

August 4, 2010

The Honorable Jessica A. Little  
Brown County Prosecuting Attorney  
200 East Cherry Street  
Georgetown, Ohio 45121

SYLLABUS:

2010-019

1. A board of health of a general health district has authority to require that a household sewage disposal system be directly connected to a sanitary sewerage system whenever a sanitary sewerage system becomes accessible to a property.
2. If a board of health of a general health district determines that a household septic system is a "household sewage disposal system," as defined in 6 Ohio Admin. Code 3701-29-01(L) (2009-2010 Supplement), and that a "sanitary sewerage system," as defined in 6 Ohio Admin. Code 3701-29-01(W) (2009-2010 Supplement), has become accessible to a property with a household sewage disposal system installed, maintained, or operated on the property, then R.C. 3701.56 requires the board of health to enforce divisions (L) and (M) of 6 Ohio Admin. Code 3701-29-02 (2009-2010 Supplement), which prescribe abandonment of the household sewage disposal system and direct connection of a house sewer to the sanitary sewerage system.
3. Pursuant to 6 Ohio Admin. Code 3701-29-20(A) (2009-2010 Supplement), a board of health of a general health district may grant a variance from the requirements of divisions (L) and (M) of 6 Ohio Admin. Code 3701-29-02 (2009-2010 Supplement) if a person shows that, because of practical difficulties or other special conditions, strict application of rule 3701-29-02(L) and (M) will cause him unusual and unnecessary hardship. Rule 3701-29-20(A) does not authorize a board of health to grant a variance from rule 3701-29-02(L) and (M) if doing so will defeat the spirit and general intent of 6 Ohio Admin. Code Chapter 3701-29 or be otherwise contrary to the public interest.



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**RICHARD CORDRAY**  
OHIO ATTORNEY GENERAL

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August 4, 2010

OPINION NO. 2010-019

The Honorable Jessica A. Little  
Brown County Prosecuting Attorney  
200 East Cherry Street  
Georgetown, Ohio 45121

Dear Prosecutor Little:

You have requested a formal opinion concerning this issue: whether, under 6 Ohio Admin. Code 3701-29-02(L) and (M), the Brown County Board of Health must order approximately 50 homeowners to abandon their septic systems and connect to a new sewer system.

According to your letter, the Village of Sardinia (“Village”) recently upgraded its sewer system and extended it past the Village limits to a new elementary school. The Village later tried to annex the land between the Village and the school, but the board of county commissioners denied this request. Seeking to require all residences in the area that would have been annexed to connect to the new sewer system, the Village solicited the Brown County Board of Health to secure these sewer connections at a cost to an individual homeowner of at least \$2,800. Finding that requiring homeowners to connect to the new sewer system would cause them undue economic hardship given the high rate of unemployment in the county, the Brown County Board of Health has deferred ordering homeowners in the affected area to connect to the new sewer system at this time.

For the reasons that follow, we conclude that the Brown County Board of Health does have authority to order property owners in the affected area to connect to the new sewer system. We also conclude that if the Brown County Board of Health determines that a household septic system is a “household sewage disposal system,” as defined in 6 Ohio Admin. Code 3701-29-01(L) (2009-2010 Supplement), and that a “sanitary sewerage system,” as defined in 6 Ohio Admin. Code 3701-29-01(W) (2009-2010 Supplement), has become accessible to a property with a household sewage disposal system installed, maintained, or operated on the property, then R.C. 3701.56 requires the Brown County Board of Health to enforce divisions (L) and (M) of 6

Ohio Admin. Code 3701-29-02 (2009-2010 Supplement), which prescribe abandonment of the household sewage disposal system and direct connection of a house sewer to the sanitary sewerage system. We further conclude that pursuant to 6 Ohio Admin. Code 3701-29-20(A) (2009-2010 Supplement), a board of health of a general health district may grant a variance from the requirements of divisions (L) and (M) of rule 3701-29-02 (2009-2010 Supplement) if a person shows that, because of practical difficulties or other special conditions, strict application of rule 3701-29-02(L) and (M) will cause him unusual and unnecessary hardship. Rule 3701-29-20(A) does not authorize a board of health to grant a variance from rule 3701-29-02(L) and (M) if doing so will defeat the spirit and general intent of 6 Ohio Admin. Code Chapter 3701-29 or be otherwise contrary to the public interest.

