

September 19, 2012

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park—Second Floor
Mansfield, Ohio 44902

SYLLABUS:

2012-029

1. A county may in accordance with R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75 enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.
2. A county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is not required to comply with R.C. 153.44, R.C. 153.69, or R.C. 307.86-.92.
3. A prosecuting attorney may require that an agreement in which a board of county commissioners or county engineer authorizes a private company that conducts oil and gas drilling operations or operates a wind farm to improve and repair the county roads it uses at no cost to the county be submitted to his office for review prior to the agreement's execution.
4. A county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is required to comply with R.C. 4115.03-.16 when the total overall project cost to the company is fairly estimated to be more than the amount prescribed in R.C. 4115.03(B)(4).
5. Whether a county may incur civil liability for damages for failing to comply with R.C. 4115.03-.16 is, in part, a question of fact that cannot be determined by means of an Attorney General opinion.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

September 19, 2012

OPINION NO. 2012-029

The Honorable James J. Mayer, Jr.
Richland County Prosecuting Attorney
38 South Park—Second Floor
Mansfield, Ohio 44902

Dear Prosecutor Mayer:

We are in receipt of your request for an opinion regarding the authority of a county to have a private company improve and repair public roads. As explained in your letter, the county is experiencing a significant increase in the number of heavy-duty trucks using county roads. The trucks are used primarily in conjunction with oil and gas drilling operations and wind farms. While the trucks are generally within the weight and size limits prescribed by law, the high volume and heavy weight of the trucks on county roads are of concern to county officials.

The frequent use of these trucks on county roads may necessitate additional improvements and repairs to the roads and require the county to increase the amount of money the county spends to keep the roads safe and in good condition. In order to offset extra costs in this regard, the county would like to enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses.¹

Under the agreement, the company will be required to provide the county with a list of (1) county roads that will be affected by the company's operations and (2) improvements needed to enable those roads to withstand the additional wear caused by the company's vehicles. The company also will be responsible for making the needed improvements and repairing damage to the county roads caused by its trucks. The company may use its own employees or hire one or more independent contractors to improve and repair the county roads it uses.

¹ An example of a model agreement, which is commonly referred to as a road use maintenance agreement or RUMA, requiring a private company that conducts oil and gas drilling operations to improve and repair the county roads it uses has been prepared by the County Engineers Association of Ohio and is available at <http://www.ceao.org>. The model agreement does not refer to a particular statute that a county and private company must follow when entering into the agreement. The model agreement, however, requires the board of county commissioners and county engineer to enter into the agreement on behalf of the county and encourages them to describe the specific duties the company will undertake for the county under the agreement.

The company, rather than the county, will pay for the materials and labor used in, and fees, costs, and expenses arising from, the company's improving and repairing the county roads. In addition, the county is not required to compensate the company for performing roadwork or serving as a general contractor under the agreement.

You question whether a county is authorized to enter into the type of agreement described above. Further, if a county does have such authority, you are concerned about the applicability of the laws governing the payment of prevailing wage rates, competitive bidding, county construction contracts, and political subdivision liability.

Based on the information provided to us, your questions may be summarized as follows:

1. May a county enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county?
2. If a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county, must the company comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-92, and R.C. 4115.03-.16?²
3. If a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair county roads it uses at no cost to the county, is the county civilly liable for damages when the company fails to comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-92, or R.C. 4115.03-.16?

I. Duty of a County to Improve and Repair County Roads

The General Assembly has addressed the improvement and repair of public highways in a wide variety of statutes located throughout the Revised Code, rather than in a single comprehensive statute. As one Attorney General has observed, the statutory scheme governing the improvement and repair of public highways in Ohio "is complex and confusing." 1988 Op. Att'y Gen. No. 88-036 at 2-

² In your letter you ask whether a private company that conducts oil and gas drilling operations or operates a wind farm is "bound to comply with the sections of law in [R.C. Chapters] 153, 307, and 4115" when the company and a county enter into an agreement to have the company improve and repair county roads it uses. These three chapters set forth nearly three hundred statutes. It is impossible for us by means of a formal opinion to address the applicability of all the numerous provisions of law set forth in R.C. Chapters 153, 307, and 4115. Thus, we will limit our analysis to the statutory sections within R.C. Chapters 153, 307, and 4115 that are of particular concern to you—R.C. 153.44, R.C. 153.69, R.C. 307.86-92, and R.C. 4115.03-.16.

175. It is therefore necessary for us to examine numerous statutes to determine whether a county has authority to enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.

R.C. 5535.01 classifies Ohio's public highways as state, county, and township roads.³ *See generally* R.C. 505.82(D) (undedicated roads are not part of the state, county, or township road systems). State roads are the roads and highways on the state highway system, R.C. 5535.01(A), and county roads are those "roads which are or may be established as a part of the county system of roads as provided in [R.C. 5541.01-.03], which shall be known as the county highway system," R.C. 5535.01(B). All public highways other than state or county roads are township roads. R.C. 5535.01(C).

Further, as explained in 2006 Op. Att'y Gen. No. 2006-051 at 2-490, although they are not mentioned in R.C. 5535.01, county and township roads located within municipal corporations are generally classified as streets. "Municipal streets thus form another class of public highways." 2006 Op. Att'y Gen. No. 2006-051 at 2-490.

Pursuant to R.C. 5535.08(A), "[t]he state, county, and township shall each maintain its roads, as designated in [R.C. 5535.01]." *See* R.C. 5501.11(A)(1); R.C. 5501.31; R.C. 5535.01; R.C. 5571.02; 2006 Op. Att'y Gen. No. 2006-051 at 2-490 and 2-491. Municipal streets, as a general rule, are improved and repaired by municipal corporations. *See* Ohio Const. art. XVIII, § 3; R.C. 715.19; R.C. 717.01(P); R.C. 723.01; 2006 Op. Att'y Gen. No. 2006-051 at 2-491.

Your questions concern the improvement and repair of county roads by a private company. For that reason, we will not address in this opinion the improvement and repair of municipal streets or state or township roads by a private company.

