

OPINION NO. 88-099**Syllabus:**

1. Pursuant to R.C. 3734.05(E)(3), as construed in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), a county or township may adopt or enforce a provision that affects a state-licensed hazardous waste facility, provided that the provision does not alter, impair, or limit the operation of the state-licensed hazardous waste facility and that the county or township has statutory authority to adopt or enforce the provision.
2. R.C. 3734.18 levies fees on the disposal and treatment of hazardous waste, and levies additional fees to be paid to the municipal corporation or county in which a hazardous waste facility is located, but does not levy such fees when hazardous waste is incinerated as fuel.
3. R.C. 3734.57(B) authorizes the solid waste management policy committee of a county or joint solid waste management district to levy fees upon the disposal of solid wastes at a solid waste disposal facility located in the district and permits the expenditure of such fees to defray certain costs incurred by a county, but does not apply to hazardous waste facilities.
4. R.C. 3734.57(C) authorizes a township to levy a fee on the disposal of solid wastes at a solid waste disposal facility located within its boundaries, but does not apply to hazardous waste facilities.
5. Counties and townships have no authority to impose a permit or user fee upon a facility that incinerates hazardous waste as fuel pursuant to a permit issued by the Hazardous Waste Facility Board under R.C. Chapter 3734.

To: John E. Meyers, Sandusky County Prosecuting Attorney, Fremont, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1988

I have before me your request for an opinion concerning the authority of a township or a county to impose a permit or user fee upon a facility that incinerates hazardous waste. You have indicated that the facility is expected to operate pursuant to a permit issued by the Hazardous Waste Facility Board under R.C. Chapter 3734. See R.C. 3734.01(F), (J), (K), (M), (N); R.C. 3734.02; R.C. 3734.05. Proceeds of the fee would be used to defray costs incurred by the township or county in monitoring the operations of the facility.

December 1988

You have raised your question in light of the case of *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), in which the Ohio Supreme Court held that a municipal corporation was authorized to enact a police power ordinance under which it imposed a monthly fee and certain record-keeping requirements upon hazardous waste landfills located within the municipality. In *Fondessy* the court found that such authority existed notwithstanding the fact that R.C. Chapter 3734 establishes a comprehensive scheme for the disposal of hazardous waste, see *Clermont Environmental Reclamation Co. v. Wiederhold*, 2 Ohio St. 3d 44, 442 N.E.2d 1278 (1982), and contains the following prohibition against local regulation:

No political subdivision of this state shall require any additional zoning or other approval, consent, permit, certificate, or other condition for the construction or operation of a hazardous waste facility authorized by a hazardous waste facility installation and operation permit issued pursuant to this chapter, nor shall any political subdivision adopt or enforce any law, ordinance, or regulation that in any way alters, impairs, or limits the authority granted in the permit.

R.C. 3734.05(E)(3).¹ The *Fondessy* court based its conclusion upon a finding that the municipal ordinance in question did not conflict with state regulation under R.C. Chapter 3734.

I discussed the *Fondessy* and *Clermont* cases in detail in 1988 Op. Att'y Gen. No. 88-053 and, in the first footnote to that opinion, I addressed the issue that you have raised in your opinion request:

The construction of R.C. 3734.05(D)(3) [now R.C. 3734.05(E)(3)] adopted in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), is phrased in terms of application of Ohio Const. art. XVIII, §3, which grants municipal corporations home rule powers. The *Fondessy* case involves a municipal corporation, and it is not clear to what extent it is applicable to townships, which are creatures of statute having no constitutional home rule powers. The *Fondessy* case does, however, state that R.C. 3734.05(D)(3) does not constitute express preemption of the regulation of hazardous waste facilities, but "may be utilized only to limit the legislative power of municipalities by the precise terms it sets forth." 23 Ohio St. 3d at 217, 492 N.E.2d at 801. To the extent that this conclusion involves a matter of interpretation of the language of R.C. 3734.05(D)(3), it appears to be applicable to all political subdivisions to which R.C. 3734.05(D)(3) applies. That is, notwithstanding that a political subdivision other than a municipal corporation does not have home rule powers, that political subdivision may adopt or enforce a provision that does not alter, impair, or limit the operation of a state-licensed hazardous waste facility, provided that the political subdivision has statutory authority to adopt or enforce such a provision. *But see Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d at 221, 492 N.E.2d at 804 (C. Brown, J., dissenting) (R.C. 3734.05(D)(3) "in clear and comprehensive language, expressly prohibits the imposition of any additional condition for the operation of state-authorized hazardous waste facilities").

