August 28, 2009

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

SYLLABUS: 2009-032

1. The building department of a township that has adopted township residential building regulations under R.C. 505.75(A)(1) need not be certified by the Board of Building Standards in order to enforce only township residential building regulations and not the state residential and nonresidential building codes.

2. R.C. 505.78(B)(1) prohibits a township from adopting residential building regulations if the township is located in a county that has adopted residential building regulations under R.C. 307.37(B)(1)(a), whether or not the county's regulations are enforceable within that township.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

August 28, 2009

OPINION NO. 2009-032

The Honorable Dennis P. Will
Lorain County Prosecuting Attorney
225 Court Street, 3rd Floor
Elyria, Ohio 44035

Dear Prosecutor Will:

You have requested an opinion concerning the authority of township building departments. We have restated your questions, as follows:

1. Must a township building department, which has adopted local residential building regulations in compliance with R.C. 505.75(A)(1) and does not enforce the state code, be certified by the state board of building standards?

2. Are township local residential building regulations preempted pursuant to R.C. 505.78(B)(2), when the board of county commissioners adopts local residential building regulations pursuant to R.C. 307.37 that are applicable only to districts within the county, none of which districts includes the township?

As will be explained below, we conclude that the building department of a township that has adopted residential building regulations under R.C. 505.75(A)(1) may enforce such regulations within the township, whether or not the department has been certified by the Board of Building Standards under R.C. 3781.10, but may not enforce the state residential and nonresidential building codes without such certification. We also conclude that R.C. 505.78(B)(1) prohibits a township from adopting residential building regulations under R.C. 505.75 if the township is located in a county that has adopted residential building regulations applicable only to districts within the unincorporated portions of the county, whether or not the township is located within a district to which the county's residential building regulations apply.

Your first question asks whether the building department of a township that has adopted local residential building regulations under R.C. 505.75(A)(1) must be certified by the state

Board of Building Standards if the department does not enforce the state building codes.[1] Because a township building department is a creature of statute, we begin by examining R.C. 505.75(A), which authorizes a board of township trustees to adopt local residential building regulations, as follows:

> (1) A board of township trustees may adopt local residential building regulations governing residential buildings as defined in section 3781.06 of the Revised Code. No regulation shall differ from the state residential building code unless the regulation addresses subject matter not addressed by the state residential building code or is adopted pursuant to section 3781.01 of the Revised Code.
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> (2) The board may adopt regulations that are necessary for participation in the national flood insurance program and that do not conflict with the residential and nonresidential building codes, governing the prohibition, location, erection, construction, or floodproofing of new buildings or structures, or substantial improvements to existing buildings or structures, in unincorporated territory within flood hazard areas identified under the "Flood Disaster Protection Act of 1973," 87 Stat. 975, 42 U.S.C.A. 4002, as amended, including, but not limited to, residential, commercial, or industrial buildings or structures.

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[1] In accordance with R.C. 3781.10, the Board of Building Standards has authority to adopt both residential and nonresidential building codes for the state, as follows:

> (A)(1) The board of building standards shall formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in [R.C. 3781.06], including land area incidental to those buildings, the construction of industrialized units, the installation of equipment, and the standards or requirements for materials used in connection with those buildings. The board shall incorporate those rules into separate residential and nonresidential building codes. The standards shall relate to the conservation of energy and the safety and sanitation of those buildings.
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> (2) The rules governing nonresidential buildings are the lawful minimum requirements specified for those buildings and industrialized units, except that no rule other than as provided in [R.C. 3781.108(C)] that specifies a higher requirement than is imposed by any section of the Revised Code is enforceable. The rules governing residential buildings are uniform requirements for residential buildings in any area with a building department certified to enforce the state residential building code. In no case shall any local code or regulation differ from the state residential building code unless that code or regulation addresses subject matter not addressed by the state residential building code or is adopted pursuant to section 3781.01 of the Revised Code.

