April 17, 1997

OPINION NO. 97-022

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested my opinion on the following two questions:

1. Can a township require that all building contractors who operate within the township be licensed by the township or by the state?

2. Can a township charge an impact fee in addition to its regular building permit fee in order to defray the damage done to the township by drainage problems and soil erosion?

In answering your questions, I note first that a board of township trustees may exercise only those powers conferred upon it by the General Assembly. *In re Petition for Incorporation*, 70 Ohio St. 3d 365, 639 N.E.2d 42 (1994). Thus, a board of township trustees may require the licensing of building contractors or charge an impact fee for damage due to drainage problems and soil erosion only if it has been authorized by statute to do so.

Your first question asks whether the township may require that building contractors who operate within the township be licensed by the township or by the state. Within the Revised Code there is no system for the licensing of persons or entities generally as "building contractors." There are provisions, however, for governmental regulation of specific types of contractors. *See, e.g.*, R.C. 3710.05 (licensure of asbestos abatement contractors, among others, by Department of Health); R.C. 3723.06(A) (licensure by Director of Health of "radon testers, mitigation specialists, and mitigation contractors"); *see also* R.C. 4104.101(A) (requiring contractors to be registered with the division of industrial compliance "before installing or making major repairs or modifications to any boiler"). No statute of which I am aware, however, expressly authorizes a board of township trustees either to license a particular type of contractor or to impose a requirement that contractors operating within the township be licensed by the state. Rather, the General Assembly has granted townships only limited authority to license or regulate the practice of occupations within their jurisdictions. *See*

R.C. 503.45 (authority of township to issue license as masseur or masseuse); *see also* R.C. 503.43 (township may require permit to operate massage establishment); R.C. 503.54 (township may require permit to operate an adult cabaret).

Moreover, R.C. Chapter 4740, which provides for the issuance of "qualification certificates" by the Ohio Construction Industry Examining Board to persons who wish to act as heating, ventilating, and air conditioning contractors, refrigeration contractors, plumbing contractors, electrical contractors, or hydronics contractors, has excluded townships from among the subdivisions with authority to license such contractors. In this regard, R.C. 4740.12 states:

> (A) Except as otherwise provided in this chapter, *only a municipal corporation* pursuant to [R.C. 715.27] or a *board of county commissioners* pursuant to [R.C. 3781.102] shall regulate the licensing of heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, plumbing contractors, and hydronics contractors.
> (B) Nothing in this chapter shall be construed to limit the operation of any statute or rule of this state or any ordinance or rule of any political subdivision, district, or agency of the state that:
> (1) Regulates the installation, repair, maintenance, or alteration of plumbing systems, electrical systems, heating, ventilating, and air conditioning systems, or refrigeration systems;
> (2) Requires the registration and assessment of a registration or license fee of individuals who are engaged in the business of heating, ventilating, and air conditioning, refrigeration, electrical, plumbing, or hydronics contracting. (Emphasis added.)

Thus, outside of the certification scheme established by R.C. Chapter 4740, the General Assembly has limited the licensing of heating, ventilating, and air conditioning contractors, refrigeration contractors, electrical contractors, plumbing contractors, and hydronics contractors to municipal corporations acting under R.C. 715.27 and boards of county commissioners acting in accordance with R.C. 3781.102.

Because no statute authorizes a board of township trustees to license any type of building contractor, I must conclude that a board of township trustees has no such authority. *See* 1963 Op. Att'y Gen. No. 331, p. 360 (syllabus, paragraph one) (a board of county commissioners has no express or implied authority to license electrical contractors); 1950 Op. Att'y Gen. No. 1983, p. 473 (syllabus, paragraph one) (the authority of the board of county commissioners to adopt a building code does not include the authority to prohibit unlicensed plumbers from conducting plumbing business in the unincorporated area of the county).

Part of your first question is whether a board of township trustees may require building contractors operating within the county to be licensed by the state. Again, I am aware of no statute authorizing a board of township trustees to impose such a requirement. *Cf.* R.C. 3710.05(A) ("[e]xcept as otherwise provided in this chapter, no person shall engage in any asbestos hazard abatement activities in this state unless licensed or certified pursuant to this chapter"); R.C. 3742.02(C)(3) (prohibiting a person from acting as, or holding himself out as, a lead abatement contractor without an appropriate valid license issued under R.C. 3742.05). In answer to your first question, therefore, I conclude that a board of township trustees is without authority to require persons who act as building contractors within the township to be licensed by the township or by the state.

Your second question asks whether a township may charge an "impact fee in addition to its regular building permit fee in order to defray the damage done to the township by drainage problems and soil erosion."[1] The authority of a township to control sediment and stormwater runoff from urban development was previously addressed by this office in 1985 Op. Att'y Gen. No. 85-053, which concluded in the syllabus that, in order to promote the public health, safety, and morals and in accordance with a comprehensive plan, a township may enact zoning regulations "which regulate land use in such a manner as to control sediment and stormwater runoff from urban development, so long as its resolutions do not come into direct conflict with rules adopted by the Chief of the Division of Soil and Water Conservation under R.C. 1511.02(E), with rules pertaining to urban sediment control which are adopted by a county under R.C. 307.79, or with other laws of the state." Thus, the opinion concluded that, although the General Assembly had enacted various statutes relating to the abatement of urban sediment pollution, the regulation of that matter remained within the authority of a township as part of its zoning power, so long as the township's regulation did not conflict with other provisions of state law.[2] *See also* 1994 Op. Att'y Gen. No. 94-098 (townships may include in township zoning plan regulation of drainage of surface water from residential subdivisions, so long as regulation does not conflict with state or federal law). Accordingly, a township may include in its township zoning plan regulation of sediment and stormwater runoff and the drainage of surface water.

