

August 15, 2019

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
Columbiana County Courthouse
105 South Market Street
Lisbon, Ohio 44432

SYLLABUS:

2019-029

1. A regional water district created under R.C. Chapter 6119, for the purpose of carrying out its appropriate functions, may excavate within a township road or road right-of-way without obtaining a permit which is otherwise required for such excavation under a township resolution adopted pursuant to R.C. 5571.16. The regional water district, however, must otherwise abide by all applicable laws and regulations. Its obligations include under R.C. 6119.06(Z), the duty to restore, repair, or replace any public or private property damaged or destroyed as a result of the district's activity. Such restoration, repair, or replacement must restore the damaged or destroyed property to its original condition as nearly as practicable. In the alternative, the district may provide compensation adequate to accomplish that end; and
2. A township and its board of trustees enjoy no authority or control over the construction efforts of a regional water district conducted on a township road or within a township road right-of-way. A township may be held liable, however, for injury, death, or loss of person or property caused by the negligent failure of an employee or officer of the township to keep the public roads of the township in repair, or his or her negligent failure to remove obstructions from the public roadways of the township. A board of township trustees is empowered to close a township road to public access and use, temporarily, when the board deems the road to be impassable or dangerous to the traveling public, and its closure necessary to protect the public. Determinations as to the reasonableness of the

action reside within the sound discretion of the board of trustees, and are not susceptible to assessment as part of the Attorney General's opinion-rendering function.



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OPINION NO. 2019-029

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
Columbiana County Courthouse
105 South Market Street
Lisbon, Ohio 44432

Dear Prosecutor Herron:

You have requested an opinion on the following questions concerning R.C. 5571.16 and R.C. 6119.06:

1. May a regional water district, created pursuant to R.C. Chapter 6119, excavate within a township road or road right-of-way without obtaining a permit to do so from a township that has adopted a resolution requiring such permits under R.C. 5571.16?
2. If the answer to the first question is in the affirmative, what then are the duties and responsibilities of the township, if any, to the traveling public utilizing the road during construction?

You state in your letter that a regional water district (the “district” or the “water district”) is constructing a utility line, part of which will be installed within a township road and/or road right-of-way. The township has adopted a resolution requiring persons wishing to excavate within its roads or road rights-of-way to first obtain from township authorities a permit authorizing such activity. According to your letter, the water district claims that it does not need a permit because it is not a “person” under R.C. 5571.16, and because it is authorized by R.C. 6119.06(Z) and (BB) to act without the township’s consent. You write that the officials of the township do not intend to prevent or obstruct the water district’s project, but feel that the township should be able to regulate any excavations on a township road, or within a township road right-of-way, in light of the township’s duty to keep township roads open and unobstructed.

R.C. 6119.01 provides that “[a]ny area situated in any unincorporated part of one or more contiguous counties or one or more municipal corporations, or both, may be organized as a regional water or sewer district” R.C. 6119.01. Such a district may be created for the purpose of supplying “water to users within or without the district[.]” R.C. 6119.01(A), or “[t]o provide for the collection, treatment, and disposal of waste water within or without the

district[,]” R.C. 6119.01(B), or both. Chapter 6119 provides the procedure pursuant to which a regional water district may be formed. *See generally* R.C. Chapter 6119.

A township may adopt a resolution requiring “any person” to obtain a permit before excavating a township road or road right-of-way. R.C. 5571.16. However, R.C. 5571.16 provides that the meaning of “person” is the same as that set out in R.C. 1.59. R.C. 5571.16. That section defines “person” as “an individual, corporation, business trust, estate, trust, partnership, and association.” R.C. 1.59(C). Water districts are political subdivisions. R.C. 6119.011(B), (U).¹ A “political subdivision” is not a “person” under R.C. 1.59(C). *City of Akron v. Ohio Dep’t of Ins.*, 2014-Ohio-96, 9 N.E.3d 371, at ¶ 36 (Franklin County). As such, water districts are not subject to the requirements and limitations of a resolution adopted under R.C. 5571.16. A resolution adopted by a township under that section may require any person, *i.e.*, any individual, corporation, business trust, estate, trust, partnership, or association to obtain an excavation permit, but the resolution imposes no such obligation upon an R.C. Chapter 6119 water district. *See* R.C. 5571.16. Further, R.C. 6119.06(Z) provides that a regional water district may exercise its delegated powers “without obtaining the consent of any other political subdivision,” provided the district effects appropriate remedial measures incident to any damage to, or destruction of, property resulting from its activities. R.C. 6119.06(Z).² We conclude, therefore, that a water district need not obtain a township permit authorizing it to excavate on a township road or within a township road right-of-way, but the district is obligated to repair any

¹ R.C. 6119.011(B) states: “Political subdivision” includes “special water districts, including county and regional water and sewer districts” R.C. 6119.011(B). R.C. 6119.011(U) elaborates that “[r]egional water and sewer district” means “a district organized or operating for one or both of the purposes described in section 6119.01 of the Revised Code and, if organized or operating for only one of those purposes, may be designated either a regional water district or a regional sewer district, as the case may be.” R.C. 6119.011(U).

² R.C. 5571.16 reads:

The board of township trustees, by resolution, may require any person to obtain a permit before installing a driveway culvert or making any excavation in a township highway or highway right-of-way within its jurisdiction, except an excavation to repair, rehabilitate, or replace a pole already installed for the purpose of providing electric or telecommunications service.

R.C. 5571.16. The statute goes on to provide a list of the requirements the board may impose on a person as a precondition to obtaining a permit. Such conditions include, for example, the requirement that an applicant (A) submit the project plans, (B) specify the method of excavation, refilling, and resurfacing, (C) use warning devices, and (D) indemnify the township against any liability stemming from the excavation. R.C. 5571.16(A)-(D).

damage to the roadway and its accoutrements, and to replace any destruction of the same, or to provide compensation to the township that is fully adequate to accomplish those ends.

It is well established that “boards of township trustees are creatures of statutes and as such have only those powers which are expressly granted by statute or necessarily implied therefrom.” 1981 Op. Att’y Gen. No. 81-011, at 2-40. It has been held that “neither a township nor its trustees are invested with the general powers of a corporation” *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875); *see also Geauga Cnty. Bd. Of Comm’rs v. Munn Rd. Sand & Gravel*, 67 Ohio St.3d 579, 585, 621 N.E.2d 696 (1993) (absent home rule authority, entities created by statute may exercise only those powers granted by the General Assembly); *Schwing v. McClure*, 120 Ohio St. 335, 340-41, 166 N.E. 230 (1929); *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 467, 134 N.E. 655 (1921); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916). On the basis of the R.C. 6119.06(Z) provision which exempts a water district from the township permitting processes of R.C. 5571.16, and the absence of any other statutory enactment affording a township or its board of trustees control over the activities of a water district which you describe, it is our opinion that the township has no such authority.

Your second question concerns the duties and responsibilities of the township to those using the road during the water district’s construction project, and the potential liability of the township for damage or loss suffered by such users. Ohio’s public highways are divided into three classes: “state roads, county roads, and township roads.” R.C. 5535.01. All public highways other than state or county roads are classified as township roads. R.C. 5535.01(C). The duty to maintain township roads falls on the township, R.C. 5535.08(A), and specifically on the board of township trustees. R.C. 5535.01(C). Similarly, the board of township trustees has the general duty and obligation to keep township roads in “good repair.” R.C. 5571.02.³

Chapter 2744 of the Ohio Revised Code sets out Ohio’s governmental tort immunity provisions. *See generally* R.C. Chapter 2744. R.C. 2744.01(C)(2)(e) provides that a “governmental function[.]” for the purpose of that Chapter, includes “[t]he regulation of the use of, and the maintenance and repair of, roads, highways, streets, avenues, alleys, walkways, bridges, aqueducts, viaducts, and public grounds[.]” R.C. 2744.01(C)(2)(e). R.C. 2744.02(B)(3), however, indicates that “a political subdivision is liable in damages in a civil action for injury, death, or loss of person or property allegedly caused by an act or omission of the political subdivision or any of its employees in connection with a governmental or proprietary function[.]” including harm “caused by their negligent failure to keep the public roads in repair and other negligent failure to remove obstructions from public roads” R.C. 2744.02(B)(3).

³ R.C. 5571.02 relevantly states: “The board of township trustees shall have control of the township roads of its township and, except for those township roads the board places on nonmaintained status pursuant to section 5571.20 of the Revised Code, shall keep them in good repair.” R.C. 5571.02.

The Ohio Supreme Court has held that “[i]t is rudimentary that in order to establish actionable negligence, one must show the existence of a duty, a breach of the duty, and an injury resulting proximately therefrom.” *Menifee v. Ohio Welding Products, Inc.*, 15 Ohio St. 3d 75, 77, 472 N.E.2d 707 (1984) (citing *Di Gildo v. Caponi*, 18 Ohio St. 2d 125, 127, 247 N.E.2d 732 (1969); *Feldman v. Howard*, 10 Ohio St. 2d 189, 193, 226 N.E.2d 564 (1967)). In order for a plaintiff to establish liability in the pursuit of a claim against a public entity under R.C. 2744.02(B)(2) it must be proven that an employee of the subdivision was “negligent in the performance of his duty” *Puffenberger v. City of Cleveland*, 8th Dist. No. 99660, 2013-Ohio-4479, 2013 Ohio App. LEXIS 4716, at ¶ 11. A public entity “is liable only for negligence in creating a faulty condition or failing to repair, remove or guard against defects after receiving actual or constructive notice of their existence.” *Id.* at ¶ 13 (quoting *Wilson v. City of Cleveland*, 8th Dist. No. 98035, 2012-Ohio-4289, 979 N.E.2d 356, at ¶ 23).

It is our opinion, therefore, that a township, in that it has no control over the activities of a water district or authority to impose requirements on or limitations to its construction efforts on a township road or within a township road right-of-way, should not be liable for the acts or omissions of a water district. The obligations of the township to users of the roadway and potential liability arising therefrom are limited to negligence on the part of township employees and officials in creating faulty conditions or in failing to repair, remove, or guard against defects after receiving actual or constructive notice of their existence.

Although a township has no authority to direct or to control the activities of the water district in regard to its construction activities, the township trustees are empowered to close a township road to public use, temporarily, when the board deems the road to be “impassable or dangerous to the traveling public” See R.C. 5571.02; 1990 Op. Att’y Gen. No. 90-029 (syllabus, paragraph 1). A township has authority to close a township road if it deems the closure necessary to protect the public. *Id.* at 2-111. The reasonableness of this determination depends on the condition of the road at issue, which is a fact specific inquiry and cannot be categorically answered by the Attorney General. *Id.* Instead, the determination is left to the township trustees, “in the exercise of their sound discretion.” *Id.* (quoting 1939 Op. Att’y Gen. No. 893, vol. II, p. 1208, at 1210).⁴

Based on the foregoing, it is our opinion, and you are hereby advised that:

1. A regional water district created under R.C. Chapter 6119, for the purpose of carrying out its appropriate functions, may excavate within a township road or road right-of-way without obtaining a permit which is otherwise required for such excavation under a township resolution adopted pursuant to R.C. 5571.16. The regional water district, however, must otherwise abide by all applicable laws and regulations. Its obligations include under R.C. 6119.06(Z), the duty to restore, repair, or replace any public or

⁴ The situation is different where the township is carrying out the construction, in which case the county engineer must approve of any temporary road closures. *Id.* (syllabus, paragraph 2).

private property damaged or destroyed as a result of the district's activity. Such restoration, repair, or replacement must restore the damaged or destroyed property to its original condition as nearly as practicable. In the alternative, the district may provide compensation adequate to accomplish that end; and

2. A township and its board of trustees enjoy no authority or control over the construction efforts of a regional water district conducted on a township road or within a township road right-of-way. A township may be held liable, however, for injury, death, or loss of person or property caused by the negligent failure of an employee or officer of the township to keep the public roads of the township in repair, or his or her negligent failure to remove obstructions from the public roadways of the township. A board of township trustees is empowered to close a township road to public access and use, temporarily, when the board deems the road to be impassable or dangerous to the traveling public, and its closure necessary to protect the public. Determinations as to the reasonableness of the action reside within the sound discretion of the board of trustees, and are not susceptible to assessment as part of the Attorney General's opinion-rendering function.

Respectfully,



DAVE YOST
Ohio Attorney General