In order to administer and enforce its local regulations, a board of township trustees may, among other alternatives,[2] create a building department in accordance with R.C. 505.75(C)(1), which states:

> The board of township trustees may create a building department and employ personnel it determines necessary to administer and enforce any *local* residential building regulations or existing structures code[3] the board adopts pursuant to this section. The building department may enforce state residential and nonresidential building codes the board of building standards establishes pursuant to Chapter 3781. of the Revised Code *if the department is certified*

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[2] R.C. 505.75(C)(2) and (D) establish alternative means by which a township may provide for the administration and enforcement of building regulations, in part, as follows:

> (C)(2) To administer and enforce any local residential building regulations, or existing structures code *and the state residential and nonresidential building codes*, the board [of township trustees] may create, establish, fill, and fix the compensation of the position of township building inspector to serve as the chief administrative officer of the township building department. In lieu of creating the position of township building inspector, the board may assign the duties of the inspector to an existing township officer who is *certified pursuant to [R.C. 3781.10(E)]*.
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> (D)(1) The board of township trustees may enter into a contract with any other township, any municipal corporation, or board of county commissioners for the municipal corporation or board of county commissioners to administer and enforce local residential building regulations or existing structures code in the township or to enforce the state residential and nonresidential building codes in the township *if the building department of the municipal corporation or county is certified to enforce those codes*.
>
> (2) Any other township, any municipal corporation, or a board of county commissioners may contract with a board of township trustees to administer and enforce local building regulations or an existing structures code in the municipal corporation or county and, *if certified*, to enforce the state residential and nonresidential building codes in the municipal corporation or unincorporated areas of the county. (Emphasis added.)

Your question, however, is limited to a situation in which a township has created a building department under R.C. 505.75(C)(1).

[3] R.C. 505.73(A), in part, authorizes a board of township trustees, acting by resolution, to "adopt by incorporation by reference, administer, and enforce within the unincorporated area of the township an existing structures code pertaining to the repair and continued maintenance of structures and the premises of those structures."

> *pursuant to [R.C. 3781.10]*[4] to enforce those codes. Upon certification of the building department under [R.C. 3781.10], the board of township trustees may direct the building department to exercise enforcement authority and to accept and approve plans pursuant to [R.C. 3781.03 and R.C. 3791.04] for the classes of buildings for which the building department and personnel are certified. (Footnote and emphasis added.)

The first sentence of R.C. 505.75(C)(1), which authorizes a township building department to enforce local residential building regulations, does not mention certification by the Board of Building Standards under R.C. 3781.10. In contrast, the second sentence of R.C. 507.75(C)(1) qualifies the authority of a township building department to enforce the state residential and nonresidential building codes by expressly requiring the township department to be certified under R.C. 3781.10 before enforcing the state codes. As explained in *State ex rel. Bohan v. Industrial Commission*, 147 Ohio St. 249, 251, 70 N.E.2d 888 (1946), in interpreting a statute, one must "accord meaning to each word of a [legislative] enactment if it is reasonably possible so to do. It is to be presumed that each word in a statute was placed there for a purpose." The difference in the language used in these two sentences, therefore, indicates that the General Assembly did not intend to require a township building department to be certified under R.C. 3781.10 if the department enforces only local residential building regulations, but that such certification is required in order for the department to enforce the state building codes. *See generally, e.g.*, *State v. Taniguchi*, 74 Ohio St. 3d 154, 156, 656 N.E.2d 1286 (1995) ("[a] court should give effect to the words actually employed in a statute, and should not delete words used, or insert words not used, in the guise of interpreting the statute"); *Cablevision of the Midwest, Inc. v. Gross*, 70 Ohio St. 3d 541, 544, 639 N.E.2d 1154 (1994) ("[i]t is the responsibility of courts to enforce the literal language of a statute whenever possible").

R.C. 3781.10(E), which describes the powers and duties of the Board of Building Standards with respect to the certification of building departments, their personnel, and certain other persons, provides additional support for the conclusion that, in accordance with R.C. 505.75(C)(1), a township building department that enforces only the township's building regulations need not be certified under R.C. 3781.10. *See generally United Telephone Co. of Ohio v. Limbach*, 71 Ohio St. 3d 369, 372, 643 N.E.2d 1129 (1994) ("all statutes which relate to the same general subject matter must be read *in pari materia*").

According to R.C. 3781.10(E):

> (1) The [Board of Building Standards] shall certify municipal, township, and county building departments and the personnel of those building departments

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[4] R.C. 3781.10 sets forth the powers and duties of the Board of Building Standards, including, among other things, the duty to establish state residential and nonresidential building codes and the duty to certify local building departments and personnel to enforce those codes within their local jurisdictions.

