

OPINION NO. 2005-013**Syllabus:**

An easement granted by a board of township trustees to a county under R.C. 6117.39 for the construction of new sewer lines on property owned and used as greenspace by the township may include a provision requiring the county to reforest the property when the construction is completed.

To: Frederick O. Kiel, Anderson Township Law Director, Anderson Township, Ohio
By: Jim Petro, Attorney General, March 31, 2005

You have requested an opinion whether an easement granted by a board of township trustees to a county for the construction of new sewer lines on property owned and used as greenspace by the township may include a provision requiring the county to reforest the

property when the construction is completed.¹ Based on the following, an easement granted by a township to a county under R.C. 6117.39 for the construction of new sewer lines on township property may include such a condition.

You have informed us that the board of township trustees has levied a tax under R.C. 5705.19(HH) for the purpose of providing greenspace within the township.² The board has used the proceeds of this tax to acquire an ownership interest in property throughout the township for greenspace purposes.³

On several occasions, the county has sought to acquire easements for the construc-

¹ You also have asked whether a city that operates and manages for the county a sewer district established under R.C. Chapter 6117 may agree to have the county provide or pay for the reforestation of the township's property as the sole consideration for the board of township trustees granting an easement for the construction of new sewer lines on township property. As a township law director, you have no duty to provide legal advice to city or county officials. *See* R.C. 309.09; R.C. 504.15; R.C. 733.51. *See generally* 1988 Op. Att'y Gen. No. 88-008 at 2-25 (the Attorney General may advise statutory clients only to the extent of their duties). *See generally also* 2004 Op. Att'y Gen. No. 2004-032 at 2-290 ("a county prosecuting attorney has only the powers granted by statute and has no power to enlarge the scope of the duties of the office by providing legal services without statutory authority").

Further, as stated in 1983 Op. Att'y Gen. No. 83-087 at 2-342, the Attorney General is "without authority to render an opinion interpreting a particular agreement or contract. The determination of particular parties' rights is a matter which falls within the jurisdiction of the judiciary." *Accord* 1988 Op. Att'y Gen. No. 88-076 at 2-371. We are thus unable by means of a formal opinion to determine whether the contract between the city and county for the operation and management of the sewer district authorizes the city to agree to have the county reforest township property when the construction of the new sewer lines is completed and whether the county's reforestation of the property is sufficient consideration for an easement to construct new sewer lines on township property. Therefore, in light of the foregoing restrictions on the opinion-rendering function, we must respectfully decline answering your second question.

² R.C. 5705.19(HH) authorizes a board of township trustees to levy a tax in excess of the ten-mill limitation for the following purpose:

For a board of township trustees to acquire, other than by appropriation, an ownership interest in land, water, or wetlands, or to restore or maintain land, water, or wetlands in which the board has an ownership interest, not for purposes of recreation, but for the purposes of protecting and preserving the natural, scenic, open, or wooded condition of the land, water, or wetlands against modification or encroachment resulting from occupation, development, or other use, which may be styled as protecting or preserving "greenspace" in the resolution, notice of election, or ballot form[.]

³ R.C. 505.26, which authorizes a board of township trustees to purchase real property, provides, in part:

tion of new sewer lines on property owned and used as greenspace by the township.⁴ As explained in your letter, “[w]hen construction to be performed within a proposed easement will destroy trees, it has been the Township’s policy to condition its grant of the easement upon reforestation of the affected area ..., without requiring any cash compensation.” The county “has now taken the position that it will no longer agree to reforestation provisions in sewer easements, but will instead offer to pay the Township only the appraised value of the

The board of township trustees, not for purposes of recreation, but for the purposes of protecting and preserving the natural, scenic, open, or wooded condition of land, water, or wetlands against modification or encroachment resulting from occupation, development, or other use, may acquire, other than by appropriation, an ownership interest in land, water, or wetlands, and may restore and maintain land, water, or wetlands in which it has such an interest.

