

OPINION NO. 2010-027**Syllabus:**

2010-027

A township is not required to maintain or repair underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township unless the maintenance or repair of the facilities is needed to remove surface waters from a township road.

To: Thomas A. Swope, Deerfield Township Law Director, West Chester, Ohio
By: Richard Cordray, Ohio Attorney General, November 19, 2010

You have requested an opinion concerning the maintenance and repair of underground storm water drainage facilities installed by a private developer of a residential subdivision located in the unincorporated territory of a township.¹ You have informed us that the plat for the subdivision was approved by “the Warren County Commissioners, the Warren County Engineer, the Warren County Sanitary Engineer, the Warren County Regional Planning Commission and a [t]ownship zoning official.” See R.C. 711.10. Also, “no officials from Warren County or any other governmental entity” oversaw or inspected the installation of the storm water drainage facilities.

It has recently come to the attention of county and township officials that some of the underground storm water drainage facilities in the subdivision have failed or are about to fail. This situation has raised the following questions:

1. Is Warren County or any other governmental entity required to repair or maintain underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township?
2. Is a person who owns land in a residential subdivision located in the unincorporated territory of a township responsible for repairing or maintaining underground

¹ For the purpose of this opinion, the term “storm water drainage facilities” means the pipes and other appurtenances, equipment, and furnishings of a sewer system designed to dissipate surface waters, which are “those waters which are diffused over the surface of the ground, derived from falling rains and melting snows or which rise to the surface in springs.” *Frost v. Bank One of Fremont*, 7 Ohio App. Unrep. 179, 182 (Sandusky County 1990). In addition, this opinion does not consider situations involving underground storm water drainage facilities (1) installed by a governmental entity, (2) acquired by contract or in some other manner by a governmental entity, or (3) situated on land owned or developed by a governmental entity.

storm water drainage facilities installed on his land by the subdivision's developer when the facilities remove surface waters from his land and land owned by other persons? ²

Both of your questions concern the repair and maintenance of underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township. For ease of discussion, we will consider your questions together.

As a general matter, the authority of the Attorney General to advise township law directors extends only to matters that relate to their official duties. *See* R.C. 109.14; *see also* 1993 Op. Att'y Gen. No. 93-003 at 2-21 n.1 (“[t]he Attorney General is only authorized to give legal advice to state officers and boards and county prosecuting attorneys concerning matters relating to their official duties” (citations omitted)). Pursuant to R.C. 504.15(A), a township law director is the “legal advisor to the board of township trustees, the township administrator, and all other township officers, and any of them may require written opinions or instructions from the township law director in matters connected with their official duties.” A township

² You have also asked about the ownership of underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township when (1) the facilities are situated on land subject to an easement covering the facilities and the recorded plat of the subdivision sets forth statements pertaining to the easement or (2) the developer has not provided the purchaser of land in the subdivision with paperwork establishing the purchaser as the record owner of the facilities. Because the Attorney General cannot determine the property rights of a person or entity under an instrument creating an easement, a recorded plat of a residential subdivision, deed, or a contract for the purchase of land in a residential subdivision, we are unable to definitively answer your remaining questions, and thus will not consider them. *See generally* 1986 Op. Att'y Gen. No. 86-039 at 2-198 (the Attorney General is “unable to use the opinion-rendering function . . . to make determinations concerning the validity of particular documents, or the rights of persons under such documents”); 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”); *see generally also* 2005 Op. Att'y Gen. No. 2005-013 at 2-127 (“[a]n easement is an interest in real property which is generally defined as a right to use the land of another for a specified purpose. The nature and extent of an easement created by express grant are determined by the words used in the instrument creating the easement” (citations omitted)).

We are able, however, to advise you that insofar as no governmental entity (1) developed the residential subdivision, (2) owns land on which the underground storm water drainage facilities are situated, or (3) installed or acquired ownership of such facilities by contract or in some other manner, the facilities are not owned by a governmental entity.

law director thus is responsible for advising township officials concerning matters connected with their official duties.

A township law director does not have a duty to advise or express an opinion on the official duties or responsibilities of any other governmental officials. *See generally* R.C. 504.15(C) (“[n]othing in [R.C. 504.15] confers any of the powers or duties of a prosecuting attorney under [R.C. 309.08] upon a township law director”). Nor does a township law director have the power to determine the rights and obligations of a private landowner with regard to the repair or maintenance of underground storm water drainage facilities installed on the landowner’s property by a private developer. As a township law director may only advise township officials concerning matters connected with their official duties, this opinion will only address the authority of a township to repair or maintain underground storm water drainage facilities installed on private property by the developer of a residential subdivision.

