June 16, 1998

OPINION NO. 98-018

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Mayberry:

You have requested an opinion concerning the authority of township zoning inspectors. Specifically, you wish to know:

1. May a township zoning inspector enter and inspect private property without a search warrant where the owner of the property does not give consent?

2. May a township zoning inspector be classified as a law enforcement officer?

With respect to your first question, 1973 Op. Att'y Gen. No. 73-116 addressed the authority of a township zoning inspector to enter and inspect private property when the owner of the property has not consented to the inspection. The opinion first determined that the right of a township zoning inspector to investigate alleged zoning violations on private property is implicit in the specific provisions of R.C. Chapter 519.[1] *See generally* 1956 Op. Att'y Gen. No. 7111, p. 667 at 672 ("it is within the power of the township trustees in adopting zoning regulations to impose reasonable fees to cover the cost of issuing permits and making inspections contemplated by the law"). In addition, 1973 Op. Att'y Gen. No. 73-116 stated at 2-445 and 2-446 that such inspections may be made without the consent of the property owner, provided the township zoning inspector presents proper identification and conducts the inspection at a reasonable hour and in a reasonable manner:

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[1] R.C. Chapter 519 authorizes a township to regulate the use of land within its boundaries through the enactment of zoning regulations.

> In State, ex rel. Eaton v. Price, 168 Ohio St. 123 (1958), the [Ohio Supreme] Court held that a statute which authorized a housing inspector to enter and inspect a dwelling at any reasonable hour upon showing appropriate identification, even over objection by the occupant, was not a violation of the constitutional prohibition against unreasonable searches and seizures. Although the statute granting authority to the township zoning inspector is less specific,[2] similar restrictions should be read into it in view of the principle that a statute must be so construed as to preserve it from constitutional infirmities. Wilson v. Kennedy, 151 Ohio St. 485, 491-493 (1949); Chambers v. Owens-Ames-Kimball Co., 146 Ohio St. 559, 566-571 (1946); State ex rel. Mack v. Guckenberger, 139 Ohio St. 273, 277-286 (1942).
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> The decision in the Eaton case was reviewed by the Supreme Court of the United States and was affirmed by an equally divided Court. Ohio, ex rel. Eaton v. Price, 364 U.S. 263 (1960). Subsequently, however, the [United States] Supreme Court held that a warrantless search of a locked storeroom during business hours, as part of an inspection authorized by the Gun Control Act of 1968, was not violative of the Fourth Amendment because the language of the statute reasonably limited the time, place and scope of the search. United States v. Biswell, 406 U.S. 311 (1972). See also, Colonnade Catering Corp. v. United States, 397 U.S. 541 (1970), Camera [*sic*] v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, 387 U.S. 541 (1967), in all of which searches were found improper because the statutes under which they were made did not contain restrictions protective of constitutional rights. (Footnote added.)

1973 Op. Att'y Gen. No. 73-116 thus relied on *State ex rel. Eaton v. Price*, 168 Ohio St. 123, 151 N.E.2d 523 (1958), *aff'd ex necessitate by an equally divided court*, 364 U.S. 263

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[2] The authority of a board of township trustees to have a township zoning inspector enforce zoning regulations is provided in R.C. 519.16, which states, in part, that, for the purpose of enforcing the zoning regulations, the board of township trustees may establish and fill the position of township zoning inspector. *See* 1973 Op. Att'y Gen. No. 73-116.

(1960),[3] to conclude that, pursuant to R.C. 519.16, a township zoning inspector does not need a property owner's or occupant's consent in order to inspect private property for zoning violations, provided the inspector presents proper identification and conducts his inspection at a reasonable hour and in a reasonable manner.

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[3] Because the decision of the Ohio Supreme Court in *State ex rel. Eaton v. Price,* 168 Ohio St. 123, 151 N.E.2d 523 (1958), was affirmed ex necessitate by an equally divided United States Supreme Court, the judgment of the United States Supreme Court "is without force as precedent." *Ohio ex rel. Eaton v. Price*, 364 U.S. 263, 263-64 (1960).

