OPINION NO. 86-026

Syllabus:

1. The Adjutant General, in constructing, repairing, or using armories, airfields, buildings, or other facilities of the Ohio National Guard, must make a reasonable attempt to comply with applicable requirements of local zoning, building, and fire codes. If such attempts fail and a court determines that the proposed construction, repair, or use of the armories, airfields, buildings, or other facilities in the desired area or desired manner would serve the needs of the greater number of citizens than construction, repair, or use in accordance with applicable requirements of the local codes, then the Adjutant General will be excused from complying with those requirements.

2. Absent express statutory authorization, local governmental entities may not assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes.

To: Raymond R. Galloway, Adjutant General, Worthington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, May 6, 1986

I have before me your request for my opinion on the following questions:

1. Is the Adjutant General, an official and agency of the sovereign State of Ohio, required to comply with zoning, building, fire, and other codes adopted and enforced by local governments and to obtain appropriate permits for the construction, repair, and use of National Guard armories, airfields, and other facilities?

2. Is the Adjutant General exempt from paying fees for local zoning, building, fire and similar permits?

As you note in your letter, R.C. Chapter 5911 provides for the Adjutant General's jurisdiction over armories, airfields, buildings, and other facilities of the Ohio National Guard. In this regard R.C. 5911.011 provides as follows:

> The adjutant general is the director of state armories. He shall provide grounds, armories, airfields, and other buildings, and facilities for the purpose of training and for the safekeeping of arms, clothing, equipment, and other military property issued to the Ohio national guard or the Ohio defense corps and may purchase, lease for any period of time not exceeding ninety-nine years, or build suitable buildings, airfields, and facilities for such purposes when, in his judgment, it is for the best interests of the state to do so. He shall provide for the management, care, and maintenance of such grounds, armories, airfields, buildings, and facilities and may prescribe such rules and regulations for the management, government, and guidance of the

> organizations and units occupying them as are necessary and desirable.

See also R.C. 5911.13 (creation of the armory building authority); R.C. 5911.14 (powers of the armory building authority).

Turning to your question whether the Adjutant General, as a state official, must comply with local zoning, building, and fire codes in the construction, repair, and use of armories, airfields, buildings, or other facilities of the Ohio National Guard, I note that, historically, agencies of the State of Ohio were absolutely immune from the requirements of local zoning and building ordinances if the State's activities were conducted on land that was or could have been acquired by the State through its power of eminent domain. See State ex rel. Ohio Turnpike Commission v. Allen, 158 Ohio St. 168, 107 N.E.2d 345 (1952), cert. denied, 344 U.S. 865 (1952). Consequently, under the eminent domain test, the Adjutant General would not be required to comply with local zoning and building requirements since he is given the power to "condemn and appropriate land and such land is hereby declared to be a public necessity." R.C. 5911.05.[1]

In 1980, however, the Ohio Supreme Court discarded the power of eminent domain as the test for determining whether the State and its agencies are immune from the requirements of local zoning ordinances. In Brownfield v. State, 63 Ohio St. 2d 282, 407 N.E.2d 1365 (1980), the court rejected the State's argument that its proposed halfway house for psychiatric patients was automatically exempt from the operation of municipal zoning restrictions since the State had the power to acquire such property by appropriation. After rejecting this argument, the court went on to set forth the proper analysis to be used in such cases, stating:

> We believe that 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.
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> Appellees' premise that the power of condemnation is superior to the zoning power is, in turn, grounded in the notion that zoning ordinances may completely frustrate attempts to exercise the power of eminent domain. While this is a legitimate concern, it does not justify the invocation of absolute immunity in all cases. Unless a municipality completely prohibits a certain use within its corporate limits, the state may acquire property for that use and still comply with local zoning restrictions....

