

OPINION NO. 77-016

Syllabus:

County prosecuting attorneys and city attorneys, solicitors, or law directors may initiate and prosecute criminal and civil actions under R.C. 3704.05 when so authorized by the Director of the Environmental Protection Agency pursuant to R.C. 3704.03(Q).

**To: Ned E. Williams, Director, Ohio Environmental Protection Agency,
Columbus, Ohio**
By: William J. Brown, Attorney General, March 21, 1977

You have requested my opinion as to whether county and city prosecutors, solicitors, and law directors may initiate and prosecute civil and criminal actions under R.C. 3704.05.

R.C. 3704.05 sets forth specific prohibitions against violations of and non-compliance with the provisions of R.C. Chapter 3704, and regulations, orders, permits, and variances adopted or issued pursuant to such provisions. The primary responsibility for the enforcement of these statutes resides with the Director of the Ohio Environmental Protection Agency.

The Director's power to enforce the provisions of R.C. Chapter 3704 by means of court action derives from R.C. 3704.06, which provides, in pertinent part, that:

The attorney general, upon the request of the director of environmental protection, shall prosecute any person who violates section 3704.05 of the Revised Code.

The attorney general, upon request of the director, shall bring an action for an injunction or any other appropriate proceedings in any court of competent jurisdiction against any person violating or threatening to violate section 3704.05 of the Revised Code. The court shall have jurisdiction to grant injunctive relief or enter such other judgment, and orders enforcing such judgment, as the public interest and equities of the case require.

As the above-quoted statute indicates, the sole power of the Director to initiate enforcement action in the courts for violations of R.C. 3704.05 is to request the Attorney General to bring a criminal or civil action.

This power, as well as certain others, may be delegated by the Director pursuant to R.C. 3704.03(Q) which provides that he may:

Delegate to any city or general health district or political subdivision of the state any of his enforcement and monitoring powers and duties, other than regulation making powers, as the director elects to delegate, and in addition employ, compensate, and prescribe the powers and duties of such officers, employees, and consultants as are necessary to enable the director to exercise his authority and perform duties imposed upon him by law. Technical and other services shall be performed, insofar as practical, by personnel of the environmental protection agency.

This section provides a vehicle whereby certain governmental entities may exercise powers reserved in the first instance to the Director. However, it does not provide for these entities to exercise greater or additional powers than those delegated to the Director by the General Assembly. Therefore, although a governmental entity which has been delegated enforcement powers by the Director pursuant to R.C. 3704.03(Q) could request the Attorney General to bring a civil or criminal action,

that section does not authorize enforcement actions by city solicitors, law directors, and attorneys or county prosecutors.

The powers and duties of those officials insofar as such powers and duties are relevant here, are set forth in, respectively, R.C. 1901.34, R.C. 733.52, and R.C. 309.08. City solicitors, city attorneys, and city law directors are authorized by R.C. 1901.34 to:

prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is solicitor, attorney, or director of law, or for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is a solicitor, attorney, or director of law.

Those officials are also empowered by R.C. 733.52 to prosecute cases brought before the mayor's court.

The jurisdiction of the municipal court to try criminal cases is prescribed in R.C. 1901.20 and 2931.041. Those sections provide as follows:

"1901.20 CRIMINAL JURISDICTION

The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory and of any misdemeanor committed within the limits of its territory. In all such prosecutions and cases, the court shall proceed to a final determination thereof. The court has jurisdiction to hear felony cases committed within its territory and to discharge, recognize, or commit the accused."

"2931.041 CRIMINAL JURISDICTION

Municipal courts have jurisdiction in criminal cases to finally try and determine prosecutions for the violation of municipal ordinances within corporate limits of municipal corporations within their territories and misdemeanor cases within their territories as provided in Chapter 1901. of the Revised Code. Such courts also have the same powers as a county court as a committing magistrate in felony cases.

As defined by R.C. 2901.02, which classifies crime in Ohio, violations of R.C. 3704.05 are neither felonies nor misdemeanors but are offenses not specifically classified, and the municipal court does not have criminal jurisdiction over such offenses. State v. Supinger, Case No. 75 CA 9 and 10 (Ct. of App., Miami Cty., Sept. 9, 1975). Likewise the criminal jurisdiction of the mayor's court, as defined by R.C. 1905.01, does not encompass violations of R.C. 3704.05. Inasmuch as the city solicitor, city attorney, or city law director can only prosecute criminal cases before the municipal court and the mayor's court and those courts do not have jurisdiction over criminal prosecutions for violations of R.C. 3704.05, it follows that city solicitors et al. cannot initiate criminal actions for violations of R.C. 3704.05.

The powers and duties of the county prosecutors are set forth in R.C. 309.08, which provides:

The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession.

It follows from a reading of the section quoted above that the county prosecutor is authorized to initiate and prosecute criminal actions for violations of Chapter 3704 occurring within the county. R.C. 3704.06 does not limit or repeal this power of county prosecutors, but rather enlarges the power of the Attorney General, enabling him to bring criminal prosecutions for violations of R.C. 3704.05. See Village of Leipsic v. Wagner, 105 Ohio St. 466 (1922).

With respect to civil actions, it is my opinion that the Attorney General is the sole person authorized to bring such for violations of R.C. 3704. As I stated in Opinion No. 73-089 "it has been settled law in Ohio that absent a specific statute authorizing a prosecuting attorney to institute . . . a civil action he has no such authority." See State ex rel. Schwartz v. Zumstein, 4 Ohio C.C.R. 268, 2 Ohio C. Dec. 530 (1890), aff'd, 30 W.L.B. 275, 10 Ohio D. Re. 827 (Sup. Ct. 1893).

If the General Assembly had intended that county and city prosecutors also have the authority to bring civil actions to enforce R.C. 3704, there is every indication that it would have granted this authority expressly. In two other statutory schemes relating to protection of the environment - R.C. Chapter 3734, relating to solid waste disposal, and R.C. 3767.32 and 3767.33, relating to the disposal of materials upon the banks of streams - the General Assembly expressly provided that local prosecutors, as well as the Attorney General, are empowered to bring injunctive actions.

R.C. 3704.032 is a further indication that local prosecutors do not have authority to bring civil actions for violations of R.C. 3704. That section provides that "[d]uring an air pollution emergency the attorney general or the prosecuting attorney of the county where a violation of an emergency order occurs may bring action for an immediate injunction to enjoin any emission or other activity violating an emergency order." (emphasis added.) If a prosecuting attorney had general power to bring a civil action, the specific authorization quoted above would have been unnecessary.

In specific answer to your question, it is my opinion and you are so advised that county prosecuting attorneys can initiate and prosecute criminal actions for violations of R.C. 3704.05, but are not empowered to bring civil actions to enforce that section. City attorneys, city solicitors, and city law directors are not authorized to initiate or prosecute either criminal or civil actions for violations of R.C. 3704.05.