Responsibility for the improvement and repair of county roads is vested in the board of county commissioners and the county engineer. *See* R.C. 315.08; R.C. 315.13; R.C. 5535.01(B); R.C. 5543.01; R.C. 5543.09; R.C. 5549.01; R.C. 5553.02; R.C. 5555.02; R.C. 5555.07; R.C. 5555.94; R.C. 5559.02; R.C. 5559.15; R.C. 5591.02; R.C. 5591.21; R.C. 5591.23. The board or county engineer may improve or repair a county road by using county employees or paying a private company to perform the roadwork. *See, e.g.,* R.C. 9.334; R.C. 153.693; R.C. 5543.19; R.C. 5543.22; R.C. 5549.01; R.C. 5555.022; R.C. 5555.61; R.C. 5555.69; R.C. 5557.06. In addition, a board of county commissioners may enter into an agreement with, or receive assistance from, the state or another political subdivision when improving or repairing a county road. *See, e.g.,* R.C. 9.482; R.C. 164.01-.16; R.C. 303.37(B); R.C. 307.15; R.C. 5501.11(A)(4); R.C. 5517.04; R.C. 5535.08; R.C. 5535.15;

³ For purposes of R.C. 5535.01, as well as other statutes in R.C. Title 55, the term "road" is defined to include "all appurtenances to the road ..., including but not limited to, bridges, viaducts, grade separations, culverts, lighting, signalization, and approaches on or to such road." R.C. 5501.01(C).

R.C. 5555.43; R.C. 5557.09. A private entity may also contribute money toward or assume the cost of, and be responsible to the county for, improving or repairing a county road. *See, e.g.*, R.C. 1509.06; R.C. 1514.024; R.C. 3734.35(C); R.C. 4513.34(D); R.C. 5501.53; R.C. 5545.01; R.C. 5545.08; R.C. 5561.12(B); R.C. 5561.16; R.C. 5591.03; R.C. 5727.75(F)(4).

II. Authority of a County to Have a Private Company Improve and Repair the County Roads it Uses

Your first question asks whether a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county. The issue presented by your question is novel and unique. Traditionally, when a county intends to have a private company improve and repair county roads, the county and company enter into an agreement and the county pays the private company for the roadwork. *See, e.g.*, R.C. 9.334; R.C. 153.693; R.C. 5543.19; R.C. 5545.03; R.C. 5555.022; R.C. 5557.06. Prior to entering into the agreement, the county identifies the specific improvements and repairs that must be made to the county roads. Also, during the term of the agreement, the county determines whether any additional improvements and repairs are to be made to the county roads.

In contrast, your situation involves a private company paying for improvements and repairs to county roads it uses. Before entering into the agreement, the company, rather than the county, determines what improvements and repairs must be made to the county roads in order to accommodate the trucks of the company. After entering into the agreement, the company performs the roadwork and assumes responsibility for determining whether additional improvements and repairs are necessary. If additional roadwork is needed, the company performs it and pays for it. Roadwork undertaken by the company will be overseen and subject to approval by the county and performed in accordance with the specific terms and conditions of the agreement.

Although your particular situation involves an unusual approach to performing county roadwork, it still involves having the county enter into an agreement to have a private company improve and repair county roads. Consequently, your situation is not materially different from any other situation in which a county seeks to enter into an agreement with a private company to have the company improve and repair county roads.

As pointed out above, several statutes authorize a county to enter into an agreement with a private company to have the company improve and repair county roads. These statutes are R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5543.19, R.C. 5545.03, R.C. 5555.022, R.C. 5557.06, and R.C. 5727.75. Two of these statutes, R.C. 5543.19 and R.C. 5545.03, do not, however, apply to the situation you have presented to us.

R.C. 5543.19 authorizes a county to improve and repair county roads by force account.⁴ Under this statute, “a county engineer may, as the general contractor of a force account project, acquire material and equipment pursuant to contract, and may subcontract part of the work undertaken by force account, so long as the contracts for material and equipment and the subcontracts are let in compliance with R.C. 307.86-.92.” 2008 Op. Att’y Gen. No. 2008-007 (syllabus, paragraph 3).

R.C. 5543.19 does not apply to your situation because the agreement described in your letter does not contemplate having the county engineer perform the roadwork or serve as general contractor of a force account project. Instead, under the agreement, the private company, rather than the county, will (1) perform the work or (2) serve as a general contractor and hire one or more independent contractors to perform the roadwork. R.C. 5543.19 thus does not authorize a county to enter into the agreement described in your letter.

The other statute, R.C. 5545.03, provides that, “[a]fter adopting plans, specifications, and estimates for a proposed road improvement the commission provided for in [R.C. 5545.01] shall invite bids for construction and award the contracts therefor.”⁵ The commission referred to in R.C. 5545.03 is formed when a “person, firm, partnership, corporation, or association desires to contribute a fund for the purpose of assisting in the improvement of” a county road. R.C. 5545.01. In your particular situation, the private company will not contribute money to establish a fund to improve and repair county roads. As no fund described in R.C. 5545.01 will be created, no commission will be formed to award the contract to the private company. Accordingly, R.C. 5545.03 does not provide authority for a county to enter into the agreement proposed in your letter.

Unlike R.C. 5543.19 and R.C. 5545.03, the following statutes do appear to authorize a county to enter into the type of agreement envisioned by your letter: R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, and R.C. 5727.75. The first statute, R.C. 9.334, authorizes a county, as a public authority, *see* R.C. 9.33(F)(1), to contract for construction management services with a construction manager at risk. For purposes of R.C. 9.334, construction management services include planning, coordinating, managing, directing, and constructing all phases of a project to improve and repair a public building, structure, or other improvement. *See* R.C. 9.33(B)-(D).

County roads are public improvements for purposes of R.C. 9.334. *See* 1980 Op. Att’y Gen. No. 80-051 at 2-208 n.1; *see also* R.C. 9.31-.311. Thus, if a private company that conducts oil and gas drilling operations or operates a wind farm is deemed to be a “construction manager at risk,” as defined in R.C. 9.33(B)(1), a county may in accordance with R.C. 9.334 enter into a contract with the

⁴ For purposes of R.C. 5543.19, “force account” means “that the county engineer will act as contractor, using labor employed by the engineer using material and equipment either owned by the county or leased or purchased in compliance with [R.C. 307.86-.92] and excludes subcontracting any part of such work unless done pursuant to [R.C. 307.86-.92].” R.C. 5543.19(C).

⁵ The commission referred to in R.C. 5545.03 consists of suitable and competent freeholders of the county and the board of county commissioners. R.C. 5545.01.

company to have the company improve and repair the county roads it uses at no cost to the county. *See generally* R.C. 9.33(B)(1) (as used in R.C. 9.33-.335, a “construction manager at risk” is a “person with substantial discretion and authority to plan, coordinate, manage, direct, and construct all phases of a project for the construction, demolition, alteration, repair, or reconstruction of any public building, structure, or other improvement and who provides the public authority a guaranteed maximum price as determined in [R.C. 9.334]”).

A county, as a public authority for purposes of R.C. 153.65-.73, *see* R.C. 153.65(A)(1), also is authorized to enter into a contract with a design-build firm for design-build services. R.C. 153.693. The term “design-build firm,” as used in R.C. 153.65-.73, includes a private company that is capable of providing services that form an integrated delivery system for which a person is responsible to a public authority for the design and construction, demolition, alteration, repair, or reconstruction of a public improvement. R.C. 153.65(F)-(G).

Under a design-build contract, a private company may design and improve or repair public improvements. *See* R.C. 153.65(E)-(G). For purposes of R.C. Chapter 153, the term “public improvement” includes county roads. *See* 1980 Op. Att’y Gen. No. 80-051 at 2-208 n.1 Hence, a county may in accordance with R.C. 153.693 enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.

The next statute providing authority for the type of agreement described in your letter is R.C. 5555.022(A), which states:

A board of county commissioners, by resolution adopted by a majority vote and acting without regard to or the necessity for a petition, may find that the public convenience and welfare require the improvement of any public road or roads, or parts of any public road or roads, identified in that resolution in a manner provided in [R.C. 5555.06] and may fix the route and termini of the improvement.

R.C. 5555.06 sets forth the procedures a board of county commissioners must follow when improving and repairing county roads under R.C. 5555.022. *See generally* 1988 Op. Att’y Gen. No. 88-039 at 2-191 and 2-192 (repairs constitute “road improvements” as that term is used in R.C. 5555.06).

In addition, the following provision of law applies:

The improvement and the proceedings for its construction and financing, including a contract for the construction, may include, consistent with the other provisions of this section and notwithstanding any provisions of this chapter to the contrary, any road or roads or parts of any road or roads, and the provisions of [R.C. 5555.61-.69] relating to contracts for the construction of an improvement shall be construed accordingly and shall be controlling to the extent applicable.

R.C. 5555.022(C)(1). Hence, pursuant to R.C. 5555.022, a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county. *See generally* 1987 Op. Att’y Gen. No. 87-070 at 2-444 (“[o]nce plans and specifications for the county road improvement are selected in accordance with R.C. 5555.06 and .07, and the county commissioners have decided to proceed with the improvement, a contract may be let in accordance with R.C. 5555.61”). *See generally also* R.C. 5555.61 (“[a]fter the board of county commissioners decides to proceed with the improvement, it shall do so in accordance with [R.C. 307.86-.92]. No contract for any improvement shall be awarded at a price more than ten per cent in excess of the estimated cost”).

The fourth statute authorizing the type of agreement proposed in your letter is R.C. 5557.06. Under this statute, when a board of county commissioners intends to improve or repair a county road that extends into or through a municipal corporation, the board “shall receive bids and let the contract for improving such portion of [the] road as lies within the municipal corporation, in connection with the remainder of a proposed road improvement or separately, as the board determines.” *See generally* R.C. 5557.02 (authorizing a board of county commissioners to “construct a proposed road improvement into, within, or through a municipal corporation, when the consent of the legislative authority of such municipal corporation has been first obtained”); R.C. 5557.08 (a “board of county commissioners may repair that portion of a county road extending into or through a municipal corporation, or a part of a county road and a municipal corporation’s streets extending into or through a municipal corporation and forming a continuous road improvement, when the consent of the legislative authority of said municipal corporation has been first obtained”). R.C. 5557.06 thus authorizes a county to enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.

Additional authority for a county to enter into an agreement with a private company that operates a wind farm to have the company improve and repair the county roads it uses is set forth in R.C. 5727.75. This statute exempts from taxation the tangible personal property of a qualified energy project using renewable energy resources. A wind farm may qualify as an energy project using renewable energy resources for purposes of R.C. 5727.75. *See* R.C. 5727.01(N)(1); R.C. 5727.01(P); R.C. 5727.75(A)(1)-(2).

In order for a private company that operates a wind farm to qualify for the tax exemption, the company must apply for certification of the wind farm as a qualified energy project. *See* R.C. 5727.75(E)(1); 2 Ohio Admin. Code 122:23-1-03. When applying for such certification, a private company that is the owner or a lessee pursuant to a sale and leaseback transaction of a qualified energy project is required to do the following:

For energy projects with a nameplate capacity of five megawatts or greater, repair all roads, bridges, and culverts affected by construction as reasonably required to restore them to their preconstruction condition, as determined by the county engineer in consultation with the local jurisdiction responsible for the roads, bridges, and culverts.... The energy facility owner or lessee and the county engineer may enter

into an agreement regarding specific transportation plans, reinforcements, modifications, use and repair of roads, financial security to be provided, and any other relevant issue.

R.C. 5727.75(F)(4); *see also* rule 122:23-1-03(F) (“[i]n addition to the documentation described in paragraphs (D) and (E) of this rule, an application for certification for an energy project with a nameplate capacity of five megawatts or greater must satisfy the following requirements to be considered for certification by the director [of development]: ... The director receives from the applicant a certificate of the county engineer for each county in which any part of the energy project is located to the effect that the applicant has complied with, or has entered into an agreement with the county to comply with, the provisions of division (F)(4) of [R.C. 5727.75] regarding the repair, rebuilding, and reinforcement of roads, bridges, and culverts”); rule 122:23-1-03(G)(4) (“[t]he director [of development] may issue a conditional certification for an application that does not include the certificate(s) of the county engineer(s) and related agreement(s) as described in paragraph (F)(2) of this rule. The applicant must submit to the director the certificate(s) and agreement(s) described in paragraph (F)(2) of this rule so that they are received at the Columbus office of the department of development not later than the close of business on the earlier of (a) the date which is ninety days after the date of the conditional certification or (b) the date the energy project is placed in service”).

An applicant for certification of a wind farm as a qualified energy project with a nameplate capacity of five megawatts or greater thus must make arrangements with the county engineer to improve and repair the roads affected by the wind farm’s construction. And, pursuant to R.C. 5727.75, the applicant may satisfy this requirement by entering into an agreement with the county engineer to improve and repair the roads affected by the wind farm’s construction. Hence, a county may in accordance with R.C. 5727.75 enter into an agreement with a private company that operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.

Finally, the Governor recently signed Am. Sub. S.B. 315, 129th Gen. A. (2012) (eff. June 11, 2012, with most sections effective on Sept. 10, 2012). This Act amends R.C. 1509.06 as it pertains to the information that an applicant for a permit to drill a horizontal well⁶ must supply to the Chief of the Division of Oil and Gas Resources Management.⁷ R.C. 1509.06(A)(11)(a) requires such an applicant to provide a “description by name or number of the county, township, and municipal corporation roads, streets, and highways that the applicant anticipates will be used for access to and egress from the well site.” The applicant also must include (1) “a copy of an agreement concerning maintenance and safe use of the roads, streets, and highways ... entered into on reasonable terms with the public official that has the legal authority to enter into such maintenance and use agreements for each county, township, and municipal corporation, as applicable, in which any such road, street, or highway is

⁶ As used in R.C. Chapter 1509, a “horizontal well” is “a well that is drilled for the production of oil or gas in which the wellbore reaches a horizontal or near horizontal position in the Point Pleasant, Utica, or Marcellus formation and the well is stimulated.” R.C. 1509.01(GG).

⁷ R.C. 1509.06, as amended by Am. Sub. S.B. 315, became effective on September 10, 2012.

located” or (2) an affidavit attesting that the applicant attempted in good faith to enter into such an agreement, but was unable to do so. R.C. 1509.06(A)(11)(b).

Pursuant to R.C. 1509.06, a county and an applicant for a permit to drill a horizontal well may enter into an agreement to have the applicant improve and repair the county roads it uses. The agreement is entered into on behalf of the county by the public official who has the legal authority to enter into road maintenance and use agreements for the county.

As a general matter, except in limited situations, a board of county commissioners is conferred by statute with the authority to enter into road maintenance and use agreements for the county. *See, e.g.,* R.C. 9.482; R.C. 303.37; R.C. 307.15; R.C. 5535.08; R.C. 5555.022; R.C. 5555.43; R.C. 5555.61; R.C. 5555.69; R.C. 5557.06; R.C. 5557.09. *See generally* *Burkholder v. Lauber*, 6 Ohio Misc. 152, 154, 216 N.E.2d 909 (C.P. Fulton County 1965) (“[i]t is the province of the board of county commissioners to make contracts for the county, and no other officer can bind the county by contract, unless by reason of some express provision of law”). *But see, e.g.,* R.C. 5543.19; R.C. 5545.03; R.C. 5727.75(F)(4). Accordingly, R.C. 1509.06 authorizes a board of county commissioners to enter into an agreement with a private company that applies for a permit to drill a horizontal well to have the company improve and repair the county roads it uses at no cost to the county.

Therefore, in response to your first question, a county may in accordance with R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75 enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.⁸

III. Applicability of R.C. 153.44, R.C. 153.69, R.C. 307.86-92, and R.C. 4115.03-16

Your second question asks, if a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county, must the company comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-92, and R.C. 4115.03-16. At the county government level, the Attorney General may advise “the prosecuting attorneys of the several counties respecting their duties in all complaints, suits, and controversies in which the state is, or may be a party.” R.C. 109.14. Pursuant to R.C. 309.09(A), a prosecuting attorney is the legal adviser of the board of county commissioners and all other county officers and boards. A prosecuting attorney does not, however, have a duty or the

⁸ When a county enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county pursuant to R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75, the county must comply with the requirements and procedures set forth in any applicable statutes. *See* 2004 Op. Att’y Gen. No. 2004-031 at 2-276 (“[i]n exercising its authority to enter into a contract, each public official or entity must comply with all applicable statutory provisions. A determination of which statutes apply to each contract must be made on a case-by-case basis”).

authority to determine the legal obligations of a private company that conducts oil and gas drilling operations or operates a wind farm. *See* 2002 Op. Att’y Gen. No. 2002-017 at 2-98 n.2; 1983 Op. Att’y Gen. No. 83-037 at 2-142. As a prosecuting attorney may only advise county officers of their statutory obligations, we must limit our analysis of your second question to whether the county must comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-.92, and R.C. 4115.03-.16.

A. Compliance with R.C. 307.86-.92: Competitive Bidding of Purchases of Goods or Services

We will first consider R.C. 307.86-.92, which provide procedures for accepting bids for specified goods or defined services. Unless otherwise excepted by law, a county or contracting authority is required to obtain through competitive bidding “[a]nything to be ... constructed, including, but not limited to, any ... improvement, maintenance, [or] repair..., *by or on behalf of the county or contracting authority, as defined in [R.C. 307.92], at a cost in excess of [25,000] dollars.*”⁹ R.C. 307.86 (emphasis added).

R.C. 307.92 defines “contracting authority,” for purposes of R.C. 307.86-.91, as “any board, department, commission, authority, trustee, official, administrator, agent, or individual which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office, or board thereof.” As stated earlier, a board of county commissioners or county engineer may in accordance with R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75 enter into a contract for or on behalf of the county to have a private company improve and repair county roads. For that reason, a board of county commissioners and a county engineer are included within the term “contracting authority,” as defined in R.C. 307.92, and each is required to competitively bid a project that requires a county road to be improved and repaired “at a *cost* in excess of [25,000] dollars.” R.C. 307.86 (emphasis added).

While the term “cost” is not defined for purposes of R.C. 307.86, this term is commonly understood to mean “[t]he amount paid or charged for something; price or expenditure.” *Black’s Law Dictionary* 397 (9th ed. 2009). When, pursuant to R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75, a board of county commissioners or county engineer enters into an agreement for or on behalf of the county with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county, the county is not required to pay the company any money for the roadwork. Nor is the county charged by the company for the roadwork. In other words, the roadwork undertaken by the private company is done at no cost for purposes of R.C. 307.86 since the county is not required to pay any money for the roadwork.

⁹ Various exceptions to the competitive bidding requirements of R.C. 307.86-.92 appear in R.C. 307.86 and elsewhere in the Revised Code. None of these exceptions, however, applies to a county’s agreement with a private company to have the company improve and repair the county roads it uses.

The roadwork undertaken by a private company under R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75 thus will not require the county to expend more than 25,000 dollars. As a result, R.C. 307.86 and the other provisions of R.C. 307.87-92 relating to competitive bidding do not apply when a county enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county. See *Danis Clarkco Landfill Co. v. Clark County Solid Waste Mgmt. Dist.*, 73 Ohio St. 3d 590, 601, 653 N.E.2d 646 (1995) (R.C. 307.86 does not apply when a private company assumes the entire cost of a waste disposal facility used by county residents and a county solid waste management district contractually agrees to designate the facility as the place where all solid waste and recyclable materials generated in the district are to be transported. In such a situation, “[t]he anticipated contract quite simply did not involve *any* monetary cost to the public or expenditure of public funds by the District. As then in effect, R.C. 307.86 applied only to contracts ‘at a cost in excess of ten thousand dollars,’ and the court of appeals correctly held that the proposed contracts contemplated by the [request for proposals] process did not fall within the scope of the statute”). *But cf. U.S. Corr. Corp. v. Ohio Dep’t of Indus. Relations*, 73 Ohio St. 3d 210, 652 N.E.2d 766 (1995).¹⁰

In addition, the private company is not established or designated by law as a part of county government or as an agent of the county or a county entity or official. The company is separate and distinct from the county. The company also will not be empowered under the agreement to act as an agent or agency of, or enter into contracts for or on behalf of, the county or any county official or entity in order to perform the roadwork contemplated under the agreement. See generally *News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So.2d 1029, 1031, 1992 Fla. LEXIS 274 (Fla. 1992) (a private corporation does not act “‘on behalf of’ a public agency merely by entering into a contract to provide professional services to the agency”). The private company thus will not have any authority to contract for or on behalf of the county or a county entity or official and is not a “contracting authority,” as defined in R.C. 307.92, for purposes of the competitive bidding statutes set forth in R.C. 307.86-92. Accordingly, a county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is not required to comply with R.C. 307.86-92.

¹⁰ In *U.S. Corr. Corp. v. Ohio Dep’t of Indus. Relations*, 73 Ohio St. 3d 210, 652 N.E.2d 766 (1995), the Ohio Supreme Court held that a county must comply with R.C. 307.86 when contracting for a lease pursuant to R.C. 307.022. The contract considered by the court required the county to enter into a lease for a term of years for a county correctional facility with a private company whereby the company would privately fund renovations to convert a former hardware building into a correctional facility. Although the company was to directly fund the renovation, public funds were to be expended under the terms of the lease, thus indirectly funding the renovation. *U.S. Corr. Corp. v. Ohio Dep’t of Indus. Relations*, therefore, is factually distinguishable from the type of agreement described in your letter since the agreement does not obligate the county to expend any public money.

B. Compliance with R.C. 153.44: Review of Contract by Prosecuting Attorney

The next statute with which you are concerned is R.C. 153.44. This statute provides that, “[b]efore work is done or material is furnished, all contracts that exceed [1,000] dollars in amount shall be submitted by the board of county commissioners to the prosecuting attorney of the county. If found by him to be in accordance with [R.C. 153.01-.60], and his certificate to that effect is indorsed thereon, such contracts shall have full effect, otherwise they shall be void.”

A previous Attorney General opinion determined that R.C. 153.44 applies to “contracts falling within the scope of [R.C. 153.01-.60].” 1954 Op. Att’y Gen. No. 3743, p. 207 (syllabus, paragraph 2); *see* 2005 Op. Att’y Gen. No. 2005-007 at 2-76. R.C. 153.01-.60 set forth procedures for the construction of county buildings, bridges, roads, and other public improvements.¹¹ *See* R.C. 153.12(A); R.C. 153.21; R.C. 153.32; 2005 Op. Att’y Gen. No. 2005-029 at 2-299 n.2; 1980 Op. Att’y Gen. No. 80-051; *see also* 2005 Op. Att’y Gen. No. 2005-007 at 2-76 (R.C. 153.44 requires a prosecuting attorney “to provide certification of compliance with the substantive requirements set forth in R.C. 153.01 to R.C. 153.60”). R.C. 153.44 thus applies to a county contract for the improvement and repair of county roads when the amount of the contract exceeds 1,000 dollars.

In your particular situation, the county is not paying the private company money for improving and repairing the county roads it uses. This means that the amount paid by the county under the agreement for the roadwork is zero and the county is not required to comply with R.C. 153.44.

While the cost to the private company to improve and repair county roads will probably exceed 1,000 dollars, this fact is immaterial when determining whether the amount of the agreement exceeds 1,000 dollars, as required by R.C. 153.44. R.C. 153.44 is part of a statutory scheme governing the manner in which a county awards a contract for the construction of a public improvement and pays the private company that is awarded and performs the work under the contract. As part of the process of awarding the contract, a county must accept bids for the work to be done or use another type of competitive selection process. *See* R.C. 153.12; R.C. 153.26; R.C. 153.32; R.C. 153.50; R.C. 153.54; R.C. 153.69; R.C. 153.693; *see also* 2004 Op. Att’y Gen. No. 2004-014 at 2-112 (“[t]he general understanding of awarding a contract, thus, is that it requires a formal competitive process for considering bids or proposals, selecting the offer that best serves the needs of the public body, and entering into a written contract with the person making that offer”). *See generally Black’s Law Dictionary* 183 (9th ed. 2009) (a “bid” is “[a] submitted price at which one will perform work or supply goods”). Also, at the times named in the contract, the county makes payments to the private company performing the work. *See* R.C. 153.13; R.C. 153.14; R.C. 153.56; *see also* R.C. 153.49 (“[t]he county treasurer shall pay the warrants drawn for materials and labor furnished on county

¹¹ The term “public improvement” is not statutorily defined for purposes of R.C. Chapter 153. 1980 Op. Att’y Gen. No. 80-051 at 2-208 n.1, however, stated that the term “has been defined to include buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works and all other structures constructed by the state or a political subdivision of the state.”

contracts pursuant to estimates prepared under [R.C. 153.14], place them on file and keep a register of the names of the persons to whom they are paid”).

Reading R.C. 153.44 in conjunction with the other provisions of R.C. Chapter 153 pertaining to the award of, and payments made under, a county contract for the construction of a public improvement, it follows that R.C. 153.44 applies only to a county contract for the improvement and repair of county roads when the county awards the roadwork through a competitive selection process and is required to pay more than 1,000 dollars under the contract. *See generally 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, at ¶20 (statutes relating to the same subject matter must be read together in an attempt to “arrive at a reasonable construction giving the proper force and effect, if possible, to each statute”); 2004 Op. Att’y Gen. No. 2004-014 at 2-112 (“[c]onstrued in accordance with common usage, a contract is ‘awarded’ when a written agreement is executed pursuant to a formal competitive contracting procedure that may include competitive bidding, requests for proposals, or invitations to bid. Under this construction, the word ‘award’ may not reasonably be applied to situations in which a contract for goods, services, or construction is exempted from competitive contracting procedures. Rather, the same factors that exempt a particular contract or type of contract from competitive contracting procedures operate also to exempt the contract from the provisions of R.C. 9.24” (citations omitted)). As the county is not awarding the agreement through a competitive selection process and paying more than 1,000 dollars to have a private company improve and repair county roads under the agreement, the county is not required to comply with R.C. 153.44 when entering into such an agreement under R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75.

Although R.C. 153.44 does not expressly apply, a prosecuting attorney may nonetheless require a board of county commissioners or county engineer to submit to him for review an agreement that authorizes a private company to improve and repair the county roads it uses at no cost to the county. As stated in note 8 above, county officials must comply with all applicable statutory provisions when entering into an agreement for roadwork. Further, the prosecuting attorney, as legal counsel for the board of county commissioners and county engineer, *see* R.C. 309.09(A), may establish a policy or procedures for reviewing an agreement pertaining to road construction for compliance with applicable statutory provisions.

As determined in 2005 Op. Att’y Gen. No. 2005-007 at 2-77, “[a]part from statutes providing expressly for approval as to form, the county prosecutor’s general duties to provide legal counsel and services to county officers and boards clearly permit the prosecutor to establish a policy or procedure for reviewing county contracts and approving them as to form.” *See* 2000 Op. Att’y Gen. No. 2000-008 at 2-41 (“[i]n the absence of ... statutory mandates, ... the nature and extent of advice the prosecuting attorney renders to county officers and entities under R.C. 309.09(A) is a matter to be determined by the prosecuting attorney in a reasonable exercise of discretion”); *see also* 2004 Op. Att’y Gen. No. 2004-032 at 2-294 (a prosecuting attorney may exercise reasonable discretion in determining the manner of performing his duties). Accordingly, we conclude further that a prosecuting attorney may require that an agreement in which a board of county commissioners or county engineer authorizes a private company that conducts oil and gas drilling operations or operates

a wind farm to improve and repair the county roads it uses at no cost to the county be submitted to his office for review prior to the agreement's execution.

C. Compliance with R.C. 153.69: Professional Design Services

You also are concerned about the applicability of R.C. 153.69. This statute authorizes a public authority to contract for professional design services, which are "services within the scope of practice of an architect or landscape architect registered under [R.C. Chapter 4703] or a professional engineer or surveyor registered under [R.C. Chapter 4733]," R.C. 153.65(C). As a public authority for purposes of R.C. 153.65-.73, *see* R.C. 153.65(A)(1), a county must follow R.C. 153.69 when planning to enter into a contract for professional design services.

Under a professional design services contract, a private company may plan and design county roads for a county. *See* R.C. 4703.30(B) (the "practice of landscape architecture" means the planning and designing of projects); R.C. 4733.01(D) (the "practice of engineering" means the "consultation, investigation, evaluation, planning, design, or inspection of construction or operation for the purpose of assuring compliance with drawings or specifications in connection with any public or privately owned public utilities, structures, buildings, machines, equipment, processes, works, or projects"); R.C. 4733.01(F) (the "practice of surveying" means (1) determining the area of any portion of the earth's surface, the lengths and directions of the bounding lines, and the contour of the surface and (2) accurately delineating the whole on paper); *Merriam-Webster's Collegiate Dictionary* 65 (11th ed. 2005) (an "architect" is a "person who designs and guides a plan or undertaking"). *See generally* note 11, *supra* (a road is a public improvement for purposes of R.C. Chapter 153). The contract does not, however, impart authority to the company to make the improvements or repairs to the roads set forth in the plans and designs. *Compare* R.C. 153.65(C) ("professional design services," as used in R.C. 153.65-.73, relate to the planning and design of a public improvement), *with* R.C. 153.65(G) ("design-build services," as used in R.C. 153.65-.73, "means services that form an integrated delivery system for which a person is responsible to a public authority for both the design and construction, demolition, alteration, repair, or reconstruction of a public improvement"). In other words, R.C. 153.69 applies when a county enters into a "professional design services contract," as that term is used in R.C. 153.69, to have a private company plan and design county roads, but not make the improvements or repairs to the roads set forth in the plans and designs.

As explained above, R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, and R.C. 5727.75 authorize a county to enter into an agreement with a private company to have the company improve and repair the county roads it uses. While such an agreement may entail aspects of planning and designing with regard to the improving and repairing of county roads, the agreement is not a "professional design services contract," as that term is used in R.C. 153.69, since the company also will make the improvements and repairs to the county roads set forth in the plans and designs. Therefore, a county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is not required to comply with R.C. 153.69.

D. Compliance with R.C. 4115.03-.16: Payment of Prevailing Wage Rates

The final set of statutes to be considered is R.C. 4115.03-.16, Ohio's prevailing-wage laws. These statutes set forth the obligations of a public authority in regard to the prevailing wage rate when taking bids and contracting for the construction of a public improvement.¹² R.C. 4115.04(A)(1) states, in part, that "[e]very public authority authorized to contract for ... a public improvement, before advertising for bids ..., shall have the director of commerce determine the prevailing rates of wages of mechanics and laborers in accordance with [R.C. 4115.05] for the class of work called for by the public improvement, in the locality where the work is to be performed." *See also* R.C. 4115.08 ("[n]o public official, authorized to contract for or construct with the official's own forces a public improvement, shall fail, before advertising for bids or undertaking such construction, with those forces, to have the director of commerce determine the prevailing rates of wages of mechanics and laborers for the class of work called for by the public improvement in the locality where the work is to be performed, as provided in [R.C. 4115.04]").

In addition, R.C. 4115.06 provides that, if a public authority fixes a prevailing rate of wages under R.C. 4115.04, and the work is done by contract, "the contract executed between the public authority and the successful bidder shall contain a provision requiring the successful bidder and all his subcontractors to pay a rate of wages which shall not be less than the rate of wages so fixed. The successful bidder and all his subcontractors shall comply strictly with the wage provisions of the contract." *See also* R.C. 4115.05 ("[e]very contract for a public work shall contain a provision that each laborer, worker, or mechanic, employed by such contractor, subcontractor, or other person about or upon such public work, shall be paid the prevailing rate of wages provided in this section"). Pursuant to these statutes, a public authority must comply with the prevailing-wage provisions of R.C. 4115.03-.16 when entering into a contract to have a private company construct a public improvement.

A "public authority," as used in R.C. 4115.03-.16, is "any political subdivision of the state[] authorized to enter into a contract for the construction of a public improvement or to construct the same by the direct employment of labor." R.C. 4115.03(A). The term "political subdivision" is not defined for purposes of R.C. 4115.03-.16, nor is there a single definition of the term applicable throughout the Revised Code. *See* 1992 Op. Att'y Gen. No. 92-061 at 2-254 (overruled on other grounds by 2007 Op. Att'y Gen. No. 2007-012 (syllabus, paragraph 4)) ("[t]he term 'political subdivision' is used in various contexts throughout the Revised Code and is given various definitions. It is possible for an entity to be a political subdivision for one purpose and not for another"). When no statutory definition is provided for the term "political subdivision," it is appropriate to use the common, ordinary meaning of the term. *See* R.C. 1.42.

A "political subdivision" is "a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function." 1972 Op. Att'y Gen. No. 72-035 at 2-135; *accord* 2004 Op. Att'y Gen. No. 2004-014 at 2-115. This definition includes a variety of public

¹² Exceptions to Ohio's prevailing-wage law are set forth in R.C. 4115.04(B). None of these exceptions apply to the situation you have presented to us.

entities, including counties. See *W. Pennsylvania Nat'l Bank v. Ross*, 345 F.2d 525, 526 (6th Cir. 1965); *Schaffer v. Bd. of Trustees of the Franklin County Veterans Mem'l*, 171 Ohio St. 228, 230-31, 168 N.E.2d 547 (1960); 2005 Op. Att'y Gen. No. 2005-015 at 2-149. As a political subdivision, a county is a "public authority," as defined in R.C. 4115.03(A), which is required to comply with R.C. 4115.03-16 when it enters into a contract for the construction of a public improvement.

As used in R.C. 4115.03-16, the term "construction" includes, among other things, "[a]ny reconstruction, enlargement, alteration, repair, remodeling, renovation, or painting of a public improvement that involves roads ... and other works connected to road or bridge construction, the total overall project cost of which is fairly estimated to be more than [23,447] dollars adjusted biennially by the director of commerce pursuant to [R.C. 4115.034] and performed by other than full-time employees who have completed their probationary periods in the classified service of a public authority." R.C. 4115.03(B)(4). The term "construction," as defined in R.C. 4115.03(B), thus includes the improvement and repair of county roads by a private company when the overall project cost exceeds the amount prescribed in R.C. 4115.03(B)(4). This means that a county must comply with Ohio's prevailing-wage laws if the project is a "public improvement," as defined in R.C. 4115.03(C), when the county enters into an agreement with a private company to have the company improve and repair county roads pursuant to R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75, and estimates the cost of the total overall project to be more than the amount prescribed in R.C. 4115.03(B)(4). See *U.S. Corr. Corp. v. Ohio Dep't of Indus. Relations*, 73 Ohio St. 3d at 218 (Ohio's prevailing-wage law applies to "all construction projects that are 'public improvements'"); *Episcopal Ret. Homes, Inc. v. Ohio Dep't of Indus. Relations*, 61 Ohio St. 3d 366, 369, 575 N.E.2d 134 (1991) (same as the previous parenthetical).

A "public improvement" for purposes of R.C. 4115.03-16 includes a road or other structure or work constructed by any political subdivision of the state or by any person who, pursuant to a contract with a public authority, constructs a structure for a public authority of a political subdivision of the state. R.C. 4115.03(C). Ohio courts have examined the definition of "public improvement" set forth in R.C. 4115.03(C) for purposes of determining the applicability of Ohio's prevailing-wage laws and stated:

As applicable here, to satisfy the first sentence of R.C. 4115.03(C), the project must be constructed "pursuant to a contract with a public authority" and "for a public authority." A project is constructed pursuant to a contract with a public authority when the contract is the "animating force" for the construction. To be constructed for a public authority, "the public authority [must] receive the benefit of the construction, either through maintaining a possessory or property interest in the completed project or through the use of public funds in the construction of the project." (Citations omitted.)

Zurz v. 770 West Broad AGA, LLC, 192 Ohio App. 3d 521, 2011-Ohio-832, 949 N.E.2d 595, ¶10 (Franklin County) (quoting *Episcopal*, 61 Ohio St. 3d at 370); see *U.S. Corr. Corp. v. Ohio Dep't of Indus. Relations*, 73 Ohio St. 3d at 218-19; see also *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa County Improvement Corp.*, 122 Ohio St. 3d 283, 2009-Ohio-2957, 910 N.E.2d

1025, ¶15. The term “public improvement,” as defined in R.C. 4115.03(C), thus includes a construction project constructed by a private company (1) pursuant to a contract with a county and (2) for a county.

When a private company enters into an agreement with a county to improve and repair county roads pursuant to R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75, the agreement is the “animating force” for the improvement and repair. The terms of the agreement require the company to perform the roadwork. Absent the agreement, the company would be under no obligation to improve and repair the county roads it uses. The agreement thus authorizes the company to perform the roadwork under the direction of the county. Accordingly, the roadwork performed by the company under the agreement is done pursuant to a contract with the county.

The county also benefits from the roadwork even though no public money is used. After the company completes the roadwork, the county will retain an easement in the land on which the county roads are situated. *See Ziegler v. Ohio Water Serv.*, 18 Ohio St. 2d 101, 247 N.E.2d 728 (1969); *Ohio Bell Tel. Co. v. Watson*, 112 Ohio St. 385, 147 N.E. 907 (1925); *Sandy v. Rataiczak*, 2008-Ohio-6212, 2008 Ohio App. LEXIS 5192, ¶12 (Noble County); *Dibella v. Village of Ontario*, 4 Ohio Misc. 120, 122, 212 N.E.2d 679 (C.P. Richland County 1965); 2002 Op. Att’y Gen. No. 2002-009 at 2-50 and 2-51. An easement is a property interest that allows the owner of the easement a limited use of the land in which the interest exists. *See Sunshine Diversified Inv. III, LLC v. Chuck*, 2012-Ohio-492, 2012 Ohio App. LEXIS 426, ¶20 (Cuyahoga County); *Gateway Park, LLC v. Ferrous Realty Limited*, 2008-Ohio-6161, 2008 Ohio App. LEXIS 5156, ¶27 (Cuyahoga County); *City of Canton v. Adelman*, Case No. 97CA00390, 1998 Ohio App. LEXIS 3099, at **6-7 (Stark County June 15, 1998). By maintaining a property interest in the county roads after the company completes the roadwork, the county has benefitted from the roadwork and, as such, the roadwork is done for the county. *See* 1987 Op. Att’y Gen. No. 87-028; *see also* 1987 Op. Att’y Gen. No. 87-007 at 2-35 (“construction that inures to the benefit of a public authority would also appear to be for a public authority”).

The improvement and repair of county roads by a private company under the agreement described in your letter thus is done pursuant to a contract with a county and for a county, and is a “public improvement,” as defined in R.C. 4115.03(C). Accordingly, a county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is required to comply with R.C. 4115.03-.16 when the total overall project cost to the company is fairly estimated to be more than the amount prescribed in R.C. 4115.03(B)(4).¹³

¹³ The Ohio Supreme Court’s holding in *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa County Improvement Corp.*, 122 Ohio St. 3d 283, 2009-Ohio-2957, 910 N.E.2d 1025, may suggest that Ohio’s prevailing-wage law, R.C. 4115.03-.16, applies only when public moneys are expended. However, as deftly explained in *Zurz v. 770 West Broad AGA, LLC*, 192 Ohio App. 3d 521, 2011-Ohio-832, 949 N.E.2d 595, ¶¶19-24 (Franklin County), the Ohio Supreme Court did not

IV. County Liability: Failure to Comply with Prevailing Wage Rate Laws

Your third question asks, if a county may enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county, whether the county is civilly liable for damages when the company fails to comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-.92, or R.C. 4115.03-.16. As explained above, this opinion does not consider whether a private company must comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-.92, or R.C. 4115.03-.16 when entering into such an agreement with a county. And, so we will not consider whether a county is civilly liable for damages if a company fails to comply with R.C. 153.44, R.C. 153.69, R.C. 307.86-.92, or R.C. 4115.03-.16.

We have, however, determined that Ohio's prevailing-wage laws are implicated when the county enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county. For this reason, we will generally discuss civil liability.

As explained at the beginning of this opinion, you have presented us with an unusual situation. Under the agreement between the county and private company, no county employees will be used to perform the roadwork and the county will not be required to pay compensation to the company. Thus,

address whether the use of public money is a necessary prerequisite when determining whether R.C. 4115.03-.16 apply.

Instead, the court in *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa County Improvement Corp.* specifically addressed the following issue: “where a public authority ... spends public funds, must the expenditure be made on a ‘public improvement’ to require compliance with the prevailing wage law.” *Zurz v. 770 West Broad AGA, LLC*, 192 Ohio App. 3d at ¶21. As the court in *Northwestern Ohio Bldg. & Constr. Trades Council v. Ottawa County Improvement Corp.* did not specifically consider whether the use of public money is a necessary prerequisite when determining whether R.C. 4115.03-.16 apply, the case may not be interpreted as precluding the application of R.C. 4115.03-.16 when no public money is used. *See Zurz v. 770 West Broad AGA, LLC*, 192 Ohio App. 3d at ¶24 (“*Northwestern* does not effectively add a requirement to the statutory framework for determining whether a construction project is subject to prevailing-wage law, i.e., that a construction project need not only qualify as a ‘public improvement,’ but must also be publicly funded. In the context of its facts, *Northwestern* is not inconsistent with *Episcopal Retirement Homes and U.S. Corr. Corp.* The *Northwestern* court’s holding, that despite the expenditure of public funds by a public authority, prevailing-wage law applies only if the expenditure is made on a ‘public improvement,’ is consistent with the Supreme Court’s statements in *Episcopal Retirement Homes*, 61 Ohio St. 3d at 369, 575 N.E.2d 134, and *U.S. Corr. Corp.*, 73 Ohio St. 3d at 218, 652 N.E.2d 766, that prevailing-wage law applies to ‘all construction projects that are ‘public improvements.’” Absent any indication to limit or overrule *Episcopal Retirement Homes* and *U.S. Corr. Corp.*, and in light of the court’s reliance on those cases, we read *Northwestern* consistently with those cases and conclude that the lack of public funds does not preclude the application of prevailing-wage law here”).

the private company, rather than the county, is the employer of the persons who perform the roadwork under the agreement.

This is an important fact when determining liability under Ohio's prevailing-wage laws since it is the responsibility of an employer to pay his employees the prevailing rate of wages on a public improvement project. See R.C. 4115.05; R.C. 4115.06; *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations*, 63 Ohio St. 3d 512, 516-17, 589 N.E.2d 35 (1992). Also, it remains, in part, a factual question whether a court would find a county civilly liable for damages when a private company, as an employer, fails to pay prevailing wage rates on a public improvement project.¹⁴ See 2006 Op. Att'y Gen. No. 2006-028 at 2-249 and 2-250; 2005 Op. Att'y Gen. No. 2005-002 at 2-12; 2004 Op. Att'y Gen. No. 2004-022 at 2-186 and 2-187; 2003 Op. Att'y Gen. No. 2003-037 at 2-311; 2000 Op. Att'y Gen. No. 2000-021 at 2-136. See generally *Ohio Asphalt Paving, Inc. v. Ohio Dep't of Indus. Relations*, 63 Ohio St. 3d at 517 (in order for an employer to maintain a cause of action in contribution against a public authority, "the facts underlying a particular public improvement contract [must] indicate culpability on the part of the public authority for failing to comply with the prevailing wage provisions"). Finally, as this is a case of first impression in Ohio, we "cannot definitively predict the approach that the courts may take in deciding whether or not to impose ... liability in any particular case, as that is a matter solely for the judiciary." 2009 Op. Att'y Gen. No. 2009-033 at 2-229; see 2003 Op. Att'y Gen. No. 2003-037 at 2-311 ("[q]uestions of liability are decided by the courts, in particular contexts and with consideration of specific facts"); 2000 Op. Att'y Gen. No. 2000-021 at 2-136 ("[q]uestions of liability are resolved by the courts and cannot be determined by means of an opinion of the Attorney General"). Consequently, whether a county may incur civil liability for damages for failing to comply with R.C. 4115.03-16 is, in part, a question of fact that cannot be determined by means of an Attorney General opinion.

V. Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A county may in accordance with R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75 enter into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county.
2. A county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company

¹⁴ When considering whether a county is civilly liable for damages when a private company fails to pay prevailing wage rates on a public improvement project, the terms of the agreement must be considered. In your particular situation, it is significant to note that the agreement expressly requires the private company, rather than the county, to compensate the employees who work on the project.

improve and repair the county roads it uses at no cost to the county is not required to comply with R.C. 153.44, R.C. 153.69, or R.C. 307.86-.92.

3. A prosecuting attorney may require that an agreement in which a board of county commissioners or county engineer authorizes a private company that conducts oil and gas drilling operations or operates a wind farm to improve and repair the county roads it uses at no cost to the county be submitted to his office for review prior to the agreement's execution.
4. A county that enters into an agreement with a private company that conducts oil and gas drilling operations or operates a wind farm to have the company improve and repair the county roads it uses at no cost to the county is required to comply with R.C. 4115.03-.16 when the total overall project cost to the company is fairly estimated to be more than the amount prescribed in R.C. 4115.03(B)(4).
5. Whether a county may incur civil liability for damages for failing to comply with R.C. 4115.03-.16 is, in part, a question of fact that cannot be determined by means of an Attorney General opinion.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General