OPINION NO. 86-010

Syllabus:

1. Summit County is authorized, pursuant to art. I, §1.01 of the Summit County Charter and R.C. 5547.03 and R.C. 5547.04, to remove and relocate roadside mailboxes that obstruct or interfere with the use of county roads and highways, provided that such removal and relocation does not constitute a violation of 18 U.S.C. §1705.

2. Summit County is authorized, pursuant to art. I, §1.01 of the Summit County Charter, to regulate, by ordinance or resolution, the placement of mailboxes and other mail receptacles adjacent to county roads and highways, provided the terms of such an ordinance or resolution do not conflict with regulations promulgated by the United States Postal Service governing such placement.

3. Summit County may be liable, under R.C. 2744.02(B)(3), to the extent that a mailbox or other mail receptacle adjacent to a county road or highway obstructs the flow of traffic or constitutes a nuisance, for any injury or damages resulting therefrom for its failure to remove or relocate the mailbox or other mail receptacle. A court may determine, however, that impossibility of compliance with the terms of R.C. 2744.02(B)(3), which is attributable to the prohibition contained in 18 U.S.C. §1705, absolves Summit County of any tort liability it might otherwise

incur for personal injuries or property damage resulting from its failure to remove or relocate a hazardous mailbox or other mail receptacle adjacent to a county road or highway.

To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 20, 1986

I have before me your request for my opinion regarding the authority of a county to remove and relocate roadside mailboxes that constitute hazards or obstructions to the traveling public. In your letter you state that Summit County is concerned about its liability for property damage or personal injury resulting from the improper placement of mailboxes adjacent to county roads.

Your specific questions read as follows:

1. Is 18 U.S.C. §1705 unconstitutional as being overbroad and/or vague since a strict interpretation of the statute would prohibit even the property owner from relocating his own mailbox and since it is not clear what acts are prohibited under the statute? Does the act of removing the support post of the mailbox to relocate the mailbox constitute "willfully or maliciously injuring, tearing down or destroying any letter box or any other receptacle"?

2. Does a county have the right to relocate mailboxes which are in the right-of-way of county roads and constitute obstructions under Ohio Revised Code §5547.03?

3. Can a county adopt ordinances regulating the distance of mailboxes from county roads? If so, how can such an ordinance be enforced?

4. What liability does a county have for a mailbox located in the right-of-way of a county road and obstructing the public's use of the road?

5. Does the county's liability remain the same if the county is prohibited by federal law from relocating the mailbox in order to remove it from the county road right-of-way?

For ease of discussion, I will discuss initially your second question. You ask whether a county has the right to relocate mailboxes which are in the right-of-way of county roads and constitute obstructions under R.C. 5547.03.

Pursuant to Ohio Const. art. X, §3, Summit County has adopted a charter for the exercise of its county government. See also R.C. 301.22. Article I, §1.01 of the Summit County Charter states in part:

> The County is responsible for the exercise within its boundaries of all powers vested in and the performance of all duties imposed upon counties and county officers by law. In addition, the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this

> Charter and all other powers which the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law. All powers shall be exercised and enforced in the manner prescribed by this Charter, or, when not prescribed herein, in such manner as may be provided by ordinance or resolution of the County Council, and, when not prescribed by the Charter or amendments thereto or by ordinance or resolution, then such powers shall be exercised in the manner prescribed by general law.

The Summit County Charter, art. III, §§3.01, 3.03, further provides that all the legislative power of the County is vested in the County Council, and that all such legislative powers of the County Council "shall be exercised by ordinance or resolution." The Summit County Charter has thus empowered the county to prescribe its form of government, to exercise those powers and duties granted to counties, and to exercise those powers of local self-government and police and sanitary powers granted to municipalities. See Ohio Const. art. XVIII, §3; 1985 Op. Att'y Gen. No. 85-039. I believe that Summit County has the authority under its home rule power to provide, in its charter or by ordinance or resolution of the County Council, for the removal or relocation of mailboxes which obstruct county roads or highways. Cf. Massa v. City of Cincinnati, 110 N.E.2d 726, 730 (C.P. Hamilton County 1953), appeal dismissed, 160 Ohio St. 254, 115 N.E.2d 689 (1953) (the making of municipal improvements to local streets constitutes an exercise of the power of municipal home rule).

