

April 4, 2006

The Honorable Dave Yost  
Delaware County Prosecuting Attorney  
140 North Sandusky Street  
Delaware, Ohio 43015

SYLLABUS:

2006-016

1. The board of health of a general health district is not required to exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211.
2. The board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. As legal advisor of the board of health, a county prosecuting attorney shall advise the board that he may not initiate such an action on the board's behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts.
3. A county prosecuting attorney may criminally prosecute a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21 even if the board does not direct the county prosecuting attorney to initiate the prosecution.



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April 4, 2006

OPINION NO. 2006-016

The Honorable Dave Yost  
Delaware County Prosecuting Attorney  
140 North Sandusky Street  
Delaware, Ohio 43015

Dear Prosecutor Yost:

You have requested an opinion concerning the filing of petitions for nuisance abatement injunctions under R.C. 3707.021 and R.C. 3709.211. In particular, you wish to know the following:

1. Must a board of health of a general health district exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211?
2. May a county prosecuting attorney exercise prosecutorial discretion in determining whether to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211?

For the reasons that follow, we conclude that the board of health of a general health district is not required to exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. The board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211, but the county prosecuting attorney, as legal advisor of the board of health, shall advise the board that he may not initiate such an action on the board's behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts. Finally, a county prosecuting attorney may criminally prosecute a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21 even if the board does not direct the county prosecuting attorney to initiate the prosecution.

**Authority of a Board of Health of a General Health District to Abate and Remove Nuisances**

Before addressing your specific questions, we must set forth the authority of a board of health of a general health district to abate and remove nuisances under R.C. Chapters 3707 and

3709.<sup>1</sup> R.C. 3707.01 provides that “[t]he board of health of a ... general health district shall abate and remove all nuisances within its jurisdiction.” *See also* R.C. 3707.03 (“[t]he board of health of a ... general health district shall abate all nuisances and may remove or correct all conditions detrimental to health or well-being found upon school property by serving an order upon the board of education, school board, or other person responsible for such property, for the abatement of such nuisance or condition within a reasonable but fixed time”); R.C. 3709.22 (the board of health of a general health district “may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease”). In order to discharge this duty, a board of health of a general health district “may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, and prosecute such persons for neglect or refusal to obey such orders.” R.C. 3707.01. In addition, the board of health may do the following:

When a building, erection, excavation, premises, business, pursuit, matter, or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board [of health], in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent, or other person having control thereof or responsible for such condition, and may prosecute him for the refusal or neglect to obey such order. The board may, by its officers and employees, remove, abate, suspend, alter, or otherwise improve or purify such nuisance and certify the costs and expense thereof to the county auditor, to be assessed against the property and thereby made a lien upon it and collected as other taxes.

*Id.*

If an order of a board of health of a general health district issued under R.C. 3707.01 is neglected or disregarded, the board is authorized by R.C. 3707.02 to do the following:

When an order of the board of health of a ... general health district, made pursuant to [R.C. 3707.01], is neglected or disregarded, in whole or in part, the

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<sup>1</sup> Additional provisions governing the removal and abatement of nuisances are set forth in R.C. Chapter 3767. Because your specific questions concern the filing of petitions for nuisance abatement injunctions under R.C. 3707.021 and R.C. 3709.211, this opinion does not address the authority of a board of health of a general health district or a county prosecuting attorney to bring an action in the court of common pleas to abate a nuisance and enjoin a person from maintaining the nuisance under R.C. Chapter 3767.

board may elect to cause the arrest and prosecution of all persons offending,<sup>2</sup> or to perform, by its officers and employees, what the offending parties should have done. If the latter course is chosen, before the execution of the order is begun, the board shall cause a citation to issue and be served upon the persons responsible, if residing within the jurisdiction of the board, but if not, such citation shall be mailed to such persons by registered letter, if the address is known or can be found by ordinary diligence. If the address cannot be found, the board shall cause the citation to be left upon the premises, in charge of any person residing thereon, otherwise it shall be posted conspicuously thereon. The citation shall briefly recite the cause of complaint, and require the owner or other persons responsible to appear before the board at a time and place stated, or as soon thereafter as a hearing can be had, and show cause why the board should not proceed and furnish the material and labor necessary and remove the cause of complaint.