⁴ The board of county commissioners has established a county sewer district under R.C. Chapter 6117 for the purpose of constructing and maintaining sewer lines within the township. *See* R.C. 6117.01(B) (authorizing a board of county commissioners to establish one or more sewer districts within the unincorporated territory of the county); R.C. 6117.03 (authorizing a board of county commissioners to establish “one or more sewer districts within its county to include a part or all of the territory within [a] municipal corporation as the whole or a part of such district”). A city operates and manages the sewer district for the county. *See generally* R.C. 6117.01(B) (a board of county commissioners may provide for the protection of the sanitary and drainage facilities of a sewer district established under R.C. Chapter 6117 and may negotiate and enter into a contract with a city for the management, maintenance, operation, and repair of any of the facilities on behalf of the county upon the terms and conditions that may be agreed upon with the city and that may be determined by the board to be in the best interests of the county).

A sewer district established under R.C. Chapter 6117 “is not an entity or district independent of a county.” 1984 Op. Att’y Gen. No. 84-085 at 2-293. Instead, such a district is “governed by the board of county commissioners as part of the board’s duties as the governing authority of the county.” *Id.* Thus, any action undertaken by a city in operating or managing the sewer district is done on behalf of the county. *See* R.C. 6117.01(B) (a board of county commissioners may enter into a contract with a city whereby the city manages and operates “the facilities [of a sewer district] on behalf of the county”); R.C. 6117.05(A) (“[w]henever any portion of a sewer district is incorporated as, or annexed to, a municipal corporation, the area so incorporated or annexed shall remain under the jurisdiction of the board of county commissioners for purposes of the acquisition and construction of sanitary and drainage facility improvements until all of those improvements for the area for which a resolution described in [R.C. 6117.06(A) or R.C. 6117.06(E)] has been adopted by the board have been acquired or completed or until the board has abandoned the improvements. The board, unless and until a conveyance is made to a municipal corporation in accordance with [R.C. 6117.05(B)], shall continue to have jurisdiction in the area so incorporated or annexed with respect to the management, maintenance, and operation of all sanitary and drainage facilities so acquired or completed, or previously acquired or completed, including the right to establish rules and rates and charges for the use of, and connections to, the facilities”).

easement, calculated without regard to the value of the trees or the cost of reforestation by a contractor hired by the Township.’⁵

The authority for a board of county commissioners to purchase an interest in property for the construction of new sewer lines is set forth in R.C. 6117.39, which provides, in part, as follows:

Whenever, in the opinion of the board of county commissioners, it is necessary to acquire real estate or any interest in real estate for the acquisition, construction, maintenance, or operation of any sewer, drainage, or other improvement authorized by [R.C. Chapter 6117], or to acquire the right to construct, maintain, and operate the sewer, drainage, or other improvement in and upon any property within or outside of a county sewer district, it may purchase the real estate, interest in real estate, or right by negotiation.

R.C. 6117.39 thus authorizes a board of county commissioners to purchase an easement or other interest in real estate from a landowner for the purpose of constructing new sewer lines on the landowner’s property.⁶

⁵ We note that, if the construction of the new sewer lines on township property is to be done within a public highway or roadway easement or right-of-way, the county could argue that the county is not required to compensate the township for the removal of any trees during the construction of the new sewer lines. *See generally Romohr v. Frank*, 20 Ohio Misc. 2d 4, 485 N.E.2d 841 (C.P. Clermont County 1984) (the construction or installation of sewage pipelines is a permissible highway easement purpose that does not constitute an added burden upon the servient estate in fee of the landowner for which the landowner would be entitled to compensation for a permanent taking); 2001 Op. Att’y Gen. No. 2001-003 (syllabus, paragraph two) (“[t]he removal of trees or other vegetation from a county or township road by a county engineer or board of township trustees in accordance with R.C. 5543.14 is part of the public’s easement or right-of-way created when the county or township road was established, and, therefore, does not constitute a taking of any property rights remaining in the abutting landowners within the meaning of Ohio Const. art. I, § 19 or U.S. Const. amend. V. Accordingly, a county engineer or board of township trustees may take those actions authorized by R.C. 5543.14 without first obtaining the consent of, or compensating, the abutting landowners”). *But see generally* 1965 Op. Att’y Gen. No. 65-22 (syllabus, paragraph one) (“[w]ater lines and sanitary sewer lines cannot be considered as a part of an easement for highway purposes and such lines cannot be placed within a highway right-of-way without a separate easement from the owners of the fee”). It is assumed, however, for the purpose of this opinion, that the construction of the new sewer lines on township property will not take place within a public highway or roadway easement or right-of-way.