Even if there is no existing charter provision, ordinance, or resolution providing for the removal of mailboxes which constitute obstructions, R.C. Chapter 5547 confers certain powers upon a board of county commissioners[1] to carry out the removal of structures that obstruct county highways. R.C. 5547.03 reads in part, as follows:

> All persons, partnerships, and corporations using or occupying any part of a highway, bridge, or culvert with telegraph or telephone lines, steam, electrical, or industrial railways, oil, gas, water, or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise legally granted, shall remove from the bounds of such highway, bridge, or culvert, their poles and wires connected therewith, or any and all tracks, switches, spurs, or oil, gas,

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1. The Summit County Charter does not provide for a board of county commissioners. Instead, those powers generally exercised by a board of county commissioners are exercised by the County Executive and County Council pursuant to articles II and III, respectively, of the County Charter.

I shall address your questions in terms of the statutory provisions in the Revised Code governing county operations generally. Thus, any discussion of the statutory powers and duties of boards of county commissioners should be read with reference to the appropriate local officials who are responsible under the Summit County Charter for performing the particular function being considered.

> or water pipes, mains, conduits, or other objects or structures when, in the opinion of the board of county commissioners, they constitute obstructions in any highway, other than the state highway system; or the bridges or culverts thereon, or interfere or may interfere with the proposed improvement of such highways, bridges, or culverts or the use thereof by the traveling public. By obtaining the consent and approval of the board, such persons, partnerships, and corporations may relocate their properties within the bounds of such highways, bridges, or culverts in such manner as the board prescribes. The giving of such consent and approval by the board does not grant any franchise rights.
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> ....
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> If, in the opinion of the engineer, such persons, partnerships, or companies [corporations] have obstructed any such highway, bridges, or culverts, or if any of their properties are, in his opinion, so located that they do or may interfere with the proposed improvement, maintenance, or repair the board shall notify such person, partnership, or corporation directing the removal or relocation of the obstruction or property, and, if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board may do so by employing the necessary labor. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person, partnership, or corporation, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person, partnership, or corporation by civil action by the state on the relation of the board.

R.C. 5547.04 provides in part that, "[t]he owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent" and states further that, "[n]o person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highways on the state highway system."[2] In enforcing the provisions of R.C. 5547.04, the

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[2] Although "obstruction" is not defined for purposes of R.C. Chapter 5547, or in any other chapter in Title 55 that uses the word, 1980 Op. Att'y Gen. No. 80-043 provides the following interpretation of its meaning:

> In putting these parts of R.C. 5547.04 together, it becomes clear that the General Assembly intended that the word "obstruction" have a very broad meaning. In order to give effect to this intention of the General Assembly, it appears that "obstruction" must be defined so

board of county commissioners may avail itself of R.C. 5547.03. R.C.5547.04. Thus, a board of county commissioners is expressly empowered by R.C. 5547.03 and R.C. 5547.04 to require any person using or occupying any part of a highway with any object or structure to remove such object or structure when, in the opinion of the board, the object or structure constitutes an obstruction in the highway or interferes with the use thereof by the traveling public. If a person does not within five days after notification by the board proceed to remove or relocate the obstruction and complete the removal or relocation within a reasonable time, the board may remove or relocate the obstruction by employing the necessary labor. I believe that the plain language of R.C. 5547.03 and R.C. 5547.04 clearly empowers a county to remove or relocate roadside mailboxes that obstruct or interfere with the use of county roads and highways pursuant to the procedure set forth therein. See 1980 Op. Att'y Gen. No. 80-043; 1921 Op. Att'y Gen. No. 2480, vol. II, p. 908 (concluding that the statutory predecessor to R.C. 5547.03, G.C. 7204, permitted the Department of Highways and Public Works to remove hazardous and obstructive rural roadside mailboxes).

