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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF OHIO

OPINION NO. 87-099

1987 Ohio AG LEXIS 14; 1987 Op. Atty Gen. Ohio 653

December 28, 1987

CORE TERMS: hazardous, emergency, public peace, inspector, evacuation, political subdivision, commandeer, heavy, duty, authority conferred, fire marshal, reasonably necessary, municipal, authorized representative, inspection, vicinity, township, evacuate, site, fire department, conjunction, situated, safe, reasonable manner, persons residing, scene, fire official, 1301:7-1-03, explosion, fire prevention

SYLLABUS:

[*1]

1. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident or emergency when reasonably necessary for the protection of the health, safety, and well-being of such persons. In effecting such an evacuation the sheriff may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily.

2. A fire chief or his authorized representative, pursuant to the authority conferred thereon by 2 Ohio Admin. Code 1301:7-1-03(I), may order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident or emergency when reasonably necessary for the protection of the health, safety, and well-being of such persons. In effecting such an evacuation the fire chief or his authorized representative may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily.

3. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may enter upon private property where [*2] hazardous materials are located for the purpose of extinguishing a pilot light or other ignition source, provided such entry is made in a reasonable manner and does not otherwise violate any rights of the property owner that may be protected by provisions of the United States or Ohio Constitutions.

4. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency.

5. A fire chief or his authorized representative, pursuant to the authority conferred thereon by 2 Ohio Admin. Code 1301:7-1-03(I), may commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency.

6. A fire safety inspector, as defined in R.C. 3737.01(D), may not commandeer a vehicle or other heavy equipment for use at the site of, or in

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conjunction with, a hazardous materials accident or emergency.

7. The liability of a political subdivision in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission [*3] of the political subdivision or an employee thereof in connection with the commandeering of a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency shall be determined in accordance with the provisions of R.C. Chapter 2744.

REQUESTBY:

ANTHONY J. CELEBREZZE, JR., Attorney General

OPINION:

The Honorable Lynn C. Slaby
Summit County Prosecuting Attorney
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You have requested my opinion regarding the respective authority and responsibilities of a sheriff, deputy sheriff, fire chief, and fire inspector with regard to certain aspects of the control, management, and prevention of hazardous materials accidents and emergencies. n1 Specifically, you have asked that I address the following questions:

1. Who has authority to order an evacuation at a hazardous materials accident? To what extent does that authority exist (i.e., can persons refusing to evacuate be forcibly removed to a safe area)?
2. Does a Sheriff or Deputy Sheriff have authority to enter into locked premises (residential and/or business) to extinguish pilot lights, etc., when a potential exists for explosion or ignition of hazardous [*4] materials?
3. Does a Sheriff, Deputy Sheriff, or Fire Chief (or Inspector) have authority to commandeer a vehicle and/or heavy equipment (e.g., a bulldozer) to use in a hazardous materials emergency, and what is, and who assumes, any liability for such use?

Resolution of your questions requires that I examine those statutes and administrative rules that address the powers, duties, and responsibilities of the foregoing officials, and thereby determine the extent to which those statutes and administrative rules may authorize those officials to perform the actions enumerated in your letter as a means of protecting the public health and welfare.

n1 The manufacture, storage, handling, and use of hazardous materials are addressed in 2 Ohio Admin. Code 1301:7-7-29. Such materials and substances are characterized as being either highly flammable, highly toxic, chemically unstable, or potentially explosive, and as a result, may pose a threat of serious injury to life, or damage to property, in the event that such materials and substances escape uncontrolled into the open environment, or are set aflame. 2 Ohio Admin. Code 1301:7-7-29(A) (1).

I commence my inquiry with R.C. [*5] Chapter 311, which delineates the general powers, duties, and responsibilities conferred upon the sheriff and

his deputies. See R.C. 311.01 (qualifications for sheriff); R.C. 311.04 (appointment of deputy sheriffs); R.C. 311.05 (conduct of sheriff's deputies). In particular, R.C. 311.07 provides, in relevant part, as follows:

(A) Each sheriff shall preserve the public peace and cause all persons guilty of any breach of the peace, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas, and the sheriff shall commit such persons to jail in case they refuse to do so. . . . In the execution of the duties required of him, the sheriff may call to his aid such persons or power of the county as is necessary.

