

OPINION NO. 88-088**Syllabus:**

1. Absent authority based on statute, a board of township trustees is not empowered to contest proposed actions that are of significant interest to the residents of the township or which the residents consider contrary to the "quality of life," whether those actions occur within or outside of the township.
2. A county prosecutor acting pursuant to R.C. 309.09 may represent a board of township trustees only when the board of township trustees is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
3. Additional legal counsel permitted by R.C. 309.09 may be employed to represent a board of township trustees only when the board is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
4. A board of township trustees may disburse township funds only by clear authority of law.
5. Absent authority based on statute, a board of township trustees is not empowered to contribute township funds to private groups opposing actions which may affect the township or its residents.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1988

I have before me your request for my opinion, concerning the expenditure of public funds by boards of township trustees. Your letter indicates concerns about expenditures for attorney fees, litigation costs, and contributions to private groups opposing proposed actions which may adversely affect a township's residents. Specifically, you ask:

May a board of township trustees 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?

You have also questioned whether such expenditures are permitted if the objectionable proposed activity lies outside of the township even though it may affect township residents.

A board of township trustees may exercise only those powers granted by the General Assembly. Powers not expressly conferred may be exercised only if they are necessarily implied from a statutorily granted power. The Ohio Supreme Court has articulated the rule:

It is settled that neither the township nor its trustees are invested with the general powers of a corporation; and hence the 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.

Trustees of New London Township v. Miner, 26 Ohio St. 452, 456 (1875). See also *Hopple v. Trustees of Brown Township*, 13 Ohio St. 311 (1862); 1981 Op. Att'y Gen. No. 81-103. The Ohio Supreme Court has also succinctly framed the proper inquiry to be considered when there is no statutory prohibition against an act, as: "[T]ownships are creatures of the law and have only such authority as is conferred upon them by law. Therefore, the 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).

Townships in Ohio have been specifically empowered to participate in litigation. R.C. 503.01 states, in pertinent part: "Each civil township is a body politic and corporate, for the purpose of enjoying and exercising the rights and privileges conferred upon it by law. It may sue and be sued, plead and be impleaded...." It is thus clear that a township has a general power to sue. The general power to sue, however, is necessarily limited to those matters arising from the statutorily expressed or implied scope of authority of the board of township trustees. The Ohio Supreme Court has addressed the power of a board of township trustees to litigate a township "quality of life" issue in a case involving a petition for annexation of territory in the township to an adjacent municipal corporation. *In Re Appeal of Bass Lake Community, Inc.*, 5 Ohio St. 3d 141, 449 N.E.2d 771 (1983). The primary relevant statute authorizing litigation was R.C. 505.62, which at that time read:

A board of township trustees may enter into a contract with, and appropriate township general revenue fund moneys for the services of, an attorney to represent the township at annexation hearings before the board of county commissioners and upon any appeal of the board's decision pursuant to section 709.07 of the Revised Code.

The board of township trustees sought to participate in an appeal brought pursuant to R.C. Chapter 2506 (final decision of any agency of any political subdivision is subject to appeal to court of common pleas) by landowners whose annexation petition had been denied. The board of trustees opposed reversal of the denial of the petition. The court held that the township lacked standing to participate in the appeal and noted that it lacked authority to use legal counsel for such an appeal since no such authority was granted by statute. The court stated:

The language of this section [R.C. 505.62] clearly provides that the use of an attorney to represent the township upon an appeal is permitted solely when the appeal is pursuant to R.C. 709.07. That is not the present case. Appellee's appeal was taken under the authority of R.C. Chapter 2506, not as an R.C. 709.07 proceeding.

5 Ohio St. 3d at 143, 449 N.E.2d at 774. The court found that the general authority of R.C. Chapter 2506 was not sufficient to authorize the township to join in the appeal. The finding of a lack of authority to pursue an appeal is consistent with the *Ayres* test of determining whether townships have authority conferred upon them by law.

The conclusion that the general power of a township to litigate is necessarily limited to those matters arising from its statutorily expressed or implied scope of authority is further compelled by the restriction on a township limiting use of legal counsel to matters in which the township's participation is authorized. The legal adviser and counsel for a township is the county prosecuting attorney. That duty, as well as authority for additional counsel, is contained in the express provisions of R.C. 309.09(A), which in relevant part, states:

Such prosecuting attorney shall be the legal adviser for all township officers. When the board of township trustees deems it

advisable or necessary to have additional legal counsel it may employ an attorney other than the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers in their official capacities and to advise them on legal matters. No such counsel or attorney may be employed, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund.

