July 31, 2014

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

SYLLABUS: 2014-031

1. A board of county commissioners is not permitted to waive sanitary rates for properties that are capable of, but are not currently, being served by a county sewer district established pursuant to R.C. Chapter 6117.

2. When a board of county commissioners fixes sanitary rates pursuant to R.C. 6117.02(A), the board reasonably may distinguish between properties that are served by a county sewer district and properties that are capable of, but are not currently, being served by a county sewer district. The board of county commissioners ultimately may decide to impose lower sanitary rates on the latter type of properties.

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OPINION NO. 2014-031

The Honorable Anneka P. Collins
Highland County Prosecuting Attorney
112 Governor Foraker Place
Hillsboro, Ohio 45133

Dear Prosecutor Collins:

You have asked whether a board of county commissioners may, by means of a resolution, waive "sewer service fees"[1] for properties that are capable of, but are not currently, being served by a county sewer district established pursuant to R.C. Chapter 6117. Some Highland County residents have requested the board of county commissioners to waive the sanitary rates associated with the mere ability to use the sanitary facilities of the county sewer district. Since the sewer district was developed in Highland County in the 1990s, the board of county commissioners has assessed sanitary rates on properties that initially contained a habitable residence or useable structure. Property owners who request a waiver have indicated that structures on their particular properties have become vacant, have been removed, or otherwise have become uninhabitable. Therefore, the board of county commissioners contemplates waiving the imposition of sanitary rates for properties that were, but no longer are, served by a county sewer district. The option of being served by a county sewer district remains available for these properties.

Authority of Board of County Commissioners to Establish, Maintain, and Operate a County Sewer District

To answer your inquiry, we first must discuss the powers of a board of county commissioners and the statutory scheme governing county sewer districts in Ohio. It is firmly established that a board of county commissioners, as a creature of statute, has only those powers that are expressly granted by statute or that are necessarily implied thereby. 2009 Op. Att'y Gen. No. 2009-040, at 2-296 (citing *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) ("[i]t is well established that a board of county commissioners is a creature of statute that may exercise only those powers conferred upon it expressly by statute or as may be implied by necessity in order to facilitate the exercise of another express power")); 1998 Op. Att'y Gen. No. 98-010, at 2-53; *see Elder v. Smith*,

[1] Although you refer to the imposition of "sewer service fees," the relevant statute requires the imposition of "rates" for the use, or the availability for use, of the sanitary facilities of a county sewer district. *See* R.C. 6117.02(A). Thus, we will refer to the imposition of "sanitary rates" throughout this opinion.

103 Ohio St. 369, 370, 133 N.E. 791 (1921) (a "board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute"). Therefore, if a board of county commissioners is not granted a particular power expressly by statute or necessarily by implication, it is precluded from exercising that power.

Boards of county commissioners are granted the power to establish, maintain, and operate sewer districts. The statutory scheme governing county sewer districts is set forth in R.C. Chapter 6117. Pursuant to R.C. 6117.01(B)(1), a board of county commissioners, for the purpose of promoting public health and welfare, may establish one or more county sewer districts within the county. The board of county commissioners is granted the power to lay out the boundaries of these districts and may operate within any district sanitary or drainage facilities it determines to be necessary or appropriate for the collection of sewage and other wastes originating in or entering the district. R.C. 6117.01(B)(1). The board of county commissioners is further authorized to provide for the protection of the sanitary and drainage facilities it establishes, and it may negotiate and enter contracts with other individuals or agencies for the operation of the facilities on behalf of the county. *Id.*; *see* 2013 Op. Att'y Gen. No. 2013-014, at 2-132 to 2-133 (discussing statutory scheme governing county sewer districts).