(B) The sheriff of a county may call upon the sheriff of any adjoining county, the mayor or other chief executive of any municipal corporation within his county or in adjoining counties, and the chairman of the board of township trustees of any township within his county or in adjoining counties, to furnish such law enforcement or fire protection personnel, or both, together with [*6] appropriate equipment and apparatus, as may be necessary to preserve the public peace and protect persons and property in the requesting sheriff's county in the event of riot, insurrection, or invasion.

R.C. 311.08(A) further states that the sheriff shall "exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law." Thus, under the foregoing statutes, the sheriff is directed to preserve the public peace, utilizing such power of the county as is necessary therefor, R.C. 311.07, and shall exercise all powers conferred and perform all the duties enjoined upon him by the common law, in addition to those powers and duties otherwise imposed by statute, R.C. 311.08.

The various powers and responsibilities conferred upon state and local fire officials and personnel are enumerated in R.C. Chapter 3737 (fire marshal) and the administrative rules and regulations promulgated pursuant thereto, which appear in 2 Ohio Admin. Code Chapters 1301:7-1 through 1301:7-7. R.C. 3737.21 establishes the office of state fire marshal within the Department of Commerce, and provides that the state fire marshal shall be appointed by the Director thereof from names [*7] submitted by the state fire commission. See R.C. 3737.81 (creation of state fire commission). See also R.C. 3737.03 (advisory duties of state fire commission). R.C. 3737.22 delineates the general powers and duties of the state fire marshal and his assistants and employees, and R.C. 3737.23-.73 and R.C. 3737.82-.88 in turn enumerate his specific powers and areas of responsibility with regard to fire prevention and fire investigations. R.C. 3737.22 states, in part, that the state fire marshal shall "[a]dopt the state fire code under [R.C. 3737.82-.86]," R.C. 3737.22(A)(1), "[e]nforce the state fire code," R.C. 3737.22(A)(2), and "[a]ppoint assistant fire marshals who are authorized to enforce the state fire code," R.C. 3737.22(A)(3). See also R.C. 3737.82 (the state fire marshal shall adopt a state fire code consisting of rules relating to all aspects of fire safety, including rules relating to the "transportation, storage, location, and use of flammable or explosive materials," and the "procedures to be employed by persons in the event of fire"); R.C. 3737.83 (adoption of rules in state fire code pertaining to fire protection equipment standards and consumer [*8] goods flammability standards). Cf. R.C. 3737.84 (specific provisions that may not be included within the state fire code).

Pursuant to R.C. 3737.22 and R.C. 3737.82, the state fire marshal has adopted a statewide fire code, see 2 Ohio Admin. Code Chapters 1301:7-1 through 1301:7-7, which has as its purpose the prescription of minimum requirements and controls to "safeguard life, property or public welfare from the hazards of fire and explosion arising from the storage, handling or use of substances, materials or devices and from conditions hazardous to life, property or public welfare in the use or occupancy of buildings, structures, sheds, tents, lots or premises." 2 Ohio Admin. Code 1301:7-1-01(B). Authority to enforce the provisions of the Ohio Fire Code, including the authority to perform the actions it prescribes as necessary for the protection of life and property, is conferred upon the following state and local fire officials:

The fire marshal, any assistant fire marshal, any certified fire safety inspector, the chief of the fire department of each municipal corporation where a fire department is established, the chief of the fire department in each township where [*9] a fire department is established, and such members of any such departments as may be designated by such chief, the fire prevention officer of a municipal corporation where no fire department exists, or the fire prevention officer of a township where no fire department is established.

2 Ohio Admin. Code 1301:7-1-03(A). 2 Ohio Admin. Code 1301:7-1-03(B) through (J) further address the specific authority conferred upon the foregoing fire officials with respect to the control, investigation, and prevention of fires and related emergencies. In particular, rule 1301:7-1-03(B), which governs the inspection of property for fire hazards, and rule 1301:7-1-03(D), which provides a right to enter property to effect an inspection thereof, read as follows:

(B) FM-102.2. Inspections: The fire marshal, any assistant fire marshal, or certified fire safety inspector may inspect all structures, premises and vehicles pursuant to section 3737.14 n2 of the Revised Code as often as may be necessary for the purpose of ascertaining and causing to be corrected, any conditions liable to cause fire, contribute to the spread of fire, interfere with fire fighting operations, endanger life or any violations [*10] of the provisions or intent of this code or any other ordinance affecting fire safety.

