

OPINION NO. 89-079**Syllabus:**

1. As used in R.C. 5709.73, the term "public improvements" includes road improvements.
2. A board of township trustees may utilize the tax increment financing scheme of R.C. 5709.73-.75 to pay for improvements to property that is not owned by the township, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that the improvements are a public purpose.
3. A board of township trustees may utilize the tax increment financing scheme of R.C. 5709.73-.75 to pay for improvements to a county road that is located in the unincorporated area of the township, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that the improvements are a public purpose.

To: Donald W. White, Clermont County Prosecuting Attorney, Batavia, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 16, 1989

I have before me your request for my opinion in which you ask whether a board of township trustees may utilize the financing method set forth in R.C. 5709.73-.75 to pay for improvements to a county road that is located in the unincorporated area of the township. You state that the county road abuts land in the township that is to be commercially developed and that the road improvements are necessary for that development.

Your letter raises two important issues concerning the tax increment financing scheme set forth in R.C. 5709.73-.75: first, whether road improvements are "public improvements" as that term is used in the statute; and, second, whether a township board of trustees may use R.C. 5709.73-.75 to pay for improvements to land it does not own. As you noted in your letter, a board of township trustees has the authority to make improvements to a county road that runs through the township so long as the board of county commissioners agrees to the improvements. See R.C. 5535.01; R.C. 5535.08. The question in this case is whether the board of

trustees may pay for such county road improvements using tax increment financing for townships under R.C. 5709.73-.75.

R.C. 5709.73 provides a financing method that a township may use to pay for public improvements that are needed for the development of land in the unincorporated area of the township. R.C. 5709.73 states, in part:

A board of township trustees may, by unanimous vote, adopt a resolution that declares to be a public purpose for any number of years not to exceed thirty any public improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township. Such resolution may exempt from real property taxation further improvements to a parcel of land which benefited from such public improvements. The exemption commences on the effective date of the resolution and ends on the date specified in the resolution as the date the improvement ceases to be a public purpose, or ends on the date on which such improvements are paid in full from the township public improvement tax increment equivalent fund established under section 5709.75 of the Revised Code, whichever occurs first.

According to provisions of R.C. 5709.74 and R.C. 5709.75, the township may require the owner of the benefited property to make annual service payments in lieu of taxes. Those payments are placed in a township public improvement tax increment equivalent fund. The moneys from the fund must be used by the township to pay the cost of the public improvements.

There is no language in R.C. 5709.73-.75 defining the term "public improvements."¹ Where no statutory definition is provided, "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." R.C. 1.42; *see, e.g., State v. Scott*, 69 Ohio St. 2d 439, 440, 432 N.E.2d 798, 799 (1982); *State v. Carroll*, 62 Ohio St. 2d 313, 315, 405 N.E.2d 305, 307 (1980); *State v. Nipps*, 66 Ohio App.2d 17, 21, 419 N.E.2d 1128, 1132 (Franklin County 1979); *Clinton v. Leis*, 56 Ohio App. 2d 30, 32, 381 N.E.2d 344, 345 (Hamilton County 1977). *The Random House Dictionary of the English Language* 1162 (unabridged ed. 1973) defines "public" as "of, pertaining to, or affecting the people as a whole or the community, state, or nation." "Improvement" is defined as the "act of improving; state of being improved...a change or addition by which a thing is improved." *The Random House Dictionary of the English Language* 717 (unabridged ed. 1973). The plain ordinary meanings of the words "public" and "improvement" do not appear to exclude road improvements or articulate any basis for limiting the scope of the term "public improvement." It appears, therefore, that the term "public improvements" is broad enough to include road improvements.

Support for this conclusion may be seen in the provisions of R.C. 5709.73-.75. As one court noted, intent of the legislature is to be determined from the language of the statute itself. *Katz v. Dep't of Liquor Control*, 166 Ohio St. 229, 231, 141 N.E.2d 294, 295-96 (1957). *See generally* R.C. 1.47; R.C. 1.49. R.C. 5709.73 allows a board of township trustees to declare as a public purpose "any public improvements made" that are necessary for the development of certain parcels of land located in the unincorporated area of the township. Use of the word "any" indicates that the statutory language is to be read broadly. As I stated in 1984 Op. Att'y Gen. No. 84-068 at 2-221: "The word 'any' is

¹ R.C. 5709.73 does contain the following definition of "further improvement":

As used in this section and section 5709.74 of the Revised Code, "further improvement" means the increase in the true value of the parcel of property in the unincorporated territory of the township after the effective date of the resolution.

