ASHLAND COUNTY PROSECUTING ATTORNEY

NEWS

RAMONA FRANCESCONI ROGERS

Prosecutor's Newsletter **November, 2007**

From the Desk of

The Prosecutor

A Message from the Prosecutor ~ RAMONA FRANCESCONI ROGERS ~

In February of 2006, I published the first newsletter from the Ashland County Prosecutor's Office and followed that newsletter with several more. I have received positive feedback from some of you regarding the value of the newsletter so I am again publishing the summaries of a number of our written opinions that I think could be of benefit to several of our civil clients.

I'm interested in hearing from those of you who we have not heard from – are the newsletters helpful to you? As always, I am open to suggestions as to how the newsletter can be improved to maximize its benefit to our civil clients.

~ *Ramona Francesconi Rogers* ~

For Your Information

2007
CRIMINAL CASES UPDATE

	2007	2006
Intake	151*	199
Filed	90*	135

*As of November 15

2007
JUVENILE CASES UPDATE

	2007
Intake (Juvenile & Adult)	339*
Filed	170*

*As of November 15

2007
CIVIL OPINION UPDATE

2007		2006	
	167 formal written opinions*		138 formal written opinions
	45 advisory opinions*		56 advisory opinions
Total	212	Total	194

*As of November 15

NEWS
FROM THE CIVIL DIVISION

OHIO PUBLIC RECORDS ACT AMENDED EFFECTIVE 9-29-07

The Ohio Public Records Act was recently amended by the General Assembly. The amendments, which became effective September 29, 2007, include extensive changes to R.C. 149.43. Among many other changes, the amendments to R.C. 149.43 now provide that:

- All elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code.
- In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code.

PROSECUTOR'S OPINIONS CORNER

OVERVIEW

In this issue of the Prosecutor's Newsletter, we have included brief opinion summaries of twenty-four written opinions that we feel are especially relevant to townships and to other public bodies in the county. This issue of the Prosecutor's Newsletter includes opinion summaries about budgets and public funds, township cemeteries, township officers, the creation of public indebtedness, recording of agricultural easements, roads and right-of-ways, sexually oriented business regulations, Ohio's "Sunshine Laws" (the Open Meetings and Public Records Acts), tax levies, and township zoning regulations. This time, we have grouped the opinion summaries according to the subject categories discussed. We hope you will find this portion of the Prosecutor's Newsletter helpful.

BUDGETS AND PUBLIC FUNDS

Opinion No. 2007-032-CIV ***BUDGETS***

Pursuant to R.C. 5705.30, the taxing authority of a township or other subdivision must adopt its budget for the ensuing fiscal year and certify it to the county auditor no later than July 20. In the case of townships, the county auditor then submits the tax budget to the Budget Commission, which approves and/or modifies tax levies and determines the total appropriation that can be made from each fund. Pursuant to R.C. 5705.35, the Budget Commission must, no later than September 1, certify its action to the township, together with an estimate by the county auditor of the rate of tax that the township must levy and the part that is within the ten-mill limitation. The township must then by resolution or ordinance authorize the necessary tax levies and certify them to the county auditor by October 1 in each year. Before the end of the year, the township must revise its tax budget so that the total contemplated expenditures from any fund during the ensuing fiscal year will not exceed the total appropriations that may be made from such fund, as determined by the Budget Commission in its certification. If a township or any taxing authority is dissatisfied with any action of the Budget Commission, then R.C. 5705.37 provides that the fiscal officer should file an appeal to the Board of Tax Appeals within thirty days after the receipt by such subdivision of the official certificate or notice of such action by the Budget

Commission. The law clearly provides that once the taxing authority of a political subdivision or other taxing unit adopts a budget and certifies it to the auditor pursuant to Chapter 5705, the taxing authority has no power to afterwards change the budget so far as necessary contemplated expenditures during the ensuing fiscal year are concerned, regardless of the purpose for the contemplated expenditures. *See* 1935 Op. Att'y Gen. No. 35-4043. Pursuant to R.C. 5705.30, the public has the right to inspect the budget, and the taxing authority must hold at least one public hearing before the budget is adopted so interested tax payers have the opportunity to know what expenditures are contemplated and protest if not satisfied. If the taxing authority was later allowed to change the budget and contemplated expenditures, it would defeat the purpose behind R.C. 5705.30.