### **General Health Districts as Political Subdivisions of the State for Purposes of Local Health Administration**

“Protection and preservation of public health are among the prime governmental concerns and functions of the state as a sovereignty.... Under the powers reserved to it by the Constitution, the state, acting through the General Assembly, may enact general laws to that end.” *State ex rel. Mowrer v. Underwood*, 137 Ohio St. 1, 3-4, 27 N.E.2d 773 (1940). “In accordance with this reserved power, the General Assembly first enacted the Hughes Act and later, in amended form, the Griswold Act, ... by the terms of which the state was divided into health districts.” *Mowrer*, at 4. *See also State ex rel. Cuyahoga Heights v. Zangerle*, 103 Ohio St. 566, 134 N.E. 686 (1921) (syllabus, paragraph 5) (holding the Hughes health law and Griswold law to be valid enactments that did not conflict with the state constitution).

R.C. 3709.01 provides, in part, that “[t]he state shall be divided into health districts.... The townships and villages in each county shall be combined into a health district and shall be known as a ‘general health district.’” “A general health district is a political subdivision of the state[,]” 1995 Op. Att’y Gen. No. 95-030, at 2-149 (citations omitted), and “actually is an arm of the state and derives its authority directly from the state.” 1974 Op. Att’y Gen. No. 74-032, at 2-144. *See also* 1980 Op. Att’y Gen. No. 80-087, at 2-343 (“[g]eneral health districts are political subdivisions of the state, not state agencies”); 1974 Op. Att’y Gen. No. 74-032, at 2-144 (observing that, “[a]lthough ... health districts derive their powers entirely from the state, they still retain certain ties with the county or the city with which they coexist”); 1940 Op. Att’y Gen. No. 1921, vol. I, p. 222, at 229 (“it has been held that health districts throughout the state exist as separate subdivisions of the state for the purposes of local health administration”) (citations omitted).

Under R.C. 3709.02(A) and R.C. 3709.03(A), respectively, the General Assembly has provided for a board of health and a district advisory council within each general health district. 1995 Op. Att’y Gen. No. 95-030, at 2-150. A board of health is vested with authority to provide for the public health, prevention or restriction of disease, and prevention, abatement, or

suppression of nuisances within its district. R.C. 3709.21;<sup>1</sup> 1995 Op. Att’y Gen. No. 95-030, at 2-150. A board of health of a general health district “may also provide for the inspection and

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<sup>1</sup> R.C. 3709.21 provides, in part, that “[t]he 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.... 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 see D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health*, 96 Ohio St. 3d 250, 2002-Ohio-4172, 773 N.E.2d 536 (syllabus, paragraphs 2 and 3) (“[a]dministrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly” and “R.C. 3709.21 is a rules-enabling statute, not a provision granting substantive regulatory authority”).