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[1] R.C. 5911.05 states that, "[t]he adjutant general has the same power as the director of administrative services to condemn and appropriate land and such land is hereby declared to be a public necessity. Such power shall be exercised in accordance with sections 163.01 to 163.22 of the Revised Code." R.C. 163.01-.22 address the appropriation of real property and the procedures to be followed therefor.

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In most instances, the conflict between one government's power to condemn and another's power to restrict the use of land is more apparent than real....Whenever possible, the divergent interests of governmental entities should be harmonized rather than placed in opposition....Thus, unless there exists a direct statutory grant of immunity in a given instance, the condemning or land-owning authority must make a reasonable attempt to comply with the zoning restrictions of the affected political subdivision....

The issue of governmental immunity from zoning arises only after efforts to comply with municipal zoning have failed. Where compliance with zoning regulations would frustrate or significantly hinder the public purpose underlying the acquisition of property, a court should consider, inter alia, the essential nature of the government-owned facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility, in determining whether the proposed use should be immune from zoning laws.... (Emphasis added and citations omitted).

63 Ohio St. 2d at 285-287, 407 N.E.2d at 1365, 1367.

Under Brownfield, therefore, in determining whether the State must comply with local zoning requirements, it first must be ascertained whether the State enjoys a statutory grant of immunity therefrom. If there is no statutory immunity, the State must attempt to comply with the pertinent provisions of the local ordinances.[2]

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[2] In Board of Education v. Puck, No. 999,280 (Cuyahoga County Ct. App. Nov. 20, 1980), the court of appeals discussed what efforts constitute a reasonable attempt on the part of governmental entities to comply with the requirements of local zoning ordinances within the meaning of Brownfield. In Puck the court considered whether a municipal board of education had made a reasonable attempt to secure compliance with the requirements of local zoning ordinances for its use of an abandoned school site for the storage of buses owned and maintained by the board of education. The court held that the board of education had made a reasonable attempt to comply with municipal zoning ordinances by engaging in the following efforts:

> In this case the school board applied for a permit for the desired use and, when that failed, sought a variance. It then appealed to the Common Pleas Court. These attempts, if not efforts at compliance, demonstrate at least a respectful consideration of Cleveland zoning concerns and satisfy the prerequisite of a failed compliance effort....

Thus, the decision in Puck makes it clear that an application for a use permit, coupled with a subsequent application for a variance and appeal to the appropriate court satisfies Brownfield's prerequisite of a failed compliance effort. It is not clear, however, whether any less vigorous efforts, such as an application for a use permit and variance without a subsequent appeal will also satisfy the failed compliance prerequisite.

If, after attempting to comply with the requirements of local zoning ordinances, and failing, the State is able to demonstrate that compliance would significantly frustrate or hinder the public purpose underlying the proposed use of the property, then the public purpose served by the exercise of the State's power and the public purpose served by the exercise of the local subdivision's zoning power must be weighed by a court of law. The impasse will be resolved in favor of the power that will serve the needs of the greater number of citizens, the considerations being, inter alia, the nature of the State's facility, the impact of the facility upon surrounding property, and the alternative locations available for the facility.

The principles and analysis enunciated in Brownfield have subsequently been applied within the context of local building and fire codes. In City of East Cleveland v. Board of County Commissioners, 69 Ohio St. 2d 23, 430 N.E.2d 456 (1982), the Ohio Supreme Court held that a public body with the power of eminent domain is not absolutely immune from the requirements of local building and fire codes, and if compliance with the local codes would hinder or frustrate the purpose underlying the proposed use of the property the Brownfield balancing test must be utilized in determining whether the public body must comply with the specific requirements of such building and fire codes.

Applying the above principles to your specific questions, I note that the Adjutant General enjoys no statutory grant of immunity from compliance with the requirements of local zoning, building, and fire codes with regard to armories, airfields, buildings, and other facilities of the Ohio National Guard. Accordingly, the Adjutant General must demonstrate a reasonable attempt to comply with the specific requirements of such codes.[3] Such attempt would include application for any required permits. See 1985 Op. Att'y Gen. No. 85-098. If such attempts fail and the Adjutant General is able to demonstrate that construction of the proposed armories, airfields, buildings, or other facilities in the desired area or desired manner would serve the needs of the greater number of citizens than construction in accordance with local standards, only then will the Adjutant General be excused from complying with those local standards.