⁶ R.C. 6117.39 further provides that, if the board of county commissioners and the “owner of the real estate, interest in real estate, or right are unable to agree upon its purchase and sale, or the amount of damages to be awarded for it, the board may appropriate the real estate, interest, or right in accordance with [R.C. 163.01-.22].” This opinion does not consider whether the county may appropriate the right to construct new sewer lines on town-

Although a board of township trustees does not have specific statutory authorization to convey a lesser interest than a fee in township property, 1980 Op. Att’y Gen. No. 80-028 at 2-115, it is firmly recognized that, absent a statute to the contrary, the board’s power to “receive and hold real estate by devise or deed,” R.C. 503.01, implies the power to alienate a lesser interest than a fee in township property. *See, e.g.*, 1980 Op. Att’y Gen. No. 80-028 (syllabus, paragraph one) (“[a] board of township trustees has the implied power to alienate, by lease, real property owned by the township and determined by the trustees not to be needed for current public use”); 1941 Op. Att’y Gen. No. 3802, p. 393 (township may lease land; however, a lease for 99 years is unquestionably unreasonable); 1935 Op. Att’y Gen. No. 4312, vol. I, p. 650 (township may grant easements or right-of-way over township property, and need not conduct auction therefor). *See generally Reynolds v. Comm’rs of Stark County*, 5 Ohio 204 (1831) (where real estate is vested absolutely in county commissioners, they may dispose of it in the same manner as could individuals); *Minamax Gas Co. v. State ex rel. McCurdy*, 33 Ohio App. 501, 507-08, 170 N.E. 33 (Scioto County 1929) (the power to hold property includes the power to dispose of such property, as appropriate). No statute prohibits a board of township trustees from granting easements for the construction of sewer lines on township property used for greenspace. Accordingly, a board of township trustees may grant an easement to the county for the construction of new sewer lines on property owned and used as greenspace by the township.

An easement is an interest in real property which is generally defined as a right to use the land of another for a specified purpose. *Ross v. Franko*, 139 Ohio St. 395, 397, 40 N.E.2d 664 (1942); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line*, 138 Ohio App. 3d 57, 66, 740 N.E.2d 328 (Hocking County 2000); 1990 Op. Att’y Gen. No. 90-066 at 2-277; *Black’s Law Dictionary* 527 (7th ed. 1999). The nature and extent of an easement created by express grant are determined by the words used in the instrument creating the easement. *Lowe v. Redgate*, 42 Ohio St. 329, 339 (1884); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line*, 138 Ohio App. 3d at 66, 740 N.E.2d 328; *Murray v. Lyon*, 95 Ohio App. 3d 215, 219, 642 N.E.2d 41 (1994); 1990 Op. Att’y Gen. No. 90-066 at 2-279. *See generally* 1949 Op. Att’y Gen. No. 925, p. 559, at 560 (“[t]he purchaser’s title to a [township cemetery] lot being an easement, its extent may be restricted by the express terms of the instrument creating it, and restrictions upon an easement imposed by the instrument creating the easement are binding upon a transferee of the dominant tenement”).

