Co. v. Cleveland*, 2 Ohio App. 3d at 390, 442 N.E.2d at 463 (when a municipality superimposes its storm sewer system upon a natural watercourse, it must do so in a manner consistent with the riparian rights of adjoining landowners, and the defense of sovereign immunity does not preclude liability for damages caused by any attendant abridgement of riparian rights).

The question whether a township has made a reasonable use of its property depends, in large part, upon particular questions of fact peculiar to each situation that can be resolved only on a case-by-case basis. As a general matter, however, a township would not be responsible if storm water backs up onto the property of homeowners unless the township has abridged the riparian rights of homeowners who have installed a storm sewer pipe to carry water from their property to a township storm sewer pipe.

Conclusion

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A township is not required to repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe.

2. If the installation of a storm sewer pipe by a homeowner to carry water from his property to a township storm sewer pipe were to constitute a wrongful diversion of water to a township road, then the homeowner would be in violation of R.C. 5589.06.

3. A township is not responsible if storm water backs up onto the property of homeowners unless the township has abridged the riparian rights of homeowners who have installed a storm sewer pipe to carry water from their property to a township storm sewer pipe.

Respectfully,

LEE FISHER
Attorney General

September 28, 1994

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
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SYLLABUS: 94-061

1.A township is not required to repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe.

2.If the installation of a storm sewer pipe by a homeowner to carry water from his property to a township storm sewer pipe were to constitute a wrongful diversion of water to a township road, then the homeowner would be in violation of R.C. 5589.06.

3.A township is not responsible if storm water backs up onto the property of homeowners unless the township has abridged the riparian rights of homeowners who have installed a storm sewer pipe to carry water from their property to a township storm sewer pipe.