(D) F-102.2.2. Right of entry: Whenever necessary for the purpose of enforcing the provisions of this code, or whenever the fire official has reasonable cause to believe that there exists in any structure or upon any premises any condition which makes such structure or premises unsafe, the fire official may enter such structure or premises at all reasonable times to inspect the same or to perform any duty imposed upon the fire official by this code; provided, that if such structure or premises be occupied, he shall first present proper credentials and request entry. If such entry is refused, the fire official shall have recourse to every remedy provided by law to secure entry. (Footnote added.)

See also 2 Ohio Admin. Code 1301:7-1-03(C) (coordinated inspections by more than one enforcement official). Rule 1301:7-1-03(I) also states that the "fire chief or his authorized representative shall be in charge at the scene of a fire or other emergency involving the protection of life and/or property, and shall remain in charge until authority is relinquished."

n2 R.C. 3737.14 provides as follows:

The fire marshal, any assistant fire marshal, the chief of the fire department of each municipal corporation where a fire department is established, the chief of the fire department in each township where a fire department is established, and such members of any such department as may be designated by such chief, the fire prevention officer of a municipal corporation where no fire department exists, or the fire prevention officer of a township where no fire department is established, at all reasonable hours, may enter into all buildings and upon all premises and vehicles within their jurisdiction for the purpose of examination. [*11]

I now direct my attention to your specific questions. In your first question you ask who is authorized to order an evacuation at a hazardous materials accident, and whether such authority may be used to forcibly remove to a safe area any persons who refuse to evacuate. On this point I shall consider first the authority of the sheriff. As a creature of statute, see R.C. 311.01, a sheriff may exercise those powers and responsibilities expressly conferred upon him by statute, or that are necessarily implied by those expressly granted. *United States v. Laub Baking Co.*, 283 F. Supp. 217, 220 (N.D. Ohio 1968) ("the sheriff has additional implied powers under Ohio law. He possesses the authority to engage in activities which are reasonably necessary for the due and efficient exercise of the powers expressly granted to him"). R.C. 311.07(A) states that the sheriff "shall preserve the public peace," and may "call to his aid such . . . power of the county as is necessary" therefor. R.C. 311.08(A) also states that the sheriff shall exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law. Neither R.C. 311.07 nor R.C. 311.08, however, [*12] expressly states that a sheriff may order an evacuation at a hazardous materials accident, or forcibly remove to a safe area any persons who refuse to evacuate. Thus, any authority the sheriff may exercise in this regard must exist under R.C. 311.07 and R.C. 311.08 by implication, as a result of the sheriff's general authority to preserve the public peace.

Insofar as the activities that may be included within the authority of the sheriff to preserve the public peace are not, as a general matter, amenable to precise definition, the sheriff may exercise a reasonable discretion in determining the manner in which he may exercise such power. See generally *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915). The scope of the sheriff's authority to preserve the public peace under R.C. 311.07 and R.C. 311.08, however, has been the subject of several Attorney General opinions, which, in turn, furnish some guidance in determining whether the power to evacuate may be implied therefrom. In 1958 Op. Att'y Gen. No. 3039, p. 676, for example, one of my predecessors noted that the sheriff's power to preserve the public peace under R.C. 311.07 is quite broad, and authorizes [*13] the sheriff to keep the public highways free of damaged automobiles and remove injured and unconscious motorists and other persons from such highways. Similarly, in 1979 Op. Att'y Gen. No. 79-027 my predecessor concluded at 2-92 that the sheriff's duty to preserve the public peace "permits him to participate in emergency rescue operations and to incur necessary transportation expenses related thereto." More recently I concluded in 1986 Op. Att'y Gen. No. 86-023 (syllabus, paragraph one) that a sheriff may, pursuant to R.C. 311.07 and R.C. 311.08, declare a snow emergency and temporarily close county and township roads within his jurisdiction when such action is reasonably necessary for the preservation of the public peace.