If the persons cited appear, they shall be fully apprised of the cause of complaint and given a fair hearing. The board shall then make such order as it deems proper, and if material or labor is necessary to satisfy the order, and the persons cited promise, within a definite and reasonable time, to furnish them, the board shall grant such time. If no promise is made, or kept, the board shall furnish the material and labor, cause the work to be done, and certify the cost and expense to the county auditor. If the material and labor are itemized and the statement is accompanied by the certificate of the president of the board, attested by the clerk, reciting the order of the board and that the amount is correct, the auditor has no discretion, but shall place such sum against the property upon which the material and labor were expended, which shall, from the date of entry, be a lien upon the property and be paid as other taxes are paid. (Footnote added.)

R.C. 3707.021 further authorizes the board of health to petition a court of common pleas for an injunction requiring compliance with an order made by the board pursuant to R.C. 3707.01:

When an order of the board of health of a ... general health district, made pursuant to [R.C. 3707.01], is not complied with in whole or in part, the board may petition the court of common pleas for an injunction requiring all persons to whom such order of the board is directed to comply with such order. The court of

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<sup>2</sup> R.C. 3707.48 states that no person shall violate R.C. 3707.01-.53 or any order or regulation of the board of health of a general health district “made in pursuance thereof, obstruct or interfere with the execution of such order, or willfully or illegally omit to obey such order.” A person who violates R.C. 3707.48 “is guilty of a minor misdemeanor on a first offense; on each subsequent offense, the person is guilty of a misdemeanor of the fourth degree.” R.C. 3707.99(B).

the county in which the offense is alleged to be occurring may grant such injunctive relief as the equities of the case require.

Similar provisions governing the authority of a board of health of a general health district to issue and enforce orders to abate and remove nuisances are set forth in R.C. Chapter 3709. R.C. 3709.21, which authorizes a board of health of a general health district to make orders and regulations to prevent, abate, and suppress nuisances, states, in pertinent part:

The board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded, and certified as are ordinances of municipal corporations and the record thereof shall be given in all courts the same effect as is given such ordinances, but the advertisements of such orders and regulations shall be by publication in one newspaper published and of general circulation within the district.

In order to enforce an order issued under R.C. 3709.21, a board of health of a general health district may do the following:

When an order of the board of health of a ... general health district made pursuant to ... [R.C. 3709.21] is not complied with in whole or in part, the board may petition the court of common pleas for injunctive or other appropriate relief requiring all persons to whom such order of the board is directed to comply with such order. The court of the county in which such offense is alleged to be occurring may grant such injunctive or other appropriate relief as the equities of the case require.

R.C. 3709.211.

In addition, the board of health may cause the prosecution of a person who violates an order or regulation of the board adopted under R.C. 3709.21. *See* R.C. 3707.01; R.C. 3709.22; 1987 Op. Att’y Gen. No. 87-097 at 2-645 n.7. R.C. 3709.99(A), which imposes criminal liability upon a person who violates an order or regulation of a board of health adopted under R.C. 3709.21, provides:

Whoever violates ... [R.C. 3709.21] ... or any order or regulation of the board of health of a ... general health district adopted in pursuance of those sections, or whoever interferes with the execution of an order or regulation of that nature by a member of the board or person authorized by the board, shall be fined

not more than one hundred dollars or imprisoned not more than ninety days, or both. No person shall be imprisoned for the first offense, and the prosecution shall always be for a first offense unless the affidavit upon which the prosecution is instituted contains the allegation that the offense is a subsequent offense.