Because the authority of a board of county commissioners to establish one or more sewer districts within the county is granted in the permissive, the decision of whether to establish a sewer district is within the sound discretion of the board of county commissioners. A board of county commissioners is not required to exercise the power. In 1987 Op. Att'y Gen. No. 87-083, the Attorney General discussed the exercise of this discretionary power in the context of determining whether a board of county commissioners had the authority to divest itself of a county sewer district that was created pursuant to R.C. Chapter 6117. The Attorney General determined:

> A board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district established pursuant to R.C. Chapter 6117 where divestiture is not inconsistent with preservation and promotion of the public health and welfare, and provided that divestiture does not result in violation of the statutory provisions and administrative regulations governing the lawful operation of a sewer district, such as R.C. Chapter 6111.

1987 Op. Att'y Gen. No. 87-083 (syllabus). In reaching that conclusion, the Attorney General noted that the responsibility of a board of county commissioners to establish, manage, and maintain a county sewer district is discretionary in nature, and that a reasonable application of that discretion may lead to the determination that a county sewer district is unnecessary. *Id.* at 2-559. Because a board of county commissioners' decision to establish a sewer district to promote health and welfare is discretionary, it logically follows that, after a sewer district has been established, circumstances may change so as to cause the board of county commissioners to determine that the established sewer district no longer sufficiently serves the purpose of promoting the public health and welfare. *Id.* at 2-560. Thus, a board of county commissioners has the concomitant implied authority to reasonably divest itself of responsibility for the control, management, and maintenance of the previously established sewer district. *Id.* at 2-562; *see* 1921 Op. Att'y Gen. No. 2071, vol. I, p. 387 at 390 ("[i]f the county

commissioners are permitted to exercise discretion in laying out and establishing sewer districts, it is not a violation of deductive reasoning to say they may also modify and abandon districts they have created where their action does not transgress vested rights").

Duties of Board of County Commissioners upon Establishing Sewer District

In addition to being granted the general powers to establish, maintain, and operate sewer districts, boards of county commissioners are granted numerous specific powers in connection with those general powers. R.C. 6117.02(A) provides in pertinent part as follows:

> The board of county commissioners shall fix reasonable rates, including penalties for late payments, for the use, or the availability for use, of the sanitary facilities of a sewer district to be paid by every person and public agency whose premises are served, or capable of being served, by a connection directly or indirectly to those facilities when those facilities are owned or operated by the county and may change the rates from time to time as it considers advisable.

This means a board of county commissioners must fix reasonable sanitary rates for the use, or the availability for use, of the sanitary facilities of the county sewer district. These sanitary rates are to be paid by persons or public agencies whose properties are either actually served, or merely capable of being served, by a direct or indirect connection to the county sewer facilities. Therefore, "[i]n the operation of a county sewer district, a board of county commissioners has a duty to fix and collect various rates and charges for the use, or the availability for use, of the district's sanitary facilities[.]" 2002 Op. Att'y Gen. No. 2002-030, at 2-202 (citing R.C. 6117.02(A)).[2]

Pursuant to R.C. 6117.02(A), a board of county commissioners' duty to fix and collect sanitary rates extends beyond properties actually connected to the county sewer facilities. The duty to fix and collect sanitary rates does not, however, reach all properties within the territory of the sewer district. Because R.C. 6117.02(A) requires those premises that are either served or "capable of being served" to be charged sanitary rates, it is reasonable to infer that a board of county commissioners does not have a duty to fix and collect sanitary rates as to properties that are neither served nor "capable of being served" by county sewer facilities. Thus, a board of county commissioner's duty to fix and collect sanitary rates is limited to properties that are either served or "capable of being served" by a county sewer district, and this duty does not extend beyond those properties.

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[2] In addition to having a duty to charge and collect sanitary rates pursuant to R.C. 6117.02(A), R.C. 6117.02(B) requires a board of county commissioners to "establish reasonable charges to be collected for the privilege of connecting to the sanitary facilities of the district[.]" Prior to the connection of a property to county sewer facilities, the person or public agency that controls the property must pay the charge in full, unless the board of county commissioners decides to allow installment payments in the interest of equity. *Id.*

The term "rates," as used in R.C. 6117.02(A), is not defined by statute. In the absence of a statutory definition, words and phrases must 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." R.C. 1.42; *see State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449, 451 (1983) ("any term left undefined by statute is to be accorded its common, everyday meaning"). *Black's Law Dictionary* 1375 (9th ed. 2009) defines "rate" as "[p]roportional or relative value; the proportion by which quantity or value is adjusted" and as "[a]n amount paid or charged for a good or service."