Your first question concerns the interpretation of 18 U.S.C. §1705, which states:

> Whoever willfully or maliciously injures, tears down or destroys any letter box or other receptacle intended or used for the receipt or delivery of mail on any mail route, or breaks open the same, or willfully or maliciously injures, defaces or destroys any mail deposited therein, shall be fined not more than $1,000 or imprisoned not more than three years.

You have included with your request a letter from the Regional Counsel for the United States Postal Service addressing the question whether a county engineer may remove mailbox posts that are deemed to be road hazards. In response, the Regional Counsel concludes that any action by local governmental authorities that has the result of tearing down, destroying, or making inoperable any postal or letter box would fall within the purview of 18 U.S.C. §1705. One may reasonably infer from the Regional Counsel's statements that such action by local authorities would include the removal and relocation of roadside mailboxes for reasons of public safety. Thus, a decision by county officials to employ the necessary labor, pursuant to R.C. 5547.03, to remove or relocate roadside mailboxes would carry with it the risk that the county officials or their agents would be subject to criminal prosecution under 18 U.S.C. §1705.

> as to include virtually any object within the bounds of a highway that has been "placed" or "erected" there. In other words, an "obstruction" is any object that has the potential of interfering with the highway easement. An object could interfere with the easement without hindering the flow of traffic or the construction or maintenance of the highway. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location.

Op. No. 80-043 at 2-181.

In light of the Regional Counsel's interpretation of 18 U.S.C. §1705, you ask whether the statute is unconstitutionally vague or overbroad. I note that it is the policy of this office to refrain from issuing opinions upon the constitutionality of particular federal or state statutes, since the power to do so rests entirely with the courts. State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 169, 114 N.E. 55, 59 (1916); 1976 Op. Att'y Gen. No. 76-021 at 2-66 ("[i]t is inappropriate for this office to determine the constitutionality of state statutes"); 1962 Op. Att'y Gen. No. 2769, p. 53 (syllabus, paragraph one) ("[t]he power of determining whether a statute is constitutional is lodged solely in the courts"). Likewise, this office is unable to provide authoritative interpretations of federal statutes. 1982 Op. Att'y Gen. No. 82-097 at 2-270 n.1; 1982 Op. Att'y Gen. No. 82-071 at 2-202. Thus, I am unable to advise you with respect to the constitutionality of 18 U.S.C. §1705, and I am unable to state which types of conduct may be deemed to fall within the purview of that section.

As you note in your letter, however, a rule of strict construction applies to criminal statutes generally, according to which a criminal statute shall be strictly construed against the state and liberally construed in favor of an accused charged thereunder. Smith v. United States, 360 U.S. 1, 9 (1959) (the traditional canon of construction calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved); Northern Securities Co. v. United States, 193 U.S. 197, 358-59 (1904) (the rule that a criminal statute must be strictly construed means that a court should not bring cases within the provisions of the statute that are not clearly embraced by it); United States v. Tarter, 522 F.2d 520, 525 (6th Cir. 1975) (courts are to consider the legislative history of a criminal statute, particularly if its language is ambiguous, and construe it strictly to prevent the imposition of a penalty on unintended individuals). Notwithstanding the interpretation placed upon 18 U.S.C. §1705 by the Postal Service's Regional Counsel, I believe a plausible argument may be made that §1705, strictly construed, does not prohibit local governmental officials, acting in the good faith performance of their duties, from removing and relocating roadside mailboxes for reasons of public safety. While the legislative history of §1705 furnishes little guidance regarding the type of conduct proscribed thereunder, I note, as a general matter, that of the reported decisions of prosecutions brought pursuant to §1705, not one has involved the prosecution of local governmental officials for their removal and relocation of roadside mailboxes for reasons of public safety. See, e.g., United States v. Boyd, 620 F.2d 129 (6th Cir. 1980) (individual charged under §1705 with breaking into a U.S. mail car); United States v. Berryhill, 466 F.2d 621 (8th Cir. 1972) (individual charged under §1705 with breaking open a mailbox); United States v. Hills, 455 F.2d 504 (9th Cir. 1972) (same); United States v. Sandy, 421 F.2d 182 (9th Cir. 1970) (individual charged under §1705 with theft of U.S. mails); United States v. Eagley, 410 F.2d 752 (4th Cir. 1969)(two individuals charged under §1705 with breaking open a mailbox).