Op. No. 88-053, slip op. at 4 n. 1. It thus appears that, notwithstanding that a county or a township does not have home rule powers,² the county or township

¹ At the time of the decision in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), this language appeared in R.C. 3734.05(D)(3). It was designated as R.C. 3734.05(E)(3) by virtue of amendments enacted in Am. Sub. H.B. 592, 117th Gen. A. (1988) (eff. June 24, 1988).

² Because Sandusky County has not adopted a charter pursuant to Ohio Const. art. X, §§3 and 4, I am not considering the authority of a charter county.

may adopt or enforce a provision that affects a state-licensed hazardous waste facility, provided that the provision does not alter, impair, or limit the operation of the state-licensed hazardous waste facility and that the county or township has statutory authority to adopt or enforce the provision. The Ohio Supreme Court found in the *Fondessy* case that local imposition of record-keeping requirements and a monthly fee did not constitute an additional condition for the construction or operation of a hazardous waste facility and did not alter, impair, or limit the authority granted by the state to operate the facility. It follows that a township or county may impose similar record-keeping requirements or fees without violating R.C. 3734.05(E)(3), provided that it has statutory authority to impose such requirements or fees. The issue raised by your request is, accordingly, whether a township or county has statutory authority to impose a permit or user fee upon a state-licensed hazardous waste facility located within its territory, with the intent of using proceeds derived from the fee to defray costs incurred in monitoring the operations of the facility.

The statutory scheme governing the regulation of solid and hazardous waste facilities that was considered in Op. No. 88-053 has been amended by Am. Sub. H.B. 592, 117th Gen. A. (1988) (eff. June 24, 1988). Under the statutory scheme as currently in effect, a hazardous waste facility includes a site or installation used for the storage, treatment, or disposal of hazardous waste. See R.C. 3734.01(J), (N). The word "treatment," used in connection with hazardous waste, includes any method, technique, or process designed to recover energy from the waste. See R.C. 3734.01(K). You have informed my staff that the facility with which you are concerned incinerates hazardous waste as fuel. In accordance with R.C. 3734.01, such a facility constitutes a hazardous waste facility used for the treatment of hazardous waste. R.C. 3734.02(E) provides that, with certain exceptions, "no person shall establish or operate a hazardous waste facility...without a hazardous waste facility installation and operation permit from the hazardous waste facility board," issued in accordance with R.C. 3734.05. R.C. 3734.02(E) also provides for application fees of up to \$1,500, and for annual permit fees, in varying amounts, for different types of storage, disposal, and treatment facilities. Annual permit fees for treatment facilities using incinerators are set at five or ten thousand dollars. See R.C. 3734.02(E). Both the application fees and the annual permit fees are to be credited to the hazardous waste facility management fund created in R.C. 3734.18. R.C. 3734.18 provides that the Ohio Environmental Protection Agency and the Hazardous Waste Facility Board may use moneys from the hazardous waste facility management fund for administration of the hazardous waste program established under R.C. Chapter 3734 and that the Agency "may use and pledge moneys in the fund for repayment of and for interest on any loans made by the Ohio water development authority to the agency for the hazardous waste program established under [R.C. Chapter 3734]." No provision is made for the distribution of such moneys to counties or townships.

R.C. 3734.18 levies fees on the disposal and treatment of hazardous waste, and provides that certain of the moneys so collected are to be allocated to counties and municipalities. R.C. 3734.18 states, in part:

(A) There are hereby levied fees on the disposal of hazardous waste to be collected according to the following schedule at each disposal facility to which the hazardous waste facility board has issued a hazardous waste facility installation and operation permit or the director of environmental protection has issued a renewal permit pursuant to section 3734.05 of the Revised Code:

(1) For disposal facilities that are off-site facilities as defined in division (E) of section 3734.02 of the Revised Code, fees shall be levied at the rate of four dollars and fifty cents per ton for hazardous waste disposed of by deep well injection and nine dollars per ton for hazardous waste disposed of by land application or landfilling....

(2) For disposal facilities that are on-site or satellite facilities, as defined in division (E) of section 3734.02 of the Revised Code, fees shall be levied at the rate of two dollars per ton for hazardous waste disposed of by deep well injection and four dollars per ton for hazardous waste disposed of by land application or landfilling....

(B) *There are hereby levied fees at the rate of two dollars per ton on hazardous waste that is treated at treatment facilities that are*

not on-site or satellite facilities, as defined in division (E) of section 3734.02 of the Revised Code, to which the hazardous waste facility board has issued a hazardous waste facility installation and operation permit or the director of environmental protection has issued a renewal permit, or that are not subject to the hazardous waste facility installation and operation permit requirements under rules adopted by the director.