Based on these definitions, the use of the term "rates" in R.C. 6117.02(A) reasonably may be interpreted as authorizing a board of county commissioners to fix set sanitary rates that are not directly related to each customer's level of usage of the county sewer facilities. This reading is appropriate as to properties that are served by a county sewer district, as well as properties that are capable of, but are not currently, being served by a county sewer district. Alternatively, the use of the term "rates" in R.C. 6117.02(A) reasonably may mean that a board of county commissioners may fix rates in correlation to usage of county sewer facilities, such as by charging a certain amount per gallon of water used by a customer. This interpretation is reasonable as to properties using county sewer facilities. However, this interpretation is not reasonable as to properties not connected to county sewer facilities because it would be illogical to require a board of county commissioners to charge a rate based on the amount of usage, if the particular property, while capable of being served by a county sewer district, is not using county sewer facilities.

For the purpose of R.C. 6117.02(A), we do not believe that the term "rates" is to be read in a restrictive manner, at least as to properties that are using county sewer facilities. Thus, R.C. 6117.02(A) permits a board of county commissioners to charge a set sanitary rate as to a property capable of, but not currently, being served by a county sewer district. Conversely, R.C. 6117.02(A) permits a board of county commissioners to either charge a set sanitary rate, or charge a sanitary rate that correlates and fluctuates proportionately to usage, as to a property being served by a county sewer district.

The phrase "capable of being served" as used in R.C. 6117.02(A) is not defined by statute. When the phrase "capable of being served" is read in context, it becomes clear that it means, at a minimum, a property that has the necessary plumbing, namely installed pipes, fittings, and fixtures, to be served by a county sewer district. Thus, a property without a structure containing plumbing is not capable of being served by a county sewer district. And if a property is not capable of being served by a county sewer district, the board of county commissioners has no authority to charge or collect sanitary rates from a person or public agency that controls that property.[3]

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[3] Prior to March 12, 2001, R.C. 6117.02(A) did not include language directing boards of county commissioners to fix reasonable rates for the "availability for use" of county sewer facilities by persons or public agencies whose premises are merely "capable of being served." *See* 1999-2000

A board of county commissioners has a duty to collect unpaid sanitary rates and connection charges, and it may pursue that collection by various means. 2002 Op. Att'y Gen. No. 2002-030, at 2-202 (citing R.C. 6117.02(C) for the principle that "responsibility is imposed upon the board of county commissioners to collect any such rates or charges that are unpaid"). Pursuant to R.C. 6117.02(C), the board of county commissioners is permitted to take various steps to collect any sanitary rates or connection charges, together with penalties, not timely paid. Specifically, the board of county commissioners may take one or more of the following collection steps to fulfill its responsibility to collect any unpaid sanitary rates, connection charges, or penalties: certify the unpaid amounts to the county auditor in order to obtain a lien, institute a legal action to collect unpaid charges, terminate service to the particular property until the necessary payments are made, or apply any available security deposit toward an unpaid balance. R.C. 6117.02(C)(1)-(4).

You ask whether a board of county commissioners is authorized to waive the imposition of sanitary rates for properties that were previously, but not currently, connected to county sewer facilities because structures on the properties have become vacant, have been removed, or otherwise have become uninhabitable. As explained above, when a board of county commissioners decides to establish a sewer district, it assumes specific duties and responsibilities in connection with that establishment. Among these duties is the duty to fix and collect reasonable rates for the use, or the availability for use, of the sanitary facilities of a county sewer district, from those whose property is

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Ohio Laws, Part III, 6178, 6218 (Sub. H.B. 549, eff. Mar. 12, 2001). The previous version of R.C. 6117.02(A) stated in pertinent part as follows:

> The board of county commissioners shall fix reasonable rates to be charged for the use of the sewers or sewerage treatment or disposal works referred to in section 6117.01 of the Revised Code by every person, firm, or corporation whose premises are served by a connection to such sewers or sewerage treatment or disposal works when such sewers or sewerage treatment or disposal works are owned and operated by the county, and may change such rates as it deems advisable.