> . . . to exercise enforcement authority, to accept and approve plans and specifications, and to make inspections, pursuant to sections 3781.03 [enforcement of laws for the construction of buildings], 3791.04 [approval of building plans], and 4104.43 [regulation of boilers] of the Revised Code.
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> (2) The board shall certify departments, personnel, and persons to enforce the *state residential building code*, to enforce the *nonresidential building code*, *or* to enforce *both* the residential and the nonresidential building codes. Any department, personnel, or person may enforce only the type of building code for which certified.
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> (3) The board *shall not require* a building department, its personnel, or any persons that it employs to be certified for residential building code enforcement if that building department *does not enforce the state residential building code*. . . .
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> . . . .
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> (6) This division *does not require or authorize the board to certify personnel* of municipal, township, and county building departments . . . whose responsibilities do *not* include the exercise of enforcement authority, the approval of plans and specifications, or making inspections under the *state residential and nonresidential building codes*. (Emphasis added.)

Thus, while R.C. 3781.10(E)(2) imposes a duty upon the Board of Building Standards to certify a township building department that enforces either or both of the state building codes, R.C. 3781.10(E)(3) prohibits the Board of Building Standards from requiring that a township building department or its personnel be certified if such department does not enforce the state residential building code. In addition, R.C. 3781.10(E)(6) expressly excludes from the certification powers of the Board of Building Standards the ability to certify personnel of a township building department that does not enforce, approve plans, or make inspections under the state residential and nonresidential building codes. Thus, the Board of Building Standards is without authority under R.C. 3781.10(E) to require a township building department that enforces only township residential building regulations, but not the state residential building code, to be certified.[5]

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[5] The adoption of residential building regulations by the state and local governmental entities was first authorized by Am. Sub. H.B. 175, 125th Gen. A. (2005) (eff. May 27, 2005). Prior to that time, the state building code applied only to nonresidential buildings. The Legislative Service Commission's Final Analysis of Am. Sub. H.B. 175 at 5, includes the following comments concerning the certification of local building departments:

> Unlike the ongoing [state nonresidential building code], statewide enforcement of the state residential building code is *not required*. The state residential building code is to be enforced only if there is jurisdiction by a municipal, county, or township building department that is certified for residential enforcement. The act specifically states that the BBS may not require a building department, its personnel, or any persons that it employs to be certified for

In answer to your first question, we conclude that the building department of a township that has adopted township residential building regulations under R.C. 505.75(A)(1) need not be certified by the Board of Building Standards in order to enforce only township residential building regulations and not the state residential and nonresidential building codes.

Your second question asks whether R.C. 505.78(B)(2) precludes a township from adopting township residential building regulations if the township is located within a county that has adopted under R.C. 307.37 local residential building regulations that apply only to districts within the county, none of which districts includes the township.

The scope of the residential building regulations a board of township trustees may adopt and the manner in which such regulations are to be adopted are governed primarily by divisions (A) and (B) of R.C. 505.75. Limitations upon the power of a board of township trustees to adopt such regulations, however, appear in R.C. 505.78(B), as follows:

> (1) A board of trustees *shall not* adopt local residential building regulations pursuant to [R.C. 505.75] in *any* county in which the board of county commissioners has adopted such regulations pursuant to [R.C. 303.37].
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> (2) If a board of township trustees adopts local residential building regulations and the board of county commissioners subsequently adopts such regulations, the township regulations shall be of no force and effect one year after the county regulations become effective or at an earlier date as the board of township trustees provides. (Emphasis added.)

R.C. 505.78(B)(1) thus prohibits a township that is located in a county that has adopted residential building regulations under R.C. 307.37 from adopting its own such regulations.

The authority of a county to adopt local residential building regulations is described, in pertinent part, by R.C. 307.37(B)(1)(a), as follows:

> The board of county commissioners may adopt local residential building regulations governing residential buildings as defined in [R.C. 3781.06], to be

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> residential building code enforcement if that building department does not choose to enforce the state residential building code. Unlike the ongoing [state nonresidential building code], if there is no building department with residential enforcement certification, there is no requirement that an owner of a proposed residential building submit plans for approval to any entity.
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> Although a local government may seek certification for residential enforcement, it is not required to do so.

See generally Meeks v. Papadopulos, 62 Ohio St. 2d 187, 404 N.E.2d 159 (1980) (although Legislative Service Commission analyses of bills are not binding, they may be helpful in construing statutes).

> enforced within the unincorporated area of the county or *within districts the board establishes in any part of the unincorporated area*. No local residential building regulation shall differ from the state residential building code the board of building standards establishes pursuant to [R.C. Chapter 3781] unless the regulation addresses subject matter not addressed by the state residential building code or is adopted pursuant to [R.C. 3781.01]. (Emphasis added.)

According to R.C. 307.37(B)(1)(a), a board of county commissioners may make the county's residential building regulations enforceable throughout the entire unincorporated area of the county or within only certain districts in such unincorporated area. In those instances in which a county's building regulations apply only to certain areas or districts within the unincorporated portion of the county, it is possible that some townships within the county will be located outside of such districts and, as such, will not be subject to the county's regulations.

The General Assembly, however, has not separately addressed the authority of a board of township trustees to adopt residential building regulations under R.C. 505.75 in situations in which a county has adopted residential building regulations under R.C. 307.37(B)(1)(a) that are not enforceable within a particular township in the county. Instead, R.C. 505.78(B)(1) speaks broadly and prohibits a board of township trustees from adopting such regulations if the township is located in "*any* county in which the board of county commissioners has adopted such regulations pursuant to [R.C. 303.37]." (Emphasis added.) According to *Merriam Webster's Collegiate Dictionary* 56 (11th ed. 2005), the word "any" means, in part, "one or some indiscriminately of whatever kind . . . one or another taken at random <ask ~ man you meet." By modifying the phrase "county in which the board of county commissioners has adopted such regulations pursuant to [R.C. 303.37]" with the word "any" in R.C. 505.78(B)(1), the General Assembly has indicated its intention that whenever any county adopts residential building regulations under R.C. 307.37, regardless of the areas in which such regulations are enforceable, a township within that county may not adopt residential building regulations.[6]

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[6] In Am. Sub. H.B. 175, 125th Gen. A. (2005) (eff. May 27, 2005), the General Assembly made many changes related to the regulation of residential construction and required the Board of Building Standards to adopt a state residential building code. The version of R.C. 505.75 enacted in Am. Sub. H.B. 175 remains in effect. R.C. 307.37, also amended in Am. Sub. H.B. 175, was subsequently amended in Am. Sub. H.B. 66, 126th Gen. A. (2005) (eff., in pertinent part, Sept. 29, 2005). Am. Sub. H.B. 66 refined the authority of a board of county commissioners under R.C. 307.37(B)(1) to adopt residential building regulations for the entire unincorporated area of the county by stating that such regulations are "to be enforced within the unincorporated area of the county *or within districts the board establishes in any part of the unincorporated area*." (Emphasis added.) R.C. 505.75 has not, however, been amended since the foregoing language was added to R.C. 307.37(B)(1) by Am. Sub. H.B. 66.

We also note that it is a well-established rule of statutory construction that in interpreting a statute, one must "give effect to the words used and not to insert words not used." *State ex rel. Cuyahoga County v. State Personnel Bd. of Review*, 82 Ohio St. 3d 496, 499, 696 N.E.2d 1054 (1998). Thus, we cannot read into R.C. 505.78(B)(1) language that limits the counties referred to therein to only those that have adopted regulations under R.C. 307.37 that are enforceable throughout the entire unincorporated area of the county. Similarly, we cannot read the limitation in R.C. 505.78(B)(1) as not applying to a township that is located within a county that has adopted regulations only for districts within the unincorporated area of the county, none of which districts include that township. Had the General Assembly intended that a board of township trustees have authority to adopt residential building regulations if the county in which the township is located has adopted residential building regulations under R.C. 307.37(B)(1)(a) that are not enforceable within that township, it could easily have added language to R.C. 507.75 that expressed that intention. *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). We conclude, therefore, that R.C. 505.78(B)(1) prohibits a township from adopting residential building regulations if the township is located in a county that has adopted residential building regulations under R.C. 307.37(B)(1)(a), whether or not the county's regulations are enforceable within that township.

We recognize that a board of county commissioners that adopts residential building regulations that are enforceable within only certain districts of the county may have no interest in preventing townships outside of such districts from adopting their own residential building regulations. Under the current statutory scheme, however, the county commissioners' adoption of residential building regulations under R.C. 307.37(B)(1)(a) that are enforceable only within certain districts in the county has the effect, although perhaps unintended, of also precluding townships outside of such districts from adopting their own residential building regulations. If the General Assembly did not intend to prohibit townships that are not subject to county residential building regulations from adopting township residential building regulations, it would be a simple matter to amend R.C. 505.78(B)(1) to reflect that intent.

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

1. The building department of a township that has adopted township residential building regulations under R.C. 505.75(A)(1) need not be certified by the Board of Building Standards in order to enforce only township residential building regulations and not the state residential and nonresidential building codes.

2. R.C. 505.78(B)(1) prohibits a township from adopting residential building regulations if the township is located in a county that has adopted residential building regulations under R.C. 307.37(B)(1)(a), whether or not the county's regulations are enforceable within that township.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General