Opinion No. 2007-032-CIV ***TRANSFER OF FUNDS***

The proceeds of a tax levy may be expended only for the purpose for which the tax is levied, and money paid into any fund may be expended only for the purpose for which the fund is established. Transfers of township money from one township fund to another township fund are governed generally by R.C. 5705.09-.16, and a township may not transfer funds from the road and bridge fund to the general fund without an order from the court of common pleas pursuant to R.C. 5705.15 and 5705.16. Furthermore, R.C. 5705.15 prohibits the transfer by court order of money in the road and bridge fund if it is made up in part or entirely of motor vehicle license tax money or gasoline tax funds.

Opinion No. 2007-070-CIV ***PROPER EXPENDITURE OF PUBLIC MONEY***

A township asked us if it is legal to reimburse the township fiscal officer and/or trustees for the portion of their home electric bill that is used for township business on their home computers and/or home fax machines. In our opinion, this would not be a proper expenditure of public funds because no statute that we are aware of authorizes this type of expenditure, there is no way to determine precisely what portion of the home electric bill is devoted exclusively to township business, and it is fundamental that authority to expend public funds must be construed strictly and cases of doubt must be resolved against such authority. *See Auditor of State Technical Bulletin 2003-005*; *State ex rel. Bentley and Sons Co. v. Pierce*, 96 Ohio St. 44 (1917); 1976 Op. Atty. Gen. No. 76-008; and 1975 Op. Atty. Gen. No. 75-008.

CEMETERIES

Opinion No. 2007-016-CIV ***"PUBLIC" vs. "PRIVATE" CEMETERIES***

Pursuant to R.C. 517.10, a board of township trustees has control over and thus a duty to maintain a *public* cemetery but not a private cemetery. Therefore, a board of township trustees has legal authority to expend properly appropriate public moneys to maintain a public cemetery but not a private cemetery. Whenver a question arises, it is first necessary to determine whether a particular cemetery located in the unincorporated territory of the township is in fact a public cemetery or a private cemetery. This is not a simple inquiry because, in some instances, a cemetery that is privately owned by an individual or corporation can in fact still be a public cemetery. The law defines a public cemetery as one that is used by the general community, a neighborhood, or a church. On the other hand, a private cemetery is used only by a family or a small portion of the community. The test is whether the cemetery has been opened to the public not who has title to the cemetery. Therefore, even though a cemetery is privately owned or maintained, it may be a public cemetery if it is open, under reasonable regulations, to the use of the public for the burial of the dead. Also, a privately owned cemetery is properly classified as a "public cemetery" as distinguished from a private one, when it consists of a great number of burial plots or sites sold and for sale to the public. One Ohio court looked at various factors to determine whether a particular cemetery was private or public. Among the factors the court considered were the following: the evidence appeared to show that no one had been buried in the cemetery for approximately seventy-eight years; the board of township trustees had no formal record of the ownership of the cemetery; the cemetery was surrounded by a four-strand barbed wire fence with no gate or entrance of any kind; a township trustee testified that for the twenty-seven years he had been a trustee, no one had been buried in the cemetery; neither the township trustees nor their predecessors in office ever sold or issued deeds to lots in the cemetery; the trustees did not and never had any regulations regarding burial in the cemetery; and the members of only eight families were buried in the cemetery. In ACPA 2007-016-CIV, we opined, based upon the facts which were provided to us by a board of township trustees, that the particular cemetery in question was a private cemetery and the trustees therefore had no duty or obligation to maintain it; and, in addition, the board of township trustees did not have any legal authority to expend township funds to maintain that it.