More importantly, reported decisions of prosecutions brought pursuant to related provisions in Title 18, see e.g., 18 U.S.C. §1701 (obstruction or retardation of mails generally); §1702 (obstruction of correspondence); §1708 (theft or receipt of stolen mail matter generally); §1709 (theft of mail matter by officer or employee); §1711 (misappropriation of

postal funds), have noted the significance of mens rea, in particular specific criminal intent, in assessing the likely guilt or innocence of a defendant charged under those statutes. See, e.g., United States v. Nash, 649 F.2d 369 (5th Cir. 1981) (elements necessary to establish offense of unlawful possession of item stolen from mail in violation of 18 U.S.C. §1708 are possession of item by defendant, theft of item from mail, knowledge of defendant that item was stolen, and specific intent on part of defendant to possess the item unlawfully); United States v. Beechum, 555 F.2d 487 (5th Cir. 1977), vacated on other grounds, 582 F.2d 898 (5th Cir. 1978) (same); United States v. Ashford, 530 F.2d 792 (8th Cir. 1976) (to constitute a violation of 18 U.S.C. §1702, there must be a specific evil intent to obstruct correspondence or pry into the business secrets of another); United States v. Brown, 425 F.2d 1172 (9th Cir. 1970) (same); United States v. Lester, 541 F.2d 499 (5th Cir. 1976) (a conviction under 18 U.S.C. §1711 for conversion requires a finding of a willful, knowing act done with wrongful intent to deprive the owner or the United States of property); United States v. Morrison, 536 F.2d 286 (9th Cir. 1976) (a showing of criminal intent is necessary to sustain a conviction under 18 U.S.C. §1711); United States v. Coleman, 449 F.2d 772 (5th Cir. 1971) (an indictment under 18 U.S.C. §1709 alleging that defendant "did steal one watch from a parcel post package," implied allegation that watch was removed with criminal intent rather than by mistake or for some other innocent reason, and thus indictment sufficiently alleged criminal intent); United States v. Austin, 492 F. Supp. 502 (N.D. Ill. 1980) (under 18 U.S.C. §1701, any obstruction of mail, no matter how minor, if done willfully and with improper motives, can constitute retardation). See generally United States v. Stickrath, 242 F. 151, 154 (S.D. Ohio 1917) (doing a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intent to do it); United States v. Claypool, 14 F. 127, 128 (W.D. Mo. 1882) (under statutory predecessor to 18 U.S.C. §1701, there is a distinction between the act of obstructing done while in pursuit of a legitimate or innocent object, and obstructing done while committing an unlawful act).

Since §1705 and these companion provisions in Title 18 relate to the same subject matter, and thus are to be construed in pari materia, see generally Erlenbaugh v. United States, 409 U.S. 239 (1972); United States v. Stauffer Chemical Co., 684 F.2d 1174 (6th Cir. 1982), aff'd 464 U.S. 165 (1984); United States v. Garcia, 676 F.2d 1086 (5th Cir. 1982), vacated and remanded on other grounds, 462 U.S. 1127 (1983), I believe that a court, if asked to consider the question, might reasonably conclude that §1705, insofar as it prohibits the willful or malicious destruction of letter boxes or other mail receptacles, requires proof of a specific intent, on the part of a defendant charged thereunder, to engage in the criminal act of destroying or damaging a mailbox,[3] and that such intent is absent in the case of local governmental officials who remove and relocate roadside mailboxes in pursuit of a legitimate public safety objective, such as alleviating hazardous road conditions, which might otherwise result in

