

November 10, 2003

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
21 West Boardman Street, 6th Floor
Youngstown, Ohio 44503

SYLLABUS:

2003-035

A board of township trustees may enter into a contract to acquire, for the use of the township's law enforcement agency, vehicles displaying the designs, decals, and themes of corporate advertisers, although the board may not agree to terms that violate constitutional or statutory limitations. (2003 Op. Att'y Gen. No. 2003-008, distinguished.)



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OPINION NO. 2003-035

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
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Dear Prosecutor Gains:

You have asked whether a board of township trustees has the authority to enter into an agreement with a private company that would provide a motor vehicle displaying corporate advertising to township police for a nominal fee. As you note in your opinion request, 2003 Op. Att’y Gen. No. 2003-008 considered this issue with regard to the ability of a board of county commissioners to enter into the same agreement to acquire motor vehicles for the use of the county sheriff. As summarized in 2003 Op. Att’y Gen. No. 2003-008, a private company is offering to provide vehicles to political subdivisions for use by its law enforcement agency for a cost of one dollar per vehicle. The automobiles would display, in addition to the standard markings required for law enforcement vehicles, the designs, decals, and other advertising graphics of corporate sponsors. After a three-year period, the political subdivision would transfer the vehicle back to the company for one dollar.

We will begin with a brief description of the several options townships may exercise in order to procure police protection for their citizens. First, a board of township trustees may appoint constables, and “provide them with the automobiles, communication systems, uniforms, and police equipment that the board considers necessary.” R.C. 509.01. A board of township trustees is also authorized to create by resolution, “a township police district comprised of all or a portion of the unincorporated territory of the township as the resolution may specify.” R.C. 505.48.¹ The board of township trustees is authorized to “purchase, lease, lease with an option to purchase, or otherwise acquire any police apparatus, equipment, including a public communications system, or materials that the township police district requires.” R.C. 505.50.

¹ See R.C. 505.49(B)(2) (the “township trustees may include in the township police district and under the direction and control of the chief of police any constable appointed pursuant to section 509.01 of the Revised Code, or may designate the chief of police or any patrol officer appointed by the chief of police as a constable, as provided for in section 509.01 of the Revised Code, for the township police district”); *State v. Layman*, 29 Ohio App. 3d 343, 345, 505 N.E.2d 999 (Montgomery County 1986) (“a person can be both a township police constable and a township police officer”).

See also R.C. 505.49(B)(1) (a board of township trustees “may adopt rules necessary for the operation of the township police district”). Also, the boards of two or more contiguous townships may jointly purchase, lease, lease with an option to purchase, maintain, use, and operate police equipment. R.C. 505.50.

Townships also have several options with regard to contracting with other political subdivisions to acquire, provide, and supplement police protection. R.C. 505.481 authorizes the boards of township trustees of any two or more contiguous townships, whether or not within the same county, to form themselves into a joint township police district board, and thereby create a joint township police district.² The joint board is granted the same powers as a board of township trustees in operating a township police district, including the power to “acquire equipment and buildings.” *Id.*³

Thus, a board of township trustees is authorized to “provide” constables “with the automobiles ... that the board considers necessary,” and to “purchase, lease ... or otherwise acquire any ... equipment ... that the township police district [or joint district] requires.”

We will now summarize 2003 Op. Att’y Gen. No. 2003-008, and determine its applicability to townships. After analyzing the terms and conditions of the proposed transaction, 2003 Op. Att’y Gen. No. 2003-008 concluded that the agreement appeared to constitute a “lease” of vehicles to the county, and that, accordingly, a board of county commissioners, which has the

² *See also* R.C. 505.43 (“[i]n order to obtain police protection, or to obtain additional police protection, any township may enter into a contract with one or more townships, municipal corporations, park districts ... or county sheriffs or with a governmental entity of an adjoining state upon any terms that are agreed to by them, for services of police departments or use of police equipment, or the interchange of the service of police departments or use of police equipment within the several territories of the contracting subdivisions”); R.C. 505.49(E) (“[t]he board of township trustees may enter into a contract under section 505.43 or 505.50 of the Revised Code to obtain all police protection for the township police district from one or more municipal corporations, county sheriffs, or other townships”); R.C. 505.50 (“[t]he board of trustees of any township may enter into a contract with one or more townships, a municipal corporation, a park district ... or the county sheriff upon any terms that are mutually agreed upon for the provision of police protection services or additional police protection services either on a regular basis or for additional protection in times of emergency”).

