OPINION NO. 2001-002

Syllabus:

1. A board of park commissioners that establishes a bike path that passes through a township must make a reasonable attempt to comply with that township's zoning or land use restrictions, but need not comply with the township's zoning procedures, *e.g.*, obtaining permits, variances, or zoning changes, before it begins such project. If, after attempting compliance with the township's zoning or land use restrictions, the board finds that compliance would frustrate or significantly hinder its use of the property for a bike path, the board may proceed with such use of its property, unless a court of competent jurisdiction enjoins it from so proceeding.

2. Absent a contractual or statutory requirement with respect to the use of particular funds, a state entity has no general duty to determine that a board of park commissioners has complied with all local zoning requirements in the construction of a bike path before awarding a grant of state moneys to the board for such construction.

3. Whether a board of park commissioners' receipt of a grant from the state for construction of a bike path affects the board's duty under the standards set forth in *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), *overruled in part on other grounds by Racing Guild of Ohio v. Ohio State Racing Comm'n*, 28 Ohio St. 3d 317, 503 N.E.2d 1025 (1986), to comply with township zoning or land use restrictions

when constructing such path depends upon whether a statute applicable to such grant moneys or the agreement pursuant to which the grant is made impose that requirement.

To: David P. Joyce, Geauga County Prosecuting Attorney, Chardon, Ohio
By: Betty D. Montgomery, Attorney General, March 9, 2001

You have submitted an opinion request asking whether a park district board, in the establishment of a bicycle path, must comply with zoning regulations of a township through which the bicycle path passes. Based upon information provided by a member of your staff, we have restated your questions as follows:

1. Must a county park board, in the construction of a bike path that passes through a township, comply with the township's zoning requirements and proceedings?

2. Does the state have a duty to determine whether a county park board has complied with all local zoning regulations before awarding the park board a grant for the construction of a bike path?

3. Does a county park board's receipt of state funds for the construction of a bike path affect whether the park board must comply with the zoning regulations of a township through which the bike path passes?

In order to answer your questions, we must begin with a brief examination of the manner in which a board of park commissioners is established and the statutory powers and duties vested in such a board. Pursuant to R.C. 1545.01, "[p]ark districts may be created which include all or a part of the territory within a county, and the boundary lines of such district shall be so drawn as not to divide any existing township or municipal corporation within such county."[1] Upon application to the probate judge, and after proper notice and hearing, R.C. 1545.03, if the judge finds, among other things, that creation of the park district will be conducive to the general welfare, "he shall enter an order creating the district under the name specified in the application" R.C. 1545.04.

When a park district is created, R.C. 1545.05 requires the probate judge to appoint a board of park commissioners consisting of three members. Pursuant to R.C. 1545.07, a board of park commissioners is "a body politic and corporate, and may sue and be sued as provided in [R.C. 1545.01-.28]." As characterized by the court in *Village of Willoughby Hills v. Board of Park Comm'rs*, 3 Ohio St. 2d 49, 51, 209 N.E.2d 162, 163 (1965), a park district is "a political subdivision of the state of Ohio which performs a function of the state that is governmental in character."

The powers of a board of park commissioners are set forth in R.C. Chapter 1545 and include, among others, the power to employ and to contract for goods and services, R.C. 1545.07, and the power to levy taxes upon the taxable property within the district, R.C. 1545.20. A park district may also acquire property for park district purposes, as provided in R.C. 1545.11.[2] The authority of a board of park commissioners to acquire property includes

---

[1]R.C. 1545.041 also provides for the conversion of certain township park districts created under R.C. 511.18 to park districts that operate under R.C. Chapter 1545.

[2]R.C. 1545.11 states, in pertinent part:

the power to acquire a fee or any lesser interest in such properties. *See Pontiac Improvement Co. v. Board of Comm'rs*, 104 Ohio St. 447, 135 N.E. 635 (1922), *limited on other grounds by State ex rel. Bruestle v. Rich*, 159 Ohio St. 13, 110 N.E.2d 778 (1953).