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[3] The historical note appended to 18 U.S.C. §1705 states in part that, "section [1705] is used as [the] basis for prosecutions for malicious mischief to mail boxes or receptacles."

serious accidents involving personal injuries and property damage. See 1921 Op. No. 2480 at 911-12 (applicable Postal Service regulations do not authorize a property owner to locate his mailbox in such a way as to obstruct the public highway and the removal of obstructive rural roadside mailboxes by state authorities pursuant to state law does not constitute an interference with the transit of the United States mail, particularly "where there is no intention of willfully detaining the transit of the mail").

I turn now to your third question, whether a county may adopt ordinances regulating the distance of mailboxes from county roads. Even as I concluded that the provisions of its charter authorize Summit County to remove or relocate hazardous road obstructions, I believe it must also be concluded that the Summit County Charter authorizes Summit County to regulate, by ordinance or resolution, the placement of mailboxes and other mail receptacles adjacent to county roads and highways. Further, such ordinance or resolution may include a provision for the enforcement of its terms. The question arises, however, whether Summit County may be constrained in its exercise of this authority in light of United States Postal Service rules and regulations that address the same subject.

The United States Constitution, art. VI, cl.2, provides in part that, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Thus, it has been a longstanding principle of law that when state and federal law, and administrative rules and regulations promulgated pursuant thereto, address similar areas of concern, and are found to conflict in their particular pronouncements, the state law provisions are superseded by the federal enactments. See, e.g., Jones v. Rath Packing Co., 430 U.S. 519 (1977) (a state may not enact food labelling requirements that do not permit reasonable weight variations when federal law allows reasonable variations in accuracy resulting from moisture loss during distribution because the state law conflicts with the goal of the federal law to facilitate value comparisons); City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973) (local government may not regulate aviation in a manner contrary to the national scheme of regulation simply in order to comport with local preferences); Campbell v. Hussey, 368 U.S. 297 (1961) (Georgia law that had superseded federal requirements pertaining to the labelling of tobacco products invalidated); 1973 Op. Att'y Gen. No. 73-117 at 2-447 ("[f]ormer Attorneys General have advised that certain [state] statutes conflicted with federal enactments, and therefore were superseded to the extent they were inconsistent"). Whether the enforcement of a state or local law is precluded by a federal enactment on the same subject turns on "[t]he nature of the power exerted by Congress, the object sought to be attained, and the character of the obligations imposed by the law," and whether, under the circumstances of the particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67, 70 (1941). State law is preempted by federal law whenever the two schemes inevitably conflict so as to make compliance with both federal and state regulations a physical impossibility or whenever Congress has manifested an intent, express or implied, to displace state regulation in a specific area. Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963); Northern States

Power Co. v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd, 405 U.S. 1035 (1972).

Insofar as the supersession of state laws is concerned, the same principles apply when the postal powers of Congress are exercised. Johnson v. State of Maryland, 254 U.S. 51 (1920); Martin v. Pittsburg & L.E.R. Co., 203 U.S. 284 (1906); Illinois C.R. Co. v. Illinois, 163 U.S. 142 (1896). Thus, it has been stated that the United States Postal Service is immune from local and state regulations that have the effect of interfering with the exercise of the Postal Service's authority. United States v. City of Pittsburg, Cal., 467 F. Supp. 1080, 1087 (N.D. Cal. 1979); Grover City v. United States Postal Service, 391 F. Supp. 982, 986-87 (C.D. Cal. 1975) ("[i]f there were any conflicts between the City's ordinance and postal regulations, the regulations necessarily would pre-empt the ordinance under the Supremacy Clause of the Constitution, Article VI, clause 2, because federal regulations authorized under federal law have the same pre-emptive effect on state or local laws as the federal laws themselves"). But cf. United States v. City of St. Louis, 452 F. Supp. 1147 (E.D. Mo. 1978) (city trespass ordinance, which declared lawn crossing even by mailmen to be a trespass, was not preempted by a federal postal regulation, which provided that postal carriers may cross lawns while making deliveries, because the federal regulation was not authorized under federal law and the conduct it purported to authorize violated the householder's fifth amendment rights under prohibition of taking private property for public use without just compensation).

