

October 23, 2015

Edward J. Dowd
Miami Township Law Director
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458

SYLLABUS:

2015-031

1. Neither R.C. 309.09(B)(1) nor R.C. 1901.34 authorizes a township to employ an attorney to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township.
2. A limited home rule township does not have the power to employ an attorney to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township.
3. A board of township trustees of a limited home rule township may adopt a resolution authorizing an agreement between the township and a municipal corporation in which the township agrees to reimburse the municipal corporation the costs incurred by the municipal corporation in employing a part-time prosecutor to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township, provided the board of township trustees determines that such an agreement is in the interest of the public health, safety, morals, or general welfare of the public.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2015-031

Edward J. Dowd
Miami Township Law Director
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458

Dear Law Director Dowd:

You have requested an opinion whether a board of township trustees of a limited home rule township may employ and compensate an attorney to prosecute in municipal court criminal offenses that occur in the unincorporated areas of the township. If not, you wish to know whether a township may enter into an agreement with a city whereby the city law director appoints and compensates an attorney to prosecute in municipal court criminal offenses that occur in the unincorporated areas of the township and the township reimburses the city for the compensation it pays the attorney.

Authority of Limited Home Rule Townships

In general, a board of township trustees possesses only those powers expressly conferred by statute or necessarily inferred therefrom. *Trs. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875); *see also State ex rel. Schramm v. Ayres*, 158 Ohio St. 30, 33, 106 N.E.2d 630 (1952) (“the question is not whether townships are prohibited from exercising such authority. Rather it is whether townships have such authority conferred on them by law”). R.C. 504.01 authorizes a township to adopt a limited home rule government under which the township exercises limited powers of local self-government and limited police powers as authorized by R.C. Chapter 504. *See generally* 2014 Op. Att’y Gen. No. 2014-041, at 2-362 (describing township limited home rule government). “As a practical matter, R.C. Chapter 504 grants a limited home rule township authority to exercise a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by the other provisions of R.C. Title 5.” 2002 Op. Att’y Gen. No. 2002-032, at 2-210 n.2. A township that has adopted this form of government is authorized, *inter alia*, to “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and to “[a]dopt and enforce within the unincorporated area of the township local police, sanitary,

and other similar regulations that are not in conflict with general laws[.]” R.C. 504.04(A)(1), (2); *see also* 2014 Op. Att’y Gen. No. 2014-041, at 2-362. These limited home rule powers are exercised by the adoption of township resolutions. R.C. 504.04(A).

Authority of a Limited Home Rule Township to Employ Legal Counsel

R.C. 504.15 directs limited home rule townships either to appoint a township law director as the legal advisor to the board of township trustees and township officers or to contract with the county prosecuting attorney to serve as the township law director. R.C. 504.15(A), (B). You have specifically asked about the provisions of R.C. 309.09. Pursuant to R.C. 309.09(B)(1), the county prosecuting attorney

shall be the legal adviser for all township officers, boards, and commissions, unless ... the township has adopted a limited home rule government pursuant to [R.C. Chapter 504] and has not entered into a contract to have the prosecuting attorney serve as the township law director, in which case ... the township law director ... shall be the legal adviser for all township officers, boards, and commissions.

R.C. 309.09(B)(1) further authorizes a board of township trustees to “employ an attorney other than the township law director or the prosecuting attorney of the county, either for a particular matter or on an annual basis, to represent the township and its officers, boards, and commissions in their official capacities and to advise them on legal matters.” The plain language of R.C. 309.09(B)(1) does not include prosecutorial duties. Rather, it contemplates legal representation of and counsel to the township and its officers, boards, and commissions. *See generally* 1969 Op. Att’y Gen. No. 69-098 (“I am mindful that [R.C. 309.09] directs the prosecuting attorney to be the legal adviser to all township officers, ...[b]ut it is an elementary legal proposition that a misdemeanor, being a criminal action, is prosecuted in the name of the government, as a public prosecution. Thus, in the prosecution of an alleged township zoning misdemeanor violation no township officer or board would be an actual party” (citations omitted)). Thus, R.C. 309.09(B)(1) does not authorize a limited home rule township to employ and compensate an attorney to prosecute in municipal court criminal offenses that occur in the unincorporated areas of the township.