³ Townships that have adopted the limited self-government form of government must establish a police district pursuant to R.C. 505.48, establish a joint township police district pursuant to R.C. 505.481, or contract for police protection services pursuant to R.C. 311.29 (the county sheriff), R.C. 505.43, or R.C. 505.50. R.C. 504.16. *See* R.C. 505.49(F) (“[t]he members of the police force of a township police district of a township that adopts the limited self-government form of township government shall serve as peace officers for the township territory included in the district”).

power under R.C. 307.41 to purchase or lease motor vehicles for the use of elected county officials and their employees, arguably had the implied authority to enter into the agreement in question. *Id.* at 2-48 to 2-51.

2003 Op. Att’y Gen. No. 2003-008 went on to recognize, however, that, “[i]t is a well-established principle of statutory construction that, although the ability of a ... board or officer to carry out a certain activity may be implied from one of the powers expressly granted to it, the exercise of that implied power is subject to any limiting or constricting statutory language or scheme that would curtail, inhibit, or extinguish it.” *Id.* at 2-51. The opinion explained that, “[t]ypically, the enactment of a thorough and inclusive statutory scheme governing or regulating the manner in which an agency is to implement its express duties in a particular area will be deemed to constrict any implied authority the agency would otherwise have to carry out those express duties, and to limit the agency to operating only within the parameters of that statutory scheme.” *Id.* at 2-51.

2003 Op. Att’y Gen. No. 2003-008 found such a “thorough and inclusive statutory scheme,” in the legislature’s establishment of the county sheriffs’ standard car-marking and uniform commission (commission) and the administrative regulations the commission has promulgated. The commission is statutorily charged with prescribing a standard color and design of marking for motor vehicles used by county sheriffs, R.C. 311.25; R.C. 311.28, and has promulgated 2 Ohio Admin. Code 311-3-01 (2002-2003 Supp.), which “minutely describes the markings that are required to be displayed on a vehicle and the placement of those markings.” 2003 Op. Att’y Gen. No. 2003-008 at 2-52. The opinion interpreted the “degree of detail with which the permissible markings are described,” along with the requirement in rule 311-3-01 “mandating conformity to the prescribed standards,” to mean that the markings set forth in rule 311-3-01 were intended to be exclusive. *Id.* at 2-53. It concluded that R.C. 311.28 and rule 311-3-01 constituted “a complete regulatory scheme that limits the implied authority the board of county commissioners might otherwise have to agree to display corporate advertising on the vehicles used by the county sheriff.” *Id.*

A board of township trustees has the express statutory authority, similar to that of a board of county commissioners, to provide automobiles, and purchase, lease, or otherwise acquire equipment, for its law enforcement agency. R.C. 505.50; R.C. 509.01. From this express authorization, the authority of a board of township trustees to lease, for the use of its officers, vehicles displaying corporate advertising and designs may be implied. Unlike sheriffs’ vehicles, however, township law enforcement vehicles are not subject to R.C. 311.28 and rule 311-3-01, and there is no similar scheme standardizing markings on township law enforcement vehicles that would act as constricting authority on the ability of the township trustees to acquire vehicles with corporate advertising.

As mentioned in 2003 Op. Att’y Gen. No. 2003-008, R.C. 4549.13 requires that a motor vehicle used by any peace officer, who is on duty to enforce the motor vehicle or traffic laws, be marked in a distinctive manner or color, and equipped with at least one flashing colored light

mounted outside on top of the vehicle. R.C. 4549.13 does apply to township law enforcement officers. See 1963 Op. Att’y Gen. No. 259, p. 318. Unlike R.C. 311.28 and rule 311-3-01, however, R.C. 4549.13 does not constitute a comprehensive, overriding scheme that standardizes markings, requires their use, and excludes all others. I must conclude, therefore, that a board of township trustees has the authority, implied from R.C. 509.01 and R.C. 505.50, to enter into a contract to acquire, for the use of the township’s law enforcement agency, vehicles displaying the designs and themes of corporate advertisers.⁴

Nonetheless, I must reiterate the problems, discussed in 2003 Op. Att’y Gen. No. 2003-008, that such markings pose for law enforcement. Statutes like R.C. 311.28, R.C. 4549.13, and R.C. 2913.441, which makes it a criminal violation for any person who is not a law enforcement officer to display on a vehicle an emblem of a law enforcement agency, all serve the same underlying public purpose—to ensure “that law enforcement vehicles [are] immediately and easily recognizable as such,” 2003 Op. Att’y Gen. No. 2003-008 at 2-53. This assurance serves to protect the safety of the public and promote effective and professional law enforcement. See 1949 Op. Att’y Gen. No. 241, p. 23, 26 (“[t]he marking of vehicles used in patrolling the highways and enforcing the traffic laws have long since been held by police officials to be of great importance not only as to its bearing on the safety and protection of the law-abiding citizens, but also on the detection and apprehension of law violators”). As the Ohio Supreme Court explained in *State v. Heins*, 72 Ohio St. 3d 504, 506, 651 N.E.2d 933 (1995), “[i]t requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he [or she] was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty *to be identified clearly*” (citation omitted and emphasis added). See also *City of South Euclid v. Varasso-Burgess*, No. 68409, 1995 Ohio App. LEXIS 4517 at *8 (Cuyahoga County Oct. 12, 1995) (the markings on a police vehicle must “distinguish [it] from an ordinary passenger car” and “provide fair notice that the passenger car is a police vehicle,” belonging to “a public law enforcement officer acting under color of law”); 2003 Op. Att’y Gen. No. 2003-008 at 2-54 (“[a] citizen followed or stopped by a vehicle with extraneous markings, unrelated to law enforcement, may be as easily misled, with the attendant dangers, as one who is stopped by a vehicle with no markings at all”).