This definition is not, however, helpful in determining the scope of public improvements for purposes of R.C. 5709.73-.75.

generally defined as meaning 'one or more without specification or identification' or 'whatever or whichever it may be.' *The Random House Dictionary of the English Language* 68 (unabridged ed. 1973). It is, thus, a broad word." See also *Motor Cargo, Inc. v. Board of Township Trustees*, 52 Ohio Op. 257, 259, 117 N.E.2d 224, 227 (C.P. Summit County 1953) ("[i]n construing statutes the word 'any' is equivalent and has the force of 'every' or 'all.'...The word 'any' excludes selection or distinction"); 1982 Op. Att'y Gen. No. 82-008 at 2-28; 1980 Op. Att'y Gen. No. 80-058 at 2-229. The language in the statute thus appears to be intended to allow the tax increment financing method to be applied to each public improvement necessary for the development of real estate in the unincorporated area of the township that the board of township trustees unanimously declares to be a public purpose. On its face, the statute contemplates no limitations concerning the type of public improvement that may be found to constitute a public purpose for tax increment financing, and I have no basis for creating any such limitations. I conclude, therefore, that the legislature intended that the scope of public improvements, as used in R.C. 5709.73, be determined by the board of township trustees and intended, further, that the board of trustees be permitted to include all types of improvements found to constitute a public purpose, including road improvements. I note that the statute requires unanimous agreement by the board of trustees as to the public purpose of any project.

The conclusion that the term "public improvements" as used in R.C. 5709.73-75 includes road improvements is consistent with the statutory treatment of road improvements. Pursuant to R.C. 5535.01, state, county, and township roads are all classified as public highways. Improvements made by a public body to a public highway must by their very nature be considered public improvements. See generally, e.g., R.C. 5535.01; R.C. 5555.43.

Furthermore, the term "public improvement" appears in various contexts throughout the Revised Code and, in general, appears to include road improvements. For example, R.C. 4115.03(C) defines public improvements in the context of wages and hours for public works projects. For that purpose, "[p]ublic improvement includes all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof..." (emphasis added). In the context of mechanics liens, R.C. 1311.26 states that such liens are available, in part, "for the construction, alteration, removal, or repair of any property, appurtenance, or structure, described in sections 1311.02 and 1311.03 of the Revised Code, or for the construction, improvement, or repair of any turnpike, road improvement, sewer, street, or other public improvement, or public building..." (emphasis added). See also, e.g., R.C. 9.31 ("public building, structure, highway, or other improvement"); 1988 Op. Att'y Gen. No. 88-039 (concluding that bridge repairs are public improvements for purposes of R.C. Chapter 153). It is, thus, consistent with usage of the term "public improvement" elsewhere in the Revised Code to include road improvements in the term as used in R.C. 5709.73.

A second issue addressed in your letter is whether a township may use the financing method of R.C. 5709.73-75 to make improvements to property that it does not own. Your letter suggests that R.C. 503.01 may require the township to own the property which is to benefit from the public improvement. An amendment to R.C. 503.01 was adopted as part of the bill that enacted R.C. 5709.73-75. See Sub. H.B. 390, 117th Gen. A. (1987) (eff. Oct. 20, 1987). Sub. H.B. 390 added to R.C. 503.01 a sentence that states: "The board of township trustees may acquire real property within the unincorporated territory of the township in order to provide needed public improvements to the property pursuant to sections 5709.73 to 5709.75 of the Revised Code." This language allows the board of trustees to purchase real property as it finds necessary in order to provide for public improvements to the property pursuant to R.C. 5709.73-75. Use of the word "may" within a statute is generally found to make a provision optional, discretionary or permissive, rather than mandatory. See *State ex rel. City of Niles v. Bernard*, 53 Ohio St. 2d 31, 34, 372 N.E.2d 339, 341 (1978); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834, 837 (1971); *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574, 576 (1956). The relevant language of R.C. 503.01 thus appears to authorize the purchase of real property in order to provide it with public improvements pursuant to R.C. 5709.73-75. There is, however, no indication of an intent to impose such an ownership requirement on all land that is

improved under R.C. 5709.73-.75. R.C. 503.01 merely establishes the status of a township as a body politic and corporate and details certain of its powers. The language added by Sub. H.B. 390 empowers townships to acquire real property where such acquisition will permit implementation of R.C. 5709.73-.75, but it does not impose restrictions upon the circumstances in which the financing method authorized by R.C. 5709.73 may be used.