(C) Notwithstanding the fees specified in divisions (A) and (B) of this section, the fees levied on hazardous wastes generated outside the boundaries of this state that are treated or disposed of at facilities within this state shall be an amount equal to the fee applicable to the waste if it were treated or disposed of in the state where it was generated, whichever is greater.

(D) *There are hereby levied additional fees on the treatment and disposal of hazardous waste at the rate of ten per cent of the applicable fee prescribed in division (A), (B), or (C) of this section for the purposes of paying the costs of municipal corporations and counties for conducting reviews of applications for hazardous waste facility installation and operation permits for proposed new or modified hazardous waste landfills within their boundaries, emergency response actions with respect to releases of hazardous waste from hazardous waste facilities within their boundaries, monitoring the operation of such hazardous waste facilities, and local waste management planning programs.* The owner or operator of a facility located within a municipal corporation shall, as a trustee for the municipal corporation, collect the fees levied by this division and forward them to the treasurer of the municipal corporation or such officer as, by virtue of the charter, has the duties of the treasurer in accordance with the rules adopted under this section. The owner or operator of a facility located in an unincorporated area shall, as a trustee of the county in which the facility is located, collect the fees levied by this division and forward them to the county treasurer of that county in accordance with the rules adopted under this section. The owner or operator shall pay the fees levied by this division to the treasurer or such other officer of the municipal corporation or to the county treasurer each year upon the anniversary of the date his installation and operation permit was issued under division (H) of section 3734.05 of the Revised Code. If payment is late, the owner or operator shall pay an additional ten per cent of the amount of the fee for each month that the payment is late.

Moneys received by a municipal corporation under this division shall be paid into a special fund of the municipal corporation and used exclusively for the purposes of conducting reviews of applications for hazardous waste facility installation and operation permits for new or modified hazardous waste landfills located or proposed within the municipal corporation, conducting emergency response actions with respect to releases of hazardous waste from facilities located within the municipal corporation, monitoring operation of such hazardous waste facilities, and conducting waste management planning programs within the municipal corporation through employees of the municipal corporation or pursuant to contracts entered into with persons or political subdivisions. *Moneys received by a board of county commissioners under this division shall be paid into a special fund of the county and shall be used exclusively for those purposes within the unincorporated area of the county through employees of the county district or pursuant to contracts entered into with persons or political subdivisions.*

(E) *As used in this section, "treatment" or "treated" does not include any method, technique, or process designed to recover energy or material resources from the waste or to render the waste amenable for recovery.* The fees levied by divisions (B) and (C) of this section do not apply to hazardous waste that is treated and disposed of on the same premises or by the same person. (Emphasis added.)

R.C. 3734.18(A) thus levies fees on the disposal of hazardous waste by deep well injection, land application, or landfilling, calculating such fees on the basis of a

certain amount per ton of hazardous waste disposed of. R.C. 3734.18(B) levies fees at the rate of two dollars per ton on hazardous waste that is treated at treatment facilities that are not on-site or satellite facilities. R.C. 3734.18(D) levies additional fees on the treatment and disposal of hazardous waste at the rate of ten percent of the applicable fee and earmarks those additional fees for paying costs incurred by municipal corporations and counties in conducting reviews of applications for hazardous waste facility installation and operation permits for proposed new or modified hazardous waste landfills, conducting emergency response actions with respect to releases of hazardous waste from hazardous waste facilities within their boundaries, monitoring the operation of hazardous waste facilities, and conducting local waste management planning programs. Hazardous waste facilities located in a municipal corporation pay the additional fees to the municipality, which pays them into a special fund to be used for the designated purposes. Hazardous waste facilities located in an unincorporated area pay the additional fees to the county, which pays them into a special fund to be used within the unincorporated area of the county for the designated purposes.

Pursuant to R.C. 3734.18, a county will receive moneys from fees imposed by statute upon certain hazardous waste treatment or disposal facilities located in the unincorporated area of the county. Those moneys may be used for costs of monitoring the facilities. It should, however, be noted that, pursuant to R.C. 3734.18(E), the terms "treatment" and "treated," as used in R.C. 3734.18, do not include "any method, technique, or process designed to recover energy or material resources from the waste or to render the waste amenable for recovery." Further, hazardous waste that is treated and disposed of on the same premises or by the same person is not subject to fees under R.C. 3737.18(B) and (C), but is subject to fees only under R.C. 3734.18(A). The situation with which you are concerned involves a facility that burns hazardous waste as fuel. As discussed above, this activity constitutes a method designed to recover energy from the waste. It is, accordingly, excluded from the payment of a fee under R.C. 3734.18. It follows that, in such a situation, no fees will be levied under R.C. 3734.18 for payment to the municipal corporation or county in which the facility is located. I am aware of no other statutory provision that imposes fees upon a facility of the type that you have described or authorizes a county to establish such fees.