OFFICERS

Opinion No. 2006-132-CIV ***TRUSTEE'S SALARIES***

Many years ago, a board of township trustees unanimously voted to adopt a method of compensation consisting of an annual salary to be paid in equal monthly payments, the township continues to pay trustees salaries under the annual salary method, and this method of payment is not being changed. At the beginning of the 2006 fiscal year, the trustees each decided to voluntarily waive a part of their annual salary. Later in the same fiscal year, the trustees decided that, if legally permissible, they wanted to be paid the full amount of their annual salary in accordance with R.C. 505.24. We determined that the trustees were entitled to the full amount of compensation specified in R.C. 505.24 for 2006, even though they voluntarily waived part of their 2006 salaries at the beginning of that fiscal year; provided, however, that: (1) there was a sufficient amount of money still available that could be legally appropriated and spent to pay the trustees salaries for 2006; (2) the trustees could and did appropriate for this purpose the full amount of money to which they were entitled to be paid as compensation under R.C. 505.24; and (3) the trustees were only receiving payment for the full amount of their 2006 salaries, and the payments had to be capable of being paid with 2006 funds and *before* the close of the 2006 fiscal year. The trustees could not, however, receive any money in 2006 for salaries that they may have waived *prior* to 2006. Furthermore, such payment in 2006, for 2006 salaries, did not, in our opinion, constitute an in-term increase in compensation, which is prohibited by of Ohio Const. art. II, § 20, because R.C. 505.24 was last amended to provide for compensation of trustees on September 5, 2001, which was well before any of these trustees began their current terms of office.

Opinion No. 2007-014-CIV ***RESIGNATION OF TOWNSHIP OFFICE***

The holder of an elected township office wanted to know how to resign. The term "resignation" means a "formal renouncement or relinquishment" of office made voluntarily with the intention of relinquishing the office and accompanied by "an act of relinquishment." Thus, an effective resignation from township office under Ohio law requires two distinct components.

- *First*, *an intention to voluntarily resign from office*. A "formal renouncement or relinquishment" of office can take many different forms. However, a "formal renouncement or relinquishment" of office is usually a written letter of resignation that is voluntarily tendered by the resigning township officer to the board of township trustees at a public meeting. The resigning township official can probably make the resignation "effective immediately," but it would be better to give the board sufficient advance notice so that they can appoint a successor. In this regard, R.C. 3.01 provides that "a person holding an office of public trust shall continue therein until his successor is elected or appointed and qualified, unless otherwise provided in the constitution or laws of this state."

- *Second*, *an act of voluntary relinquishment of office*. Likewise, "an act of relinquishment" of office can also take many different forms. However, an "act of relinquishment" of office usually consists of some substantive act taken voluntarily by the resigning township officer, such as surrendering his or her records and/or turning over the keys to township buildings to the successor in office or the board of trustees. An "act of relinquishment" could also consist of other acts, including acts that unequivocally manifest a clear refusal of the township officer to continue to perform the statutory duties of that office, such as saying "I quit" during a township meeting and then abruptly leaving the meeting or otherwise failing to perform the duties of the office.

If a township officer does resign, he or she should be aware that R.C. 503.28 provides that "all township officers shall deliver to their successors in office all books, records, documents, laws, obligations, papers, blanks, and all other articles and property belonging to their respective offices or deposited with them in their official capacity." In our opinion, this requirement would apply even if the successor to the township office is not appointed until after the effective date of the resignation. *See* R.C. 3.01, 503.24, 503.241, 503.28, and 507.051.

Opinion No. 2007-015-CIV ***FILLING VACANCY IN TOWNSHIP OFFICE***

The procedure that the board of township trustees should follow upon a vacancy in a township office is as follows:

- *First*, notify the board of elections of the vacancy, in writing, not later than ten days after the vacancy occurs. The notice should state the date that the township officer's resignation becomes effective.

- *Second*, the board of township trustees has thirty days from the occurrence of the vacancy (i.e., from the effective date of the resignation) in which to appoint a person having the qualifications of an elector in the township to fill the vacancy for the unexpired term or until a successor is elected. If the board of township trustees is able to fill the vacancy within this thirty day period, the fiscal officer (or a trustee) should notify the board of elections, in writing, that the vacancy has been filled and provide the board of elections with the name, address, and telephone number of the successor.

