

The Michigan Attorney General (AG) has issued an opinion stating that a county board of commissioners lacks the power to create a countywide ordinance regulating the withdrawal of water from an underground aquifer, but a local health department can regulate such activities through regulations.

The question was posed by State Representative A.T. Frank, who indicated to the AG that increased summertime well water usage by farmers for irrigation was periodically depleting nearby residential wells. Representative Frank wanted to know whether a countywide ordinance could be adopted to regulate the farmers' activities.

In response, the AG initially noted that a county's powers are limited to those granted to it by the Michigan Constitution or Legislature, and, consequently, a "county board of commissioners has no inherent powers." The AG observed that several Michigan statutes grant counties the specific authority to enact certain types of ordinances (none of which apply to well water), but beyond those types of ordinances, a noncharter county can only pass ordinances that "relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county." The AG opined that a countywide well water ordinance would extend beyond county affairs, and, thus, a county board of commissioners lacked the power to adopt such an ordinance. The AG also noted, however, the limited exception that a county can pass any sort of regulation it wants to regarding its *own* property. Therefore, if a county board of commissioners passed a well water ordinance applying to county property only, that ordinance would be valid.

The AG also explained that, although a county board of commissioners could not pass a countywide well water ordinance, a local health department could achieve the same result

through its regulations. Several provisions of the Public Health Code allow local health departments to adopt regulations that are necessary to protect public health, including regulations designed to control environmental health hazards. Furthermore, unlike a county's authority, which must not interfere with local affairs, a public health department's regulations "take precedence over inconsistent local regulations." Under this broad authority, the AG opined, a county health department could regulate the withdrawal of well water within that county, if such regulation was necessary to protect public health.

Representative Frank also asked whether a countywide regulation limiting the amount of well water that could be withdrawn from an aquifer would constitute a "taking" of property requiring just compensation. The AG could not provide a definitive answer, citing the United States Supreme Court's 2002 decision in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, where the Supreme Court held that a regulatory takings question like the one posed by Representative Frank did not lend itself to categorical rules and must instead be dealt with on a case-by-case basis. The AG also noted, however, that Michigan groundwater is not "owned" by anybody, and persons merely have rights to use that water.

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