In your letter you have not identified any local regulations adopted by the Brown County Board of Health that require a household to directly connect to a sanitary sewerage system whenever such a system becomes accessible to the property. Accordingly, for purposes of this opinion, we shall assume that there are no local regulations that are pertinent. *See generally* R.C. 3709.21; R.C. 3718.02(B) (providing that a board of health may adopt more stringent standards governing household sewage treatment systems); *but see* Sub. H.B. No. 363, 128th Gen. A. (2009) (eff. Dec. 22, 2009) (section 6, uncodified) (amending sections 120.01 and 120.02 of Am. Sub. H.B. 119 of the 127th General Assembly, as amended by Am. Sub. H.B. 1 of the 128th General Assembly) (suspending the operation of R.C. 3718.02 until July 1, 2010, and directing that on July 1, 2010, R.C. 3718.02, in either its present form or as amended by the act or any other act, shall again become operational); Am. Sub. S.B. No. 110, 128th Gen. A. (2010) (eff. Sept. 17, 2010) (amending, *inter alia*, R.C. 3718.02(B)). *See also* 6 Ohio Admin. Code 3701-29-20(D) (2009-2010 Supplement) (“[r]ules 3701-29-01 to 3701-29-21 of the Administrative Code ... are minimum standards. A board of health may adopt more stringent standards when local conditions indicate such standards are necessary”). *See, e.g., State v. Simon*, 108 Ohio Misc. 2d 56, 57, 739 N.E.2d 1257 (Mun. Ct. Hamilton County 2000) (construing Hamilton County Household Sewage Code Section 529.02(K) that provided “[w]henver a sanitary sewerage system becomes available to the property, the building drain shall be directly connected to such sanitary sewerage system and the household sewage disposal system shall be properly abandoned”); *Franklin County Dist. Bd. of Health v. Sturgill*, No. 99AP-273, 1999 Ohio App. LEXIS 4502, at \*2 (Franklin County Sept. 28, 1999) (construing Franklin County Health Department Sanitary Regulation 701.02(M) that provided “[w]henver a sanitary sewerage system becomes available to the property, the household sewage disposal system shall be abandoned and the house sewer directly connected to the sewerage system”); *Bd. of Health of the Cuyahoga County Gen. Health Dist. v. Avallone*, No. 53277, 1988 Ohio App. LEXIS 154 (Cuyahoga County Jan. 21, 1988) (construing Cuyahoga County Board of Health Household Sewage Regulations 7.5 and 7.6 that required homeowners to abandon private sewage treatment

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.” R.C. 3709.22. *See also* 1995 Op. Att’y Gen. No. 95-030, at 2-150 (outlining other duties of a board of health of a general health district).

### **Duty of Board of Health of a General Health District to Enforce Sanitary Laws and Regulations Regarding Household Sewage Treatment Systems**

Apart from its authority under R.C. 3709.21 and R.C. 3709.22, a board of health of a general health district also is empowered to enforce rules that the Ohio Health Department adopts. R.C. 3701.56 provides:

*Boards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce quarantine and isolation orders, and the rules the department of health adopts.*

(Emphasis added.) *See also* R.C. 3709.11 (providing, *inter alia*, that a health commissioner in a general health district “*shall be* charged with the enforcement of all sanitary laws and regulations in the district”). (Emphasis added.)

When construing a statute, the paramount consideration is legislative intent. *State ex rel. Purdy v. Clermont County Bd. of Elections*, 77 Ohio St. 3d 338, 340, 673 N.E.2d 1351 (1997) (citing *State ex rel. Zonders v. Delaware County Bd. of Elections*, 69 Ohio St. 3d 5, 8, 630 N.E.2d 313 (1994)); *see also* *Gutmann v. Feldman*, 97 Ohio St. 3d 473, 2002-Ohio-6721, 780 N.E.2d 562, at ¶14. “Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.” *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944) (syllabus, paragraph 5).

“To determine the legislative intent, we first review the statutory language. In reviewing the statutory language, we accord the words used their usual, normal, or customary meaning.” *Gutmann*, at ¶14 (quoting *State ex rel. Wolfe v. Delaware County Bd. of Elections*, 88 Ohio St. 3d 182, 184, 724 N.E.2d 771 (2000)) (Citations omitted.) *Accord* R.C. 1.42 (stating, in part, that “[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”).

“In statutory construction, the word ‘may’ shall be construed as permissive and the word ‘shall’ shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage.” *Dorrian v. Scioto*

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systems and connect to the public sewer whenever an approved public sanitary sewage system was accessible).

*Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1). The Ohio Supreme Court has further explained: “We have repeatedly recognized that use of the term ‘shall’ in a statute or rule connotes the imposition of a mandatory obligation unless other language is included that evidences a clear and unequivocal intent to the contrary.... We have previously held that a statute or rule which uses the word ‘shall’ in describing an act which is to be performed is not generally susceptible of a ‘substantial compliance’ standard of interpretation.” *State v. Golphin*, 81 Ohio St. 3d 543, 545-46, 692 N.E.2d 608 (1998). *Cf. State ex rel. Jones v. Farrar*, 146 Ohio St. 467, 66 N.E.2d 531 (1946) (syllabus, paragraph 2) (“[a]s a general rule, statutes which relate to the essence of the act to be performed or to matters of substance are mandatory, and those which do not relate to the essence and compliance with which is merely a matter of convenience rather than substance are directory”).