The public’s inability to readily identify a law enforcement vehicle could also have a detrimental effect on prosecutions for certain criminal offenses, such as R.C. 2921.33, resisting

⁴ You have asked what discretion a township has to determine the size and placement of the corporate advertisements. A board of township trustees would ordinarily have broad discretion, subject to R.C. 4549.13, to designate markings as it deemed appropriate for the motor vehicles used by its police officers. See 1963 Op. Att’y Gen. No. 259, p. 318. If a township enters into a contract to accept motor vehicles with corporate advertising, however, it would be bound to abide by the specific terms of that agreement. See 2003 Op. Att’y Gen. No. 2003-008 (setting forth the relative rights of the parties to dictate placement of both corporate and county markings under the contract in question).

arrest, and R.C. 2921.331(B), operating a motor vehicle to willfully flee or elude a police officer. *See State of Michigan v. King*, No. 224919, 2001 Mich. App. LEXIS 303 at *4-*5 (Dec. 18, 2001) (“[d]efendant’s defense to the charge of fleeing and eluding was that he did not know that he was being pursued by police ... because the police car that was pursuing him was not sufficiently ‘marked’ as a law enforcement vehicle”). *See also* R.C. 4549.14 (an arresting officer is incompetent to testify in the prosecution of a defendant charged with certain offenses if the officer was, at the time of the arrest, using a motor vehicle not marked in compliance with R.C. 4549.13). In light of the adverse impact that the use of police vehicles with corporate markings would have on the vitally important objectives of public safety and effective law enforcement, we strongly urge you and the township officials involved to carefully consider the serious consequences that may ensue if the township should agree to accept such vehicles.

Furthermore, the specific agreement proposed in this instance includes terms to which a board of township trustees has no authority to agree. For example, as described in 2003 Op. Att’y Gen. No. 2003-008, the agreement would require the political subdivision “to accede to a broadly worded indemnification clause, under which it would be required to indemnify, defend, and hold harmless the company, its licensors, advertisers and sponsors, and their personnel.” *Id.* at 2-56.⁵ While a public agency is not absolutely prohibited from agreeing to an indemnification or hold harmless clause, it must meet certain constitutional and statutory requirements. 1999 Op. Att’y Gen. No. 99-049; 1996 Op. Att’y Gen. No. 96-060.

As explained in 1999 Op. Att’y Gen. No. 99-049, a contract entered into by a township or other political subdivision must, pursuant to R.C. 5705.41, bear a certificate by the political subdivision’s fiscal officer that the amount required to meet the contractual obligation has been lawfully appropriated and is in the treasury or in the process of collection. R.C. 5705.41(D)(1). A contract made without the fiscal officer’s certificate is void. *Id.* Discussing the application of R.C. 5705.41 to indemnification clauses, 1999 Op. Att’y Gen. No. 99-049 states at 2-304:

If it is not known when liability may be incurred under a contract, the funds necessary to cover the liability must be presumed due and payable in the first fiscal year and appropriated and certified accordingly.... Amounts that are certified in accordance with R.C. 5705.41(D)(1) are considered to be encumbered and remain available in subsequent years for the expenditures for which they have been certified....

An indemnification or hold harmless clause commits the contacting party to financial obligations that are generally unknown at the time the contract is made. A [political subdivision] has no statutory authority to promise that, at some time in the future, it will secure funds to pay whatever liability may occur under a contract. Rather, pursuant to R.C. 5705.41(D)(1), the [political subdivision] must

⁵ The proposed agreement that was the subject of 2003 Op. Att’y Gen. No. 2003-008 is the one that you have presented for our consideration in this instance.

certify at the time it makes a contract that it has sufficient money to pay its obligations under that contract. In order to make such a certification, the [political subdivision] must identify a specific dollar amount that is at risk under the contract.