It is evident, therefore, that the sheriff's duty to "preserve the public peace" under R.C. 311.07 permits him, in the appropriate circumstances, and in the exercise of a reasonable discretion, to take those actions reasonably necessary to protect the general public welfare. In the case of a hazardous materials accident or emergency, for example, the sheriff may reasonably determine that the evacuation of persons residing or otherwise situated in the vicinity [*14] of the accident or emergency is necessary in order to protect those persons from exposure to toxic fumes or gases, or the threat of fire or explosion. See note one, supra. Obviously, an evacuation in such a circumstance would have as its purpose the preservation of the health, safety, and well-being of the persons being evacuated. To that extent, therefore, such an evacuation, when ordered and carried out by the sheriff, would appear to be an appropriate exercise of the sheriff's powers under R.C. 311.07 and R.C. 311.08 to preserve the public peace. Accordingly, I conclude that a sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident or emergency, when reasonably necessary for the protection of the health, safety, and well-being of such persons. Further, in effecting such an evacuation, the sheriff may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily. See generally R.C. 2917.13(A)(2) (no person shall knowingly "[f]ail to obey the lawful order [*15] of any law enforcement officer engaged in his duties at the scene of or in connection with a fire, accident, disaster, riot, or emergency of any kind"); R.C. 2917.13(C) (whoever violates R.C. 2917.13 is guilty of misconduct at an emergency, a minor misdemeanor, and if such violation creates a risk of physical harm to persons or property, such misconduct at an emergency is a misdemeanor of the fourth degree). See also R.C. 2901.01(K)(1) (as used in the Revised Code, the term "[l]aw enforcement officer," includes a sheriff or deputy sheriff); Op. No. 86-023.

It also appears that certain local fire officials are authorized to order an evacuation at a hazardous materials accident or emergency. In particular, 2 Ohio Admin. Code 1301:7-1-03(I) states clearly that the "fire chief or his authorized representative shall be in charge at the scene of a fire or other emergency involving the protection of life and/or property, and shall remain in charge until authority is relinquished." (Emphasis added.) It appears reasonably implicit in the foregoing language of rule 1301:7-1-03(I) that a municipal or township fire chief, or his authorized representative, see 2 Ohio Admin. [*16] Code 1301:7-1-03(A), may take whatever actions he deems reasonably necessary to protect life or property at the scene of a fire or other emergency. In the case of a hazardous materials accident, this may include the evacuation of persons residing or otherwise situated in the vicinity of the accident. Thus, pursuant to 2 Ohio Admin. Code 1301:7-1-03(I), a fire chief or his authorized representative may, if reasonably necessary, order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident as a means of protecting the lives of such persons. In effecting such an evacuation the fire chief or his authorized representative may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily.

In your second question you ask whether a sheriff or deputy sheriff has the authority to enter locked premises, whether residential or business, to extinguish pilot lights where a potential exists for explosion or ignition of hazardous materials. As in the case of the sheriff's power to evacuate persons in the vicinity of a hazardous materials accident, neither R.C. 311.07 nor

R.C. 311.08 confers express authority [*17] upon the sheriff to enter locked premises for the purpose of extinguishing pilot lights, or other open flames, that pose a potential for igniting hazardous materials located upon the premises in question. Thus, any authority the sheriff may possess in this regard must be implied from the sheriff's power to preserve the public peace under R.C. 311.07 and R.C. 311.08.

I conclude that the authority of a sheriff to enter locked premises for the purpose of extinguishing pilot lights or other open flames that present a potential for igniting hazardous materials located upon such premises may properly be implied from the sheriff's power to preserve the public peace under R.C. 311.07 and R.C. 311.08. As I have already noted, the responsibility of the sheriff to "preserve the public peace" is, in one sense, synonymous with a concern for the health, safety, and welfare of the general public. Certainly, there may be instances in which the presence of a pilot light or other ignition source on property where hazardous materials are situated may result in a fire or explosion. In such circumstance, eradicating this threat by extinguishing the pilot light or other ignition source would obviously [*18] be an action undertaken in furtherance of the public health, safety, and welfare, and, thus, is, as a general matter, consistent with the sheriff's responsibility to preserve the public peace. It appears, therefore, that authority on the part of the sheriff in this regard may be properly implied in the sheriff's power to preserve the public peace.

In deciding to exercise this authority, however, the sheriff should bear in mind the admonition that he must act within the bounds of his statutory authority and in a reasonable fashion. See generally *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601 (1878). In particular, a court, if asked to consider the question, would most likely be inclined to characterize a law enforcement officer's entry upon private property, without the consent of the owner thereof, for the purpose of investigating and removing a fire hazard, as an activity within the purview of the fourth amendment to the United States Constitution, which prohibits unreasonable searches and seizures of persons and their property, and which generally imposes a requirement for a warrant prior to searches or seizures. n3 See, e.g., *Michigan v. Clifford*, 464 U.S. [*19] 287 (1984) (a warrantless, nonconsensual search of a fire-damaged home by fire investigators violated the homeowners' fourth amendment rights, where such search was conducted at 1:30 p.m. following a fire that was extinguished by 7:04 a.m., and where all the fire officials and police had previously left the premises); *Michigan v. Tyler*, 436 U.S. 499 (1978) (the fourth amendment safeguards the privacy and security of individuals against arbitrary invasions by government officials, whether the officials are health, fire, or building inspectors, whether their purpose is to locate and abate a suspected public nuisance or simply to perform a routine periodic inspection, and whether the privacy that is invaded is that of a private home or a commercial establishment not open to the public); *Camara v. Municipal Court*, 387 U.S. 523 (1967) (administrative searches of residences to enforce municipal fire, health, or housing codes are subject to the fourth amendment's prohibition of unreasonable searches and seizures). Cf. *Donovan v. Dewey*, 452 U.S. 594 (1981) (noting that commercial property may be reasonably inspected without a warrant in more situations than private homes). [*20] See generally Annot., 69 L.Ed.2d 1078 (1982) ("Fourth Amendment's Prohibition of Unreasonable Search and Seizure as Applied to Administrative Inspections of Private Property-Supreme Court Cases"). Only in precisely defined situations, such as certain types of life-threatening emergencies, may such an entry be effected absent a warrant or the property

owner's consent. See, e.g., Michigan v. Tyler; Camara v. Municipal Court. Accordingly, the sheriff may find it prudent to obtain, if possible, either the property owner's consent or a warrant before making such an entry, and, in the absence thereof, to limit such an entry to those situations in which the threat of fire or explosion involving hazardous materials is substantial, and poses a likelihood of serious harm to life or property.

n3 Article I, @ 14 of the Ohio Constitution also prohibits unreasonable searches and seizures.

In your third question you ask whether a sheriff, deputy sheriff, fire chief, or fire safety inspector is authorized to commandeer a vehicle or heavy equipment for use in a hazardous materials emergency. You further wish to know what is, and who assumes, the liability for such [*21] use. I presume that the appropriation of the equipment in question is for the purpose of removing or disposing of hazardous materials, cleaning up the site of a hazardous materials emergency, or preventing the continued spread of such materials into the surrounding environment.

The preceding discussion of your first two questions also provides a partial answer to your third question. Even as I have concluded that the power of the sheriff to preserve the public peace implies the authority to order an evacuation at a hazardous materials accident or enter upon private property to prevent the imminent combustion or explosion of hazardous materials, I similarly conclude that such power on the part of the sheriff also implies the authority to commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials emergency. As in the case of an evacuation of persons in the vicinity of a hazardous materials accident, or an entry upon private property where combustible or explosive hazardous materials are stored, the sheriff's use of certain vehicles or heavy equipment in connection with a hazardous materials accident or emergency may be required [*22] to protect the lives and property of persons in the area of the accident or emergency. To the extent that state or local governmental entities may not have such equipment available for the sheriff's use, it appears that the sheriff may find it necessary to request that private, nongovernmental entities supply such equipment for his use. Thus, such action on the part of a sheriff, insofar as it is reasonably necessary to protect the lives and property of persons, is a proper exercise of the sheriff's power to preserve the public peace under R.C. 311.07 and R.C. 311.08. Cf. generally R.C. 307.47 (requiring the board of county commissioners to provide monetary relief out of the county general funds for any person temporarily or permanently disabled as a result of his automobile having been commandeered by any police officer of the county in the discharge of his duty).