We discern in R.C. 3701.56 no unequivocal intent that the word “shall,” as contained in the statute, be construed as permissive rather than mandatory, which is its usual statutory meaning. Accordingly, pursuant to R.C. 3701.56 the Brown County Board of Health is required to enforce rules related to household sewage treatment systems that the Ohio Department of Health adopts. *See generally* 6 Ohio Admin. Code Chapter 3701-29 (household sewage disposal systems).

### **Household and Small Flow On-Site Sewage Treatment Systems**

R.C. Chapter 3718 governs household and small flow on-site sewage treatment systems. Under R.C. 3718.02(A), “the public health council, in accordance with Chapter 119. of the Revised Code, shall adopt, and subsequently may amend and rescind, rules of general application throughout the state to administer this chapter.”<sup>2</sup> Pursuant to its authority under R.C. 3718.02, the public health council has adopted 6 Ohio Admin. Code 3701-29-02.<sup>3</sup>

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<sup>2</sup> As part of its duties, the Public Health Council, a part of the Ohio Department of Health, establishes rules of general application throughout Ohio. R.C. 3701.02; R.C. 3701.34(A)(1); *Clark v. Greene County Combined Health Dist.*, 108 Ohio St. 3d 427, 2006-Ohio-1326, 844 N.E.2d 330, at ¶13. The Public Health Council, however, does not have or exercise executive or administrative duties. R.C. 3701.34(B).

<sup>3</sup> *See* Am. Sub. S.B. No. 110, 128th Gen. A. (2010) (eff. Sept. 17, 2010) (section 3, uncodified) (providing that 6 Ohio Admin. Code Chapter 3701-29 shall remain in effect until superseded by rules that are to be adopted at a later date). Section 3 of Am. Sub. S.B. No. 110 states: “Notwithstanding any provision of law to the contrary, Chapter 3701-29 of the Ohio Administrative Code adopted pursuant to Section 120.02 of Am. Sub. H.B. 119 of the 127th General Assembly, as amended by Am. Sub. H.B. 1 and Sub. H.B. 363 of the 128th General Assembly, shall remain in effect as it exists on the effective date of this act until it is superseded by the rules that are required to be adopted under section 3718.02 of the Revised Code as amended by this act. The rules that are required to be adopted under that section as amended by

Rule 3701-29-02 (2009-2010 Supplement) provides in part:

(L) No household sewage disposal system *shall* be installed, maintained, or operated on property accessible to a sanitary sewerage system.

(M) Whenever a sanitary sewerage system becomes accessible to the property, a household sewage disposal system *shall* be abandoned and the house sewer directly connected to the sewerage system.<sup>4</sup> (Footnote and emphasis added.)

According to 6 Ohio Admin. Code 3701-29-01(W) (2009-2010 Supplement), a “sanitary sewerage system” is “any public or community sewerage collection system conveying sewage to a central sewage treatment plant.” Under 6 Ohio Admin. Code 3701-29-01(L) (2009-2010 Supplement), “household sewage disposal system” is defined as “any sewage disposal or treatment system or part thereof for a single family, two family, or three family dwelling which receives sewage.”<sup>5</sup>

Although rule 3701-29-01 (2009-2010 Supplement) defines “sanitary sewerage system” and “household sewage disposal system,” it does not define the term “accessible.” *See generally* 6 Ohio Admin. Code 3701-29-01 (2009-2010 Supplement) (definitions). *Cf.* 6 Ohio Admin. Code 3701-29-01(I) (2009-2010 Supplement) (the term “[e]asily accessible” “means of such location and design as to permit exposure with the use of only simple tools, such as screwdriver, pliers, open-end wrench, or other simple tools supplied by the manufacturer”). Further, no statute in R.C. Chapter 3718 defines “accessible” or otherwise suggests the meaning it should have. *See, e.g.,* R.C. 3718.01 (definitions). *See also* Am. Sub. S.B. No. 110, 128th Gen. A.