I turn now to your second question, whether the Adjutant General is exempt from paying fees for local zoning, building, fire, and similar permits. In City of East Cleveland v. Board of County Commissioners the court held that a municipality may not assess a county a fee for the review of plans and

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[3] The terms of local zoning, building, and fire codes, however, may not conflict with the requirements of similar state law enactments, "[w]hen the state by comprehensive statutory plan has imposed regulations statewide where there is a genuine statewide concern for uniformity" in a particular area of regulation. City of Eastlake v. Ohio Board of Building Standards, 66 Ohio St. 2d 363, 368, 422 N.E.2d 598, 602 (1981). Accord, In Re Cincinnati Certified Building Department, 10 Ohio App. 3d 178, 461 N.E.2d 11 (Franklin County 1983) (syllabus, paragraph two) (a municipal corporation may operate a building department and enforce its own building code, using its own appellate process, so long as its substantive provisions do not conflict with the state building code).

specifications by the municipality's building department for the construction of a county project, in the absence of express statutory authorization therefor. This holding was based upon the court's earlier decision in Niehaus v. State ex rel. Board of Education, 111 Ohio St. 47, 144 N.E. 433 (1924), in which the court considered whether the building inspection department of a municipality could assess a municipal board of education a fee for reviewing the board's plans and specifications for the construction of a new school building. The syllabus in the Niehaus decision provides in paragraph two as follows:

> The General Assembly of the state having enacted a general law requiring the building inspection departments of municipalities having a regularly organized building inspection department to approve plans for the construction of public school buildings erected within such municipalities, a municipality is without power to thwart the operation of such general law by the enactment of an ordinance requiring the payment of a fee as a condition precedent to compliance therewith.

In Op. No. 85-098 I recently applied the principles set forth in City of East Cleveland and Niehaus within the context of village zoning regulations, which required the board of education of a local school district to pay a fee in order to erect signs which the board was required to post pursuant to R.C. 3313.20 (board of education should post at or near the entrance to school grounds or premises rules regarding entry of persons other than students, staff, and faculty upon school grounds or premises). Noting that there is no statutory grant of authority that enables a village to assess a fee against a board of education in such a circumstance, I concluded that a board of education may not be required to pay a fee for a permit to maintain a sign required by R.C. 3313.20. Op. No. 85-098 at 2-416 to 2-417. See also 1955 Op. Att'y Gen. No. 5110, p. 182 (syllabus) (a board of county commissioners is without authority to exact an inspection fee under county regulations for the inspection of buildings constructed by the Ohio Turnpike Commission and owned by the State of Ohio).

I believe that the principles set forth in City of East Cleveland and Niehaus apply with equal force to the situation described in your letter. Thus, absent express statutory authorization, local governmental entities may not assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes. See 1955 Op. No. 5110 at 187 (there is no distinction in principle between a county and a municipality with respect to the rights of either to exact building inspection fees from the state not authorized by statute).

Accordingly, it is my opinion and you are hereby advised that:

1. The Adjutant General, in constructing, repairing, or using armories, airfields, buildings, or other facilities of the Ohio National Guard, must make a reasonable attempt to comply with applicable requirements of local zoning, building, and fire codes. If such attempts fail and a court determines that the proposed construction, repair, or use of the armories, airfields, buildings, or other facilities in the desired area or desired manner would serve the needs of

the greater number of citizens than construction, repair, or use in accordance with applicable requirements of the local codes, then the Adjutant General will be excused from complying with those requirements.

2. Absent express statutory authorization, local governmental entities may not assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes.