

OPINION NO. 84-090**Syllabus:**

1. Pursuant to R.C. 3707.02, the board of health of a general health district may post, upon the premises where a nuisance appears, a citation reciting the cause of complaint and requiring the persons responsible to appear before the board to show cause why the board should not proceed to furnish the necessary material and labor and remove the cause of complaint. This procedure is, however, appropriate only when the board has determined that a nuisance exists, when an order that the nuisance be abated has not been obeyed, when the board has decided to undertake the abatement itself, and when the citation cannot be delivered to the appropriate person in any of the other manners outlined in R.C. 3707.02.
2. The board of health of a general health district, in the exercise of its general authority to protect the public health, may post signs on public or private property warning as to health or safety hazards existing on the property, if the board reasonably finds that the posting of such signs is necessary to protect the public health, and if the board's action does not violate any constitutional guarantees.

To: Roger L. Kline, Pickaway County Prosecuting Attorney, Circleville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 28, 1984

I have before me your request for my opinion as to whether the board of health of a general health district has the authority to post signs on private or public property warning as to health or safety hazards existing on the property. I understand that such posting would be limited to situations where the board of health has already determined that a health or safety hazard exists but compliance with an order to correct the condition has been delayed. The signs would be placed prominently on the premises, would be approximately three feet by four feet, would be printed in bold colors, and would say: "WARNING Health or Safety Hazard or Violation of Health Department Standard. Specifically: (a taped-on letter to briefly define the hazard). For more information, ask the owner or call Pickaway County Health Department, 474-8861."

Provisions governing boards of health appear in R.C. Chapters 3707 and 3709. The boards have express authority to deal with nuisances. R.C. 3707.01 states that a board of health "shall abate and remove all nuisances within its

jurisdiction. It may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders." See also R.C. 3707.03 (providing for the abatement of nuisances upon school property); R.C. 3709.21 (authorizing a board of health to "make such orders and regulations as are necessary for . . . the prevention, abatement, or suppression of nuisances"); R.C. 3709.22 (authorizing a board of health to "provide for the inspection and abatement of nuisances dangerous to public health or comfort"). R.C. 3707.02 sets forth a particular procedure which may be followed if an order issued by a board of health under R.C. 3707.01 is not obeyed. R.C. 3707.02 states, in part:

When an order of the board of health of a city or general health district, made pursuant to section 3707.01 of the Revised Code, is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending, or to perform, by its officers and employees, what the offending parties should have done. If the latter course is chosen, before the execution of the order is begun, the board shall cause a citation to issue and be served upon the persons responsible, if residing within the jurisdiction of the board, but if not, such citation shall be mailed to such persons by registered letter, if the address is known or can be found by ordinary diligence. If the address cannot be found, the board shall cause the citation to be left upon the premises, in charge of any person residing thereon, otherwise it shall be posted conspicuously thereon. The citation shall briefly recite the cause of complaint, and require the owner or other persons responsible to appear before the board at a time and place stated, or as soon thereafter as a hearing can be had, and show cause why the board should not proceed and furnish the material and labor necessary and remove the cause of complaint. (Emphasis added.)

Thus, there is a statutory procedure for posting, upon the premises where a nuisance appears, a citation reciting the cause of complaint and requiring the persons responsible to appear before the board to show cause why the board should not proceed to furnish the necessary material and labor and remove the cause of complaint. See generally 1980 Op. Att'y Gen. No. 80-089. This procedure is, however, appropriate only when the board has determined that a nuisance exists, when an order that the nuisance be abated has not been obeyed, when the board has decided to undertake the abatement itself, and when the citation cannot be delivered to the appropriate person in any of the other manners outlined in the statute. It appears, therefore, that the sort of posting of signs about which you have inquired would only occasionally, if ever, come within this express statutory authority.

Boards of health also have more general authority to act in the event of a hazard to public health or safety. R.C. 3709.21 states that "[t]he board of health of a general health district may make such orders and regulations as are necessary . . . for the public health [and] the prevention or restriction of disease," and sets forth a procedure for the adoption of orders and regulations which are intended for the general public. R.C. 3709.22 authorizes a board of health to "take such steps as are necessary to protect the public health and to prevent disease."

It is firmly established that boards of health are creatures of statute and that, as such, they have only such powers as are expressly conferred or fairly implied from those expressly granted. *Stubbs v. Mitchell*, 65 Ohio L. Abs. 204, 114 N.E.2d 158 (Ct. App. Franklin County), appeal dismissed, 158 Ohio St. 245, 108 N.E.2d 281 (1952). The general authority granted to boards of health to protect the

¹ Under R.C. 3707.08, boards of health are authorized to post placards in instances of quarantine of persons with communicable diseases. Such posting is, however, distinguishable from the type of posting of signs to which your question relates.

public health has, however, been found to constitute an exercise of the police power inherent in the state and to give boards of health broad powers. *Id.* at 208, 114 N.E.2d at 160-61. See Schlenker v. Board of Health, 171 Ohio St. 23, 167 N.E.2d 920 (1960); Weber v. Board of Health, 148 Ohio St. 389, 74 N.E.2d 331 (1947); McGowen v. Shaffer, 65 Ohio L. Abs. 138, 111 N.E.2d 615 (C.P. Summit County 1953); Op. No. 80-089. Further, it has been held that the statutory procedure for abating nuisances is not exclusive, and that a board of health may take other steps if it finds them more efficacious. State ex rel. Pansing v. Lightner, 32 Ohio N.P. (n.s.) 376 (C.P. Montgomery County 1934).

Despite the broad construction accorded to language authorizing a board of health to take action to protect the public health, it is clear that a board's discretion to act is not unlimited. Rather, it is restricted by the requirement that the board may not act in a manner which is unreasonable, discriminatory, or contrary to constitutional guarantees. Weber v. Board of Health; Stubbs v. Mitchell. The general language of R.C. 3709.21 which authorizes a board of health to make orders and regulations and the provision of R.C. 3709.22 which authorizes a board of health to "take such steps as are necessary to protect the public health" thus appear to permit a board of health to post signs in the situations you have described, if the board reasonably finds that the posting of such signs is necessary to protect the public health, and if the board's action does not violate any constitutional guarantees. Such action may be taken in addition to other actions specifically authorized by statute as, for example, the seeking of injunctive relief, R.C. 3707.021; R.C. 3709.21; see State ex rel. Pansing v. Lightner, if it is found to be necessary for the protection of the public health.

It is, of course, clear that I am unable to provide you with a definite answer concerning the constitutionality of a particular proposal, since the authority to make such determinations has been vested in the judicial branch of government. See State ex rel. Davis v. Hildebrant, 94 Ohio St. 154, 114 N.E. 55, aff'd on other grounds, 241 U.S. 565 (1916); 1984 Op. Att'y Gen. No. 84-048. I am, however, able to note areas of concern which should be considered in connection with a program of the sort you have described.

One important matter for consideration is the possibility that the posting of a notice may interfere with the operations of the landowner or tenant so as to constitute a deprivation of property or livelihood. Where such interference may result, it is essential that due process requirements of the federal and state constitutions be satisfied. U.S. Const. amend. XIV (providing that no state shall "deprive any person of life, liberty, or property, without due process of law"); Ohio Const. art. I, §1 ("[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety"); Ohio Const. art. I, §19 ("[p]rivate property shall ever be held inviolate, but subservient to the public welfare").

As a general proposition of law, due process requires notice and an opportunity for an appropriate hearing at a meaningful time. As was stated in Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971):

[W]hat the Constitution does require is "an opportunity . . . granted at a meaningful time and in a meaningful manner, . . . for [a] hearing appropriate to the nature of the case" The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (Emphasis in original; citations and footnotes omitted.)

Since the proposal which you have outlined contemplates the posting of warning signs prior to or during a court hearing, there is the possibility that a property

owner or occupant may suffer a deprivation of property or loss of livelihood without a prior opportunity for a meaningful hearing. The Boddie case indicates that such a result may be justified only in an extraordinary case where a valid governmental interest is at stake. Clearly protection of the public health may constitute such an interest. See Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) (protection of the public health may justify summary destruction of property); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (allowing summary seizure of unsafe or unwholesome food); Pritz v. Messer, 112 Ohio St. 628, 637-38, 149 N.E. 30, 33 (1925) ("[u]nder the police power society may restrict the use of property without making compensation therefor, if the restriction be reasonably necessary for the preservation of the public health, morals, or safety"); Leonard v. State, 100 Ohio St. 456, 459, 127 N.E. 464, 465 (1919) ("[i]f there appears in the phrasing of the law and the practical operation of the law a reasonable relation to the public need, its comfort, health, safety and protection, then such act is constitutional unless some express provision of the constitution be clearly violated in the operation of the act"); State ex rel Pansing v. Lightner, 32 Ohio N.P. (n.s.) at 383 (in the exercise of statutory powers, boards of health "are not restrained either by law or courts unless the exercise is palpably and clearly in violation of the organic law of the land, or is so exercised that an abuse of discretion plainly obtains"). You should be aware, however, that questions of procedural due process must be determined on the facts of each case. See, e.g., Boddie v. Connecticut.

On the basis of the information before me, it appears that there may be questions as to whether the need for posting signs is sufficient to justify the type of procedure which has been proposed. An attachment to your letter of request indicates that there are two types of situations with which the board of health is concerned. The first relates to facilities which are licensed for operation by the board of health. Among these facilities are mobile home parks, camp grounds, public swimming pools, food service operations, and so on. See R.C. 3709.21; R.C. 3709.22. The proposal, as it has been described to me, is to post signs on such facilities "where a hazard exists as determined by Health Department inspection of the premises, but the hazard is correctible within a reasonable time or is not of the magnitude to necessitate revocation of the license unless correction is unreasonably delayed." The second situation in which signs might be posted involves properties which are not used for activities that are subject to licensing requirements. It is proposed that signs would be posted on such properties if "a hazard exists as determined by Health Department inspection of the premises, and there is an unreasonable delay in correction after the owner is notified. Such a delay would occur, for example, when the Health Department had to seek recourse to the courts or other governmental authority to secure correction of a hazard." The attachment to your letter does not indicate that such posting will be done only if the hazard is such as to cause an immediate danger to the public health. It is not clear that the mere fact of a delay will make posting necessary for the protection of the public health, if it was not necessary prior to the delay. There may, therefore, be some question as to whether posting signs is in fact an efficacious method of protecting the public health. Cf. Ewing v. Mytinger & Casselberry, Inc. (law authorizing seizure of misbranded articles was constitutional even though danger of injury might not always be apparent).

The attachment further suggests that there are three purposes which the posting would serve. The most important would be to alert consumers or users of the facility to the existence of the hazard, which they could then avoid. This purpose clearly constitutes a legitimate use of the police power, and if there exists a hazard which people should avoid in order to protect their health and safety, actions necessary to carry out this purpose would appear to be justified. The attachment also suggests, however, that posting would motivate and expedite correction of a hazard by the owner and would notify citizens that the board of health is taking action with respect to a particular problem. While such purposes may be sufficient to justify certain types of actions by the board of health, it is not clear that they would, in themselves, be sufficient to justify the taking of property or interference with livelihood. In any event, where these are in fact the main purposes to be served, questions of due process may arise. See generally Benjamin v. City of Columbus, 167 Ohio St. 103, 146 N.E.2d 854 (1957) (test for validity of an

exercise of the police power is whether it bears a real and substantial relation to the public health, safety, morals, or general welfare and is not unreasonable or arbitrary).

Thus, to assure compliance with statutory and constitutional limitations, officials of a board of health would be well advised to restrict the posting of signs to instances in which there is in fact a real danger to public health and the source of the hazard is clear. Even in such a case,² there can be no assurance that the action of the board will not be challenged.² It may be difficult to prove the necessity of the posting of signs when a statutory right to injunctive relief or other appropriate judicial relief is clearly given. R.C. 3707.021; R.C. 3709.211. See generally State ex rel. Pansing v. Lightner. Care should, thus, be taken in implementing a plan of the sort you have described to make certain that the action taken in each case is reasonable in relation to the danger presented to the public health. See generally Solly v. Toledo, 7 Ohio St. 2d 16, 218 N.E.2d 463 (1966) (public officer may be held liable for damages caused by destruction of private property on the grounds that it was a public nuisance where there was no judicial determination or administrative hearing on the question whether there was a nuisance).

Your question relates to both private and public property. A board of health has specific statutory duties with respect to certain types of public facilities. See, e.g., R.C. 3707.03 (board of health shall abate nuisances and may remove or correct conditions detrimental to health found upon school property by serving an order upon the person responsible for the property); R.C. 3707.26 (board of health shall inspect the sanitary condition of schools within its jurisdiction); R.C. 3707.30 (board of health may have control of certain municipal hospitals); R.C. 3709.22 (board of health may provide for the inspection of schools, public institutions, jails, workhouses, and county homes); R.C. 3709.26 (health commissioner may inspect county institutions). None of the provisions relating expressly to public facilities specifically authorizes the posting of signs. The authority of a board of health to post signs on public property appears, however, to be coextensive with its authority to regulate such property in other respects. See generally R.C. 3709.22; City of East Cleveland v. Board of County Commissioners, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982) (applying balancing test to question involving conflicting interests of governmental entities); Brownfield v. State, 63 Ohio St. 2d 282, 285, 407 N.E.2d 1365, 1367 (1980) ("the correct approach in these cases where conflicting interests of governmental entities appear would be in each instance to weigh the general public purposes to be served by the exercise of each power, and to resolve the impasse in favor of that power which will serve the needs of the greater number of our citizens"); 1980 Op. Att'y Gen. No. 80-066 (the statutory scheme authorizing state agencies to regulate sewage systems preempts the authority of local boards of health to undertake such regulation).

In conclusion, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 3707.02, the board of health of a general health district may post, upon the premises where a nuisance appears, a citation reciting the cause of complaint and requiring the persons responsible to appear before the board to show cause why the board should not proceed to furnish the necessary material and labor and remove the cause of complaint. This procedure is,

² I note that, even though a board of health might ultimately be found to have acted within its scope of authority, it is possible that its actions may be challenged on the grounds of trespass, unlawful search or seizure, or other grounds. See generally 1956 Op. Att'y Gen. No. 7172, p. 728 (concluding that entry into private premises by employees of a board of health for purposes of inspection may be accomplished with the consent of the owner; when the owner withholds consent, the entry must be pursuant to a valid court order except in cases where there is an immediate emergency or where the premises involved are those on which the occupant engages in an activity licensed by the board of health). Thus, consideration should be given to all aspects of a proposed posting, in light of any controversy which may ensue.

however, appropriate only when the board has determined that a nuisance exists, when an order that the nuisance be abated has not been obeyed, when the board has decided to undertake the abatement itself, and when the citation cannot be delivered to the appropriate person in any of the other manners outlined in R.C. 3707.02.

2. The board of health of a general health district, in the exercise of its general authority to protect the public health, may post signs on public or private property warning as to health or safety hazards existing on the property, if the board reasonably finds that the posting of such signs is necessary to protect the public health, and if the board's action does not violate any constitutional guarantees.