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# NEWS FROM THE CIVIL DIVISION

## Burning Fall Yard Waste

As summer turns to autumn, a recurring issue is the problem of what to do with the leaves that fall off the trees and fall clean-up in general. Cities have their own regulations not allowing open burning of anything, but some folks think that if they live in the country or outside city limits, anything goes. To prevent pollution, air contaminants, noxious fumes and odors, either the director of the Ohio Environmental Protection Association (EPA) or the attorney general can prohibit the open burning of many things, including leaves, household waste, trash, brush or other unwanted materials.

Ohio Revised Code Section 3704.05 prohibits the emission of air contaminants in violation of any rule adopted by the Director of Environmental Protection. The director has decreed open burning standards, starting with Section 3745-19-01, which contains definitions. Section 3745-19-03 prohibits open burning, except for recreational fires, campfires or bonfires of specific dimensions (total fuel area of three feet or less in diameter and two feet or less in height), outdoor fireplace equipment or similar combustions. These allowable burns must be fueled with clean, seasoned firewood, natural gas or any clean-burning fuel with emissions equivalent to or lower than those created from the burning of seasoned firewood.

*Interested in the specifics of these laws and regulations? Go online and look up Ohio Administrative Code Sections 3745-19 and/or Ohio Revised Code 3704.05 and 3704.06.*

The attorney general can prosecute anyone in violation of these regulations at the request of the director of the Ohio EPA. Or the director can assess fines starting at \$250.00 per day for each separate violation. In addition, the Ohio attorney general can bring an action for injunction and/or fines starting at not more than \$25,000.00 per day for each day of each violation. Any person can make a written complaint to the director of the Ohio EPA, who will conduct an investigation and make such inquiries as are necessary to secure compliance with the law.

These civil penalties are different from violations of the criminal law for arson. The criminal laws relating to arson require damage to persons or property with criminal intent.

## Case Summary: State v. Jillian Hobbs

The Supreme Court of Ohio held that, for purposes of Crim.R. 4(A), a person cannot simultaneously hold the positions of deputy sheriff for a county and of deputy clerk for a municipal court located in that same county. The Supreme Court noted that a warrant that is issued by a deputy sheriff acting in the dual capacity as a deputy clerk is invalid. The appropriate remedy for a defective warrant issued subsequent to a warrantless arrest is the suppression of wrongly obtained evidence, if there is any, not dismissal of the charges.

In *Hobbs*, there was no evidence obtained after the arrest and, therefore, there was nothing to suppress. The Supreme Court determined that the second issue, which was whether the exclusionary rule is an appropriate remedy for an invalidly issued arrest warrant, was improvidently accepted, and the Court dismissed that part of the appeal.

The Supreme Court's decision in *Hobbs* is relevant to potential claims under 42 U.S.C. 1983, because such claims would require that the conviction or sentence has been invalidated. In *Hobbs*, the Court did not reverse or dismiss the State conviction.

## Ditch Petitions for Drainage Problems

Flooding and damage caused by stormwater is a growing problem as communities throughout the state continue to develop and expand. Within the past 25 years, significant areas have been developed that, formerly, had been wooded areas or farms with the capacity to absorb excess rain water. The runoff from impermeable surfaces in these developments is compounded when unusually heavy rains hit, as happened in 2010 and 2011. In addition to flooding, the stormwater picks up pollutants and sediment as water quantities increase.

In Summit County, surface water flows primarily to the Cuyahoga River in the north and to the Tuscarawas River in the south. Downstream communities can be adversely impacted by the increased water flows and the pollution. Zoar, located about 25 miles south of Summit County on the Tuscarawas River, is one such community. The Army Corps of Engineers is considering whether to move the village to higher ground. The 4,000-foot-long levee protecting the village from the river is in desperate need of repair, but the cost to repair the levee is estimated to be more than \$100 million. It is difficult to justify such expenditure under current economic conditions.

Local governments throughout Summit County receive numerous complaints about drainage issues. Unfortunately, funding is scarce for new drainage infrastructure or even upgrades to existing infrastructure to control the water flows.