Similarly, I conclude that a fire chief, pursuant to the authority conferred upon him by 2 Ohio Admin. Code 1301:7-1-03(I), may commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency. As I have already noted, rule 1301:7-1-03(I) [*23] designates the fire chief or his authorized representative as the official in charge at the scene of a fire or other emergency involving the protection of life or property, and implicit in such designation is the authority to take those actions reasonably necessary to safeguard life or property at the scene of a hazardous materials emergency. For example, the fire chief or his representative may find it necessary to utilize certain types of vehicles or equipment at the scene of a hazardous materials

emergency in order to contain the spread of toxic liquids or other hazardous materials that would otherwise endanger persons in the vicinity of the emergency, or the spread of fire that would threaten nearby properties. State or local governmental agencies might not be able to supply the particular equipment required, however, and, thus, in such a situation, the fire chief would be reasonably justified in requiring a private, nongovernmental entity to make such equipment available for use in connection with the hazardous materials emergency. I conclude, therefore, that a fire chief or his authorized representative may, pursuant to 2 Ohio Admin. Code 1301:7-1-03(I), commandeer a vehicle [*24] or other heavy equipment for use at a hazardous materials accident or emergency.

You have also asked about the authority of a fire inspector to commandeer a vehicle or other equipment at a hazardous materials emergency. Having reviewed the statutes and administrative regulations addressed to the responsibilities of a fire safety inspector, I conclude that such person is not thereby authorized to commandeer a vehicle or other equipment for use at a hazardous materials emergency. R.C. 3737.01(D) defines a "[f]ire safety inspector," as used in R.C. Chapter 3737, as "any person who is a member of the civil service, as defined in [R.C. 124.01], or who is employed by or voluntarily serves a village or township, and who examines the property of another person for the purpose of identifying fire safety hazards." (Emphasis added.) See also R.C. 3303.07 (providing for training programs for fire fighters and fire safety inspectors, and for issuance of a certificate by the State Superintendent of Public Instruction to each person completing satisfactorily a chartered fire service training program); R.C. 3737.34 (no person shall serve as a fire safety inspector for any fire agency [*25] unless he has received a certificate issued by the State Superintendent of Public Instruction under R.C. 3303.07).

The specific duties and powers of a fire safety inspector are further enumerated in R.C. 3737.41-.46 and 2 Ohio Admin. Code 1301:7-1-03. R.C. 3737.41-.46 describe the powers of a fire safety inspector, inter alia, to order the correction of dangerous conditions and enforce the various provisions of the Ohio Fire Code. R.C. 3737.41, for example, authorizes a certified fire safety inspector to issue citations and orders to have dangerous conditions remedied if the inspector finds, upon an examination or inspection, that such conditions exist in a building or structure, upon any premises, or in a vehicle or other facility used for storing, handling, or transporting flammable or combustible liquids. R.C. 3737.42 further authorizes a certified fire safety inspector to issue citations if, upon inspection or investigation, he believes that the Ohio Fire Code or any order issued by the state fire marshal has been violated. R.C. 3737.43-.46 describe the various procedures and actions that may ensue following the issuance of a citation or order pursuant to R.C. 3737.41 [*26] or R.C. 3737.42.

2 Ohio Admin. Code 1301:7-1-03, on the other hand, describes the specific inspection authority of a fire safety inspector. In particular, rule 1301:7-1-03(B) states that a certified fire safety inspector may "inspect all structures, premises and vehicles pursuant to [R.C. 3737.14] as often as may be necessary for the purpose of ascertaining and causing to be corrected, any conditions liable to cause fire, contribute to the spread of fire, interfere with fire fighting operations, endanger life or any violations of the [Ohio Fire Code]." Rule 1301:7-1-03(D) further confers upon every fire official the right to enter any structure or upon any premises, at all reasonable times, for the purpose of inspecting such structure or premises whenever the fire official

has reasonable cause to believe that there exists in the structure or upon the premises any condition that makes the structure or premises unsafe. Pursuant to rule 1301:7-1-03(A), a certified fire safety inspector is a "fire official" who is authorized under rule 1301:7-1-03(D) to enter structures or upon premises at reasonable times for the purpose of making those inspections authorized by rule 1301:7-1-03(B). [*27] See generally 1986 Op. Att'y Gen. No. 86-014 (syllabus, paragraph six) (pursuant to R.C. Chapter 3737 and 2 Ohio Admin. Code 1301:7-1-03, a certified fire safety inspector may inspect all structures, premises, and vehicles as provided in rule 1301:7-1-03(B), and may enter into any structure or upon any premises as provided in rule 1301:7-1-03(D), regardless of whether he is a fire prevention officer).