The foregoing provisions of R.C. Chapters 3707 and 3709 thus govern the authority of a board of health of a general health district to abate and remove nuisances under R.C. Chapters 3707 and 3709. *See generally Brunner v. Rhodes*, 95 Ohio App. 259, 269, 119 N.E.2d 105 (Franklin County 1953) (“[i]t is basic that the board of health, being a creature of statute, has only such powers as are expressly conferred upon it and those which may be fairly implied from the express powers granted”); 1984 Op. Att’y Gen. No. 84-090 at 2-308 (same); 1980 Op. Att’y Gen. No. 80-089 at 2-345 (same).

### **The Administrative Remedies Set Forth in R.C. 3707.02 Do Not Have to Be Exhausted before Petitioning for an Injunction**

Let us now turn to your first question, which asks whether a board of health of a general health district must exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. A review of the statutory authority of a board of health of a general health district to abate and remove nuisances discloses that the board is not required to exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211.

1987 Op. Att’y Gen. No. 87-097 at 2-644 and 2-645 examined the statutory authority of a board of health of a general health district to abate and remove nuisances and stated that the board has several options when a person does not comply with an order made by the board pursuant to R.C. 3707.01:

While the board has statutory authority to abate and remove a nuisance, the method of abatement and removal is discretionary. The board of health “may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein...” R.C. 3707.01. See also R.C. 3709.21 (“board of health of a general health district may make such orders and regulations as are necessary for ... the prevention, abatement, or suppression of nuisances”). If such an order is disobeyed the board may choose one of several alternatives. R.C. 3707.02 provides that when an order of the board of health “is neglected or disregarded, in whole or in part, the board may elect to cause the arrest and prosecution of all persons offending,” or the board may “perform, by its officers and employees, what the offending parties should have done.” The board also has the option of petitioning the court of common pleas for an injunction requiring all persons to whom an order is directed to comply with such order. R.C. 3707.021. See also R.C. 3709.211 (board of health of general health district may petition for injunctive relief where order

made pursuant to R.C. 3709.20 or R.C. 3709.21 is not complied with); R.C. 3709.99 (penalties for failure to comply with R.C. 3709.20, R.C. 3709.21, R.C. 3709.22 or order of board of health).

Boards of health ... also enjoy broad statutory power to abate nuisances which are dangerous to the public health or comfort. R.C. 3709.22 provides: "The board may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease." In a previous opinion, I addressed the authority of a board of health of a general health district to post a sign on public or private property warning of a hazard to health or safety on such property. I stated that "it has been held that the statutory procedure for abating nuisances is not exclusive, and that a board of health may take other steps if it finds them more efficacious. State ex rel. Pansing v. Lightner, 32 Ohio N.P. (n.s.) 376 (C.P. Montgomery County 1934)." 1984 Op. Att'y Gen. No. 84-090 at 2-309. See also R.C. 3709.211 (board of health may petition for injunction and the court may grant the injunction "or other appropriate relief as the equities of the case require").

Thus, pursuant to R.C. 3707.01, the board of health of a general health district ... has the authority to abate and remove nuisances within its territory. R.C. 3707.01 empowers the board ... to issue an order for abatement and removal of a nuisance. If such an order is not obeyed, the board ... may then cause the prosecution of the offender, or may remove the nuisance pursuant to R.C. 3707.02. The board may seek an injunction pursuant to R.C. 3707.021. Pursuant to R.C. 3709.22, the board ... may take such other steps as are necessary to protect the public health. (Footnote omitted.)

As correctly explained in 1987 Op. Att'y Gen. No. 87-097, the General Assembly has granted the board of health of a general health district several options when a person does not comply with an order made by the board pursuant to R.C. 3707.01. The board may cause the prosecution of a person who violates an order, R.C. 3707.01; R.C. 3707.02; R.C. 3707.48; R.C. 3707.99(B); R.C. 3709.22, perform, by its officers and employees, what a person should have done under the order, R.C. 3707.02, seek an injunction requiring a person to comply with the order, R.C. 3707.021, or take such other steps as are necessary to protect the public health and to prevent disease, R.C. 3709.22. In addition, the General Assembly authorizes the board of health to cause the prosecution of a person who does not comply with an order made by the board pursuant to R.C. 3709.21, *see* R.C. 3707.01; R.C. 3709.22; R.C. 3709.99(A), seek an injunction requiring a person to comply with the order, R.C. 3709.211, or take such other steps as are necessary to protect the public health and to prevent disease, R.C. 3709.22. 1987 Op. Att'y Gen. No. 87-097 at 2-644 and 2-645.

In describing the authority of a board of health under each of the foregoing options, the General Assembly has repeatedly used the word "may." R.C. 3707.02 states, in part, when an order of a board of health is neglected or disregarded, "the board *may* elect to cause the arrest and prosecution of all persons offending, or to perform, by its officers and employees, what the

offending parties should have done.” (Emphasis added.) R.C. 3707.021 and R.C. 3709.211 both state that, when an order of the board of health is not complied with, “the board *may* petition the court of common pleas” for an injunction. (Emphasis added.) Additionally, R.C. 3709.22 states that a board of health “may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and *may* take such steps as are necessary to protect the public health and to prevent disease.” (Emphasis added.)

The repeated use of the word “may” in the statutory scheme setting forth the authority of a board of health of a general health district to abate and remove nuisances evinces a legislative intent that a board is permitted at any time to undertake any of the options available to the board when a person does not comply with an order made by the board pursuant to R.C. 3707.01 or R.C. 3709.21. *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 107, 271 N.E.2d 834 (1971) (“[t]he statutory use of the word ‘may’ is generally construed to make the provision in which it is contained optional, permissive, or discretionary, at least where there is nothing in the language or in the sense or policy of the provision to require an unusual interpretation” (citation omitted)); *Dennison v. Dennison*, 165 Ohio St. 146, 149, 134 N.E.2d 574 (1956) (“[o]rdinarily, the word, ‘shall,’ is a mandatory one, whereas ‘may’ denotes the granting of discretion”). Nothing in the language of any of the relevant statutes requires a board of health to choose only one option when a person does not comply with an order made by the board pursuant to R.C. 3707.01 or R.C. 3709.21 or forecloses the board from pursuing a second option after it has chosen an option and acted upon that choice.

In fact, the contrary is indicated by R.C. 3707.01 and R.C. 3709.22. R.C. 3707.01 states that a board of health “shall abate and remove all nuisances within its jurisdiction” and “may, by order, compel the owners, agents, assignees, occupants, or tenants of any lot, property, building, or structure to abate and remove any nuisance therein, *and* prosecute such persons for neglect or refusal to obey such orders.” (Emphasis added.) *See generally Webster’s New World Dictionary* 51 (2nd ed. 1986) (defining the word “and” to mean “also; in addition; moreover; as well as”). R.C. 3709.22 further authorizes a board of health to “provide for the inspection and abatement of nuisances dangerous to public health or comfort, and ... *take such steps as are necessary* to protect the public health and to prevent disease.” (Emphasis added.) The language of R.C. 3707.01 and R.C. 3709.22 thus indicates that a board of health may take such steps as are necessary to protect the public health and to prevent disease and that such steps may include pursuing more than one of its options when a person does not comply with an order made by the board pursuant to R.C. 3707.01 or R.C. 3709.21. *See State ex rel. Pansing v. Lightner*, 32 Ohio N.P. (n.s.) 376, 1934 Ohio Misc. LEXIS 1468 (C.P. Montgomery County 1934); 1984 Op. Att’y Gen. No. 84-090 at 2-309; *see also* 1980 Op. Att’y Gen. No. 80-089 at 2-347 (boards of health have “wide discretion in accomplishing their duty to protect the public health”).