Although we agree with the conclusion in 1973 Op. Att'y Gen. No. 73-116 that R.C. 519.16 authorizes a township zoning inspector to conduct inspections of private property for zoning violations, *see* note two, *surpa*, current law safeguarding the privacy and security of individuals against arbitrary invasions by governmental officials does not support the opinion's further conclusion that such inspections may be made without the property owner's or occupant's consent or a search warrant when the inspector presents proper identification and conducts the inspection at a reasonable hour and in a reasonable manner. As stated above, 1973 Op. Att'y Gen. No. 73-116 based its conclusion on *State ex rel. Eaton v. Price*, which examined the constitutionality of a Dayton city ordinance that authorized the housing inspector to make inspections of dwellings and to enter, examine, and survey any dwelling at any reasonable hour. In concluding that the ordinance was a valid exercise of police power, and did not violate the prohibition against unreasonable searches and seizures in section fourteen of article I of the Ohio Constitution,[4] the Ohio Supreme Court stated:

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[4] Ohio Const. art. I, § 14 provides as follows:

> The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.

> This issue simply boils down to the question of whether the first inspection authorized under Section 806-30 constitutes unreasonable search and seizure.[5] As to the "seizure" portion of the phrase, the question answers itself, since no seizure is contemplated. As to "search," if we are to follow the rule stated by Prettyman, J., in [*District of Columbia v. Little,* 178 F.2d 13 (D.C. Cir. 1949), *aff'd,* 339 U.S. 1 (1950)],[6] the writer can conceive of no circumstances under which a reasonable search could be made, or, to state it another way, any search without a search warrant would be unreasonable. We are not ready to say that the framers of the Constitution used the word, "unreasonable," for no purpose whatsoever.
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> ....
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> The right of a home owner to the inviolability of his "castle" should be subordinate to the general health and safety of the community wherein he lives. Certainly this ordinance does not contemplate the invasion of the privacy of the home, and, as applied to the relator here, the record confirms the reasonableness of the Housing Inspector's actions.
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> We, therefore, conclude that an ordinance establishing minimum standards "governing utilities, facilities and other physical things and conditions essential to make dwellings safe, sanitary and fit for human habitation," and "governing the conditions and maintenance of dwellings," and containing a provision which authorizes a housing inspector to make

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[5] Section 806-30 of the Code of General Ordinances of the City of Dayton, as quoted in *State ex rel. Eaton v. Price,* 168 Ohio St. at 126, 151 N.E.2d at 525, provided as follows:

> The Housing Inspector is hereby authorized and directed to make inspections to determine the condition of dwellings, dwelling units, rooming houses, rooming units and premises located within the city of Dayton in order that he may perform his duty of safeguarding the health and safety of the occupants of dwellings and of the general public. For the purpose of making such inspections and upon showing appropriate identification the Housing Inspector is hereby authorized to enter, examine and survey at any reasonable hour all dwellings, dwelling units, rooming houses, rooming units, and premises. The owner or occupant of every dwelling, dwelling unit, rooming house, and rooming unit or the person in charge thereof, shall give the Housing Inspector free access to such dwelling, dwelling unit, rooming house or rooming unit and its premises at any reasonable hour for the purpose of such inspection, examination and survey.

[6] The court in *District of Columbia v. Little,* 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd,* 339 U.S. 1 (1950), determined that "a government official cannot invade a private home, unless (1) a magistrate has authorized him to do so or (2) an immediate major crisis in the performance of duty affords neither time nor opportunity to apply to a magistrate."

> inspections of "dwellings, dwelling units, rooming houses, rooming units and premises located within the city" and which also authorizes such inspector "upon showing appropriate identification *** to enter, examine and survey at any reasonable hour all dwellings" and which requires that the "owner or occupant of every dwelling" shall give such inspector "free access to such dwelling *** at any reasonable hour for the purpose of such inspection, examination and survey," with penalties of fine or imprisonment or both for violation of such provision, is not violative of Section 14 of Article I of the Ohio Constitution prohibiting unreasonable searches and seizures. (Footnotes added.)

State ex rel. Eaton v. Price, 168 Ohio St. at 137-38, 151 N.E.2d at 532-33.