Additionally, many drainage problems originate and occur on private property. Government has no authority to work or expend funds on private property without legislative action and the appropriation of property or easements. The Summit County Engineer has found instances where drainage infrastructure was built by developers many years ago, but the maintenance responsibility was not adequately assigned or funded when ownership was transferred to homeowners associations. Thus, some existing infrastructure does not function properly and may actually cause problems rather than alleviate them.

For specific problems in the unincorporated areas of the county, property owners (as defined in the Ohio Revised Code) may petition County Council to correct these problems. Ohio Revised Code Chapter 6131 sets out the definitions and the petition process for the development of drainage projects, as well as the assessment of construction costs and ongoing maintenance to benefited properties.

*Want to know more about the ditch petition process?*

*Visit <http://engineer.co.summit.oh.us/news/publications>. Or contact the Engineer's Office at (330) 643-2850.*

The petition is often called a ditch petition, but it can cover any appropriate drainage infrastructure or improvement. The petition process provides for County Council hearings and a chance for interested citizens to comment on the project, and to formally support or object to a project and/or the related assessment. The law also provides for an appeal of County Council's decision.

Due to the limited availability of general funds for stormwater purposes, a ditch petition is one of the few ways to raise local funds for specific stormwater improvements. If a project is approved by County Council, the county will build and maintain the improvement. Unfortunately, the cost of drainage projects can be perceived as relatively high if the base of properties benefited is not large enough to absorb the related assessments. Nevertheless, this process may be a viable option if persistent stormwater problems occur and funding is limited or unavailable.

The Summit County Prosecutor's Office acts as the legal advisor to the County Engineer and County Council on these matters.

## Summit County Communities Sign Agreement with NEORSD

After back and forth litigation and settlement discussions over the last two years, the Northeast Ohio Regional Sewer District (NEORSD) and various Summit County communities finally agreed on terms for the implementation of a Regional Stormwater Program. The City of Hudson, City of Macedonia, Village of Northfield, Village of Richfield and Sagamore Hills Township agreed on a settlement that would permit the NEORSD to administer a stormwater program and provide services for all drainage areas of 300 acres or greater. In return, NEORSD agreed to fee reductions for non-residential property owners, increased potential offsets for responsible property owners and a substantial return of collected revenue for the local communities to manage their stormwater systems.

NEORSD's original program was expected to collect nearly \$40 million in revenue annually. However, this settlement agreement substantially reduced the program. The current projected revenue is \$26 million, which saves Northeast Ohio communities and residents nearly \$14 million annually. More importantly, the Summit County communities were able to include an opt-out provision for the establishment of their own regional stormwater program, should they deem that more economically viable for their residents in the future.

This additional check helps ensure that rates will not become oppressive to the residents of these Summit County communities, while at the same time addresses the necessary concerns related to increased runoff and flooding due to development. The taxpayers of Summit County can take further solace in the fact that these Summit County communities' portion of this litigation was handled almost entirely by the Summit County Prosecutor's Office, saving the projected hundreds of thousands of dollars in fees that other Cuyahoga County communities and entities will pay for representation in this matter.

The entire case, at least from Summit County's position, was about good government and due process. After these two years, it is fair to say that the residents of Summit County can take pride in knowing they have had both.

## Attorney General Opinion No. 2012-027

The Paulding County Prosecuting Attorney requested an attorney general's opinion regarding whether a township was permitted under O.R.C. §505.60(D) to reimburse a township officer or employee for an immediate dependent's health care plan. O.R.C. §505.60(D) authorizes a board of township trustees to procure and pay for health care insurance coverage for its officers and employees. If a township chooses not to procure health care insurance coverage pursuant to R.C. 505.60, the township may, pursuant to R.C. 505.601, elect to reimburse its officers and employees for health care insurance coverage they otherwise obtain for themselves and their immediate dependents. R.C. 505.60 operates separately from R.C. 505.601, and the two statutes are mutually exclusive. Because Paulding Township operates under R.C. 505.60 by providing health care coverage options to its officers and employees, the township may not operate pursuant to R.C. 505.601.