Am. Sub. H.B. 592 did enact provisions that authorize the imposition of fees to be used, *inter alia*, to defray costs incurred by counties or townships as a result of the location of certain solid waste disposal facilities within their boundaries. R.C. 3734.57 contains provisions dealing with several different types of fees. R.C. 3734.57(A) levies fees on the disposal of solid wastes for the purpose of paying various costs incurred by the state in relation to regulating or cleaning up wastes, and provides that proceeds so received shall be credited to the hazardous waste facility management fund, *see* R.C. 3734.18, or the hazardous waste clean-up fund, *see* R.C. 3734.28. Those moneys may be expended only for the statutory purposes established for such funds. Of most direct benefit to counties and townships is R.C. 3734.25, which permits grants of moneys from the hazardous waste clean-up fund to be made to a municipal corporation, county, or township to assist in the costs of closing a solid waste facility that is owned and was operated by the political subdivision and was the disposal site of significant quantities of hazardous waste, or of abating air or water pollution or soil contamination from such a facility. Moneys collected under R.C. 3734.57(A) are not, however, made generally available to counties or townships for costs of monitoring hazardous waste facilities operating within their boundaries.

Under R.C. Chapter 343 and R.C. 3734.50-57, the board of county commissioners of each county is required to either establish and maintain a county solid waste management district or participate in establishing and maintaining a joint solid waste management district. *See* R.C. 343.01; R.C. 3734.52. Each county or joint solid waste management district is required to "prepare, adopt, submit to the director of environmental protection for review and approval, and implement a solid waste management plan for the district." R.C. 3734.54; *see* R.C. 3734.55-56. Each district has a solid waste management policy committee—consisting of county, municipal, township, health district, and public representatives—that is responsible for preparing the plan. *See* R.C. 3734.54.

R.C. 3734.57(B) authorizes the solid waste management policy committee of a county or joint solid waste management district to levy fees upon the disposal of solid wastes at a solid waste facility located within the district, and states as one of the purposes of the fees: "providing financial assistance to the county to defray the added costs of maintaining roads and other public facilities and of providing emergency and other public services resulting from the location and operation of a solid waste facility within the county under the district's approved solid waste management plan." The authority to levy fees that is granted by R.C. 3734.57(B) applies to the solid waste management policy committee of a county or joint solid waste management district, and not to a county as such. Further, it applies only to the disposal of solid wastes at solid waste disposal facilities, and not to hazardous waste facilities. See R.C. 3734.01(E). Accordingly, it does not grant a county authority to impose fees in the situation with which you are concerned.

R.C. 3734.57(C) authorizes townships to levy fees for the purpose of defraying added costs resulting from the location of certain solid waste disposal facilities within their boundaries. R.C. 3734.57 states, in part:

(C) For the purposes of defraying the added costs to a municipal corporation or township for maintaining roads and other public facilities and for providing emergency and other public services, and compensating a municipal corporation or 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 municipal corporation or township under the solid waste management plan or amended plan of the county or joint solid waste management district approved or ordered to be implemented under section 3734.55 or 3734.56 of the Revised Code, a municipal corporation or township in which such a solid waste disposal facility is located may levy a fee of not more than twenty-five cents per ton on the disposal of solid wastes at a solid waste disposal facility located in the district and within the boundaries of the municipal corporation or township regardless of where the wastes were generated.

The legislative authority of a municipal corporation or township may levy fees under this division by enacting an ordinance or adopting a resolution establishing the amount of the fees....

....
(D)...

....
(3) *When solid wastes are burned in a disposal facility that is an incinerator or energy recovery facility, the fees levied under divisions (A)(1) to (3), (B)(1) to (3), and (C) of this section shall be levied upon the disposal of the fly ash and bottom ash remaining after burning of the solid wastes and shall be collected by the owner or operator of the sanitary landfill where the ash is disposed of.*

....
(E) The fees levied under divisions (B)(1) to (3) and (C) of this section shall be collected by the owner or operator of the solid waste disposal facility where the wastes are disposed of as trustee for the county or joint district and municipal corporation or township where the wastes are disposed of. Moneys from the fees levied under divisions (B)(1) to (3) of this section shall be forwarded to the board of county commissioners or board of directors of the district in accordance with rules adopted under division (F) of this section. Moneys from the fees levied under division (C) of this section shall be forwarded to the treasurer or such other officer of the municipal corporation as, by virtue of the charter, has the duties of the treasurer or to the clerk of the township, as appropriate.