Accordingly, 1973 Op. Att'y Gen. No. 73-116 determined that, under *State ex rel. Eaton v. Price*, a warrantless, nonconsenual inspection of private property by government officials statutorily authorized to enforce regulations pertaining to the general health and safety of the community is not unreasonable per se and does not violate the prohibition in Ohio Const. art. I, § 14 against unreasonable searches and seizures, provided the inspection is conducted at a reasonable hour and in a reasonable manner.

Decisions of the United States Supreme Court rendered subsequent to *State ex rel. Eaton v. Price*, however, have concluded that the fourth amendment to the United States Constitution, which prohibits unreasonable searches and seizures of persons and their property, and which generally imposes a requirement for a warrant prior to searches or seizures,[7] safeguards the privacy and security of individuals against arbitrary invasions by government officials. This is the case whether the officials are health, fire, or building inspectors, whether their purpose is to locate and abate a suspected public nuisance or simply to perform a routine periodic inspection, and whether the privacy that is invaded is that of a private home or a commercial establishment not open to the public. *See Camara v. Municipal Court,* 387 U.S. 523 (1967); *See v. City of Seattle,* 387 U.S. 541 (1967); *see also Michigan v. Tyler,* 436 U.S. 499 (1978). *See generally City of Cincinnati v. Morris Investment Co.,* 6 Ohio Misc. 2d 1, 2, 451 N.E.2d 259, 260 (Hamilton County Mun. Ct. 1982) (health and safety inspections are subject to the fourth amendment warrant requirements despite statutory or administrative authority for inspection of private homes or businesses).

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[7] The fourth amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In *Camara v. Municipal Court*, the United States Supreme Court examined whether warrantless, nonconsenual inspections of private residences by municipal housing inspectors violate the fourth amendment to the United States Constitution. Under the ordinance in question in *Camara*,[8] municipal housing inspectors were permitted to enter private residences without a search warrant to perform their duties under the city's municipal code. In holding that such warrantless, nonconsenual administrative inspections by municipal housing inspectors violated the fourth amendment, the Court reasoned that the inspections were a significant intrusion upon the interests protected by the fourth amendment and lacked the traditional safeguards which the fourth amendment guarantees to an individual.[9] In this regard, the Court stated:

> The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which "is basic to a free society." *Wolf v. Colorado*, 338 U.S. 25, 27. As such, the Fourth Amendment is enforceable against the States through the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 30.
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> Though there has been general agreement as to the fundamental purpose of the Fourth Amendment, translation of the abstract prohibition against "unreasonable searches and seizures" into workable guidelines for

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[8] The municipal ordinance in question in *Camara v. Municipal Court*, 387 U.S. 523 (1967), was section 503 of the San Francisco Housing Code.

[9] In *Camara v. Municipal Court* the United States Supreme Court explicitly overruled its earlier decision in *Frank v. Maryland,* 359 U.S. 360 (1959), in which the Court upheld, by a five-to-four vote, a state court conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a warrant. The conviction in *Frank v. Maryland* was similar to the conviction affirmed by the Court in *Ohio ex rel. Eaton v. Price*. *Camara v. Municipal Court*, 387 U.S. at 525; *see* note three, *supra*.

> the decision of particular cases is a difficult task which has for many years divided the members of this Court. Nevertheless, *one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. See, e.g., Stoner v. California*, 376 U.S. 483; *United States v. Jeffers,* 342 U.S. 48; *McDonald v. United States,* 335 U.S. 451; *Agnello v. United States,* 269 U.S. 20. As the Court explained in *Johnson v. United States*, 333 U.S. 10, 14:
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>> "The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

Camara v. Municipal Court, 387 U.S. at 528-29 (emphasis added); *see Donovan v. Dewey,* 452 U.S. 594, 598-99 (1981); *Marshall v. Barlow's, Inc.,* 436 U.S. 307, 323-24 (1978); *See v. City of Seattle,* 387 U.S. at 543. The United States Supreme Court has thus concluded that an inspection of private property by government officials is presumptively unreasonable under the fourth amendment to the United States Constitution if conducted without a warrant. *Marshall v. Barlow's, Inc.; Camara v. Municipal Court; See v. City of Seattle;*[10] *see also City of Cincinnati v. Morris Investment Co.*