The requirements that a contract containing an indemnification or hold harmless clause specify a maximum dollar amount, and bear a certificate that that amount is appropriated and available, serve to avoid the creation of debt in violation of Ohio Const. art. XII, § 11. 1999 Op. Att’y Gen. No. 99-049 at 2-305. In this instance, the indemnification clause does not set a maximum amount, and thus, is not a term to which a township may constitutionally or statutorily agree.

The indemnification clause, as well as other provisions of the agreement, also implicate Ohio Const. art. VIII, § 6, which prohibits a county, city, town or township from becoming “a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association.” Ohio Const. art. VIII, § 6 has been interpreted as prohibiting a political subdivision from “[u]ndertaking obligations that are disproportionate to the benefits received.” 1999 Op. Att’y Gen. No. 99-049 at 2-307. *See also* 1996 Op. Att’y Gen. No. 96-060. A public body must, therefore, assure that an agreement containing an indemnification or hold harmless clause provides sufficient consideration to support the financial obligation it assumes under the clause. 1999 Op. Att’y Gen. No. 99-049.

Ohio Const. art. VIII, § 6 may also bar a township from agreeing to the licensing provisions of the contract. Under the agreement, the company may, with the township’s approval, license products relating to the agreement “that bear a similar or the same characteristics as the Vehicles with the Sponsor Endorsement.” If the company manufactures, produces, markets, or sells products using the township’s name, the company would be required to pay a royalty to the township. Under the agreement, the township would grant to the company “an exclusive license and world-wide right, with rights to sublicense through multiple tiers of sub-licensees, to reproduce and make derivative works of the Township’s Vehicles, Insignias and seals (including, without limitation, Township Seal, Township insignias, photographs or renderings of the Vehicles with Township indicia present, Township employees with the Vehicles, with Township indicia, and any other promotional Products pre-approved by the Township for use in connection with the manufacture, packaging, advertising, promotion, sale and distribution of Products.” The township would have the right to pre-approve the products bearing its seal, name, or any photo or drawing of a product or use thereof.

As explained in 2003 Op. Att’y Gen. No. 2003-008 at 2-57, while the county’s receipt of royalties may not necessarily run afoul of Ohio Const. art. VIII, § 6, “the county’s grant of a license to the company, and the right of the company to sub-license, reproduce, and make derivative works of the vehicles, using the county’s seal, name, and insignia, and photographs of county officers and employees, in order to promote the company’s business interests or the

sponsors' products could well constitute the type of enterprise that would violate the lending aid and credit prohibition of Ohio Const. art. VIII, § 6.”⁶ See generally *C.I.V.I.C. Group v. City of Warren*, 88 Ohio St. 3d 37, 40, 2000-Ohio-265, 723 N.E.2d 106 (“[c]ases construing Section 6 of Article VIII have found that it forbids the union of public and private capital or credit in any enterprise whatsoever”).

As a final matter, we urge the township to carefully consider the advisability of entering into a contract that chooses a State other than Ohio as the forum in which the parties will resolve, judicially or through arbitration, contractual, tort, licensing, and other disputes. By agreeing to such a “forum selection clause,” the township would waive its right to bring suit in Ohio, as well as the right to assert the defense of lack of personal jurisdiction in a case brought against it in another State’s courts. See generally *Kennecorp Mortgage Brokers, Inc. v. Country Club Convalescent Hospital, Inc.*, 66 Ohio St. 3d 173, 610 N.E.2d 987 (1993); *Alpert v. Kodee Technologies*, 117 Ohio App. 3d 796, 691 N.E.2d 732 (Cuyahoga County 1997); 1997 Op. Att’y Gen. No. 97-025. The township should exercise the same caution in evaluating the wisdom of agreeing to a “choice of law” clause that, not only provides that the agreement will be governed by and construed in accordance with the laws of a State other than Ohio, but also precludes the other State from applying Ohio law where that might otherwise be appropriate under the State’s Law of Conflicts. See 1997 Op. Att’y Gen. No. 97-025 at 2-147 to 2-148 n.3. See generally *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St. 3d 436, 453 N.E.2d 683 (1983).

Therefore, it is my opinion, and you are advised, that a board of township trustees may enter into a contract to acquire, for the use of the township’s law enforcement agency, vehicles displaying the designs, decals, and themes of corporate advertisers, although the board may not agree to terms that violate constitutional or statutory limitations. (2003 Op. Att’y Gen. No. 2003-008, distinguished.)

Respectfully,



JIM PETRO
Attorney General

⁶ 2003 Op. Att’y Gen. No. 2003-008 also discusses the prohibition in R.C. 5.10 against the unlawful reproduction of the design of the great seal of the state. In this instance, the township police chief has stated that the vehicles used by his agency do not display the state seal.