R.C. Chapter 6131 sets forth provisions governing the repair and maintenance of storm water drainage facilities located on private property in the unincorporated territory of a county when the facilities are not installed or owned by a governmental entity. *See* 1958 Op. Att’y Gen. No. 2775, p. 579, at 584. Under this chapter, a county, upon the filing of a petition by a real property owner, may authorize the construction of an improvement “for disposal or removal of surplus water, for controlled drainage of any land, for irrigation, for storage of water to regulate stream flow or to prevent the overflow of any land in the county, or for water conservation.” R.C. 6131.02. For purposes of R.C. 6131.02, the term “improvement” includes the “reconstruction, reconditioning, [or] widening . . . of any . . . drain” and “[t]he removal of obstructions . . . from any . . . drain.” R.C. 6131.01(C). R.C. Chapter 6131 thus sets out the manner in which a county may undertake the repair and maintenance of storm water drainage facilities located on private property in the unincorporated territory of a county when the facilities are not installed or owned by a governmental entity. *See generally* 1958 Op. Att’y Gen. No. 2775, p. 579 (syllabus, paragraph 1) (“[w]here by reason of the drainage of lands in the unincorporated area of a county, surface water collects to the damage of public roads or private property or both, the county commissioners are authorized under the provisions of [R.C. Chapter 6131], upon receipt of a petition from one or more property owners, to remedy such condition by the construction of ditches or drains, and they may assess the cost of such improvement on benefited property”).

A review of R.C. Chapter 6131 discloses that a township has no duty or responsibility under that chapter to repair or maintain privately constructed underground storm water drainage facilities. *See* 1945 Op. Att’y Gen. No. 252, p. 242. *See generally* *Smith v. Griffin*, 9 Ohio C.C. 223, 225, 6 Ohio Cir. Dec. 232 (Logan County 1895) (“[t]he entire system of ditch legislation, as we now have it, proceeds on the theory, that those who are to be benefited in some substantial way, and those alone, shall bear the burden of providing the drainage”), *aff’d mem.*, 56 Ohio St. 775, 49 N.E. 1110 (1897); 1934 Op. Att’y Gen. No. 2340, vol. I, p. 254, at 257 (quoting *Smith v. Griffin*). Furthermore, it is well established that a township has no express or implied authority to construct, repair, or maintain storm water

drainage facilities “to carry off surplus water except to the extent incidental to and necessary in the improvement of a township road.”³ 1958 Op. Att’y Gen. No. 2775, p. 579 (syllabus, paragraph 3); see 1994 Op. Att’y Gen. No. 94-061 at 2-298; 1945 Op. Att’y Gen. No. 252, p. 242; 1932 Op. Att’y Gen. No. 4530, vol. II, p. 904.

As explained in 1994 Op. Att’y Gen. No. 94-061 at 2-298, which considered whether a township must repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe:

1981 Op. Att’y Gen. No. 81-039 determined that “[t]he duty to clean and repair storm sewers falls on the political subdivision responsible for the cleaning and repair of the ditches and culverts which comprise the storm sewer.” *Id.* (syllabus, paragraph four)[.] Op. No. 81-039, however, addresses a question that is fundamentally different from the one posed by your request. Op. No. 81-039 concerned the allocation of responsibility for the cleaning and repairing of storm sewers installed by a township to carry off drainage from township roads. In this regard, the opinion states that a township’s duty to maintain its road or highway system includes providing for the drainage of that highway. Further, since storm sewers that handle road drainage are part of the highway system, a township must clean and repair the storm sewers that run along its roads. Op. No. 81-039 at 2-159. Thus, Op. No. 81-039 concluded that *a township’s duty to clean and repair storm sewers is concomitant to its duty to maintain its road system.*

Inasmuch as the storm sewer pipes with which you are concerned have not been installed by the township, and are not necessary to the drainage of the township roads, authority on the part of the township to repair the storm sewer pipes cannot be implied from the various provisions set forth in R.C. Title 55 (roads, highways, and bridges) that address the responsibilities of a township to maintain and repair its road and highway system. Moreover, *there is no specific statutory provision requiring a township to repair storm sewer pipes that have been installed by a landowner on private property.* Therefore, a township is not required to repair a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe. (Citations omitted and emphasis added.)

A township, therefore, is not required to maintain or repair underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township unless the maintenance or

³ All roads and streets in a platted residential subdivision located outside a municipal corporation are township roads unless the roads and streets are part of the state highway system or the county highway system. See R.C. 5535.01(C); 1994 Op. Att’y Gen. No. 94-098 at 2-498.

repair of the facilities is needed to remove surface waters from a township road. *See generally* 1994 Op. Att’y Gen. No. 94-098 (syllabus, paragraph 2) (“[w]hen a county planning commission has adopted a plan for the unincorporated territory within the county and approved a plat of a residential subdivision therein, as provided in R.C. 711.10, and when, pursuant to R.C. 711.091, roads dedicated in that plat have been properly accepted for public use but no additional action has been taken to establish such roads as state or county roads, the township in which the roads are located is responsible for the drainage of surface water from the roads”).

In conclusion, it is my opinion, and you are hereby advised that a township is not required to maintain or repair underground storm water drainage facilities installed by the developer of a residential subdivision located in the unincorporated territory of a township unless the maintenance or repair of the facilities is needed to remove surface waters from a township road.