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this act shall not take effect prior to January 1, 2012.” *Cf.* Sub. H.B. No. 363, 128th Gen. A. (2009) (eff. Dec. 22, 2009) (section 6, uncodified) (essentially directing that, except for rules related to requirements for separation distances from a water table and soil absorption requirements, rules that were codified in 6 Ohio Admin. Code Chapter 3701-29 prior to January 1, 2007, are to be in effect).

<sup>4</sup> *See* 1986 Op. Att’y Gen. No. 86-087, at 2-496 to 2-497 (observing that “[w]hile [*DeMoise v. Dowell*, 10 Ohio St. 3d 92, 461 N.E.2d 1286 (1984)] does not directly address the authority of a county to enforce rule 3701-29-02(L) and (M), it does provide support for the validity of the provisions set forth in that rule”).

<sup>5</sup> In your letter you have not indicated whether the new sewer system is a “sanitary sewerage system,” as defined in 6 Ohio Admin. Code 3701-29-01(W) (2009-2010 Supplement) or whether septic systems of homeowners in the affected area are “household sewage disposal system[s],” as defined in 6 Ohio Admin. Code 3701-29-01(L) (2009-2010 Supplement). For the purpose of this opinion, we shall assume that (1) the new sewer system that you described in your letter is a “sanitary sewerage system,” as defined in rule 3701-29-01(W), and (2) the septic systems of homeowners in the affected area are “household sewage disposal system[s],” as defined in rule 3701-29-01(L).

(2010) (eff. Sept. 17, 2010) (amending, *inter alia*, R.C. 3718.01). It follows that “accessible,” as used in rule 3701-29-02(L) and (M), has not acquired a technical or particular meaning and therefore should be read in context and construed according to rules of common usage and grammar. *See generally* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly”); *see also* R.C. 1.41 (“[s]ections 1.41 to 1.59, inclusive, of the Revised Code apply to all statutes, subject to the conditions stated in section 1.51 of the Revised Code, and to rules adopted under them”).

According to *Webster’s Third New International Dictionary of the English Language, Unabridged* 11 (1993), the term “accessible” may be defined as, *inter alia*, “capable of being reached or easily approached.” *Merriam-Webster’s Collegiate Dictionary* 7 (11th ed. 2005) defines “accessible” as, *inter alia*, “providing access ... capable of being reached... [and] being within reach.” Thus, for purposes of rule 3701-29-02(L) and (M), a sanitary sewage disposal system is “accessible” if it is “within reach” of or “capable of being reached” by a property that has a “household sewage disposal system” installed, maintained, or operated on the property.

Accordingly, if the Brown County Board of Health finds that a “sanitary sewerage system” is “within reach” of or is “capable of being reached” by a property that has a “household sewage disposal system” installed, maintained, or operated on the property, then R.C. 3701.56 requires the Brown County Board of Health to order the abandonment of the household sewage disposal system and the direct connection of a house sewer to the sanitary sewerage system. *Accord* 1986 Op. Att’y Gen. No. 86-087 (syllabus, paragraph 2) (“[l]ocal officials may enforce the provisions of 4 Ohio Admin. Code 3701-29-02(L) and (M), which require the connection of premises to an accessible sanitary sewerage system, as authorized by R.C. 3701.56”); 1980 Op. Att’y Gen. No. 80-066, at 2-267 (overruling, in part, 1964 Op. Att’y Gen. No. 978, p. 2-142 and concluding that “a local board of health may regulate only those sewage disposal systems which serve a private residence”); *Lake County Gen. Health Dist. v. Quirk*, No. 98-L-107, 1999 Ohio App. LEXIS 2196, at \*\*10-11 (Lake County May 14, 1999) (finding that in accordance with R.C. 3701.56, “the Lake County Board of Health had a duty to implement Ohio Adm. Code 3701-29-02(L)-(M) by ordering appellants to connect to the sanitary sewerage system”).

Ohio case law supports this conclusion. In *DeMoise v. Dowell*, 10 Ohio St. 3d 92, 93, 461 N.E.2d 1286 (1984), the Ohio Supreme Court considered “whether it [was] within the authority of the Stark County Board of Health (“board”) to require that whenever a sanitary sewerage system [became] accessible to a property, the household sewage disposal system must be abandoned and the property connected to the sewerage system and, if so, whether such a requirement [constituted] a deprivation of due process of law.” The *DeMoise* court held as follows:

A local board of health possesses the authority to require that whenever a sanitary sewerage system becomes accessible to a property, the household sewage disposal system shall be abandoned and the house sewer directly connected to the

sewerage system. This authority applies regardless of the manner by which the sanitary sewerage system was constructed. Such a requirement bears a real and substantial relationship to the public health, is not unreasonable or arbitrary, and does not constitute a deprivation of due process of law.

*Id.* (syllabus). See also *Clark v. Greene County Combined Health Dist.*, 108 Ohio St. 3d 427, 2006-Ohio-1326, 844 N.E.2d 330, at ¶17 (citing *DeMoise* and observing that “[i]t is well established that local boards of health have the authority to require that a household sewer be directly connected to a sanitary sewerage system whenever such a system becomes accessible to the property”).

Furthermore, the Ohio Supreme Court “has characterized household sewage-disposal systems as a potential hazard to the public health and a potential nuisance that should be prevented whenever possible[,]” *Clark*, at ¶18 (citing *DeMoise*, at 95-96), and it has found that requiring a household sewer to be directly connected to a sanitary sewerage system when such a system becomes accessible “reflects a broad-based policy determination that individual household sewage disposal systems are inherently more dangerous to the public health than sanitary sewerage systems.” *Id.*<sup>6</sup>

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<sup>6</sup> One Ohio court has stated that it “can envision some situations in which excessive economic expense might make connection to a sewer system ‘unavailable’ as a matter of law.” *State v. Simon*, 108 Ohio Misc. 2d 56, 59, 739 N.E.2d 1257 (Mun. Ct. Hamilton County 2000) (construing Hamilton County Household Sewage Code Section 529.02(K) that required abandonment of a household sewage disposal system and direct connection of a building drain to a sanitary sewerage system whenever a sanitary sewerage system became available to the property). The *Simon* court nonetheless determined that, under the facts of that case, it lacked the information necessary to undertake such an assessment. Specifically, the *Simon* court found that, although the defendant had presented evidence of the cost of connecting to the sewer, the defendant failed to provide evidence of the value of the property on which the septic system operated, which, according to the *Simon* court, “would be a necessary element in any reasoned analysis of unavailability due to excessive cost of connection.” *Id.* at 59. (Footnote omitted.) The *Simon* court ultimately remarked: “The court is sympathetic to the concerns expressed by defendant ... regarding the financial burden that property owners face when ordered by the health department to connect to the sewer system. However, the law requires, for reasons of public policy and health, that homeowners comply with such orders.” *Id.* at 60.

Our research finds no application by an Ohio court of *Simon*’s calculus to 6 Ohio Admin. Code 3701-29-02(L) and (M) (2009-2010 Supplement) when determining the issue of accessibility of a sanitary sewerage system to a property that has a household sewage disposal system installed, maintained, or operated on the property.

**Authority of the Brown County Board of Health to Grant a Variance from the Requirements of Rule 3701-29-02(L) and (M) Because of Economic Hardship**

In your letter, you state that the Brown County Board of Health has deferred ordering homeowners in the affected area to connect to the new sewer system because the cost of connection poses an economic hardship for the homeowners. An issue therefore arises as to whether the Brown County Board of Health may grant a variance from the requirements of rule 3701-29-02(L) and (M) because of economic hardship. A variance is authorized by rule 3701-29-20(A) (2009-2010 Supplement), which provides:

The board of health may grant a variance from the requirements of rules 3701-29-01 to 3701-29-21 of the Administrative Code (Ohio Sanitary Code) as will not be contrary to the public interest, where a person shows that because of practical difficulties or other special conditions their strict application will cause unusual and unnecessary hardship. However, no variance shall be granted that will defeat the spirit and general intent of said rules, or be otherwise contrary to the public interest.

Therefore, for a variance from rule 3701-29-02(L) and (M) to lie under rule 3709-29-20(A), a person must show that, because of practical difficulties or other special conditions, strict application of rule 3701-29-02(L) and (M) will cause him unusual and unnecessary hardship. *See* 6 Ohio Admin. Code 3701-29-01(S) (2009-2010 Supplement) (as used in rules 3701-29-01 to 3701-29-21, “person” “means the state, any political subdivision, public or private corporation, partnership, firm, association, individual, or other entity”). Even if such a showing is made, a board of health shall not grant a variance if doing so “will defeat the spirit and general intent of said rules, or be otherwise contrary to the public interest.” 6 Ohio Admin. Code 3701-29-20(A).

It follows that under rule 3709-29-20(A) a board of health may consider on a case-by-case basis whether economic hardship constitutes a “practical difficult[y] or other special [condition]” such that strict application of rule 3701-29-02(L) and (M) “will cause unusual and unnecessary hardship.” Rule 3701-29-20(A) does not, however, set forth guidance as to what may constitute a “practical difficult[y]” or “other special [condition],” or what may constitute “unusual and unnecessary hardship” for purposes of the rule. Rule 3701-29-20(A) thus permits a board of health to exercise its discretion when determining what constitutes a “practical difficult[y]” or “other special [condition],” or what constitutes an “unusual and unnecessary hardship.” *See, e.g., State v. Simon*, 108 Ohio Misc. 2d 56, 59, 739 N.E.2d 1257 (Mun. Ct. Hamilton County 2000) (suggesting that evidence of the value of a property on which a septic system operates is necessary to determine whether the cost of connection to a sewer is an excessive economic expense).

Accordingly, for the reasons set forth above, we conclude that under 6 Ohio Admin. Code 3701-29-20(A) (2009-2010 Supplement), a board of health of a general health district may grant a variance from the requirements of divisions (L) and (M) of 6 Ohio Admin. Code 3701-

29-02 (2009-2010 Supplement) if a person shows that, because of practical difficulties or other special conditions, strict application of rule 3701-29-02(L) and (M) will cause him unusual and unnecessary hardship. Rule 3701-29-20(A) does not authorize a board of health to grant a variance from rule 3701-29-02(L) and (M) if doing so will defeat the spirit and general intent of 6 Ohio Admin. Code Chapter 3701-29 or be otherwise contrary to the public interest.

### **Conclusions**

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

1. A board of health of a general health district has authority to require that a household sewage disposal system be directly connected to a sanitary sewerage system whenever a sanitary sewerage system becomes accessible to a property.
2. If a board of health of a general health district determines that a household septic system is a "household sewage disposal system," as defined in 6 Ohio Admin. Code 3701-29-01(L) (2009-2010 Supplement), and that a "sanitary sewerage system," as defined in 6 Ohio Admin. Code 3701-29-01(W) (2009-2010 Supplement), has become accessible to a property with a household sewage disposal system installed, maintained, or operated on the property, then R.C. 3701.56 requires the board of health to enforce divisions (L) and (M) of 6 Ohio Admin. Code 3701-29-02 (2009-2010 Supplement), which prescribe abandonment of the household sewage disposal system and direct connection of a house sewer to the sanitary sewerage system.
3. Pursuant to 6 Ohio Admin. Code 3701-29-20(A) (2009-2010 Supplement), a board of health of a general health district may grant a variance from the requirements of divisions (L) and (M) of 6 Ohio Admin. Code 3701-29-02 (2009-2010 Supplement) if a person shows that, because of practical difficulties or other special conditions, strict application of rule 3701-29-02(L) and (M) will cause him unusual and unnecessary hardship. Rule 3701-29-20(A) does not authorize a board of health to grant a variance from rule 3701-29-02(L) and (M) if doing so will defeat the spirit and general intent of 6 Ohio Admin. Code Chapter 3701-29 or be otherwise contrary to the public interest.

Respectfully,



RICHARD CORDRAY  
Ohio Attorney General