In addition, the authority of a board of health of a general health district to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211 is not predicated upon there being no pending administrative or criminal proceedings against a person who has not complied with an order made by the board. The only condition that must be met before a board of health may petition a court of common pleas for a nuisance

abatement injunction under R.C. 3707.021 or R.C. 3709.211 is a person's failure to comply with an order made by the board pursuant to R.C. 3707.01 or R.C. 3709.21, respectively. Once this condition is satisfied, the board of health has the discretion to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211 even if there are administrative or criminal proceedings pending against the person for failing to comply with the board's order.

Moreover, if a board of health of a general health district were not permitted to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211 until after the completion of any administrative or criminal proceedings against a person, irreparable harm might befall the public health and welfare. As explained in *State ex rel. Pansing v. Lightner*, 32 Ohio N.P. (n.s.) at 385-86, 1934 Ohio Misc. LEXIS 1468:

*Such a strict limitation as contended for by the defendant upon the procedure of a board of health might prove disastrous at a time when general health was so endangered that the board and comprehensive authority of a court, expressed through a general injunction, would be the only process of protecting the life and welfare of the community.* If it were required to proceed solely upon a misdemeanor charge against one individual, this procedure might be utterly unsatisfactory, inadequate for the conditions confronting the board, and improper when considered in relation to the general welfare of the community. Not only is this contention of the defendant answered by sound reason, but it is answered specifically by the provisions of [G.C.] 1261-26 [now R.C. 3709.22], ... which provides that the board "may take such steps as are necessary to protect the public health and to prevent disease."

The very nature of the power exercised, being broad and comprehensive in scope, dealing with the fundamental right of a community to safety and protection from disease and discomfort of health, carries with it, as an implication, the authority to use those processes duly established by law, and to exercise discretion and judgment as to the nature of the processes invoked to effectuate the purposes of the board. (Emphasis added.)

The authority conferred by the General Assembly upon a board of health of a general health district to abate and remove nuisances under R.C. Chapters 3707 and 3709 thus clearly grants such a board the power to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211 whenever in the board's judgment the health and welfare of the public demands such action by the board. *See generally* R.C. 3709.22 (a board of health "may also provide for the inspection and abatement of nuisances dangerous to public health or comfort, and may take such steps as are necessary to protect the public health and to prevent disease"). Therefore, in light of the statutory scheme governing the authority of a board of health of a general health district to preserve the public health and welfare by abating and removing nuisances and the absence of a statutory provision limiting the authority of a board of health to petition a court of common pleas for a nuisance abatement injunction, we conclude that such a board is not required to exhaust all administrative remedies under R.C. 3707.02

before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. *See generally State ex rel. Pansing v. Lightner*, 32 Ohio N.P. (n.s.) at 385, 1934 Ohio Misc. LEXIS 1468 (“[t]here is a mandatory provision to the effect that the board shall abate nuisances and these two processes of abatement are afforded the board but are not exclusive of other procedure. [G.C. 4420 (analogous provisions now in R.C. 3707.01)] confers extraordinary authority but does not thereby deprive the board of the right to take other steps[, which, as in this case, may include an action in equity for injunction] if such seem more efficacious”); 1984 Op. Att’y Gen. No. 84-090 at 2-309 (the posting of signs on public or private property warning as to health and safety hazards existing on the property “may be taken in addition to other actions specifically authorized by statute as, for example, the seeking of injunctive relief, if it is found to be necessary for the protection of the public health” (citations omitted)).

**A Board of Health Is Authorized to Petition a Court of Common Pleas for an Injunction, But the Prosecuting Attorney Shall Advise the Board of Health that He May Not Initiate the Action in Certain Situations**

Your second question asks whether a county prosecuting attorney may exercise prosecutorial discretion in determining whether to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. A review of the responsibilities of the board of health of a general health district and county prosecuting attorney discloses that the board of health is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211, but the county prosecuting attorney, as legal advisor of the board of health, shall advise the board that he may not initiate such an action on the board’s behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts. A county prosecuting attorney may criminally prosecute a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21 even if the board does not direct the county prosecuting attorney to initiate the prosecution.