- *Third*, if the board of township trustees is not able to make the appointment within thirty days, then a majority of the persons designated as the committee of five on the last-filed nominating petition of the township officer whose vacancy is to be filled, who are residents of the township, shall have ten days to appoint a person having the qualifications of an elector to fill the vacancy for the unexpired term or until a successor is elected.

- *Fourth*, if the committee of five fails to make the appointment within this period of time, then the probate judge will appoint a person having the qualifications of an elector to fill the vacancy. *See* R.C. 3.07-.10, 117.40, 503.24, 503.241, and 507.051.

PUBLIC INDEBTEDNESS

Opinion No. 2007-099-CIV ***PUBLIC INDEBTEDNESS***

A claim by Lorain-Medina Rural Electric Cooperative, Inc. ("LMRE") against a board of township trustees based upon a 1999 Promissory Note and Loan Agreement in the sum of $10,000 was void, legally invalid, and unenforceable against the board of township trustees because the Loan Agreement and Promissory Note, which had been prepared by a non-attorney employee of LMRE and not by the township's legal counsel, did not comply with Ohio law in numerous respects. Therefore, we opined that the board of township trustees did not have any legal authority, absent a court order issued in response to a lawsuit, to pay the alleged loan to LMRE under the terms of the Loan Agreement or Promissory Note *even though the township received the $10,000 from LMRE in 1999* to pay for a waste water feasibility study for the township. There are constitutional and statutory limitations and requirements relating to the creation of a valid public debt by political subdivisions, including townships and counties. Deviations from the legal requirements relating to the creation of public indebtedness, whether based upon a promissory note or the bonds of a township (or county), can result in unnecessary litigation and may also subject the elected officials entering such void and invalid debts to the possibility of personal liability. Political subdivisions who are considering the creation of a valid public debt should seek legal counsel before proceeding. The Ashland County Prosecuting Attorney's Office can prepare promissory notes for townships in accordance with R.C. 505.262; plus there are also some local banks that have experience helping townships with the issuance of promissory notes under R.C. 505.262. Townships considering a bond issue should hire private bond counsel before proceeding. *See* Ohio Const. Art. XII, §§ 2 and 11 and R.C. 505.262, 5705.02, 5705.41.

Opinion No. 2007-124-CIV ***PUBLIC INDEBEDNESS***

The amount that a board of township trustees can finance under a R.C. 505.262 note is limited to an amount, as certified by the county auditor, in which:

- the "debt service charge" for the purchase or construction in the first year, together with the "debt service charge" for that same year for any other purchase or construction already undertaken pursuant to division (A) of that section, does not exceed one-tenth of the township's total revenue from all sources; *and*

- the aggregate amount of taxes that may be levied on any taxable property in the township, including the taxes levied to pay the debt service charges on the note, does not exceed ten mills on each dollar of tax valuation of the township (except for taxes specifically authorized to be levied in excess of the ten mill limitation).

The "debt service charge" on a township note generally includes the amount of principal and interest paid on the note during a given period of time. Thus, for purposes of interpreting R.C. 505.262, the "debt service charge for the purchase or construction in the first year" of a note generally means the amount of principal and interest paid on the note in the first year of the note.

RECORDING

Opinion No. 2007-087-CIV ***RECORDING AGRICULTURAL EASEMENTS***
R.C. 5301.691 governs the purchase and recording of agricultural easements. R.C. 5301.691(H) states that: "[p]romptly after the recording and indexing of an instrument conveying an agricultural easement to any person or to a municipal corporation, county, township, or soil and water conservation district or of an instrument extinguishing an agricultural easement held by any person or such a political subdivision, the county recorder shall mail, by regular mail, a photocopy of the instrument to the office of farmland preservation in the department of agriculture. The photocopy shall be accompanied by an invoice for the applicable fee established in section 317.32 of the Revised Code. Promptly after receiving the photocopy and invoice, the office of farmland preservation shall remit the fee to the county recorder."

