

**OPINION NO. 92-063**

**Syllabus:**

1. Absent authority based on statute, a board of township trustees is not empowered to take action to improve, or to prevent injury to, the "quality of life" of residents of the township. (1988 Op. Att'y Gen. No. 88-088, approved and followed.)
2. No statute, either expressly or by necessary implication, authorizes a board of township trustees to expend township

money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township; therefore, a board of township trustees is not empowered to take such action.

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**To: Mathias H. Heck, Jr., Montgomery County Prosecuting Attorney, Dayton, Ohio**

**By: Lee Fisher, Attorney General, December 29, 1992**

You have asked whether the Board of Trustees of Madison Township may expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business would have any harmful effects on the aquifer or the population of the township. The township in question includes both an incorporated area (the City of Trotwood) and an unincorporated area. Near the township, in the City of Dayton, is a parcel of land on which a particular business may be relocated. There are concerns that the operations of this business may cause an environmental or health risk to the population of the surrounding area; the specific concern is that damage may be done to the aquifer and, consequently, to the water supply.

#### **Townships Have Only the Authority Granted by Statute**

A board of township trustees is created by statute and has only the powers that are granted by statute, either expressly or by necessary implication. *See, e.g., Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875) ("[township] trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them"). Like other statutorily-created entities, a board of township trustees may expend money only upon a clear and distinct grant of statutory authority. *See, e.g., State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 134 N.E. 655 (1921). The test for determining whether a township may take particular action has been expressed by the Ohio Supreme Court, as follows: "[T]he question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred upon them by law." *State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630, 632 (1952).

A board of township trustees has express authority to hire experts for certain specified purposes. *See, e.g., R.C. 9.36* (a board of township trustees may contract for the services of fiscal and management consultants to aid it in the execution of its powers and duties); *R.C. 503.01* (a board of township trustees may employ competent appraisers to advise it of the value of real property that it owns or proposes to acquire, or expert witnesses to testify to the value of real property in an appropriation proceeding). The board of township trustees also has authority over certain aspects of the well-being of its residents. *See, e.g., R.C. 505.12* and *505.27* (a board of township trustees may provide for solid waste facilities; the site must be approved by the board of health, and other approvals may be required); *R.C. 505.17* (a board of township trustees may regulate engine noise and vehicle parking); *R.C. 505.37* (a board of township trustees "may establish all necessary rules to guard against the occurrence of fires and to protect the property and lives of the citizens against damage and accidents" and may provide firefighting equipment and water supply); *R.C. 505.75* (a board of township trustees may adopt and enforce a building code for single-family, two-family, and three-family dwellings); *R.C. 505.86* (a board of township trustees may provide for the removal or repair of buildings that have been declared unsafe); *R.C. 505.87* (a board of township trustees may provide for the abatement or removal of vegetation, garbage, refuse, and other debris from land in the township if the debris constitutes a nuisance). There is, however, no statute that either expressly or by necessary implication authorizes a board of

township trustees in the circumstances you have described to hire a hydro-geologist to study the possible impact of the siting of a business in a location outside the township.

R.C. 3745.08 does authorize an officer of a political subdivision of the state, acting in his representative capacity, to file with the Director of Environmental Protection a verified complaint:

alleging that another person has violated, is violating, or will violate any law, rule, standard, or order relating to air pollution, water pollution, solid waste, infectious wastes, construction and demolition debris, public water supply, or hazardous waste, or, if the person is in possession of a valid license, permit, variance, or plan approval relating to air pollution, water pollution, solid waste, infectious wastes, construction and demolition debris, public water supply, or hazardous waste, that the person has violated, is violating, or will violate the conditions of the license, permit, variance, or plan approval.

R.C. 3745.08(A). The issue raised by a verified complaint is not whether harmful effects may occur, but whether there is any violation of a law, rule, standard, order, license, permit, variance, or plan approval. A township trustee may submit a verified complaint pursuant to R.C. 3745.08. The verified complaint provisions do not, however, grant a township the authority to hire an expert for the purpose of supporting the allegations in a verified complaint. Rather, the responsibility for carrying out an investigation to determine whether a violation has occurred, is occurring, or will occur is placed upon the Director of Environmental Protection. *See* R.C. 3745.08.<sup>1</sup> *See generally, e.g.,* R.C. 6109.11, 6111.05.

#### **Townships Do Not Have General Authority Over the Health and Welfare of Their Residents**

In the instant case, the facility in question is subject to regulation by the Ohio Environmental Protection Agency. *See, e.g.,* R.C. Chapter 3734. Various other entities have authority to regulate facilities that may cause harmful health effects or have a deleterious effect on ground water. *See, e.g.,* Ohio Const. art. XVIII, §3 (municipal corporations); R.C. Chapter 3707 and 3709 (boards of health). *See generally, e.g.,* R.C. Chapter 3767 (abatement of nuisances); R.C. Chapter 6103 (a county's authority over public water supply); R.C. Chapter 6109 (the Ohio Environmental Protection Agency's authority over public water systems); R.C. Chapter 6111 (the Ohio Environmental Protection Agency's authority over water pollution control). The General Assembly has not, however, seen fit to grant a township general authority over the health and welfare of its residents. *See, e.g.,* 1991 Op. Att'y Gen. No. 91-070.

In 1988 Op. Att'y Gen. No. 88-088, my predecessor considered whether a board of township trustees may "properly expend township funds to contest proposed actions which they deem to be of significant interest to the residents of the township, or which they consider to be contrary to the 'quality of life' within the township, notwithstanding an apparent lack of express statutory authority for the trustees to so act." Op. No. 88-088, at 2-421. That opinion concludes that a board

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<sup>1</sup> If a hearing is held on a verified complaint, the Ohio Environmental Protection Agency and the alleged violator are required to be parties. The person who filed the verified complaint may also participate as a party. R.C. 3745.08. Whether a township may hire experts if it chooses to participate in such a hearing is not under consideration in this opinion. *See generally* 5 Ohio Admin. Code Chapters 3745-47 and 3745-49.

of township trustees is not empowered to take such action, whether the activity with which it is concerned occurs within or outside the township, unless there is authority based on statute. I concur in the analysis contained in that opinion.

As discussed above, there is no statute that either expressly, or by necessary implication, authorizes a board of township trustees to expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township. It follows that a board of township trustees is not empowered to take such action.<sup>2</sup>

### Conclusion

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

1. Absent authority based on statute, a board of township trustees is not empowered to take action to improve, or to prevent injury to, the "quality of life" of residents of the township. (1988 Op. Att'y Gen. No. 88-088, approved and followed.)
2. No statute, either expressly or by necessary implication, authorizes a board of township trustees to expend township money to hire a hydro-geologist to do testing outside the boundaries of the township to determine whether the relocation of a business to a site outside the township would have any harmful effects on the aquifer or the population of the township; therefore, a board of township trustees is not empowered to take such action.

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<sup>2</sup> Since the issuance of 1988 Op. Att'y Gen. No. 88-088, the General Assembly has enacted R.C. Chapter 504, which permits a township, by the vote of its electors, to adopt "the limited self-government form of township government," under which a township exercises limited powers of local self-government and limited police powers. *See* R.C. 504.01. The township in question has not adopted the limited self-government form of township government, and this opinion does not address the question whether the additional authority available under R.C. Chapter 504 would permit a township that has adopted the limited self-government form of government to take the action in question. *See, e.g.*, R.C. 504.04.