Of interest concerning this issue are the changes in the legislation that occurred prior to final passage. As passed by the House, Am. Sub. H.B. 390 required the township to have an ownership interest in the property being improved, as follows:

Sec. 5709.73. IF THE BOARD OF TOWNSHIP TRUSTEES, BY RESOLUTION, DECLARES TO BE A PUBLIC PURPOSE FOR ANY NUMBER OF YEARS NOT TO EXCEED THIRTY, ANY PUBLIC IMPROVEMENTS MADE BY THE TOWNSHIP TO A PARCEL OF REAL PROPERTY IN THE UNINCORPORATED TERRITORY OF THE TOWNSHIP THAT THE TOWNSHIP ACQUIRED WITH ITS OWN FUNDS, HOLDS FEE TITLE TO, AND LEASES TO ANY PERSON, SUCH IMPROVEMENTS ARE EXEMPT FROM REAL PROPERTY TAXATION.... (Emphasis added.)

As enacted, however, the legislation does not require that the township have an ownership interest in the property. The enacted legislation states that the board of township trustees may declare to be a public purpose "any public improvements made that are necessary for the development of certain parcels of land located in the unincorporated area of the township." R.C. 5709.73. This language does not require the township to acquire the property with its own funds or hold fee title to it. Under R.C. 5709.73-.75, any public improvement necessary for the development may be paid for through tax increment financing.² Therefore, a township may use this method to finance improvements to property that it does not own. Had the legislature intended use of township tax increment financing to be contingent upon ownership, the bill as enacted could have included language similar to that of the House version. Instead the statute as enacted omits language requiring ownership, leading to the conclusion that no such ownership requirement was intended.

Am. Sub. H.B. 390 also stated that the public improvement must be made to the parcel of land being developed. The law as enacted omits any language requiring that the public improvement be made to the parcel of land. Rather, the law states that the financing method may be used to pay for any public improvement necessary for the development.

Moreover, a similar tax increment financing scheme for municipal corporations is detailed in R.C. 5709.41-.43. In those provisions, as enacted in 1976, *see* 1975-1976 Ohio Laws, Part II, 3785 (Am. Sub. H.B. 1328, *eff.* Aug. 11, 1976), and as appearing in the current code sections, the General Assembly included language specifically requiring an ownership interest. The current version of R.C. 5709.41 states, in part:

(B) The legislative authority of a municipal corporation, by ordinance, may declare to be a public purpose for any number of years not to exceed thirty, any improvement to a parcel of real property, if both of the following apply:

(1) The *municipal corporation held fee title* to the parcel prior to the adoption of the ordinance;

(2) The parcel is leased, or the fee of the parcel is conveyed to any person, either before or after adoption of the ordinance. (Emphasis added.)

² I note that attachments to your letter state that the improvements to the county road have been demanded by the county engineer and are necessary for the development.

The language used in R.C. 5709.73 is different from the language used in R.C. 5709.41, thus indicating that a different result was intended. *See generally Kiefer v. State*, 106 Ohio St. 285, 289-90, 139 N.E. 852, 854 (1922).

The plain language of R.C. 5709.73 does not require that a township own the property that is to be improved pursuant to a tax increment financing arrangement, and the language of R.C. 503.01 is consistent with that interpretation. Accordingly, I conclude that a board of township trustees may utilize the tax increment financing scheme of R.C. 5709.73-.75 to pay for improvements to property that is not owned by the township, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that they are a public purpose.

Your specific concern is whether a board of township trustees may utilize the financing method set forth in R.C. 5709.73-.75 to pay for improvements to a county road that is located in the unincorporated area of the township. It follows from the analysis set forth above that the board may do so, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that the improvements are a public purpose.

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

1. As used in R.C. 5709.73, the term "public improvements" includes road improvements.
2. A board of township trustees may utilize the tax increment financing scheme of R.C. 5709.73-.75 to pay for improvements to property that is not owned by the township, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that the improvements are a public purpose.
3. A board of township trustees may utilize the tax increment financing scheme of R.C. 5709.73-.75 to pay for improvements to a county road that is located in the unincorporated area of the township, provided that the improvements are necessary for the development of land located in the unincorporated area of the township and that the board unanimously declares that the improvements are a public purpose.