The Court, however, has recognized exceptions to the search warrant requirement. Specifically, a government official may inspect private property without a search warrant when he has the consent of the owner or occupant, *Marshall v. Barlow's, Inc.*, 436 U.S. at 316; *See v. City of Seattle*, 387 U.S. at 545, an emergency exists, *Michigan v. Tyler*, 436 U.S. at 509, the premises are open to the public, *Air Pollution Variance Bd. of Colorado v. Western Alfalfa Corp.,* 416 U.S. 861, 864-65 (1974); *See v. City of Seattle*, 387 U.S. at 545, or the industry conducted on the property has a history of government oversight such that no reasonable expectation of privacy exists, *Donovan v. Dewey*, 452 U.S. at 598-602;

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[10] *See v. City of Seattle*, 387 U.S. 541 (1967), which was decided on the same day as *Camara v. Municipal Court*, held that the fourth amendment's prohibition against unreasonable searches and seizures also applies to private commercial property.

United States v. Biswell, 406 U.S. 311 (1972); *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).

Accordingly, it is our opinion that the rationale of *State ex rel. Eaton v. Price* has been superseded by subsequent decisions of the United States Supreme Court, and no longer supports the conclusion that township zoning inspectors are authorized to conduct warrantless, nonconsenual inspections of private property. *See City of Cincinnati v. Morris Investment Co.,* 6 Ohio Misc. 2d at 3, 451 N.E.2d at 261 (we do not find the case of *State ex rel. Eaton v. Price* "persuasive, and certainly its rationale has been superseded by later decisions of the United States Supreme Court"). Consequently, we overrule 1973 Op. Att'y Gen. No. 73-116 to the extent that it advises, in reliance upon *State ex rel. Eaton v. Price*, that a township zoning inspector may conduct a warrantless, nonconsenual inspection of private property. Instead, it is our opinion that, pursuant to the fourth amendment to the United States Constitution, a township zoning inspector may not enter and inspect private property without a search warrant where the owner or occupant of the property does not give consent, unless there is an emergency, the property is open to the public, or the industry conducted on the property has a history of government oversight such that no reasonable expectation of privacy exists. *See Allinder v. State of Ohio,* 808 F.2d 1180 (6th Cir. 1987), *appeal dismissed for want of jurisdiction,* 481 U.S. 1065 (1987); *State of Ohio v. Sniezek,* 8 Ohio App. 3d 147, 456 N.E.2d 542 (Cuyahoga County 1982); *City of Cincinnati v. Morris Investment Co.*

Your second question asks whether a township zoning inspector may be classified as a law enforcement officer. In order for a person to be classified as a "law enforcement officer," either his position or his duties must come within the definition of that term set forth in R.C. 2901.01 or Ohio R. Crim. P. 2. 1987 Op. Att'y Gen. No. 87-015 at 2-93.

R.C. 2901.01(A)(11) defines the term "[l]aw enforcement officer," as used in the Revised Code, as follows:

> "Law enforcement officer" means any of the following:
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> (a) A sheriff, deputy sheriff, constable, police officer of a township or joint township police district, marshal, deputy marshal, municipal police officer, member of a police force employed by a metropolitan housing authority under division (D) of section 3735.31 of the Revised Code, or state highway patrol trooper;
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> (b) An officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, a duty to conserve the peace or to enforce all or certain laws is imposed and the authority to arrest violators is conferred, within the limits of that statutory duty and authority;
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> (c) A mayor, in the mayor's capacity as chief conservator of the peace within the mayor's municipal corporation;

> (d) A member of an auxiliary police force organized by county, township, or municipal law enforcement authorities, within the scope of the member's appointment or commission;
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> (e) A person lawfully called pursuant to section 311.07 of the Revised Code to aid a sheriff in keeping the peace, for the purposes and during the time when the person is called;
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> (f) A person appointed by a mayor pursuant to section 737.01 of the Revised Code as a special patrolling officer during riot or emergency, for the purposes and during the time when the person is appointed;
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> (g) A member of the organized militia of this state or the armed forces of the United States, lawfully called to duty to aid civil authorities in keeping the peace or protect against domestic violence;
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> (h) A prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor;
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> (i) An Ohio veterans' home police officer appointed under section 5907.02 of the Revised Code;
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> (j) A member of a police force employed by a regional transit authority under division (Y) of section 306.35 of the Revised Code.