The foregoing statutory provisions and administrative regulations are quite explicit about both the type of responsibilities conferred upon a fire safety inspector, and the scope of those responsibilities. Consistent with the definition of "fire safety inspector" as one "who examines the property of another person for the purpose of identifying safety hazards," R.C. 3737.01(D), those statutes and regulations limit a fire safety inspector to performing the inspection and code enforcement activities expressly delineated therein. None of those provisions or regulations, for example, confer upon a fire safety inspector any authority that approximates in its breadth the authority conferred upon a sheriff and fire chief by R.C. 311.07 and R.C. 311.08 and 2 Ohio Admin. Code 1301:7-1-03(I), [*28] respectively. Accordingly, I am persuaded that those statutes and administrative regulations may not be interpreted as implying authority on the part of a fire safety inspector to commandeer a private vehicle or other equipment for use at the scene of a hazardous materials accident or emergency.

Finally, you have asked about liability that may attach as a result of a vehicle or other equipment being commandeered for use at a hazardous materials emergency, and who assumes such liability. You have not indicated, however, the precise type of liability you have in mind. I shall assume, therefore, that you are concerned about governmental liability for property damage or personal injury that is caused by the use of the vehicle or equipment that has been commandeered.

It is beyond the scope of this opinion to address the myriad fact patterns that might arise for the purpose of determining whether liability will be imposed on a governmental entity for property damage or personal injury resulting from the use of a commandeered vehicle. In addition, the task of determining in a particular factual situation the existence and extent of such liability, whether individual or corporate, [*29] is one that rests ultimately with the judiciary. See, e.g., 1987 Op. Att'y Gen. No. 87-074. Accordingly, I shall confine my analysis on this point to a general discussion of the pertinent provisions of R.C. Chapter 2744, which addresses the tort liability of various political subdivisions of the state.

R.C. Chapter 2744 creates, subject to several exceptions, statutory tort immunity for political subdivisions of the state. R.C. Chapter 2744 provides generally that political subdivisions, defined as municipal corporations, townships, counties, school districts, or other bodies corporate and politic responsible for governmental activities in a geographic area smaller than that of the state, see R.C. 2744.01(F), are immune from liability for damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the

political subdivision in connection with a governmental or proprietary function, as defined in R.C. 2744.01(C) and R.C. 2744.01(G), respectively. n4 R.C. 2744.02(A)(1). The immunity provided for in R.C. 2744.02(A)(1) is subject to several specific exceptions, which are [*30] enumerated in R.C. 2744.02(B)(1)-(5). In particular, R.C. 2744.02(B)(1) states that political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent operation of any motor vehicle by their employees upon the public roads, highways, or streets when the employees are engaged within the scope of their employment and authority. But cf. R.C. 2744.02(B)(1)(a)-(c) (defenses to liability under R.C. 2744.02(B)(1)). R.C. 2744.02(B)(2) also states that political subdivisions are liable for injury, death, or loss to persons or property caused by the negligent performance of acts by their employees with respect to proprietary functions of the political subdivisions.

n4 R.C. 2744.01 defines "[g]overnmental function," in part, as follows:

(C) (1) "Governmental function" means a function of a political subdivision that is specified in division (C) (2) of this section or that satisfies any of the following:

(a) A function that is imposed upon the state as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement;

(b) A function that is for the common good of all citizens of the state;

(c) A function that promotes or preserves the public peace, health, safety, or welfare, that involves activities that are not engaged in or not customarily engaged in by nongovernmental persons, and that is not specified in division (G) (2) of this section as a proprietary function.

(2) A "governmental function" includes, but is not limited to, the following:

(a) The provision or nonprovision of police, fire, emergency medical, ambulance, and rescue services or protection;

(b) The power to preserve the peace, to prevent and suppress riots, disturbances, and disorderly assemblages, and to protect persons and property;

R.C. 2744.01 also defines "[p]roprietary function," as follows:

(G) (1) "Proprietary function" means a function of a political subdivision that is specified in division (G) (2) of this section or that satisfies all of the following:

(a) The function is not one described in division (C) (1) (a) or (b) of this section and is not one specified in division (C) (2) of this section;

(b) The function is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.

(2) A "proprietary function" includes, but is not limited to, the following:

- (a) The operation of a hospital by one or more political subdivisions;
- (b) The design, construction, reconstruction, renovation, repair, maintenance, and operation of a public cemetery other than a township cemetery;
- (c) The establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, a railroad, a busline or other transit company, an airport, and a municipal corporation water supply system;
- (d) The maintenance, destruction, operation, and upkeep of a sewer system;
- (e) The operation and control of a public stadium, auditorium, civic or social center, exhibition hall, arts and crafts center, band or orchestra, or off-street parking facility. [*31]

R.C. 2744.03 in turn enumerates several defenses or immunities that may be asserted by a political subdivision and its employees to defeat claims in those circumstances where liability would otherwise be imposed under R.C. 2744.02(B). See R.C. 2744.03(A)(1)-(7). In particular, R.C. 2744.03(A)(2) states that a political subdivision is immune from liability for the conduct of an employee, other than negligent conduct, if the conduct that gave rise to the claim of liability was required or authorized by law, or was necessary or essential to the exercise of powers of the political subdivision or employee. R.C. 2744.03(A)(3) also provides that a political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.

Accordingly, under R.C. 2744.02(A)(1), a political subdivision, including a county or municipal corporation, is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly [*32] caused by the commandeering of a vehicle for use at a hazardous materials emergency by the political subdivision or an employee thereof if it is determined that the commandeering and use of such vehicle is a governmental or proprietary function of the political subdivision, subject, however, to the exceptions enumerated in R.C. 2744.02(B). Under R.C. 2744.02(B)(1), for example, a political subdivision may be liable for the negligent operation of a commandeered vehicle by its employees upon the public roads, highways, or streets when those employees are engaged within the scope of their employment and authority, provided none of the defenses enumerated in R.C. 2744.02(B)(1)(a)-(c) are available to defeat such liability. Further, under R.C. 2744.02(B)(2), a political subdivision may be liable for injury, death, or loss to persons or property caused by the negligent commandeering and use of a vehicle by its employees if such an act is deemed a proprietary function of the political subdivision. Finally, liability otherwise imposed upon a political subdivision or its employees, pursuant to R.C. 2744.02(B), in connection with the commandeering of a vehicle or other equipment for use [*33] at a hazardous materials emergency may be avoided if a defense or immunity delineated in R.C. 2744.03 is applicable to the claim in question.

Accordingly, based upon the foregoing it is my opinion, and you are advised that:

1. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident or emergency when reasonably necessary for the protection of the health, safety, and well-being of such persons. In effecting such an evacuation the sheriff may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily.

2. A fire chief or his authorized representative, pursuant to the authority conferred thereon by 2 Ohio Admin. Code 1301:7-1-03(I), may order the evacuation of persons residing or otherwise situated in the vicinity of a hazardous materials accident or emergency when reasonably necessary for the protection of the health, safety, and well-being of such persons. In effecting such an evacuation the fire chief or his authorized representative may, in a reasonable manner, remove [*34] to a safe area any persons who refuse to evacuate voluntarily.

3. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may enter upon private property where hazardous materials are located for the purpose of extinguishing a pilot light or other ignition source, provided such entry is made in a reasonable manner and does not otherwise violate any rights of the property owner that may be protected by provisions of the United States or Ohio Constitutions.

4. A sheriff, pursuant to the authority conferred upon him by R.C. 311.07 and R.C. 311.08 to preserve the public peace, may commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency.

5. A fire chief or his authorized representative, pursuant to the authority conferred thereon by 2 Ohio Admin. Code 1301:7-1-03(I), may commandeer a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency.

6. A fire safety inspector, as defined in R.C. 3737.01(D), may not commandeer a vehicle or other heavy equipment for use at the site [*35] of, or in conjunction with, a hazardous materials accident or emergency.

7. The liability of a political subdivision in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee thereof in connection with the commandeering of a vehicle or other heavy equipment for use at the site of, or in conjunction with, a hazardous materials accident or emergency shall be determined in accordance with the provisions of R.C. Chapter 2744.