ROADS AND RIGHT-OF-WAYS

Opinion No. 2007-011-CIV ***ENGINE RETARDERS OR "JAKE BRAKES"***
With regard to a township's authority to pass a resolution prohibiting the use of truck engine breaks (also referred to as engine retarders and "Jake Breaks"), the law provides that pursuant to both R.C. 505.17(A) and R.C. 4513.221(E)(4), a board of township trustees may enact a regulation prohibiting the use of engine retarders on motor vehicles within the unincorporated area of the township if the board reasonably determines that the use of an engine retarder on a motor vehicle causes the vehicle's motor to race in such a manner as to cause the exhaust system to emit a loud cracking or chattering noise unusual to its normal operation. *See* 1999 Op. Atty. Gen. No. 99-050. In fact, that opinion stated that the plain language of R.C. 4513.221(E)(4) clearly and unequivocally authorizes a board of township trustees to enact such a regulation.

Opinion No. 2007-046-CIV ***ROADS AND RIGHT-OF-WAYS***
A telephone company has the authority pursuant to R.C. 4931.03 to construct, in the unincorporated area of a township, telegraph or telephone lines upon and along any of the public roads and highways and to construct telephone lines and the fixtures necessary for containing and protecting the lines beneath the surface of public roads and highways. However, this construction is subject to the provisions of R.C. 5571.16, which provides a board of township trustees with the authority to adopt a resolution requiring persons to secure a permit from the board of township trustees before any excavation is made in a township road. The board, as a condition to the granting of the permit, may do any of the following:

- require the applicant to submit plans indicating the location, size, type, and duration of the culvert or excavation contemplated;
- specify methods of excavation, refilling, and resurfacing to be followed;
- require the use of warning devices it considers necessary to protect travelers on the highway;
- *require the applicant to indemnify the township against liability or damage as the result of the installation of the culvert or as a result of the excavation*; and
- require the applicant to post a deposit or bond, with sureties to the satisfaction of the board, conditioned upon the performance of all conditions in the permit.

When granting permission for the installation of facilities in township roads pursuant to R.C. 5571.16, it is our opinion that a board of township trustees may impose upon any person or company *any restrictions reasonably necessary for the restoration of the right-of-way and maintenance of the facilities installed*.

Opinion No. 2007-077-CIV ***ROADS AND RIGHT-OF-WAYS***

A board of township trustees may place a township graveled or unimproved road under its jurisdiction on "nonmaintained" status in accordance with R.C. 5571.20. To do so, the board must pass a resolution in a public meeting. However, a board may adopt a resolution under this section only if the board finds that placing the road on nonmaintained status will not unduly adversely affect the flow of motor vehicle traffic on that road or on any other road located in the immediate vicinity as determined by the overall use of the road during the preceding twenty-one years. Also, a graveled road may not be placed on nonmaintained status if any person resides in a residence adjacent to the road, the road is the exclusive means for obtaining access to the residence, and the residence is the person's primary place of residence. Upon adoption of such a resolution, the board is not required to cause the road to be dragged at any time; to cut, destroy, or remove any brush, weeds, briers, bushes, or thistles upon or along the road; to remove snow from the road; or to maintain or repair the road in any manner. The board, in its discretion, may cause any of these actions to be performed on or to a road that it has placed on nonmaintained status. A board may terminate the nonmaintained status of a township road by adopting a resolution to that effect. If the owner of land adjoining a road that has been placed on nonmaintained status requests the board to terminate the nonmaintained status of the road, the board, in its resolution that terminates that nonmaintained status, may require the owner to pay the costs of upgrading the road to locally adopted township standards.

SEXUALLY ORIENTED BUSINESS REGULATIONS

Opinion No. 2007-076-CIV ***SEXUALLY ORIENTED BUSINESS REGULATIONS***

A township asked us if they should use the model sexually oriented business resolution that we drafted in 2004 or the model resolution prepared by the Ohio Attorney General in 2006. In our opinion, a township that desires to adopt sexually oriented business regulations should choose to use the model resolution prepared by the Ohio Attorney General in response to the enactment of 2006 Am. Sub. H.B. No. 23. Upon the enactment of 2006 Am. Sub. H.B. No. 23, the General Assembly made many amendments to the statutes regarding township resolutions aimed at regulating sexually oriented businesses. The General Assembly also enacted R.C. 503.52(B)(2) to provide that, upon the request of any township, the attorney general shall provide legal guidance and assistance to the township in developing, formulating, and drafting a resolution regarding the operation of adult entertainment establishments and their employees. Townships should therefore use the Attorney General's model resolution as a guide to adopting a township resolution to regulate sexually oriented businesses for at least two reasons. First, the Attorney General is now charged by law with providing legal guidance and assistance to the townships with respect to drafting such resolutions. Second, the Attorney General's model resolution was drafted to incorporate changes in the law made after passage of 2006 Am. Sub. H.B. No. 23; whereas, the model resolution we prepared was drafted in 2004 and well before passage of 2006 Am. Sub. H.B. No. 23.

SUNSHINE LAWS - OPEN MEETINGS & PUBLIC RECORDS

Opinion No. 2007-027-CIV ***PUBLIC RECORDS***

The fact that a person who makes a public records request identifies himself as an attorney has no bearing on his public records request. This is because an attorney has the same rights, and no more, as any other person who makes a request for public records under the Ohio Public Records Act. The Ohio Public Records Act does not require a public office to compile information or to create a written document that does not already exist, regardless of whether the person making the request is an attorney. *See* R.C. 149.43.

Opinion No. 2007-038-CIV ***PUBLIC RECORDS***

A record kept by a public office that is a "security record" or an "infrastructure record" is not a public record under the Ohio Public Records Act, R.C. 149.43 and is not subject to mandatory release or disclosure under that section.

- A "*security record*" means any of the following: (a) any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage; (b) any record assembled, prepared, or maintained by a public office or public body to prevent, mitigate, or respond to acts of terrorism, including those portions of records containing specific and unique vulnerability assessments or specific and unique response plans either of which is intended to prevent or mitigate acts of terrorism, and other records

related to national security briefings to assist state and local government with domestic preparedness for acts of terrorism; and (c) a school safety plan adopted pursuant to section 3313.536 of the Revised Code.

- An "*infrastructure record*" means any record that discloses the configuration of a public office's or chartered nonpublic school's critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of the building in which a public office or chartered nonpublic school is located. "Infrastructure record" does not mean a simple floor plan that discloses only the spatial relationship of components of a public office or chartered nonpublic school or the building in which a public office or chartered nonpublic school is located.

Opinion No. 2007-119-CIV ***OPEN MEETINGS & PUBLIC RECORDS***

During a public meeting, the public body voted to go into an executive session to discuss a matter that they were authorized to discuss in an executive session, in accordance with the Ohio Open Meetings Act, R.C. 121.22. Although a public body is not required to make notes of what is discussed while in an executive session, in this case notes were taken on behalf of the public body by one of the persons in the executive session. The notes were later transcribed into a memorandum. Days later, a request for the notes/memorandum was made to the public body under the Ohio Public Records Act, R.C. 149.43. We determined that although there was no requirement by the public body to make notes or minutes of what was discussed in the executive session, in this case notes were made and later transcribed in a memorandum. Thus, the notes and the memorandum were clearly a "record" of the public body. Furthermore, after reading the contents of that record, we determined that it was not exempt from disclosure under any of the exceptions listed in R.C. 149.43(A)(1)(a)-(y). Therefore, the notes and memorandum of the executive session were also a "public record" of the public body. The chief protection given to executive sessions lies in the relaxation of the general requirement that detailed minutes must be kept. When, however, a member or employee of the public body decides to create a record of the executive session anyway, there is no clear provision of law protecting that record from disclosure. Moreover, when the memorandum is transcribed and created outside of the executive session at a later date, the case for an exemption becomes even weaker. The rule to remember about executive sessions is that you are not required to take notes while in the executive session, but if you decide to do so, the notes will most likely be a public record (unless covered by one of the exceptions listed under R.C. 149.43(A)(1)(a)-(y)). Thus, if you do not want executive session discussions to be made public, you should refrain from making notes about what was discussed during the executive session.