Similarly, Ohio R. Crim. P. 2(J) states that, as used in the Ohio Rules of Criminal Procedure, "[l]aw enforcement officer" means a

> sheriff, deputy sheriff, constable, municipal police officer, marshal, deputy marshal, or state highway patrolman, and also ... any officer, agent, or employee of the state or any of its agencies, instrumentalities, or political subdivisions, upon whom, by statute, the authority to arrest violators is conferred, when the officer, agent, or employee is acting within the limits of statutory authority. The definition of "law enforcement officer" contained in this rule shall not be construed to limit, modify, or expand any statutory definition, to the extent the statutory definition applies to matters not covered by the Rules of Criminal Procedure.

Neither R.C. 2901.01(A)(11) nor Ohio R. Crim. P. 2(J) lists a township zoning inspector as a "[l]aw enforcement officer" for purposes of the Revised Code or the Ohio Rules of Criminal Procedure, respectively. In addition, no provision within the Revised Code authorizes a township zoning inspector to make arrests while enforcing township zoning regulations.[11] Absent such authority, it must be concluded that a township zoning inspector is not a "[l]aw enforcement officer" under R.C. 2901.01(A)(11) or Ohio R. Crim. P.

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[11] The requirement in R.C. 2901.01(A)(11) and Ohio R. Crim. P. 2(J) that an individual must be authorized to make arrests refers to a grant of authority to make arrests other than those arrests which every person is permitted to make under R.C. 2935.04-.041. 1987 Op. Att'y Gen. No. 87-015 at 2-94 n.1.

2(J). *See generally State of Ohio v. Martins Ferry Eagles,* 62 Ohio Misc. 3, 6, 404 N.E.2d 177, 179 (Belmont County Court 1979) ("[a] secret service officer appointed by the prosecuting attorney does not have statutory authority to arrest and thus is not a law enforcement officer under Crim. R. 2 for the purpose of receiving and executing a search warrant under Crim. R. 41"); 1987 Op. Att'y Gen. No. 87-015 at 2-94 and 2-95 ("since I am unable to locate any provision giving these persons the authority to make arrests, I conclude that the Department of Agriculture's investigator's [*sic*] are not law enforcement officers under R.C. 2901.01(K)(2) [now R.C. 2901.01(A)(11)]").

In conclusion, it is my opinion, and you are advised that:

1. Pursuant to the fourth amendment to the United States Constitution, a township zoning inspector may not enter and inspect private property without a search warrant where the owner or occupant of the property does not give consent, unless there is an emergency, the property is open to the public, or the industry conducted on the property has a history of government oversight such that no reasonable expectation of privacy exists. (1973 Op. Att'y Gen. No. 73-116, overruled, in part.)

2. A township zoning inspector is not a "[l]aw enforcement officer" under R.C. 2901.01(A)(11) or Ohio R. Crim. P. 2(J).

Respectfully,

BETTY D. MONTGOMERY
Attorney General

June 16, 1998

The Honorable Alan R. Mayberry
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One Courthouse Square
Bowling Green, Ohio 43402

SYLLABUS: 98-018

1. Pursuant to the fourth amendment to the United States Constitution, a township zoning inspector may not enter and inspect private property without a search warrant where the owner or occupant of the property does not give consent, unless there is an emergency, the property is open to the public, or the industry conducted on the property has a history of government oversight such that no reasonable expectation of privacy exists. (1973 Op. Att'y Gen. No. 73-116, overruled, in part.)

2. A township zoning inspector is not a "[l]aw enforcement officer" under R.C. 2901.01(A)(11) or Ohio R. Crim. P. 2(J).