I am unable to make a conclusive determination that Summit County's enactment of ordinances governing the initial placement of roadside mailboxes would conflict with existing Postal Service regulations, and thus would be prohibited by traditional federal preemption principles. See generally 39 U.S.C. §401(1) (Postal Service shall have the power to adopt, amend, and repeal such rules and regulations as it deems necessary to accomplish the purposes of Title 39, one of which is the provision of prompt, reliable, and efficient service to patrons in all areas, see 39 U.S.C. §101(a)). It seems, however, that Summit County may exercise a certain amount of discretion in this regard. Pursuant to 39 U.S.C. §401(1), the United States Postal Service publishes the Domestic Mail Manual (DMM), which is a comprehensive compilation of the Postal Service's rules and regulations pertaining to all aspects and phases of the transit of United States mail. The DMM is incorporated by reference in the Code of Federal Regulations at 39 C.F.R. §111.1 (1985). With respect to curbside residential delivery of mail within city limits, the DMM states, at 155.232, that such delivery "may be provided to boxes located at the curb so they can be safely and conveniently served by the carrier from his vehicle." The DMM provides a similar standard for rural curbside residential delivery at 156.54, providing in part as follows:

> Rural boxes must be placed so that they may be safely and conveniently served by carriers without leaving their conveyances, and must be located on the right-hand side of the road in the direction of travel of the carriers in all cases where traffic conditions are such that it would be dangerous for the carriers to drive to the left in order to reach the boxes, or where their doing so would constitute a violation of traffic laws and regulations.

The Postal Service, however, has not promulgated any regulations requiring curbside mailboxes to be placed a certain distance from the road or highway to which they are adjacent. Instead, as stated in the DMM, the criteria by which local U.S. Postmasters are guided in this regard is the safety and convenience of the individual mail carrier. In conversations with an employee of the U.S. Postmaster in Akron, a member of my staff was informed that the Postal Service generally requires a roadside mailbox to be located in such a manner as to provide the carrier with sufficient room to pull his delivery vehicle off the highway and out of the way of following traffic. Thus, it appears that Summit County may adopt an ordinance regulating the placement of roadside mailboxes, provided that the terms of such an ordinance do not conflict with the DMM's guidelines and standards relating to the safety and convenience of the carrier. Grover City v. United States Postal Service; United States v. City of Pittsburg, Cal. See 1921 Op. No. 2480.

In your fourth question you have asked what tort liability Summit County may incur for personal injuries and property damage resulting from accidents involving roadside mailboxes that obstruct the public's use of county highways. As you are aware, the sovereign tort immunity traditionally bestowed by the common law upon the state and its various political subdivisions has been gradually abrogated by the Ohio Supreme Court in a series of significant decisions on this subject. See, e.g., Marrek v. Cleveland Metroparks Board of Commissioners, 9 Ohio St. 3d 194, 459 N.E.2d 873 (1984) (sovereign immunity of a park district abolished for both governmental and proprietary functions); Mathis v. Cleveland Public Library, 9 Ohio St. 3d 199, 459 N.E.2d 877 (1984) (same holding applied to a municipal public library); Enghauser Manufacturing Co. v. Eriksson Engineering Ltd., 6 Ohio St. 3d 31, 451 N.E.2d 228 (1983) (same holding applied to a municipal corporation); Carbone v. Overfield, 6 Ohio St. 3d 212, 451 N.E.2d 1229 (1983) (same holding applied to a board of education). The abrogation of sovereign tort immunity was extended to counties in Zents v. Board of Commissioners, 9 Ohio St. 3d 204, 204, 459 N.E.2d 881, 883 (1984), which holds that, with certain limitations, "the doctrine of governmental immunity will no longer operate to insulate counties from liability for their tortious acts." The syllabus to the Zents case reads:

> No tort action will lie against a county for those acts or omissions involving the exercise of an executive or planning function or involving the making of a basic policy decision which is characterized by the exercise of a high degree of official judgment or discretion. However, once the decision has been made to engage in a certain activity or function, a county will be held liable, the same as private corporations and persons, for the negligence of its employees and agents in the performance of their activities.

According to the Zents decision, "counties are ... subject to the same rules as private persons or corporations if a duty has been violated and a tort has been committed," but "a county will not be subject to liability where a statute provides immunity." 9 Ohio St. 3d at 207, 459 N.E.2d at 885. Thus, under the Zents holding, county commissioners may now incur common law liability if they are proven to have acted negligently in performing or carrying out activities related to county roads and highways. This common law liability is now

imposed in addition to any statutory liability which may be imposed upon county commissioners for their failure to properly fulfill their statutory duties relative to the management and supervision of county roads and highways. See, e.g., Ditmyer v. Board of County Commissioners, 64 Ohio St. 2d 146, 413 N.E.2d 829 (1980) (under R.C. 305.12 county commissioners are liable for their negligence or carelessness in failing to keep roads or bridges in proper repair).[4]

The General Assembly recently enacted Am. Sub. H.B. 176, 116th Gen. A. (1985) (eff. Nov. 20, 1985), which reinstates, subject to several exceptions, the sovereign tort immunity of political subdivisions of the state. Am. Sub. H.B. 176 enacts a new R.C. Chapter 2744, which essentially provides that political subdivisions, defined as municipal corporations, townships, counties, school districts, or other bodies corporate and politic responsible for governmental activities in a geographic area smaller than that of the state, are immune from liability for damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function. R.C. 2744.02(A)(1). The immunity provided for in R.C. 2744.02(A)(1) is subject to several specific exceptions, which are enumerated in R.C. 2744.02(B)(1)-(5). With respect to the maintenance and repair of highways, political subdivisions shall be liable for injury, death, or loss to persons or property "caused by their failure to keep public roads, highways, streets, avenues, alleys, sidewalks, bridges, aqueducts, viaducts, or public grounds within the political subdivisions open, in repair, and free from nuisance." R.C. 2744.02(B)(3). See also R.C. 2744.02(B)(5) (a political subdivision is liable for injury, death, or loss to persons or property when liability is expressly imposed by a statute). Thus, under R.C. 2744.02(B)(3), to the extent that a mailbox adjacent to a county road or highway obstructs the flow of traffic or constitutes a nuisance, a county may be liable for any injury or damages resulting therefrom for its failure to remove or relocate the mailbox.

Your last question asks whether Summity County's tort liability will remain the same if the County is prohibited by

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[4] But cf. Heckert v. Patrick, 15 Ohio St. 3d 402, 406-07, 473 N.E.2d 1204, 1208-09 (1984), in which the court held that R.C. 305.12 (liability of commissioners) imposes a duty upon county commissioners "only in matters concerning either the deterioration or disassembly of county roads and bridges," and that liability will not be imposed under R.C. 305.12 when road obstructions or interferences "are unrelated to the conditions of the roadway." The court recently reaffirmed its holding in Heckert in Ruwe v. Board of County Commissioners, 21 Ohio St. 3d 80, ____ N.E.2d ____ (1986), in which the court addressed the question whether a board of county commissioners and a county engineer could be held liable in tort pursuant to R.C. 305.12 and R.C. 315.08 (duties of county engineer) and common law principles of negligence for their alleged failure to remove from a county road a discarded auto muffler-exhaust system, which subsequently caused an automobile accident resulting in the death of one person and the serious injury of two other people. The court stated that "obstructions or interferences are

