

OPINION NO. 91-056**Syllabus:**

1. A township has the authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps on township property to the extent necessary to comply with any law requiring such improvement, including R.C. 3737.88 and R.C. 3737.882 and the rules of the Fire Marshal promulgated thereunder.
2. A township which leases real property pursuant to R.C. 505.11(A) has the authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps on such property to the extent that such alterations exceed normal repairs and are ordered by public authorities.

To: Robert P. DeSanto, Ashland County Prosecuting Attorney, Ashland, Ohio
By: Lee Fisher, Attorney General, December 31, 1991

You have asked whether a township has authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps located on township land. The underground storage tanks and pumps were originally installed by a lessee who donated them to the township at the termination of the lease. You have explained that the township does not use the underground storage tanks and pumps. Instead, the township leases the land, including the underground storage

tanks and pumps, to a private party for use as a commercial gasoline service station.¹

A township does have express authority to hold real estate, R.C. 503.01, and to accept, through the board of township trustees, the donation of real or personal property for any township use, R.C. 505.10. Additionally, "the board of township trustees may lease township real property to any person upon terms agreed upon by the board and the lessee" when, in the opinion of the board of township trustees, the township would be benefitted. R.C. 505.11(A).

I. Express Authority

A township and its trustees may exercise only powers expressly conferred by statute and such powers necessarily implied from those expressly conferred. *Board of Township Trustees v. Miner*, 26 Ohio St. 452 (1875). An examination of the statutes which govern townships and boards of township trustees reveals no general authority to replace, repair, maintain or otherwise improve township property. There are several statutes which grant specific authority to the board of township trustees to improve or maintain particular township property. *See, e.g.*, R.C. 505.12 (provision and maintenance of solid waste facilities); R.C. 505.14 (construction and maintenance of a house for a resident physician in an island township); R.C. 505.261 (acquisition, improvement, and maintenance of a township hall, township park, public library building, and certain bridges and viaducts); R.C. 505.36 (construction and repair of viaducts); R.C. 511.03 (erection, improvement or enlargement of town hall). However, there are no statutes which expressly authorize a township to replace, repair, maintain or otherwise improve underground storage tanks and pumps. The question is, thus, whether such authority is otherwise implied by statute.

II. Implied Authority

A. Township as Owner of Property

In order to determine whether a township possesses implied authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps, it is necessary to determine whether the township has any duties from which such authority may be implied. In this regard, R.C. Chapter 3737 imposes certain requirements upon owners of underground storage tanks and pumps with respect to the replacement and repair of such tanks and pumps. R.C. 3737.87-.89; R.C. 3737.91; R.C. 3737.92. For purposes of R.C. 3737.87 to 3737.98, an "owner" includes "any person who holds...a legal, equitable, or possessory interest of any kind in an underground storage tank system or in the property on which the underground storage tank system is located, including...a lessor, or lessee." R.C. 3737.87(H) (emphasis added). "Person" includes "any political subdivision of the state." R.C. 3737.01(E). Thus, a township that owns underground storage tanks and pumps is subject to the requirements of R.C. Chapter 3737 concerning such equipment.

R.C. 3737.88(A)(1) charges the State Fire Marshal with the "implementation of an underground storage tank² program and corrective action program for releases from underground petroleum storage tanks established by the 'Resource Conservation and Recovery Act of 1976,' 90 Stat. 2795, 42 U.S.C. 6901, as amended." (Footnote added.) To accomplish this, the Fire Marshal "may adopt,

¹ For purposes of this opinion, I assume that the underground storage tanks and pumps are fixtures and thus part of the real property. *See, e.g., Hover v. Clayton*, 15 Ohio Op. 245, 29 Ohio Law Abs. 410 (C.P. Logan County 1939) (gasoline storage tanks and pumps were held to have become fixtures).

² An "underground storage tank" is defined as "one or any combination of tanks, including the underground pipes connected thereto, that are used to contain an accumulation of regulated substances the volume of which, including the volume of the underground pipes connected thereto, is ten per cent or more beneath the surface of the ground." R.C. 3737.87(P). Petroleum, which term encompasses motor fuels, is a regulated substance. R.C. 3737.87(J) and (L).

amend, and rescind" rules in accordance with R.C. Chapter 119, R.C. 3737.88(E), and "conduct such inspections, require annual registration of underground storage tanks, issue such citations and orders to enforce those rules, and perform such other duties, as are consistent with those programs." R.C. 3737.88(A)(1). The Fire Marshal is also required, *inter alia*, to promulgate rules which establish standards for corrective actions for suspected and confirmed releases of petroleum. R.C. 3737.882(B). Additionally, the Fire Marshal may issue orders requiring action to protect human health and the environment. R.C. 3737.882(A)(1).

The rules promulgated pursuant to R.C. 3737.88 by the Fire Marshal with respect to underground storage tanks and pumps appear at 2 Ohio Admin. Code 1301:7-9-01 to 1301:7-9-15. These administrative rules include requirements which involve replacement, repair, maintenance and other improvements of underground storage tanks and pumps. For example, rule 1301:7-9-06(C)(1) mandates that

[o]wners and operators of all existing petroleum [underground storage tank] systems³ shall...comply with one of the following requirements for all such [underground storage tank] systems:

- (a) New [underground storage tank] system performance standards in compliance with paragraphs (B) to (B)(5) of this rule;
- (b) The upgrading requirements in paragraphs (C)(2) to (C)(4) of this rule; or
- (c) Closure requirements in compliance with this chapter of the Administrative Code, including applicable requirements for corrective action under sections 3737.88 and 3737.882 of the Revised Code and this chapter of the Administrative Code.

(Footnote added.) The new underground storage tank system performance standards, rule 1301:7-9-06(B), and the upgrading requirements, rule 1301:7-9-06(C)(2)-(4), contemplate either complete replacement of underground storage tanks or repair, improvement and maintenance of such tanks. *See, e.g.*, rule 1301:7-9-06(C)(2) (metal tanks must be upgraded by internal lining, by cathodic protection, or both); rule 1301:7-9-06(C)(4) (all existing underground storage tank systems shall comply with spill and overfill equipment requirements). The rules of the Fire Marshal with respect to underground tanks also include specific requirements concerning the installation and maintenance of leak detection systems, rule 1301:7-9-07, and repairs to prevent releases of stored substances due to structural failure or corrosion, rule 1301:7-9-08(E).

The township, as the owner of an underground storage tank system, has a duty to replace, repair, maintain and improve its underground storage tank system in accordance with the administrative rules promulgated pursuant to R.C. 3737.88 and R.C. 3737.882 and with any order of the Fire Marshal issued pursuant to R.C. 3737.88(A) or R.C. 3737.882(A)(1). *See* R.C. 3737.882(C)(1) ("[n]o person shall violate or fail to comply with a rule adopted under division (A) of section 3737.88 of the Revised Code or division (B) of this section, and no person shall violate or fail to comply with the terms of any order issued under division (A) of section 3737.88 of the Revised Code or division (A)(1) of this section"). Where a duty has been imposed by law, the authority to carry out such duty is necessarily implied. *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915). Thus, to the extent necessary to comply with R.C. 3737.88 and R.C. 3737.882 and the administrative rules and orders promulgated thereunder, a township has the implied authority to replace, repair, maintain and otherwise improve underground storage tanks and pumps.