R.C. Chapter 1901 and Prosecuting Officers in Municipal Courts

The provisions of R.C. Chapter 1901 establish and govern municipal courts in Ohio. You have asked about Miamisburg Municipal Court, which was established by R.C. 1901.01(A) and has jurisdiction within the municipal corporations of Miamisburg, Germantown, and West Carrollton and within German Township and Miami Township in Montgomery County. R.C. 1901.02(A), (B).

R.C. 1901.34, which concerns the prosecution of criminal cases brought before a municipal court states, in pertinent part, that “the village solicitor, city director of law, or similar

chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court.”¹ R.C. 1901.34(A). This authorization to prosecute criminal cases includes persons appointed as assistants to a chief legal officer of a municipal corporation. *See* R.C. 1901.34(C) (“[t]he village solicitor, city director of law, or similar chief legal officer shall perform the same duties, insofar as they are applicable to the village solicitor, city director of law, or similar chief legal officer, as are required of the prosecuting attorney of the county. The village solicitor, city director of law, similar chief legal officer *or any assistants who may be appointed* shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes” (emphasis added)); R.C. 2935.01(C) (as used in the Revised Code chapter concerning criminal procedures for arrest, citation, and disposition alternatives, the meaning of “prosecutor,” “in the case of courts inferior to courts of common pleas, includes the village solicitor, city director of law, or similar chief legal officer of a municipal corporation *[and] any such officer’s assistants*” (emphasis added)). Thus, R.C. 1901.34 requires a chief legal officer of a municipal corporation or her assistants to prosecute in a municipal court all criminal cases arising in the unincorporated areas within the territory of the municipal court. R.C. 1901.34 does not authorize the prosecution of criminal cases in a municipal court by an attorney who is employed by a township. *Cf.* 1988 Op. Att’y Gen. No. 88-086, at 2-412 (concluding that a prosecuting attorney of a county is not authorized to enter into an agreement with a municipal corporation whereby he agrees to prosecute in municipal court criminal cases that arise in unincorporated areas).

Creation and Regulation of Courts Excluded from Home Rule Authority

As a township that has adopted a limited home rule government under R.C. Chapter 504, Miami Township is authorized to “[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws,” and to “[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)].” R.C. 504.04(A)(1), (2); 2008 Op. Att’y Gen. No. 2008-035, at 2-360 to 2-361 n.4. In its enactment of R.C. Chapter 504 to grant limited home rule authority to limited home rule townships, the General Assembly chose language that mirrors Ohio Const. art. XVIII, § 3, the constitutional grant of home rule authority to municipal corporations. 2014 Op. Att’y Gen. No. 2014-041, at 2-362 to 2-363. It is, therefore, reasonable to conclude that the General Assembly intended to grant to limited home rule townships home rule authority that is similar to

¹ R.C. 1901.34(B) and (D) set forth several exceptions to R.C. 1901.34(A) for particular counties, townships, and municipal corporations. None of these exceptions appear to apply to Miami Township or the City of Miamisburg in Montgomery County.

the home rule authority of municipal corporations under Ohio Const. art. XVIII, § 3. *Id.* at 2-363.²

Among the well-established exclusions from municipal home rule authority is the creation and regulation of courts. 2001 Op. Att’y Gen. No. 2001-020, at 2-113. The creation and maintenance of the municipal courts is reserved to the General Assembly pursuant to Ohio Const. art. IV, § 1; the home rule doctrine does not give a municipality the authority to legislate concerning municipal courts. 1980 Op. Att’y Gen. No. 80-014 (syllabus, paragraph 1). As explained by the court in *State ex rel. Cherrington v. Hutsinpillar*, 112 Ohio St. 468, 473-74, 147 N.E. 647 (1925):

The judicial power of the state is distinct from the executive and the legislative, and as one of the highest elements of sovereign power can only be created in strict conformity to the manner indicated by the rules laid down in the expression given to sovereignty by the people themselves, to wit, the Constitution. This judicial power has been cared for by the organic law, and is beyond the control of municipalities, which, after all, are only agents of the state for local governmental purposes. *Section 1, art. IV*, is a special provision of the Constitution that has to do with the creation of courts, and as such *supersedes the general power of local self-government*, as granted in section 3, art. XVIII. (Emphasis added.)