When a township officer or employee is not covered by a township health care plan, either because the person is denied coverage or the person elects not to participate in the township's health care plan, R.C. 505.60(D) authorizes the township to reimburse the officer or employee for coverage otherwise obtained. However, the General Assembly has not included the phrase "and their immediate dependents" in division (D) of R.C. 505.60. Therefore, there is no authorization for the board of township trustees to reimburse an officer or employee for health care coverage that is otherwise obtained for the officer's or employee's immediate dependents.

Because township officers may not exercise a power or undertake an activity, particularly with regard to township finances, absent express or implied statutory authority to do so, and because R.C. 505.60(D) does not specifically authorize a township to reimburse an officer or employee for health care coverage that is not obtained through the township, the township is not permitted to do so.

## Road Use Maintenance Agreement (RUMA)

In the past couple of years, Ohio has seen significant oil and gas exploration and production, as well as the construction of large wind farms. As a result of this construction, roads are being exposed to increased wear and tear from numerous trips of heavy trucks. In some cases, companies have volunteered to improve the roads that they are using. In other cases, communities are requiring companies to make these improvements. A number of affected communities have entered, or have discussed entering, a Road Use Maintenance Agreement (RUMA) for the improvement and repair of roads. These agreements generally put forth that the company will perform the work and that the community will not contribute any funding. Plans, though, must be approved by the appropriate authorities.

In response to questions from Richland County, the Ohio Attorney General's Office recently issued Opinion 2012-029, which identifies a county's authority to enter into a RUMA and certain requirements for the letting of the underlying road construction contracts. Richland County was concerned that the bidding requirements under Chapters 153 and 307 of the Ohio Revised Code would need to be followed and that the county could face liability if prevailing wages under Chapter 4115 of the Ohio Revised Code were not paid. The full opinion is about 20 pages in length, but the following syllabus of the opinion summarizes the attorney general's opinion on these matters.

1. A county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.
2. A county that enters into such an agreement to have the company improve and repair the county roads it uses at no cost to the county is not required to comply with R.C. 153.44, R.C. 153.69, or R.C. 307.86-.92.
3. A prosecuting attorney may require that such an agreement be submitted to his office for review prior to the agreement's execution.
4. A county that enters into such an agreement is required to comply with R.C. 4115.03 to 4115.16 inclusive (prevailing wage laws) when the total overall project cost to the company is fairly estimated to be more than the amount prescribed in R.C. 4115.03(B)(4).
5. Whether a county may incur civil liability for damages for failing to comply with Ohio's prevailing wage laws is, in part, a question of fact that cannot be determined by means of an attorney general opinion.

The opinion does not give a definitive answer as to a community's liability on the prevailing wage issue. However, the language of R.C. 4115.05 and the opinion strongly suggest that, at a minimum, the contract between the company and the community should require the payment of prevailing wages, if they are required under the statute, and the company should indemnify the community if prevailing wages are not paid. The community should consider this aspect in its bonding requirements. The attorney general gives no opinion as to the company's duties or liabilities.

The full opinion will be available on the Ohio Attorney General's website, or may be obtained through the Summit County Prosecutor's Office.

## Summit County as Plaintiff

The Civil Division defends the county and its entities from a variety of lawsuits, including civil rights actions, employment law disputes and actions against judges and other county employees for decisions they allegedly made or failed to make. In some instances, the county can be dismissed from lawsuits pursuant to immunity laws protecting political subdivisions. However, in other instances, the county can be sued even though it had no connection whatsoever apart from being the county in which an accident occurred.

In a recent case, for example, a plaintiff sued Summit County for allegedly failing to post signs warning of flooding farther down the road. Although Summit County does have general responsibility for maintaining roads in the county, that responsibility does not apply to roads inside municipalities. As Summit County was able to establish that it had no involvement with the stretch of road or any signage on it, Summit County was dismissed from the suit.