B. Township as Lessor of Property

You have provided the information that the township does not operate a gasoline service station on the real property in question but instead leases the real property to a private party who does so. It is a general rule in Ohio that a lessor of real property does not impliedly warrant that the leased premises are in a condition

³ An "underground storage tank system" is "an underground storage tank and the connected underground piping, underground ancillary equipment, and containment system, if any." R.C. 3737.87(Q).

which is fit for the use intended by the lessee. *The Shinkle, Wilson and Kreis Co. v. Birney and Seymour*, 68 Ohio St. 328, 67 N.E. 715 (1903). Moreover, absent express agreement, a lessor has no duty to maintain or repair leased premises where there is no fraud or concealment, *Campbell v. Luck*, 2 Ohio C.C. (n.s.) 129 (Cuyahoga County 1903), and a lessor generally is not obligated to take care that the premises are safe.⁴ *Rosen v. Concordia Lutheran Church, Inc.*, 111 Ohio App. 54, 167 N.E.2d 671 (Cuyahoga County 1960). However, a lessor is generally responsible for making alterations in leased premises that are ordered by public authorities and that exceed ordinary repairs. *Wollett v. Boston Bars, Inc.*, No. 79AP-644 (Ct. App. Franklin County, June 26, 1980) (unreported). See generally *Rosinski v. Jones*, 16 Ohio Op. 2d 294, 174 N.E.2d 145 (Toledo Mun. Ct. 1961). See also *Portal Enterprises, Inc. v. Cahoon*, 715 P.2d 1324 (Nevada 1986). Since the board of township trustees has the express power to lease township property, the board has the implied authority to do that which is required by law of a lessor. See generally *Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E. 112 (1935). It follows that the board of township trustees has the authority to make alterations and repairs that are ordered by public authorities and which exceed ordinary repairs. "Ordinary repairs" are distinguished from permanent additions to or betterments of real property that make the property more useful or valuable. *Fritz v. Otis Elevator Co.*, 48 Ohio App. 3d 240, 549 N.E.2d 205 (Summit County 1988). See also *Wollett, supra*, (repairs of a structural or substantial nature are not ordinary repairs).

The inquiry thus focuses on whether public authorities have ordered alterations or structural repairs to be made with respect to underground storage tanks and pumps. In this regard, in addition to the Fire Marshal's specific responsibility concerning underground storage tanks, R.C. 3737.82 provides that "[t]he fire marshal shall adopt a state fire code which shall consist of rules relating to all aspects of fire safety" and which may include, by reference, existing published standards. The state fire code, adopted by the Fire Marshal pursuant to this mandate, appears at 2 Ohio Admin. Code Chapter 1301:7-7. Several provisions of the state fire code are applicable to gasoline service stations. For example, the state fire code includes rules concerning flammable and combustible liquids and their transportation, storage, handling, and processing, [1990-91 Monthly Record, vol. 1] Ohio Admin. Code 1301:7-7-28 at 186, and rules specifically concerning "all service stations where flammable and combustible fuels are stored and dispensed to motor vehicles." Rule 1301:7-7-16(A)(1). In part, these rules address underground storage tanks and pumps. See, e.g., rule 1301:7-7-28(E)(2), (6) and (7) (concerning the location of underground storage tanks and requirements for vent and fill piping); rule 1301:7-7-16(D)(5) (requiring that "[a]n approved impact value designed to close automatically in the event of fire or severe impact shall be installed flush with the base of the dispensing pump unit on remote pumping systems"). The board of township trustees has the authority to make any repairs, replacements or improvements of a structural or substantial nature to the extent required by the state fire code or by other order of a public authority. Whether any particular repair, replacement, or improvement is of a structural or substantial nature is necessarily a question of fact to be addressed on an individual basis.

III. Conclusion

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

1. A township has the authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps on township property to the extent necessary to comply with any law requiring such improvement, including R.C. 3737.88 and R.C. 3737.882 and the rules of the Fire Marshal promulgated thereunder.

⁴ The general common law rules that a lessor does not warrant that the leased premises are fit for the use intended by the tenant and that a lessor has no duty to maintain or repair the premises or to take care that the premises are safe have been abrogated with respect to residential facilities by R.C. Chapter 5321. However, since the real property with which your question is concerned is not a residential facility, I shall not address R.C. Chapter 5321 in this opinion.

2. A township which leases real property pursuant to R.C. 505.11(A) has the authority to replace, repair, maintain or otherwise improve underground storage tanks and pumps on such property to the extent that such alterations exceed normal repairs and are ordered by public authorities.