The independence of the courts from municipal home rule authority was further detailed in *State ex rel. Ramey v. Davis*, 119 Ohio St. 596, 165 N.E. 298 (1929), the syllabus of which reads, in pertinent part:

1. The sovereignty of the state in respect to its courts extends over all the state, including municipalities, whether governed by charter or general laws.
2. None of the various provisions of article XVIII of the Constitution of Ohio are effective to abridge the sovereignty of the state over municipalities in respect to its courts.
3. The Legislature has the exclusive power to create courts inferior to the Courts of Appeals.
4. The power to create a court carries with it the power to define its jurisdiction and to provide for its maintenance.

² The General Assembly has placed certain additional restrictions upon the exercise of home rule powers by a limited home rule township. For example, R.C. 504.04(A)(1) prohibits a limited home rule township from enacting taxes other than those authorized by general law. *See generally* R.C. 504.04(B)(1)-(7); 2014 Op. Att’y Gen. No. 2014-041, at 2-363.

Because the home rule authority granted to limited home rule townships by R.C. 504.04(A) mirrors the home rule authority granted to municipal corporations by Ohio Const. art. XVIII, § 3, it is reasonable to conclude that a limited home rule township is similarly restricted from exercising its authority with respect to the municipal courts established by the General Assembly in R.C. Chapter 1901. In other words, a township cannot rely upon its home rule powers to specify who will prosecute offenses in a municipal court; rather, the General Assembly has made that determination with great specificity in R.C. 1901.34.

Mutual Agreement with Municipal Corporation Permissible

Notwithstanding the body of law summarized above that restricts a home rule township from modifying the statutorily-established operation of a municipal court, there appears to be authority for the proposal you describe in your second question. For the reasons that follow, a board of township trustees of a limited home rule township may, pursuant to its home rule authority and by resolution, R.C. 504.04(A), authorize the expenditure of township monies to reimburse a municipal corporation (in this case, the City of Miamisburg) for employing a part-time prosecutor to prosecute criminal violations arising from the unincorporated areas of Miami Township. *See generally* 2002 Op. Att’y Gen. No. 2002-032, at 2-213 (describing the process to introduce and pass a township resolution).

“The questions of whether an exercise of the police power is really and substantially related to the public health, safety, morals or general welfare of the public, and whether such exercise is unreasonable or arbitrary, are questions initially committed to the judgment and discretion of the legislative body[.]” *City of Portsmouth v. McGraw*, 21 Ohio St. 3d 117, 119-20, 488 N.E.2d 472 (1986); 2014 Op. Att’y Gen. No. 2014-041, at 2-364. Accordingly, a board of trustees of a limited home rule township has the discretion to determine whether the subject of a proposed resolution bears a real and substantial relation to the public health, safety, morals, or general welfare of the public and is otherwise reasonable. 2014 Op. Att’y Gen. No. 2014-041, at 2-364. Generally, courts will not invalidate the decisions of a legislative body in these matters unless such decisions appear to be clearly erroneous. *City of Portsmouth v. McGraw*, 21 Ohio St. 3d at 120; *Benjamin v. City of Columbus*, 167 Ohio St. 103, 110, 146 N.E.2d 854 (1957); 2014 Op. Att’y Gen. No. 2014-041, at 2-364.