federal law, for example, 18 U.S.C. §1705, from removing and relocating mailboxes that obstruct county roads or highways. Insofar as R.C. 2744.02(B)(3), R.C. 5547.03, and R.C. 5547.04 impose a statutory obligation upon a board of county commissioners to remove hazardous objects that obstruct county roads and highways, there is some authority for the general proposition that noncompliance with a statute may be excused and will not be deemed to constitute negligence where compliance is impossible. Francis v. Bieber, 10 Ohio St. 2d 65, 225 N.E.2d 251 (1967); Bush v. Harvey Transfer Co., 146 Ohio St. 657, 67 N.E.2d 851 (1946); Kohn v. B.F. Goodrich Co., 139 Ohio St. 141, 38 N.E.2d 592 (1941). Thus, to the extent that the prohibition contained in 18 U.S.C. §1705, as interpreted by the Postal Service's Regional Counsel, makes it impossible for a board of county commissioners to fulfill its responsibilities under R.C. 2744.02(B)(3), R.C. 5547.03, and 5547.04 in the case of obstructive roadside mailboxes, a board may be able to absolve itself of any tort liability it might otherwise incur for its failure to remove or relocate hazardous roadside mailboxes that result in personal injury and property damage. I am unable to predict with any degree of certainty, however, whether a court would be inclined to absolve a board of county commissioners of liability under R.C. 2744.02(B)(3), R.C. 5547.03, and 5547.04 because of impossibility of compliance attributable to 18 U.S.C. §1705 simply because there is no caselaw addressing this issue, either in this precise circumstance or in more general terms. While it seems reasonable to conclude that the command of a criminal statute, which precludes a party's compliance with another aspect of the civil law, should be sufficient to absolve that party of tort liability that might otherwise result from such noncompliance, I would hesitate to advise a party that such would be the likely holding of a court considering the question.

Accordingly, it is my opinion, and you are hereby advised that:

1. Summit County is authorized, pursuant to art. I, §1.01 of the Summit County Charter and R.C. 5547.03 and R.C. 5547.04, to remove and relocate roadside mailboxes that obstruct or interfere with the use of county roads and highways,

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unrelated to the conditions of the roadway," and a "muffler exhaust system left by parties unknown on a roadway is therefore outside the purview of a statutorily created duty with respect to the commissioners [under R.C. 305.12]." 21 Ohio St. 3d at 82, ____ N.E.2d at____. With respect to common law tort liability, the court held that a county has no duty to keep highways free of nuisances, and that liability may be imposed in this regard only if a county voluntarily assumes a duty to remove road nuisances. 21 Ohio St. 3d at 82-3, ____ N.E.2d at ___.

In its discussion of R.C. 305.12, however, the court did not address the recent amendment of that section by Am. Sub. H.B. 176, 116th Gen. A. (1985) (eff. Nov. 20, 1985), discussed below, which deleted that portion of R.C. 305.12 imposing liability upon a board of county commissioners, in its official capacity, for damages received by reason of its negligence or carelessness in not keeping any road or bridge in proper repair. Instead, a similar, more expansive provision now appears at new R.C. 2744.02(B)(3), enacted by Am. Sub. H.B. 176 and also discussed below.

provided that such removal and relocation does not constitute a violation of 18 U.S.C. §1705.

2. Summit County is authorized, pursuant to art. I, §1.01 of the Summit County Charter, to regulate, by ordinance or resolution, the placement of mailboxes and other mail receptacles adjacent to county roads and highways, provided the terms of such an ordinance or resolution do not conflict with regulations promulgated by the United States Postal Service governing such placement.

3. Summit County may be liable, under R.C. 2744.02(B)(3), to the extent that a mailbox or other mail receptacle adjacent to a county road or highway obstructs the flow of traffic or constitutes a nuisance, for any injury or damages resulting therefrom for its failure to remove or relocate the mailbox or other mail receptacle. A court may determine, however, that impossibility of compliance with the terms of R.C. 2744.02(B)(3), which is attributable to the prohibition contained in 18 U.S.C. §1705, absolves Summit County of any tort liability it might otherwise incur for personal injuries or property damage resulting from its failure to remove or relocate a hazardous mailbox or other mail receptacle adjacent to a county road or highway.