The office of county prosecuting attorney, unlike the constitutional office of Attorney General, is created by statute. R.C. 309.01; *see* Ohio Const. art. III, § 1. As such, the duties and responsibilities of a prosecuting attorney “are prescribed by statute.” *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940) (syllabus, paragraph one); *accord* 2003 Op. Att’y Gen. No. 2003-005 at 2-28. Pursuant to R.C. 3709.33, a county prosecuting attorney serves as the legal advisor and representative of the board of health of a general health district:

In general health districts the prosecuting attorney of the county constituting all or a major part of such district shall act as the legal advisor of the board of health. In a proceeding in which the board is a party the prosecuting attorney of the county in which such proceeding is instituted shall act as the legal representative of the board.

A county prosecuting attorney thus represents the board of health of a general health district when the board seeks to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. 1987 Op. Att’y Gen. No. 87-097 at 2-645 n.7.

Both R.C. 3707.021 and R.C. 3709.211 provide that, when an order of a board of health is not complied with by a person, “the board” may petition the court of common pleas for an injunction requiring the person to comply with the order. The plain language of these statutes thus confers the authority to petition a court of common pleas for an injunction under R.C. 3707.021 and R.C. 3709.211 upon a board of health. *Cf.* 1977 Op. Att’y Gen. No. 77-026 at 2-99 (since R.C. 4732.24 authorizes the State Board of Psychology, rather than the county prosecuting attorney, to file a complaint to obtain an injunction to prevent the unlawful practice of psychology, “an injunction against the unlawful practice of psychology may be granted only upon complaint by the State Board of Psychology”).

It is well settled “in Ohio that absent a specific statute authorizing a prosecuting attorney to institute ... a civil action, he has no such authority.” 1973 Op. Att’y Gen. No. 73-089 at 2-337; *accord* 1977 Op. Att’y Gen. No. 77-026 at 2-99; 1977 Op. Att’y Gen. No. 77-016 at 2-53. As explained in 1977 Op. Att’y Gen. No. 77-016 at 2-53, which concerned an analogous situation involving the authority of a county prosecuting attorney to initiate a civil action under R.C. 3704.05:<sup>3</sup>

If the General Assembly had intended that county and city prosecutors also have the authority to bring civil actions to enforce R.C. 3704, there is every indication that it would have granted this authority expressly. In two other statutory schemes relating to the protection of the environment – R.C. Chapter 3734, relating to solid waste disposal, and R.C. 3767.32 and 3767.33, relating to the disposal of materials upon the banks of streams – the General Assembly expressly provided that local prosecutors, as well as the Attorney General, are empowered to bring injunctive actions.

R.C. 3704.032 is a further indication that local prosecutors do not have authority to bring civil actions for violations of R.C. 3704. That section provides that “[d]uring an air pollution emergency the attorney general or the prosecuting attorney of the county where a violation of an emergency order occurs may bring action for an immediate injunction to enjoin any emission or other activity violating an emergency order.” ([E]mphasis added.) If a prosecuting attorney had power to bring a civil action, the specific authorization quoted above would have been unnecessary.

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<sup>3</sup> R.C. 3704.05 sets forth specific prohibitions against violations of, and non-compliance with, the provisions of R.C. Chapter 3704, which establishes a statutory scheme for the prevention, control, and abatement of air pollution, and regulations, orders, permits, and variances adopted or issued pursuant to such provisions.

*Accord* 1973 Op. Att’y Gen. No. 73-089.