Moneys received by the board of county commissioners or board of directors under this division shall be paid to the county treasurer, or other official acting in a similar capacity under a county charter, in a county district or to the county treasurer or other official designated by the board of directors in a joint district and kept in a separate and distinct fund to the credit of the district. If a regional solid waste management authority has been formed under section 343.011 of the

Revised Code, moneys received by the board of trustees of that regional authority under this division shall be kept by the board in a separate and distinct fund to the credit of the district.

Moneys received by the treasurer or such other officer of the municipal corporation shall be paid into the general fund of the municipal corporation. Moneys received by the clerk of the township shall be paid into the general fund of the township. The treasurer or such other officer of the municipal corporation or the clerk, as appropriate, shall maintain separate records of the moneys received from the fees levied under division (C) of this section. (Emphasis added.)

The authority to levy fees that is granted by R.C. 3734.57(C) applies directly to townships, but does not apply to hazardous waste facilities and, hence, does not authorize a township to impose a fee upon a facility that burns hazardous waste as fuel. I am aware of no other statutory provision that grants a township such authority.

It should be noted further that, pursuant to R.C. 3734.57(D)(3), fees imposed under R.C. 3734.57(A), (B), or (C) when solid wastes are incinerated are to be levied upon the disposal of the ash remaining after burning of the solid wastes, and not upon the wastes that are incinerated. Such fees are, accordingly, not applicable to the burning of the wastes as fuel.

As discussed in the *Fondessy* case, municipal corporations are, by Ohio Const. art. XVIII, §3, granted the authority "to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Counties and townships have no such general grant of authority under the Ohio Constitution. See Ohio Const. art. X; see also note 2, *supra*. Their power to regulate activities within their boundaries, and to charge fees to defray the costs of such regulation, is dependent upon statutory provisions granting them such power. See, e.g., *Yorkavitz v. Board of Township Trustees*, 166 Ohio St. 349, 351, 142 N.E.2d 655, 656 (1957) ("the townships of Ohio have no inherent or constitutionally granted police power....Whatever police...power townships of Ohio have is that delegated by the General Assembly..."); *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (a board of county commissioners possesses only such power as is conferred by statute); 1988 Op. Att'y Gen. No. 88-018; 1987 Op. Att'y Gen. No. 87-048; 1985 Op. Att'y Gen. No. 85-058 (modified on other grounds by 1988 Op. Att'y Gen. No. 88-009). I am aware of no statute that, either expressly or by implication, authorizes a county or township to enact a permit or user fee in the situation with which you are concerned. Further, the existence of a detailed statutory scheme for state regulation of solid and hazardous waste treatment and disposal—including express provision for instances in which fees may be assessed by or shared with local governmental entities—suggests that the General Assembly intended to address all matters of fee imposition and allocation for solid and hazardous waste treatment and disposal in such provisions. In the absence of statutory provisions authorizing townships or counties to impose fees in other circumstances, I must conclude that such authority does not exist.

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

1. Pursuant to R.C. 3734.05(E)(3), as construed in *Fondessy Enterprises, Inc. v. City of Oregon*, 23 Ohio St. 3d 213, 492 N.E.2d 797 (1986), a county or township may adopt or enforce a provision that affects a state-licensed hazardous waste facility, provided that the provision does not alter, impair, or limit the operation of the state-licensed hazardous waste facility and that the county or township has statutory authority to adopt or enforce the provision.
2. R.C. 3734.18 levies fees on the disposal and treatment of hazardous waste, and levies additional fees to be paid to the municipal corporation or county in which a hazardous waste facility is located, but does not levy such fees when hazardous waste is incinerated as fuel.

3. R.C. 3734.57(B) authorizes the solid waste management policy committee of a county or joint solid waste management district to levy fees upon the disposal of solid wastes at a solid waste disposal facility located in the district and permits the expenditure of such fees to defray certain costs incurred by a county, but does not apply to hazardous waste facilities.
4. R.C. 3734.57(C) authorizes a township to levy a fee on the disposal of solid wastes at a solid waste disposal facility located within its boundaries, but does not apply to hazardous waste facilities.
5. Counties and townships have no authority to impose a permit or user fee upon a facility that incinerates hazardous waste as fuel pursuant to a permit issued by the Hazardous Waste Facility Board under R.C. Chapter 3734.