TAX LEVIES

Opinion No. 2007-101-CIV ***TAX LEVIES AND "TAXING DISTRICTS"***

The general rule is that any tax authorized and levied by a board of township trustees must be levied in a uniform amount throughout the territory upon which it is levied, unless otherwise provided by law. There are some exceptions to the general rule, but these exceptions can occur only when a township is authorized by a specific statute to levy a tax upon less than all the property in the township. There are exceptions that authorize a board of township trustees to establish taxing districts (consisting of various portions of the township) for the purpose of providing certain services to *only* the area within each district. Such taxing districts include the following: waste disposal districts (see R.C. 505.27-.33), fire districts (see R.C. 505.37(C)), police districts (see R.C. 505.48-.55), and road districts (see R.C. 5573.21-.211). A taxing district is a subdivision separate from the township that creates it. However, a taxing district created by a board of township trustees is still under the control of the board that created it, and the moneys for the taxing district are under the control of the township fiscal officer and the board of trustees.

ZONING

Opinion No. 2007-021-CIV ***TESTIFYING BEFORE A TOWNSHIP BZA***

A township trustee who has first-hand information that is relevant to the granting or denial of an application for a zoning certificate for a variance or conditional use can be compelled to appear as a fact witness before the township board of zoning appeals and to answer, under oath, relevant questions asked by the parties in interest, their attorneys, or the members of the board of zoning appeals. *See* R.C. 519.13-.15, 2506.03(A)(4).

Opinion No. 2007-074-CIV ***TOWNSHIP ZONING***

It is very important to keep in mind that the Revised Code says that zoning must proceed *in accordance with a comprehensive plan*. It is the township's responsibility to have a comprehensive plan in addition to zoning resolution, text and map, and there are important differences between a comprehensive plan and a zoning resolution.

- *The zoning resolution*. The zoning resolution, text and maps, depicts the different *current* use districts for the entire township. By referring to the existing zoning resolution, one should be able to find out what uses property can currently be put, what kind of regulations will currently affect the conduct of that use, and what type of buildings and structures can currently be located on that property.

- *The comprehensive plan*. A comprehensive plan is the local government's textual statement of goals, objectives, and policies accompanied by long-term planning maps to guide public and private development within the township in the future. A comprehensive plan is thus prospective; it shows what the township should be like at some point in the future. While it represents the township's policy toward public and private development for the future, it is not, like the zoning resolution, a law. Under the comprehensive plan, zoning resolutions are to be made or amended *in accordance with a comprehensive plan*. Comprehensive plans have legal significance in that a township's zoning resolution could potentially be struck down by a court if zoning is not being conducted *in accordance with a comprehensive plan*. However, a comprehensive plan, being essentially a land-use planning document, is not the sort of legal instrument that can be drafted or updated by opinions of the prosecuting attorney. Instead, townships seeking planning services and guidance in developing or updating their comprehensive plan should look for professional planning help through a county or regional planning commission or, if not available through county or regional planning, through a private professional planner. (Many private architects and engineers offer planning assistance to townships, for a price, in the development and/or updating of the township's comprehensive plan and its associated long-term planning map and zoning map.)

Opinion No. 2007-092-CIV ***TOWNSHIP ZONING***

A board of township trustees asked us whether, according to the provisions in the township's zoning resolution, a residence could be constructed on two undersized lots that are located in the Rural Center District of the township and were owned by the board of township trustees. In this opinion, we determined that a residence could be constructed on the two undersized lots regardless of whether the lots were owned by the trustees or a private person. The lots in question were part of a platted subdivision which had been legally recorded in 1836 and had been laid out and platted to be used for the construction of one-family dwellings. Both of the two "undersized" lots in question were among the lots shown on the plat. The township first adopted a zoning resolution in 1959, more that 120 years after these two lots were laid out and platted for the construction of single-family dwellings. In a very similar case, the Ohio Supreme Court held that when a lot is platted and held in single and separated ownership since before the enactment of a zoning resolution or ordinance, a nonconforming use as to minimum area and frontage requirements for home construction is established and may be continued. *See Negin v. Board of Building and Zoning Appeals of the City of Mentor et al*., 69 Ohio St.2d 492 (1982). Thus, the owner of the two undersized lots located in the Rural Center District of the township could build a single-family residence on these lots. Furthermore, in our opinion, the fact that the board of township trustees owned the two undersized lots was not relevant to our analysis and our answer would have been the same even if the two under-sized lots were owned by a private person instead of by the board of trustees.