Let us now turn to your first question, which asks whether a board of park commissioners, in the construction of a bike path that passes through a township, must comply with the township's zoning requirements and proceedings. The question of governmental immunity from local zoning regulations has been addressed in numerous cases, relying upon the analysis set forth in *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), *overruled in part on other grounds by Racing Guild of Ohio v. Ohio State Racing Comm'n*, 28 Ohio St. 3d 317, 503 N.E.2d 1025 (1986).[3]

> The board of park commissioners *may acquire* lands either *within or without the park district* for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged lands, and swamplands, and *to those ends may* create parks, parkways, forest reservations, and other reservations and afforest, develop, improve, protect, and *promote the use of the same in such manner as the board deems conducive to the general welfare. Such lands may be acquired* by such board, on behalf of said district, (1) *by gift or devise*, (2) *by purchase* for cash, by purchase by installment payments with or without a mortgage, by entering into lease-purchase agreements, by lease with or without option to purchase, or, (3) by *appropriation*. In furtherance of the use and enjoyment of the lands controlled by it, the board may accept donations of money or other property, or may act as trustees of land, money, or other property, and use and administer the same as stipulated by the donor, or as provided in the trust agreement. The terms of each such donation or trust shall first be approved by the probate court before acceptance by the board.
>
> In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided in [R.C. 163.01-.22]. (Emphasis added.)

See generally R.C. 1545.09 (requiring board of park commissioners to "adopt such bylaws and rules as the board deems advisable for the preservation of good order within and adjacent to parks and reservations of land, and for the protection and preservation of the parks, parkways, and other reservations of land under its jurisdiction and control and of property and natural life therein"); 1983 Op. Att'y Gen. No. 83-020 (syllabus) ("R.C. 1545.11 applies to all park districts, regardless of the date of their creation. (1978 Op. Att'y Gen. No. 78-045, approved and followed.)").

[3]*See, e.g., City of East Cleveland v. Board of County Comm'rs*, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982) (syllabus) ("[w]here a municipality's exercise of its zoning power conflicts with the interests of a state agency vested with the power of eminent domain, a court must weigh the general public purposes to be served by the exercise of each power and resolve the impasse in favor of that power which will serve the needs of the greater number of citizens. (*Brownfield v. State*, 63 Ohio St. 2d 282, approved and followed.)"); *Laketran Bd. of Trustees v. City of Mentor*, 135 Ohio App. 3d 187, 733 N.E.2d 313 (Lake County 1999) (discussing application of *Brownfield* criteria to question of regional transit authority's immunity from city zoning regulations), *discretionary appeal not allowed*, 88 Ohio St. 3d 1427, 723 N.E.2d 1115 (2000); *Taylor v. Ohio Dept. of Rehabilitation & Correction*, 43 Ohio App. 3d 205, 540 N.E.2d 310 (Franklin County 1988) (syllabus) ("[i]n exercising its powers of eminent domain to condemn property for an essential state governmental function, the state must make a

The conflict in *Brownfield* arose when the state attempted to use a residence that it had purchased in an area zoned for single-family residences as a halfway house to assist formerly institutionalized persons reestablish basic living skills. The state had not sought zoning approval for the proposed use of the property. The city objected to the proposed use as a violation of the city's zoning ordinance. The *Brownfield* court phrased the primary issue before it as "whether a privately-operated, state-owned facility is automatically exempt from municipal zoning restrictions." 63 Ohio St. 2d at 284, 407 N.E.2d at 1367.

In addressing this issue, the *Brownfield* court began by rejecting the state's contention that because it possessed the power of eminent domain, it was entitled to absolute immunity from local zoning regulations. Instead, the court recognized that both the municipality's exercise of its zoning powers and the state's exercise of its power of eminent domain serve public purposes, and stated:

> We believe that the correct approach in these cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens.

Id. at 285, 407 N.E.2d at 1367.