Of course, in order for such a resolution to be effective, the municipal corporation must be willing to enter into an agreement with the township. A brief restatement of the relevant statutes is helpful at this point. First, R.C. 309.09(B)(1) does not authorize a limited home rule township to employ and compensate an attorney to prosecute in municipal court criminal offenses that occur in the unincorporated areas of the township. Further, R.C. 1901.34(A) specifically directs who may prosecute criminal offenses in a municipal court. “[T]he village solicitor, city director of law, or similar chief legal officer of the municipal corporation in which a municipal court is located shall prosecute all criminal cases brought before the court arising in the unincorporated areas within the territory of the municipal court.” R.C. 1901.34(A). Additionally, a city director of law has the exclusive right to appoint her assistants. *See* R.C. 733.01 (“[t]he executive power of cities shall be vested in a mayor, president of council, ...

director of law, ... and such other officers and departments as are provided by [R.C. Title 7]. Such executive officers shall have exclusive right to appoint all officers, clerks, and employees in their respective departments or offices”); *see also* R.C. 733.621 (authority to appoint assistants who are employees or assistants in private practice); R.C. 2921.421 (conditions on appointments of assistant prosecutors). *See generally* 1985 Op. Att’y Gen. No. 85-034, at 2-121 (“[a] municipal corporation may, under its general home rule powers, hire persons to carry out its municipal purposes”).

Considering the facts you present, if a municipal corporation agrees to cooperate with a limited home rule township in this endeavor, the city law director may appoint a part-time prosecutor of her choosing for the purpose of prosecuting in municipal court all criminal offenses that arise from the unincorporated areas of the township. The municipal corporation and the township then may contract with one another, pursuant to authority granted by their respective legislative authorities, for the township to reimburse the municipal corporation the costs incurred by the municipal corporation in employing the additional part-time prosecutor. *See generally City of Cleveland v. Vill. of Cuyahoga Heights*, 81 Ohio App. 191, 196-97, 75 N.E.2d 99 (Cuyahoga County 1947) (“[i]t is well settled that a municipal corporation has the power to make and enter into contracts which are necessary or proper to enable it to perform its functions” and “[u]nder the above stated elementary principle of power of municipal corporations to contract, a municipality clearly has the power and authority to contract with other municipalities on such terms as the parties deem reasonable in order to exercise the powers granted to them by the Constitution of Ohio”); 2014 Op. Att’y Gen. No. 2014-041, at 2-363 (it is reasonable to conclude that the General Assembly intended to grant to limited home rule townships home rule authority that is similar to the home rule authority of municipal corporations under Ohio Const. art. XVIII, § 3); *see generally, e.g.*, R.C. 505.08 (after adopting a resolution declaring an emergency in connection with the administration of township services or the execution of duties assigned by law to any officer of a township, the board of township trustees may, by resolution, enter into a contract, without bidding or advertising, for the purchase of services, materials, equipment, or supplies needed to meet the emergency if the estimated cost of the contract is less than fifty thousand dollars); R.C. 505.103 (“[w]ith respect to any contract for the purchase of equipment, materials, supplies, insurance, services, or a public improvement into which a township or its officers may enter, a board of township trustees by resolution, may adopt the model system of preferences for products mined or produced in Ohio and the United States and for Ohio-based contractors”); R.C. 505.43 (townships may contract for police protection).

Thus, a board of township trustees of a limited home rule township may adopt a resolution authorizing an agreement between the township and a municipal corporation in which the township agrees to reimburse the municipal corporation the costs incurred by the municipal corporation in employing a part-time prosecutor to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township, provided the board of township trustees determines that such an agreement is in the interest of the public health, safety, morals, or general welfare of the public.

Conclusion

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

1. Neither R.C. 309.09(B)(1) nor R.C. 1901.34 authorizes a township to employ an attorney to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township.
2. A limited home rule township does not have the power to employ an attorney to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township.
3. A board of township trustees of a limited home rule township may adopt a resolution authorizing an agreement between the township and a municipal corporation in which the township agrees to reimburse the municipal corporation the costs incurred by the municipal corporation in employing a part-time prosecutor to prosecute in the municipal court criminal offenses that arise from the unincorporated areas of the township, provided the board of township trustees determines that such an agreement is in the interest of the public health, safety, morals, or general welfare of the public.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General