See also, e.g., R.C. 505.62 (containing statutory authority for obtaining legal counsel for specific legal concerns, specifically annexation). The duty of the county prosecuting attorney and the authority of a board of township trustees to hire additional legal counsel, however, is dependent upon the existence of the authority of the board of township trustees to participate in a legal controversy. 1988 Op. Att'y Gen. No. 88-066; 1966 Op. Att'y Gen. 66-061. The conclusion reached in Op. No. 66-061, at 2-101, was that

the trustees must have a duty to act themselves before they can properly retain special counsel to perform services relative to a controversy. In other words, in order for special counsel properly to be employed pursuant to [R.C.] Section 309.09, ...his duties on behalf of the trustees directly must be related to and within the scope of "official capacity" of the board of trustees contemplated by that section. The *Miner* case [*Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875)]...limits such activities to those specifically granted [and] those necessarily implied from statute.

Op. No. 88-066 cited Op. No. 66-061 favorably and extended its application to prosecuting attorneys under R.C. 309.09 by stating:

In Op. No. 66-061 it was concluded that there was no authority for a board of township trustees to participate in an annexation proceeding. Implicit in that conclusion is the corollary rule that since the board had no authority to participate, the prosecuting attorney had no duty to represent the board.

See also 1985 Op. Att'y Gen. No. 85-014 at 2-57 (citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981)) ("a prosecuting attorney has a duty to provide representation to a county officer whenever that officer, in his official capacity, requires legal representation"); 1955 Op. Att'y Gen. No. 4734, p. 29, at 31 ("a board of education may employ counsel to represent it in any proceeding in which the board has a legitimate interest").

A review of the relevant Revised Code chapters reveals no express authority for township trustees to contest proposed actions on the basis that such actions are deemed to be of significant interest to township residents or are considered by residents or the trustees to be contrary to the "quality of life" within the township. Numerous statutes do, however, authorize township involvement in particular types of situations that may negatively affect the quality of life. For example, R.C. 519.24 expressly authorizes a board of township trustees to institute injunction, mandamus, abatement, or any other appropriate action to remedy a prospective or existing violation of the township zoning code. R.C. 3745.08 authorizes a township trustee, as "[a]n officer...of a political subdivision, acting in his representative capacity" to file a verified complaint with the Ohio Director of Environmental Protection regarding violation or threatened violation of antipollution laws, rules and standards, as well as conditions of licenses, permits, and variances. *See also, e.g.,* R.C. 505.85 (disposal of abandoned motor vehicles); R.C. 505.87 (abatement of nuisances including vegetation, garbage, refuse and debris); R.C. 505.86 (removal of unsafe buildings); R.C. 505.79 (collection of leaves); R.C. 505.17 (engine noise and parking regulations); R.C. 505.171 (drive-in theatre screen regulations); R.C. Chapter 519 (township zoning). The presence of express authority to litigate in specific instances indicates that in the absence of specific authority in other instances there is no authority to litigate. The rule of *expressio unius est exclusio alterius*, or the naming of a specific thing implies the exclusion of those not named, properly applies to the authority of a township to litigate because of the restriction on township powers enunciated by *Miner*, 26 Ohio St. 452 (1875); *Hopple*, 13 Ohio

St. 311 (1862); and *Ayres*, 158 Ohio St. 30, 106 N.E.2d 630 (1952). See generally *Craftsman Type Inc. v. Lindley*, 6 Ohio St. 3d 82, 451 N.E.2d 768 (1983); *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 126 N.E.2d 449 (1955). This opinion does not consider specific factual situations or whether applicable statutory authorization exists for township participation in those situations.

You also question the propriety of an expenditure to oppose objectionable activity occurring beyond township borders but impacting upon the "quality of life" in the township. Lacking the power to oppose such an action within its borders, a township is, likewise, not invested with the power to oppose an activity which occurs beyond its borders.

You also have asked whether a board of township trustees may make contributions from township funds to private groups opposing proposed actions which may adversely affect a township's residents. Public funds may be disbursed only by clear authority of law. *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 117 N.E. 6 (1917); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916) ("authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise..."); Op. No. 88-066; Op. No. 81-103. While financial aid to other agencies or organizations, either private or governmental, is permitted for limited purposes, see, e.g., R.C. 507.701 (community improvement corporations); R.C. 505.80 (promotion of tourism); R.C. 505.70 (to establish or operate federal programs), no general authority exists that permits contributions to private groups to oppose activity which may impact negatively on the "quality of life" in the township. I also note that since the board of township trustees is not permitted to do directly what the private group intends to do, circumvention of the limited authority of the township by contributing funds to such a group is also prohibited, absent statutory authority. See *City of Parma Heights v. Schroeder*, 26 Ohio Ops. 2d 119, 122, 196 N.E.2d 813, 816 (C.P. Cuyahoga County 1963) ("one cannot do indirectly what he cannot lawfully do directly"); 1986 Op. Att'y Gen. No. 86-036.

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

1. Absent authority based on statute, a board of township trustees is not empowered to contest proposed actions that are of significant interest to the residents of the township or which the residents consider contrary to the "quality of life," whether those actions occur within or outside of the township.
2. A county prosecutor acting pursuant to R.C. 309.09 may represent a board of township trustees only when the board of township trustees is interested in a controversy that is within the scope of the board's authority as expressly set forth in a statute or necessarily implied therefrom.
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