The *Brownfield* court concluded that, unless a governmental property owner possesses a direct statutory grant of immunity from compliance with local zoning, it should make "a reasonable attempt" to comply with local zoning or land use restrictions. *Id.* at 286, 407 N.E.2d at 1368. As explained by the court in *Taylor v. Ohio Dept. of Rehabilitation & Correction*, 43 Ohio App. 3d 205, 209, 540 N.E.2d 310, 314-15 (Franklin County 1988):

> *Brownfield* requires the condemning or land-owning authority to attempt to comply with zoning *land-use* restrictions. The condemning authority must use reasonable efforts to comply with existing zoning land-use schemes or plans but need not comply with existing procedures to obtain permits, variances or changes in existing zoning from local authorities as a prerequisite to the exercise of state governmental functions that the state authority is required by law to perform. *Brownfield*, although not explicit in defining the term "zoning restrictions" in the two-step test, refers several times to attempted compliance with *"land-use schemes."* Never does *Brownfield* mention or contemplate compliance with local zoning *procedures* to obtain an exception to current zoning use restrictions.[4]

---

reasonable effort to comply with existing local land-use restrictions, but the state is not required to follow a locally prescribed set of procedures to obtain the approval of the local zoning agency of the propriety of the use proposed by the state. Where reasonable efforts to comply with land-use restrictions have been made to no avail, the state may proceed with the proposed use unless enjoined by a court of competent jurisdiction which determines that the state is not entitled to immunity from local zoning restrictions pursuant to *Brownfield v. State* (1980), 63 Ohio St. 2d 282, 17 O.O. 3d 181, 407 N.E.2d 1365"); 1987 Op. Att'y Gen. No. 87-087 at 2-584 (note one).

[4]1986 Op. Att'y Gen. No. 86-026 concluded, in part, that the Adjutant General's duty to make a reasonable effort to comply with local zoning, building, and fire codes in the construction, repair, and maintenance of facilities for the Ohio National Guard includes the duty to make application for any required permits. Based upon the conclusion in *Taylor v.*

The *Brownfield* court continued by explaining that, should the governmental property owner's attempt at compliance be unsuccessful, it may nonetheless be immune from the zoning or land use restrictions if it determines that such compliance "would frustrate or significantly hinder," the public purpose for which it purchased the property. 63 Ohio St. 2d at 286, 407 N.E.2d at 1368. The factors to be considered in making such a determination include, among other things, "the essential nature of the government-owned facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility," *id.* at 286-87, 407 N.E.2d at 1368.[5]

In the event that the governmental property owner determines that compliance with local zoning or land use restrictions would frustrate or significantly hinder its use of the property, it may proceed with the proposed use, "unless enjoined by a court of competent jurisdiction which determines that the [governmental property owner] is not entitled to immunity from local zoning restrictions pursuant to [*Brownfield*]." *Taylor v. Ohio Dept. of Rehabilitation & Correction* (syllabus).

Part of your question appears to be whether the balancing of competing governmental interests prescribed by *Brownfield* applies to a zoning dispute between a board of park commissioners and a board of township trustees. As mentioned in your letter, the parties involved in the *Brownfield* conflict were an entity of state government and a municipality. The *Brownfield* court's analysis, however, was phrased in much broader terms, referring to balancing "the divergent interests of governmental entities" and "zoning restrictions of the affected political subdivision," 63 Ohio St. 2d at 286, 407 N.E.2d at 1368, and weighing "the general public purposes to be served by the exercise of each power, and ... resolv[ing] the impasse in favor of that power which will serve the needs of the greater number of our citizens," *id.* at 285, 407 N.E.2d at 1367.[6]

Nothing in the *Brownfield* court's analysis leads us to conclude that the reasoning of that case does not extend to a zoning dispute such as you describe, *i.e.*, the board of park commissioners' proposed use of its property in apparent violation of a township's zoning or land use restrictions. Rather, if the board of park commissioners is carrying out a public purpose within the scope of its statutory authority in establishing the bike path, and if that activity conflicts with a township's zoning or land use restrictions, such conflict falls squarely within the type of zoning dispute requiring the balancing of competing public interests as described in *Brownfield*.

Ohio Dept. of Rehabilitation & Correction, however, we disagree with this portion of 1986 Op. Att'y Gen. No. 86-026.