Absent a statute authorizing a county prosecuting attorney to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211,<sup>4</sup> the county prosecuting attorney may not file such a petition on his own initiative, whether as the petitioning party or in his own capacity as legal representative of the board of health. *See generally* R.C. 309.09(A) (“[t]he prosecuting attorney shall prosecute and defend all suits and actions which any [county] officer or board *directs or to which it is a party*” (emphasis added)). Instead, the board of health of a general health district is responsible for petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. *Cf.* 1977 Op. Att’y Gen. No. 77-026 at 2-99 (“[n]either R.C. 4732.24 nor any related statute authorizes a county prosecutor or a city attorney to seek an injunction to prevent the unlawful practice of psychology. The power to seek such relief is, therefore, exclusively vested in the State Board of Psychology”).

While the General Assembly has not conferred separate authority upon a prosecuting attorney to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211, a prosecuting attorney does have certain ethical and professional responsibilities when advising a board of health of a general health district as to the course of action it should take in a particular matter. Under R.C. 3709.33, the county prosecuting attorney acts “as the legal advisor of the board of health” of a general health district and is “the legal representative of the board” in proceedings “in which the board is a party.” In his capacity as legal advisor to the board of health, a county prosecuting attorney is required to give his professional opinion as to the propriety of the board bringing or continuing enforcement actions under R.C. 3707.021 or R.C. 3709.211. *See* Ohio Code of Professional Responsibility EC 7-3 (“[a] lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different”). *See generally* 1988 Op. Att’y Gen. No. 88-066 at 2-336 n.2 (“[h]istorically, an inherent distinction existed between the functions of legal adviser and legal counsel”).

The ethical and professional obligations of a county prosecuting attorney as a legal adviser and representative are summarized in the Ohio Code of Professional Responsibility as follows:

**EC [Ethical Consideration] 7-3.** Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or

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<sup>4</sup> As stated in note one, *supra*, this opinion does not address the authority of a county prosecuting attorney to bring an action in the court of common pleas to abate a nuisance and enjoin a person from maintaining the nuisance under R.C. Chapter 3767. *See generally* 1987 Op. Att’y Gen. No. 87-097 (syllabus, paragraph five) (“[u]nder R.C. 3767.03, the Attorney General or a county prosecuting attorney may file a civil action for abatement and other injunctive relief in connection with a violation of R.C. 3767.13”).

adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

*Duty of the Lawyer to a Client*

**EC 7-4.** The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

**EC 7-5.** A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position.

*See generally* 1988 Op. Att’y Gen. No. 88-066 at 2-336 n.2 (“[a] ‘legal adviser’ is charged with the giving of opinions, while ‘legal counsel’ is charged with the prosecution and defense of actions”).

In addition, Ethical Consideration 7-8 of the Ohio Code of Professional Responsibility elaborates on the obligation of a lawyer to act as a legal adviser to his client:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as

legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions.

In light of the foregoing ethical considerations, it is clear that a county prosecuting attorney, in his capacity as the legal advisor of a board of health of a general health district, R.C. 3709.33, must thoroughly discuss with the board of health the board's legal and non-legal options before petitioning on behalf of the board of health a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. The undertaking of such a decision-making process by the county prosecuting attorney assists the board of health in reaching the proper decision as to the action to be taken against a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21.

As part of this decision-making process, the county prosecuting attorney must inform the board of health of his obligation to comply with the ethical and professional standards established by the Ohio Supreme Court. *See generally* Ohio Code of Professional Responsibility EC 7-1 (“[t]he duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations”). This includes explaining to the board of health that, as the board's legal representative, he is obligated to decline the initiation or continuation of a legal action or position he deems frivolous, or that he believes is not supportable either as a matter of law or upon the facts as he knows them. *See* Ohio Code of Professional Responsibility EC 7-4; Ohio Code of Professional Responsibility EC 7-5. *See generally* Ohio R. Civ. P. 11 (the signature of an attorney on a pleading, motion, or other document of a party constitutes a certificate by the attorney that to the best of the attorney's “knowledge, information, and belief there is good ground to support it”). As explained in Ethical Consideration 7-14 of the Ohio Code of Professional Responsibility:

A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is a lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

Thus, while the board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211, a county prosecuting attorney has an ethical and professional responsibility to advise the board of health that he may not initiate such an action on the board's behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts. Accordingly, the board of health of a general health district must carefully consider the legal advice of the county

prosecuting attorney before resolving to petition a court of common pleas for a nuisance abatement injunction.