Opinion No. 2007-111-CIV ***TOWNSHIP ZONING***

Must a township comply with its own zoning resolution and obtain a zoning permit before constructing a township building on township property, when the building will be used to store township equipment? First, the answer to this question may depend on the provisions found in the township zoning resolution. Therefore, a board of township trustees considering this question should check to see if this question is addressed in the township zoning resolution. Second, if this question is not addressed in the township zoning resolution and the trustees want to address the issue there, it is always possible to amend the zoning resolution in accordance with R.C. 519.12 in order to provide explicitly for whether township buildings are subject to or exempt from the township's own zoning regulations. Third, if the township zoning resolution is silent on this matter, you should know that there is case law that indicates that a board of trustees does have

authority to exempt its own buildings and structures from the application of its own township zoning resolution, when the buildings and structures are used for a valid governmental function and when the use does not otherwise create a nuisance.

Opinion No. 2007-127-CIV ***TOWNSHIP ZONING & THE "CHESTER METHOD"***

A township wanted to know how to correct a mistake on the township zoning map so as to accurately reflect the true state of zoning as reflected in the township zoning records. The township zoning records, including a previous zoning map recorded in the office of the county recorder, consistently indicated that a strip of land had been properly re-zoned for "industrial" use years earlier. However, when the township later amended its zoning map and created an updated zoning map that made no changes to the strip of land, the strip of land was mistakenly colored to show that it was zoned for "general farm" use instead of for "industrial" use. Our suggested solution involved the township holding a public meeting in which the trustees would hear evidence regarding the two zoning maps and then, based on the evidence presented, vote publicly and decide which zoning map correctly reflected the true zoning designation of the strip of land. We advised that although the trustees would not be amending the zoning map, they could hold a formal public hearing to consider the zoning designation of the strip of land and to correct the updated map if the trustees found an error. We further advised that this procedure, which we sometimes refer to as the *Chester Method*, should include putting a notice in the newspaper and hiring a court reporter to make a complete and permanent public record of the public hearing. The trustees should request that the zoning commission and any other person with knowledge about the zoning map attend the meeting and present sworn testimony on the matter. Any evidence from the township's records should be presented at the hearing, preferably by the township fiscal officer who is in charge of the records. In addition, the township should pay the court reporter to create an official transcript, and the trustees should maintain the transcript, along with all other exhibits, as a permanent public record of the township. The trustees should review all of the testimony and evidence offered at the public hearing and then decide, by a two-thirds vote of the board of township trustees, what is the true and correct zoning designation for the strip of land. If the trustees find from the records and evidence presented that the strip of land is truly zoned for "industrial" use instead of for "general farm" use, then the trustees can order that the map be corrected to reflect this fact. It is important to note, however, that the *Chester Method* should not be relied on to amend a township zoning map. Instead, the *Chester Method* should only be used to correct a mistake appearing on the township zoning map. Amendments to township zoning maps must always be made in strict compliance with the detailed procedures set forth in R.C. 519.12.

Opinion No. 2007-128-CIV ***TOWNSHIP ZONING***

In this opinion, we explained that a township should follow the procedure set forth in R.C. 519.12 to amend the township zoning resolution if the trustees want to eliminate references in the township zoning resolution to an obsolete or superseded document and replace that document with references to a newer document, which newer document would also be adopted as the township's new comprehensive plan. We also drafted provisions to add to the amended township zoning resolution concerning the adoption, identification, and applicability of the comprehensive plan when making decisions to either grant or deny applications for a zoning certificate or for a change of zoning.

END