[5]*See generally Laketran Bd. of Trustees v. City of Mentor*, 135 Ohio App. 3d at 195, 733 N.E.2d at 319 ("[t]raditionally, a question of immunity is one that a court of law, rather than an administrative board, has determined"); 1991 Op. Att'y Gen. No. 91-070 (syllabus, paragraph four) ("[i]t is impossible to use an opinion of the Attorney General to perform the function of weighing and balancing the interests of various governmental entities in carrying out their regulatory schemes because that function requires findings of fact").

[6]Other courts have applied the *Brownfield* analysis to the resolution of land use conflicts arising between governmental entities other than the state and municipalities. *See, e.g., Laketran Bd. of Trustees v. City of Mentor* (finding *Brownfield* analysis to be appropriate means of harmonizing competing interests of a regional transit authority and a municipality); *Board of County Comm'rs v. City of Cincinnati*, No. C-990431, 1999 Ohio App. LEXIS 5445 (Ct. App. Hamilton County Nov. 19, 1999) (finding *Brownfield* standard to apply to conflict between board of county commissioners and municipality).

In the situation you describe, the board of park commissioners has acquired property within a township for use as a bike path. Establishment of a bike path is within the purposes for which a board of park commissioners may acquire property under R.C. 1545.11.[7] *See generally* note two, *supra*. It follows, therefore, that the board of park commissioners' action in establishing a bike path is part of its statutory function, and is thus directed at serving a public purpose.

No statute of which we are aware has conferred upon a board of park commissioners immunity from local zoning restrictions. In the absence of such a statutory grant of immunity, *Brownfield* requires that the board of park commissioners make "a reasonable attempt" to comply with township zoning or land use restrictions in the use of its property.[8] Such attempted compliance, however, need not include compliance with local zoning procedures, *e.g.*, obtaining permits, variances, or changes in existing zoning. *Taylor v. Ohio Dept. of Rehabilitation & Correction*, 43 Ohio App. 3d at 209, 540 N.E.2d at 315. Moreover, if, in its attempt to comply with the township's zoning restrictions, the board of park commissioners determines that "compliance with local zoning would *in the opinion of the [board]* prevent it from performing its essential governmental duties, it may proceed unless enjoined by a court of competent jurisdiction." *Taylor v. Ohio Dept. of Rehabilitation & Correction*, 43 Ohio App. 3d at 211, 540 N.E.2d at 316 (emphasis added).

In answer to your first question, we conclude that a board of park commissioners that establishes a bike path that passes through a township must make a reasonable attempt

---

[7]It appears that governmental entities commonly establish bike paths for recreational purposes. *See, e.g.*, R.C. 1519.01 (stating in part, "[t]he director of natural resources shall plan and administer a state system of recreational trails for hiking, bicycling, horseback riding, ski touring, canoeing, and other nonmotorized forms of recreational travel"); R.C. 5553.044 (stating in part,"[i]n any proceeding on a petition or resolution to vacate a road which begins on a public road and ends on a public road, the board of county commissioners may determine the suitability of the road for public nonmotorized vehicular recreational use. Such uses include, but are not limited to, hiking, bicycling, horseback riding, and ski touring"); *Wehner v. City of Columbus*, No. 87AP-532, 1988 Ohio App. LEXIS 2031 (Ct. App. Franklin County May 26, 1988); *Wearn v. City of Cleveland*, No. 53800, 1988 Ohio App. LEXIS 1862 (Ct. App. Cuyahoga County May 12, 1988).

[8]Part of your concern appears to be what actions might constitute a "reasonable attempt" by the board of park commissioners to comply with the township's zoning or land use restrictions. The nature and extent of the actions a governmental entity must undertake in a "reasonable attempt" to comply with local zoning restrictions is a matter of discretion to be exercised by that governmental entity, subject, of course, to judicial review. *See Hocking Valley Railway Co. v. Public Utilities Comm'n*, 92 Ohio St. 362, 110 N.E. 952 (1915) (a court will not substitute its judgment for that of an administrative body, but determinations made by such a body are subject to judicial review for abuse of discretion). Because resolution of questions of this nature involve matters of judgment and findings of fact, we cannot further advise you in this matter. *See* 1986 Op. Att'y Gen. No. 86-076 at 2-422 (the Attorney General is "not authorized to exercise on behalf of another officer or entity of the government discretion that has been bestowed by statute on that officer or entity. Further, it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals" (various citations omitted)). *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("every officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty").