It is next necessary to consider whether a township has authority to charge a fee in connection with such regulation. The authority of a township to charge a fee for the issuance of a

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[1] Your question specifically asks whether a township may charge the fee you describe "in addition to its regular building permit fee." This opinion will not, therefore, address whether a township may charge the fee you describe as part of the township's building permit fee. *See generally* R.C. 505.75 (authority of township to adopt building code for regulation of safety, health, and sanitary conditions of buildings).

[2] Pursuant to R.C. 519.02, for the purpose of promoting the public health, safety, and morals, a board of township trustees may regulate land and building use in the unincorporated territory of the township through a comprehensive plan of zoning. The requirements for adoption of a zoning plan, its amendment, and the manner of its enforcement are set forth in R.C. Chapter 519.

zoning permit has been addressed in a number of prior Attorney General opinions, which have concluded that, even though not expressly granted by statute, a township's power to charge a zoning permit fee is implied from its authority to inspect and regulate the use of property. 1979 Op. Att'y Gen. No. 79-051; 1963 Op. Att'y Gen. No. 218, p. 307 (township may charge fee for zoning variances or special exceptions to cover the costs of processing the applications); 1956 Op. Att'y Gen. No. 7111, p. 667 (syllabus, paragraph one). A township is, however, limited in fixing the amount of such fees because "[s]uch fees must ... bear a reasonable relation to the cost of inspection of the site and issuance of the permits." Op. No. 79-051 (syllabus, paragraph one). *See also* 1986 Op. Att'y Gen. No. 86-081 at 2-457 ("[t]he implied authority to charge a fee pursuant to the authority to regulate extends ... only to the authority to charge a fee in such amount as is reasonable to cover the cost of inspection and regulation"). Thus, whether or not a township has included in its zoning plan the regulation of sediment and stormwater runoff or the drainage of surface water, the fee a township may charge for a zoning permit is limited to an amount that is reasonable to cover the cost of inspection and regulation.

Your question specifically asks whether a township may charge the fee you describe for the purpose of "defray[ing] the damage done to the township by drainage problems and soil erosion." Because the township's authority to charge a fee for a zoning permit extends to charging only the amount necessary to cover the cost of inspection and regulation, the inclusion within a zoning permit fee of an amount beyond that cost, *e.g.*, an amount to cover potential future costs of the township due to drainage problems and soil erosion, clearly exceeds the township's authority under R.C. Chapter 519.[3]

I note, however, that provision is made in the Revised Code for soil and water conservation efforts by public entities other than townships and for the assessment of fees for such purposes. *See, e.g.*, R.C. 1515.24 (assessment by board of county commissioners for improvements recommended by a soil and water conservation commission); R.C. 6137.03 (assessment for maintenance of ditch improvements constructed under R.C. Chapter 6131). No such authority was conferred upon townships. Also, in contrast to the situation you describe, the General Assembly has otherwise expressly authorized townships to levy fees for potential damage to the township from other causes. *See, e.g.*, R.C. 3734.57(C) (authorizing a township to levy a fee on the disposal of solid waste within the township "[f]or the purposes of defraying the added costs to a ... township of maintaining roads and other public facilities and of providing emergency and other public services, and compensating a ... township for reductions in real property tax revenues due to reductions in real property valuations resulting from the location and operation of a solid waste disposal facility within the ... township"). In the absence of similar statutory language authorizing a township to charge a fee for potential

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[3] *See Building Industry Ass'n v. City of Westlake*, 103 Ohio App. 3d 546, 660 N.E.2d 501 (Cuyahoga County 1995), *discretionary appeal denied*, 74 Ohio St. 3d 1417, 655 N.E.2d 738 (1995) (finding city ordinance that imposed "impact fee" only upon new construction for purpose of maintaining city's recreational facilities to be a tax, not a fee, and, as structured, in violation of federal constitutional equal protection requirements and Ohio Const. art. XII, § 2, which requires all real property to be taxed uniformly according to value).

damage to the township due to drainage problems and soil erosion, I must conclude that the General Assembly did not intend that townships charge such fees. *See generally State ex rel. Enos v. Stone*, 92 Ohio St. 63, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result).

In answer to your second question, I conclude, therefore, that in the absence of legislation authorizing a township to charge a fee for the purpose of defraying potential damage done to a township by drainage problems and soil erosion, a township may not charge such a fee.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A board of township trustees has no authority to require persons who act as building contractors within the township to be licensed by the township or by the state.

2. In the absence of legislation authorizing a township to charge a fee for the purpose of defraying potential damage within a township caused by drainage problems and soil erosion, a township may not charge such a fee.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS: 97-022

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