Moreover, because the public health and welfare is involved when making such a determination, it is imperative that the decision-making process between the county prosecuting attorney and the board of health be marked by meaningful discussion and cooperation, rather than an adversarial relationship, to achieve the ultimate goal of protecting the citizenry from harmful or dangerous nuisances. The public health and welfare is not advanced when the board of health and county prosecuting attorney do not function cooperatively in the abatement of such nuisances.

Therefore, in response to your second question, it is our opinion that the board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. As legal advisor of the board of health, a county prosecuting attorney shall advise the board that he may not initiate such an action on the board's behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts.

**Authority of a County Prosecuting Attorney to Criminally Prosecute a Person Who Fails to Comply with an Order Made by a Board of Health**

As a final matter, we note that a county prosecuting attorney has the authority to criminally prosecute a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21 since such failure constitutes a criminal offense, *see* R.C. 3707.01; R.C. 3707.02; R.C. 3707.48; R.C. 3707.99(B); R.C. 3709.22; R.C. 3709.99(A). *See, e.g.*, 1989 Op. Att'y Gen. No. 89-002 at 2-13 (“[s]ince failure to establish or maintain a pet cemetery endowment care fund is a crime, a county prosecutor has the power to prosecute criminal violations of R.C. 961.04 of which he is aware”). This is the case even if the board of health of a general health district does not direct the county prosecuting attorney to prosecute a person for failing to comply with an order made by the board pursuant to R.C. 3707.01 or R.C. 3709.21. *See* R.C. 309.08(A) (“[t]he prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, except for those required to be prosecuted by a special prosecutor pursuant to [R.C. 177.03] or by the attorney general pursuant to [R.C. 109.83], and other suits, matters, and controversies that the prosecuting attorney is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals”); 1989 Op. Att'y Gen. No. 89-002 at 2-13 (“[u]pon being made aware of the probable commission of a violation of R.C. 961.04, the prosecuting attorney may inquire into the commission of the crime and may prosecute”); 1987 Op. Att'y Gen. No. 87-097 (syllabus, paragraph six) (“[u]nder R.C. 309.08, the county prosecuting attorney is to prosecute any criminal charge filed in the court of common pleas charging a violation of R.C. 3767.13”); 1978 Op. Att'y Gen. No. 78-001 at 2-2 (overruled on other grounds by 1984 Op. Att'y Gen. No. 84-014) (“under R.C. 309.08 the County Prosecutor may prosecute any crime

committed in his county and need not, therefore, await a request from the Director of Environmental Protection” to prosecute persons for violating R.C. 3704.05).

### **Conclusions**

In summary, it is my opinion, and you are hereby advised as follows:

1. The board of health of a general health district is not required to exhaust all administrative remedies under R.C. 3707.02 before petitioning a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211.
2. The board of health of a general health district is authorized to petition a court of common pleas for a nuisance abatement injunction under R.C. 3707.021 or R.C. 3709.211. As legal advisor of the board of health, a county prosecuting attorney shall advise the board that he may not initiate such an action on the board’s behalf when he believes that the action is frivolous, obviously unfair, or not supported by the law or the facts.
3. A county prosecuting attorney may criminally prosecute a person who fails to comply with an order made by a board of health of a general health district pursuant to R.C. 3707.01 or R.C. 3709.21 even if the board does not direct the county prosecuting attorney to initiate the prosecution.

Respectfully,



**JIM PETRO**  
Attorney General