to comply with that township's zoning or land use restrictions, but need not comply with the township's zoning procedures, *e.g.*, obtaining permits, variances, or zoning changes, before it begins such project. If, after making a reasonable attempt to comply with the township's zoning or land use restrictions, the board finds that compliance would frustrate or significantly hinder its use of the property for a bike path, the board may proceed with such use of its property, unless a court of competent jurisdiction enjoins it from so proceeding.

We now turn to your second question, which asks whether the state has a duty to determine that a board of park commissioners has complied with all local zoning regulations before awarding the board a grant for the construction of a bike path. We have found no principle of law that, as a general rule, requires an entity of state government to determine that a grantee of state moneys for construction of a bike path has complied with local zoning regulations before it awards a grant for such purpose. Rather, any such requirement would exist only if such a limitation on the use of the particular funds awarded is imposed by statute or if the terms of the particular grant impose such a requirement.[9] In answer to your question, absent a contractual or statutory requirement with respect to the use of particular funds, a state entity has no general duty to ensure that a board of park commissioners has complied with all local zoning requirements in the construction of a bike path prior to awarding a grant of state funds for construction of such bike path.

Your final question asks whether a board of park commissioners' receipt of state funds for the construction of a bike path affects whether the park board must comply with the zoning regulations of a township through which the bike path passes. Again, we are aware of no general rule that alters the *Brownfield* standards for determining whether or not a governmental entity, such as a board of park commissioners, must comply with local zoning or land use restrictions based upon the board's receipt or use of state funds. Rather, as discussed in answer to your second question, whether a board of park commissioners' receipt of a grant from the state for construction of a bike path affects the board's duty under the standards set forth in *Brownfield* to comply with township zoning or land use restrictions when constructing such path depends upon whether a statute applicable to such grant moneys or the agreement pursuant to which the grant is made imposes that requirement.

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. A board of park commissioners that establishes a bike path that passes through a township must make a reasonable attempt to comply with that township's zoning or land use restrictions, but need not comply with the township's zoning procedures, *e.g.*, obtaining permits, variances, or zoning changes, before it begins such project. If, after attempting compliance with the township's zoning or land use restric-

---

[9]*See generally, e.g.*, 23 U.S.C.A. § 206 (2000 Supp.) (grants to states for recreational trails); 16 U.S.C.A. § 3954(c) (2000) ("[t]he Director [of the United States Fish and Wildlife Service] may only grant or otherwise provide matching moneys to a coastal State for purposes of carrying out a coastal wetlands conservation project if the grant or provision is subject to terms and conditions that will ensure that any real property interest acquired in whole or in part, or enhanced, managed, or restored with such moneys will be administered for the long-term conservation of such lands and waters and the fish and wildlife dependent thereon"); R.C. 1547.72(C) (authorizing the division of watercraft in the Department of Natural Resources, with the approval of the Director, to "distribute moneys for the purpose of administering federal assistance to public and private entities in accordance with guidelines established under each federal grant program").

tions, the board finds that compliance would frustrate or significantly hinder its use of the property for a bike path, the board may proceed with such use of its property, unless a court of competent jurisdiction enjoins it from so proceeding.

2. Absent a contractual or statutory requirement with respect to the use of particular funds, a state entity has no general duty to determine that a board of park commissioners has complied with all local zoning requirements in the construction of a bike path before awarding a grant of state moneys to the board for such construction.

3. Whether a board of park commissioners' receipt of a grant from the state for construction of a bike path affects the board's duty under the standards set forth in *Brownfield v. State*, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), *overruled in part on other grounds by Racing Guild of Ohio v. Ohio State Racing Comm'n*, 28 Ohio St. 3d 317, 503 N.E.2d 1025 (1986), to comply with township zoning or land use restrictions when constructing such path depends upon whether a statute applicable to such grant moneys or the agreement pursuant to which the grant is made impose that requirement.
