

April 29, 2013

The Honorable Donald R. Burns, Jr.
Carroll County Prosecuting Attorney
7 East Main St.
Carrollton, Ohio 44615

SYLLABUS:

2013-014

R.C. 309.09(A) requires a county prosecuting attorney to provide legal counsel and representation to a county sewer district established by a board of county commissioners under R.C. Chapter 6117.



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OPINION NO. 2013-014

The Honorable Donald R. Burns, Jr.
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Dear Prosecutor Burns:

You have asked whether R.C. 309.09(A) requires a county prosecuting attorney to provide legal counsel and representation to a county sewer district established by a board of county commissioners under R.C. Chapter 6117. We will begin with a brief discussion of the statutory scheme governing county sewer districts and then turn to the respective powers and duties of a county prosecuting attorney.

County Sewer Districts Established Under R.C. Chapter 6117

The Revised Code provides for many different types of sewer systems, including township sewers, organized under R.C. 504.18-.20, municipal sewers, organized under R.C. Chapter 729, private sewers, organized under R.C. Chapter 6112 and R.C. 307.73, regional sewers, organized under R.C. Chapter 6119, and sanitary districts, organized under R.C. Chapter 6115. This opinion concerns county sewer districts, organized under R.C. Chapter 6117.

R.C. Chapter 6117 sets forth the statutory framework for county sewer districts. It provides:

(B)(1) For the purpose of preserving and promoting the public health and welfare, a board of county commissioners may lay out, establish, consolidate, or otherwise modify the boundaries of, and maintain, one or more sewer districts within the county and outside municipal corporations and may have a registered professional engineer make the surveys necessary for the determination of the proper boundaries of each district, which shall be designated by an appropriate name or number. The board may acquire, construct, maintain, and operate within any district sanitary or drainage facilities that it determines to be necessary or appropriate for the collection of sewage and other wastes originating in or entering the district, to comply with the provisions of a contract entered into for the purposes described in sections 6117.41 to 6117.44 of the Revised Code and pursuant to those sections or other applicable provisions of law, or for the

collection, control, or abatement of waters originating or accumulating in, or flowing in, into, or through, the district, and other sanitary or drainage facilities, within or outside of the district, that it determines to be necessary or appropriate to conduct the wastes and waters to a proper outlet and to provide for their proper treatment, disposal, and disposition. The board may provide for the protection of the sanitary and drainage facilities and may negotiate and enter into a contract with any public agency or person for the management, maintenance, operation, and repair of any of the facilities on behalf of the county upon the terms and conditions that may be agreed upon with the agency or person and that may be determined by the board to be in the best interests of the county. By contract with any public agency or person operating sanitary or drainage facilities within or outside of the county, the board may provide a proper outlet for any of the wastes and waters and for their proper treatment, disposal, and disposition.

R.C. 6117.01(B)(1). This means that a board of county commissioners, for the purpose of promoting public health and welfare, may establish county sewer districts within the county. The board of county commissioners lays out the boundaries of these districts and may operate within any district sanitary or drainage facilities it determines to be necessary or appropriate for the collection of sewage and other wastes originating in or entering the district. The board of county commissioners provides for the protection of the sanitary and drainage facilities and may negotiate and enter contracts with other individuals or agencies for the operation of the facilities on behalf of the county.

Duties of a County Prosecuting Attorney

We now turn to the powers and duties of a county prosecuting attorney. “A county prosecutor has only those powers conferred by statute, either expressly or by necessary implication.” 2009 Op. Att’y Gen. No. 2009-050, at 2-374 (citing *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981) and *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940)); *see also* 2010 Op. Att’y Gen. No. 2010-025, at 2-181 to 2-182; 2009 Op. Att’y Gen. No. 2009-045, at 2-325; 2004 Op. Att’y Gen. No. 2004-032, at 2-287. A county prosecutor serves as the legal adviser to the board of county commissioners, board of elections, all other county officers and boards, and all tax-supported public libraries.¹ R.C. 309.09(A). Any of these entities may require the county prosecutor to provide written opinions or instructions regarding matters connected to their official duties. *Id.* The county prosecutor also must prosecute and defend all “suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party.” *Id.* Because there is no statute that

¹ The prosecuting attorney is also required to serve as the legal adviser for non-home rule townships (and may be retained by home-rule townships), R.C. 309.09(B), and various other public bodies as specified by statute. *See, e.g.*, R.C. 309.09(D)-(H); R.C. 1515.11; R.C. 3313.35; R.C. 3709.33.

specifically designates the county prosecutor as legal adviser to a county sewer district, your question will therefore turn on whether a county sewer district constitutes a “county board” for purposes of R.C. 309.09(A).

The term “county board,” as it is used in R.C. 309.09(A), is not defined by statute, but the Attorney General has had many opportunities to interpret this term for purposes of determining a prosecuting attorney’s duties under R.C. 309.09(A). These opinions have explained that the meaning of “county board” is limited to entities that are “essentially a subdivision of the county or a subordinate department of the county.” 1961 Op. Att’y Gen. No. 2383, p. 366, at 369; *see also* 1993 Op. Att’y Gen. No. 93-050, at 2-243; 1984 Op. Att’y Gen. No. 84-099, at 2-335; 1981 Op. Att’y Gen. No. 81-059, at 2-237; 1975 Op. Att’y Gen. No. 75-014, at 2-55; 1950 Op. Att’y Gen. No. 1970, p. 446, at 449. Whether an entity is a subdivision or subordinate department of the county turns on three factors: (1) whether the boundaries of the entity are coextensive or contained within the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and (3) whether the entity is funded by or through the county. 1999 Op. Att’y Gen. No. 99-028, at 2-186.

County Sewer District Is a County Board

We now turn to the determination of whether a county sewer district is a county board for purposes of R.C. 309.09(A). Applying the three factor test, on balance, it is clear that a county sewer district is a county board.

As to the first factor, “it is well established that an entity whose boundaries exceed those of the county cannot be a ‘county board’ for purposes of R.C. 309.09. Rather, its territory must be coextensive with or contained within the territory of the county.” 1999 Op. Att’y Gen. No. 99-028, at 2-186 (citations omitted). R.C. 6117.01(B)(1) states that a board of county commissioners may establish one or more sewer districts “within the county.” *See also* R.C. 6117.03 (“the board of county commissioners may ... establish ... one or more sewer districts within its county [including] a part or all of the territory within such municipal corporation as the whole or a part of such district”). Although the board of county commissioners is permitted to contract with public agencies or persons operating sanitary or drainage facilities outside of the county, R.C. 6117.01(B)(1), and although the board of county commissioners may make improvements to the system which are outside the county, *see* R.C. 6117.10, the physical boundaries of the district remain “within” the county. R.C. 6117.01(B)(1). *See generally Blair v. Bd. of Comm’rs*, No. 95-G-1960, 1996 Ohio App. LEXIS 2445 (Geauga County June 14, 1996) (discussing statutory sections referring to improvements in more than one county). Thus, a county sewer district meets the standard for a county board laid out in the first factor.

The second factor we must consider is whether the county is responsible for the “organization, operation, and supervision of the entity.” 1999 Op. Att’y Gen. No. 99-028, at 2-186. This is a pivotal factor in determining whether an entity is a county board for purposes of R.C. 309.09(A). 1999 Op. Att’y Gen. No. 99-028, at 2-187; 1989 Op. Att’y Gen. No. 89-001, at 2-7; 1984 Op. Att’y Gen. No. 84-099, at 2-337 (private industry council established by federal

law to work in conjunction with local governments, rather than under their supervision, is not a county board). A county sewer district “is created by and remains under the direct supervision of the board of county commissioners.” 2002 Op. Att’y Gen. No. 2002-030, at 2-200 to 2-201; *see* 1985 Op. Att’y Gen. No. 85-016, at 2-63 (“[t]he statutory scheme seems to contemplate that any improvement constructed by the board of county commissioners for a sewer district under R.C. Chapter 6117 is to belong to the county ... and that the responsibility for maintenance is to rest with the county, rather than with any other persons or entity”). The board of county commissioners is responsible for a host of supervisory tasks related to county sewer districts. Among other things, the board of county commissioners is responsible for acquiring, constructing, maintaining, and operating within the district the sanitary and drainage facilities that are necessary for the collection of sewage, R.C. 6117.01(B)(1), making surveys for any sewer district that the board is considering acquiring or constructing, R.C. 6117.011, approving plans and specifications for sanitary or drainage facilities, R.C. 6117.01(E), employing a sanitary engineer and establishing a sanitary engineering department, R.C. 6117.01(C), fixing the rates, charges, and penalties for the district’s sanitary facilities, R.C. 6117.02, and approving a general plan of sewerage or drainage for the district, R.C. 6117.06. “The role of the county commissioners in the establishment, operation, and funding of county sewer districts indicates that county sewer districts are part of county government.” 2002 Op. Att’y Gen. No. 2002-030, at 2-201. “[I]t is apparent that a sewer district established pursuant to R.C. Chapter 6117 is not an entity or district independent of a county.... [W]hile the unincorporated areas of a county may be divided geographically into sewer districts, these districts are not operated independently of the county, but are governed by the board of county commissioners as part of the board’s duties as the governing authority of the county.” 1984 Op. Att’y Gen. No. 84-085, at 2-293; *see also* 2005 Ohio Op. Att’y Gen. No. 2005-013, at 2-125 n.4. Thus, a county sewer district meets the second factor of the test for determining whether an entity is a “county board” because a county sewer district is organized, operated, and supervised by the county.

Finally, we must examine whether an entity receives public funds from or through the county. 1999 Op. Att’y Gen. No. 99-028, at 2-186; *see, e.g.*, 1993 Op. Att’y Gen. No. 93-050, at 2-244 (county funding supported finding that local cluster for services to youth was a county board); 1992 Op. Att’y Gen. No. 92-060, at 2-248 (same with respect to a county solid waste management district). A number of provisions within R.C. Chapter 6117 authorize the board of county commissioners to issue public obligations or levy taxes for construction of county sewer district improvements and for payment of county sewer district expenses. *See, e.g.*, R.C. 6117.08; R.C. 6117.25; R.C. 6117.311; *see also* 2002 Op. Att’y Gen. No. 2002-030, at 2-201. The county may pay from available county funds any part of the cost of an improvement to the sewer district if the board of county commissioners considers the payment to be just. R.C. 6117.29. Moreover, it is the board of county commissioners that fixes rates and charges for those properties served or capable of being served by the district. R.C. 6117.02. Thus, all three factors weigh in favor of a county sewer district being considered a county board.

You note in your letter that a previous opinion of the Attorney General, 1990 Op. Att’y Gen. No. 90-073, advises that regional sewer districts, created under R.C. Chapter 6119, are not county boards entitled to legal counsel and representation from a county prosecutor. Regional

sewer districts, however, are organized differently than county sewer districts and therefore do not qualify as county boards. As the 1990 opinion notes, regional sewer districts may be composed of cities, counties, and townships. 1990 Op. Att’y Gen. No. 90-073, at 2-317; *see* R.C. 6119.01 (“[a]ny area situated in any unincorporated part of one or more contiguous counties or in one or more municipal corporations, or both, may be organized as a regional water and sewer district in the manner and subject to the conditions provided in [R.C. Chapter 6119]”); R.C. 6119.02 (in order to organize a regional water and sewer district, a petition must be filed in the court of common pleas by one or more municipal corporations, one or more counties, or by one or more townships, or by any combination of them); 1984 Op. Att’y Gen. No. 84-059, at 2-193. Many of our opinions have found that where government entities are made up of multiple political subdivisions they are not considered “county boards.” *See, e.g.*, 2001 Op. Att’y Gen. No. 2001-028 (joint township hospital district); 1994 Op. Att’y Gen. No. 94-082 (regional transit authority); 1993 Op. Att’y Gen. No. 93-001 (regional planning commission); 1989 Op. Att’y Gen. No. 89-102 (joint solid waste management district); 1985 Op. Att’y Gen. No. 85-012 (regional organization for civil defense); 1983 Op. Att’y Gen. No. 83-064 (multicounty detention and treatment facility); 1979 Op. Att’y Gen. No. 79-019 (multicounty felony bureau); 1975 Op. Att’y Gen. No. 75-014 (joint county community mental health board); 1958 Op. Att’y Gen. No. 2736, p. 567 (regional planning commission). These types of entities, which exercise authority over an area that may exceed the territorial limits of the county or townships represented by the county prosecuting attorney, are “autonomous legal entities, distinguishable from the individual subdivisions that participate in their creation.” 2001 Op. Att’y Gen. No. 2001-028, at 2-164. Thus, a regional sewer district is an “independent political subdivision of the state,” R.C. 6119.04(B), and distinct and separate from the various member political subdivisions that participate in its establishment. 1990 Op. Att’y Gen. No. 90-073, at 2-318; *see also Kucinich v. Cleveland Reg’l Sewer Dist.*, 64 Ohio App. 2d 6, 15-16, 410 N.E.2d 795 (Cuyahoga County 1979) (“we again emphasize that the Cleveland Regional Sewer District is an independent political subdivision created under R.C. Chapter 6119”). In addition, regional sewer districts are not controlled by the board of county commissioners. The governing body of a regional sewer district is a board of trustees. R.C. 6119.02(A)(6); *see* R.C. 6119.07 (“[a]ll the capacity of a regional water and sewer district shall be vested in and its authority shall be exercised by a board of trustees which shall manage and conduct the affairs of the district”). Based on these reasons, a regional sewer district is not a county board for purposes of R.C. 309.09(A).

In your letter, you suggest that a county prosecutor does not advise or represent a county sewer district and you point to the fact that the county engineer only serves as the sanitary engineer when he or she agrees and contracts to do so. *See* R.C. 6117.01(A)(4) (defining “county sanitary engineer” as either the registered professional engineer employed by the board of county commissioners to be the county sanitary engineer or the county engineer if he has agreed to retain the duties of a county sanitary engineer). The county engineer is the engineer responsible for performing for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor. R.C. 315.08. The Revised Code specifically excepts from the county engineer’s duties, however, those duties described in R.C. Chapter 6117. *Id.* The county sanitary engineer, on the other hand, is the head of the sanitary engineering department for the county, R.C. 6117.01(C), and, among other things, makes

surveys or inspections as necessary for the laying out of sewer districts, R.C. 6117.01(F), and prepares the general plan of sewerage or drainage for the district, R.C. 6117.06(A). It is immaterial whether the county engineer agrees to serve as the county sanitary engineer or whether the board of county commissioners hires a person other than the county engineer to serve as the county sanitary engineer. What is important is that the board of county commissioners ultimately retains authority over the county sanitary engineer, and thus, the board of county commissioners remains in control over the operation of the district. *See* R.C. 6117.01(C) (“[t]he board may create and maintain a sanitary engineering department, which shall be under its supervision and which shall be headed by the county sanitary engineer”); 1997 Op. Att’y Gen. No. 97-054 (the sanitary engineering department and the sanitary engineer are under the supervision of the board of county commissioners).

You also suggest that R.C. 6117.251 might imply that a county prosecutor does not represent a county sewer district. R.C. 6117.251 provides that a board of county commissioners may levy assessments upon the properties to be benefited in the district in order to obtain funds for the preparation of a general plan of sewerage or drainage for the district, including the costs of “legal services” incident to the preparation of those plans. R.C. 6117.251(C), (D). The “legal services” referred to in R.C. 6117.251 are only those services that are “incident to” the preparation of the plans for sewerage discussed in R.C. 6117.251. R.C. 6117.251(C), (D). R.C. 6117.251 does not imply that a county sewer district is not generally represented by a county prosecutor. It is common for the General Assembly to provide that a county prosecutor will generally represent a certain entity, but allow that entity to hire other legal counsel in certain circumstances. *See, e.g.*, R.C. 305.14; R.C. 309.10; R.C. 343.01(E)(1); R.C. 505.62.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 309.09(A) requires a county prosecuting attorney to provide legal counsel and representation to a county sewer district established by a board of county commissioners under R.C. Chapter 6117.

Very respectfully yours,



MICHAEL DEWINE
Ohio Attorney General