October 27, 1993

OPINION NO. 93-026

The Honorable Russell B. Wiseman
Crawford County Prosecuting Attorney
255 East Mansfield Street
P.O. Box 509
Bucyrus, Ohio 44820

Dear Prosecutor Wiseman:

You have requested an opinion as to whether a board of township trustees may enter into an agreement with a private party to exchange, at a future date, the real property of the township upon which the township hall is located for other property if, at the time of the agreement, the private party has not acquired real property to exchange for the township's real property. In your letter, you explained that the private party desires the land on which the present township hall stands, and it plans to acquire land and construct a building that it will trade for the township hall.

R.C. 505.104 Permits the Exchange of Township Property Under Certain Circumstances

A board of township trustees possesses only the authority expressly granted by statute and the authority that is necessarily implied by that express grant. *Hopple v. Brown*, 13 Ohio St. 311 (1862). The authority to manage and control the property of a township is vested in the board of township trustees pursuant to several specific statutes. *See, e.g.,* R.C. 505.10 (acceptance of real or personal property for township use); R.C. 505.102 (sale or lease of township real property to nonprofit senior citizens' organization); R.C. 505.11 (leases of real property or mining rights). In particular, R.C. 505.104 permits a board of township trustees to exchange real property of the township for other real property, as follows:

> A board of township trustees may, by resolution and without bidding or advertising, exchange and transfer any real property belonging to the township if all of the following apply in regard to the real property the township acquires in the exchange:
> (A) Its current market value is equal to or greater than that of the real property the township gives up in the exchange and the county auditor so certifies prior to the transfer;
> (B) It is improved to the township's specifications;
> (C) It is to be used by the township for a public purpose that is the same as or similar to that for which the real property the township gives up in the exchange was used.

R.C. 505.104 specifies that the transfer and exchange of township property may be accomplished *by resolution* of the board of township trustees under certain conditions. Therefore, the trustees may not transfer and exchange township property by mere agreement. *See generally Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493, 497 (1951) ("when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner"); *Schwing v. McClure*, 120 Ohio St. 335, 342, 166 N.E. 230, 232 (1929) (public officers cannot "pass title to public property except when acting within their strict powers. Property devoted to public use can only be disposed of by express authority"); 1987 Op. Att'y Gen. No. 87-050 (determining that a statute that permits township trustees to sell by public auction township property that it finds, by resolution, that it does not need does not permit the sale of such property by any method other than by public auction); 1948 Op. Att'y Gen. No. 4038, p. 543 at 545 ("[t]he use of the word _may_ indicates that the statute [G.C. 2447-2] is permissive so far as the commissioner's availing themselves of its terms is concerned. But once they have decided to use the power, its exercise must be in the manner prescribed by the statute").

Furthermore, R.C. 505.104 clearly contemplates that the property to be exchanged for the township's property be a particular parcel of real property that is available for transfer. For example, R.C. 505.104(A) makes it a condition of the authority of the board of township trustees to resolve to exchange and transfer township property pursuant to R.C. 505.104 that the current market value of the property acquired by the township in the exchange "is equal to or greater than that of the real property the township gives up in the exchange." In order to determine the current market value of the property, it must be identifiable as a particular parcel of real property. Thus, a board of township trustees has no authority pursuant to R.C. 505.104 to resolve to transfer and exchange real property of the township for real property that has not yet been identified.

Moreover, a board of township trustees has no authority to permit another individual or entity to exercise the board's power to select a location for a township hall. R.C. 505.26 gives a board of township trustees the authority, *inter alia*, to "purchase, appropriate, construct, enlarge, improve, rebuild, repair, furnish, and equip a township hall." *See also* R.C. 505.262(A) ("the board of township trustees of any township may, by unanimous vote, adopt a resolution allowing the township to contract for the purchase of ... buildings, and sites, or for the construction of buildings, for any lawful township purpose"). This authority necessarily requires the selection of the site for a township hall if one is to be built. The selection of an appropriate site for the township hall requires the trustees to use their judgment and discretion on behalf of the township as to the type of land selected and its location. Discretion has been defined as follows: "[Discretion] means, when applied to public functionaries, a power or right conferred upon them by law, of acting officially in certain circumstances, according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others." *McNelly v. Clay Township*, 23 Ohio Dec. 506, 509 (C.P. Montgomery County 1910) (citations omitted) (determining that the relocation of a ditch and the acceptability of its construction was within the discretion of the board of township trustees).

The exercise of a power that requires the use of judgment and discretion on the part of a public officer cannot be delegated.

> Where the powers of judgment and discretion are by law reposed in a public officer, the presumption is that such officer was selected because of his fitness and competency to exercise that judgment and discretion, and unless the authority to do so is expressly conferred on him, he may not delegate his powers and duties to another.

Burkholder v. Lauber, 6 Ohio Misc. 152, 154, 35 Ohio Op. 2d 286, 287 (C.P. Fulton County 1965); *see also Kelley v. Cincinnati*, 7 Ohio N.P. 360, 9 Ohio Dec. 611 (C.P. Hamilton County 1899). Thus, the board of township trustees may not delegate its authority to select a site for a township hall. A resolution by the board of township trustees to exchange the real property of the township upon which the township hall is located for other property to be acquired by a private party is tantamount to delegating the board's authority to select a site for a township hall, and is thereby not permitted.

Conclusions

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

1. A board of township trustees may exchange and transfer real property of the township upon which the township hall is located for other property by resolution pursuant to R.C. 505.104.

2. A board of township trustees may not resolve, pursuant to R.C. 505.104, to exchange and transfer real property of the township upon which the township hall is located for other property if, at the time of the resolution, the other property has not been identified.

Respectfully,

LEE FISHER
Attorney General

October 27, 1993

The Honorable Russell B. Wiseman
Crawford County Prosecuting Attorney
255 East Mansfield Street
P.O. Box 509
Bucyrus, Ohio 44820

SYLLABUS: 93-026

1.A board of township trustees may exchange and transfer real property of the township upon which the township hall is located for other property by resolution pursuant to R.C. 505.104.

2.A board of township trustees may not resolve, pursuant to R.C. 505.104, to exchange and transfer property of the township upon which the township hall is located for other property if, at the time of the resolution, the other property has not been identified.