In your particular situation, you have informed us that the township grants the county easements for the construction of new sewer lines on township property pursuant to agreements. It is a well-established rule that the agreements of a governmental entity, unless limited by positive provisions of a statute, are governed by the same principles as apply to

ship property under R.C. 6117.39. *See generally Village of Richmond Heights v. Bd. of County Comm’rs*, 112 Ohio App. 272, 280, 166 N.E.2d 143 (Cuyahoga County 1960) (“[a]s a general rule, property already devoted to a public use cannot be taken for another public use which will totally destroy or materially impair or interfere with the former use, unless the intention of the Legislature that it should be so taken has been manifested in express terms or by necessary implication, mere general authority to exercise the power of eminent domain being in such case insufficient regardless of whether the property was acquired by condemnation or purchase”), *appeal dismissed*, 171 Ohio St. 449, 172 N.E.2d 133 (1961).

agreements between individuals. *Phelps v. Logan Natural Gas & Fuel Co.*, 101 Ohio St. 144, 148, 128 N.E. 58 (1920); accord 1988 Op. Att’y Gen. No. 88-076 at 2-371; see 1989 Op. Att’y Gen. No. 89-033 at 2-155. Because no statute prohibits a board of township trustees from inserting conditions into its agreements, the general rule that the power to enter into an agreement necessarily includes the authority to insert reasonable terms within the agreement applies in this situation. See 1983 Op. Att’y Gen. No. 83-069 at 2-287; 1980 Op. Att’y Gen. No. 80-028; 1977 Op. Att’y Gen. No. 77-048 at 2-170; see also 1987 Op. Att’y Gen. No. 87-014 at 2-90 and 2-91. See generally 1986 Op. Att’y Gen. No. 86-046 at 2-245 (the authority granted to a state university to negotiate and enter into contracts of employment with faculty members “includes the power to negotiate and set the terms and conditions of faculty members’ employment contracts”); 1929 Op. Att’y Gen. No. 329, vol. I, p. 515 (syllabus) (“[t]he trustees of a township are authorized to accept a conveyance of a right of way and easement in, on, upon and across the lands of another for use as a driveway in connection with the conduct of a township cemetery, although in the deed by which such easement is conveyed to the township trustees, there is inserted the condition or reservation that said driveway shall be used for cemetery purposes only, and that if the trustees shall fail to perform the conditions imposed upon them by the conveyance the grant of said easement shall be void and no longer binding”).

As explained above, a board of township trustees has the authority to grant an easement to the county for the construction of new sewer lines on property owned and used as greenspace by the township. In order to accomplish this, the board must have the related authority to enter into an agreement to convey the easement to the county. See generally *Fed. Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 541, 118 N.E. 103 (1917) (a public officer or body “is naturally and necessarily vested with a wide discretion to do such incidental things as are reasonably and manifestly” in the public’s interests to perform the act, provided such things are not prohibited by statute), *appeal dismissed*, 248 U.S. 547 (1919); *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138 (1915) (an officer who is required to perform a duty “has implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded; otherwise, full directions would have been given the officer or the duty would not have been imposed upon him”), *aff’d*, 241 U.S. 565 (1916); 1928 Op. Att’y Gen. No. 2955, vol. IV, p. 2736, at 2740 (finding implied authority for a township to obtain fire services by contract with a neighboring municipal corporation and stating: “The delegation of a power to accomplish a certain end, necessarily carries with it the power to do all things necessary to consummate that purpose”). See generally also 1983 Op. Att’y Gen. No. 83-064 at 2-269 (“since by statute the joint boards of county commissioners may engage in real estate transactions and construction agreements in order to organize and build a multicounty detention and treatment facility, the joint boards must necessarily and reasonably have the ability to employ legal counsel to advise them with respect to such matters” (citations omitted)).

Because a board of township trustees has the power to negotiate and enter into an agreement granting an easement to the county for the construction of new sewer lines on property owned and used as greenspace by the township, it reasonably follows that the board has the corresponding authority to include in that agreement a provision requiring the county to reforest the property when the construction is completed. See generally 1990 Op. Att’y Gen. No. 90-066 at 2-280 (“the authority to determine the tenure and conditions on which a

lot in a municipal and township cemetery shall be held rests with the boards of township trustees and legislative authorities of the municipal corporations. Therefore, it is within the authority of the boards of trustees and the legislative authorities of municipal corporations to establish the nature of the easement which is conveyed in the sale of a lot in a municipal and township cemetery”); 1980 Op. Att’y Gen. No. 80-043 (syllabus, paragraph four) (“[a] board of township trustees may, when granting permission for the installation of facilities in township roads pursuant to R.C. 1723.02, R.C. 4933.01, R.C. 4951.12, or R.C. 5571.16, impose upon any company installing facilities pursuant to one of these sections any restrictions reasonably necessary for the restoration of the road right-of-way and maintenance of the facilities installed”); 1949 Op. Att’y Gen. No. 925, p. 559, at 561 (a restriction set forth in a deed for a township cemetery lot “would seem to place a restriction upon the use of said lots and this restriction is binding upon the purchaser”).

As a final matter, in your letter you state that the county believes that R.C. 6115.30 supports its position that the county is not required to provide or pay for the reforestation of township property on which a new sewer line is constructed. Instead, pursuant to this statute, the county is required to pay only the costs of the easement to the sewer district.

R.C. 6115.30 provides that a board of appraisers of a sanitary district “shall appraise the damages sustained and the value of the land and other property necessary to be taken by the district for which settlement has not been made by *the board of directors of the sanitary district.*” (Emphasis added.) In addition, R.C. 6115.30 states:

Before appraisals of compensation and damages are made, the board of directors may report to the board of appraisers the parcels of land or other property it wishes to purchase, and for which it wishes appraisals to be made, both for easement and for purchase in fee simple. The board of directors may, if it deems best, specify in case of any property the particular purpose for which and the extent to which an easement in the same is desired, describing definitely such purpose and extent.... Wherever instructed to do so by the board of directors, the board of appraisers shall appraise lands or other property, within or without the district, which it is necessary or desirable for the district to own, and when instructed by the board of directors to do so, the board of appraisers shall appraise both the total value of the land, and also the damages due to an easement for the purposes of the district. When such appraisals are confirmed by the court, the board of directors has the option of paying the entire appraised value of the property and acquiring full title to it in fee simple, or of paying only the costs of such easement for the purposes of the district.

A review of R.C. 6115.30 discloses that its application is limited to the acquisition of property and easements by a board of directors of a sanitary district established pursuant to R.C. 6115.10. *See generally* R.C. 6115.01(F) (as used in R.C. 6115.01-.79, “[b]oard of directors’ applies to the duties of one director appointed in accordance with [R.C. 6115.10] in a district lying wholly within one county”). The statute does not make any reference to a board of county commissioners or to sewer districts established under R.C. Chapter 6117. Thus, R.C. 6115.30 does not govern the manner by which a board of county commissioners may acquire property or an interest in property for a sewer district established under R.C. Chapter 6117.

Moreover, R.C. 6117.39 sets forth the specific manner by which a board of county commissioners may acquire property or an interest in property for a sewer district established under R.C. Chapter 6117. R.C. 6117.39 states that, “[w]henever ... it is necessary to acquire real estate or any interest in real estate for the acquisition, construction, maintenance, or operation of any sewer, drainage, or other improvement authorized by [R.C. Chapter 6117] ... it may purchase the real estate, interest in real estate, or right by negotiation.” (Emphasis added.) R.C. 6117.39 further provides that, if the board fails to acquire the real estate, interest in real estate, or right through negotiation, “the board may appropriate the real estate, interest, or right in accordance with [R.C. 163.01-.22].”

“It is one of the well recognized canons of statutory construction that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner.” 1984 Op. Att’y Gen. No. 84-050 at 2-168; *accord Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493 (1951). Because the General Assembly, through R.C. 6117.39, has specified the manner by which a board of county commissioners may acquire property or an interest in property for the construction of sewer lines by a sewer district established under R.C. Chapter 6117, the board may not acquire property or an interest in property by paying the entire appraised value of the property or by paying only the costs of the interest in the property for the purposes of the sewer district, as provided in R.C. 6115.30. Therefore, R.C. 6115.30 does not authorize a county to acquire an easement for the construction of new sewer lines on township property by paying the township only the costs of the easement to the sewer district.

In conclusion, it is my opinion, and you are hereby advised that an easement granted by a board of township trustees to a county under R.C. 6117.39 for the construction of new sewer lines on property owned and used as greenspace by the township may include a provision requiring the county to reforest the property when the construction is completed.