R.C. 6117.02(A), as amended by 1985-1986 Ohio Laws, Part II, 3025, 3031-33 (H.B. 243, eff. Feb. 25, 1987). Applying a plain reading of the language of the pre-2001 version of R.C. 6117.02(A), the Ohio Second District Court of Appeals ruled that the section required an actual connection to a county sewer district before any user charge could be assessed. *See Bellbrook v. Bd. of Cnty. Comm'rs*, No. CA-1030, 1980 WL 352362, at *3-4 (Greene County Jan. 24, 1980) (finding that the General Assembly only granted boards of county commissioners the authority to charge and collect rents for actual use of the sanitation facilities). Therefore, by amending R.C. 6117.02(A), the General Assembly now requires boards of county commissioners to charge, as a means to support and maintain a sewer district, any person or public agency whose property is merely capable of being served by the sewer district, in addition to the actual users of the sanitary facilities of the sewer district. The 2000 amendment implicitly acknowledges that sewer improvement necessities increase as users are connected, and that those merely capable of being connected should bear some of the costs associated with readying sanitary facilities for any additional burden that may occur.

served, or capable of being served, by the sanitary facilities of the county sewer district. This duty is mandatory. Because the duty is mandatory, a board of county commissioners, upon establishing a sewer district, has no discretion in deciding whether to collect sanitary rates. Waiver of this requirement is not an option.

Board of County Commissioners has Discretion in Determining Appropriate Amount of Sanitary Rates to Impose

Even though a board of county commissioners' duty to charge and collect sanitary rates is mandatory upon establishment of a sewer district, R.C. Chapter 6117 grants a board of county commissioners discretion in determining the appropriate sanitary rates to charge those whose properties are served, or capable of being served, by a county sewer district. A board of county commissioners is authorized to fix "reasonable" rates. R.C. 6117.02(A). The General Assembly's use of the word "reasonable" expressly demonstrates its intention that a board of county commissioners may exercise discretion in deciding the appropriate sanitary rates to charge.[4] In view of a board of county commissioners' discretion in setting rates, the board of county commissioners may impose uniform rates throughout a sewer district, but it may also prescribe different rates for customers in different circumstances. *See Huber v. Denger*, 38 Ohio St. 3d 162, 527 N.E.2d 802 (1988) (holding that R.C. Chapter 6117 authorizes a board of county commissioners to allocate the cost of a facility serving a portion of a sewer district among all residents of the district); 1964 Op. Att'y Gen. No. 858, at 2-73 (concluding that "reasonable" rates fixed by a board of county commissioners pursuant to R.C. 6117.02 may or may not be uniform throughout the sewer district as they may appropriately "reflect the cost of supplying services"). Additionally, R.C. 6117.02(A) expressly grants discretion to a board of county commissioners to change rates "from time to time as it considers advisable," further demonstrating the General Assembly's intention that a board of county commissioners may independently apply its best judgment in fixing sanitary rates. Thus, a board of county commissioners

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[4] Even if the General Assembly had not used the term "reasonable" in R.C. 6117.02(A) to qualify the term "rates," a board of county commissioners would have discretion in fixing rates because the statute does not mandate the amount of sanitary rates to impose as to each property within a county sewer district, nor does the statute set forth a formula for determining the amount of sanitary rates to impose. *See generally State ex rel. Preston v. Ferguson*, 170 Ohio St. 450, 459, 166 N.E.2d 365 (1960) ("[w]here a statute clearly confers power to do a certain thing without placing any limitation as to the manner or means of doing it, and no statute can be found prescribing the exact mode of performing that duty or thing, the presumption is that it should be performed in a reasonable manner not in conflict with any law of the state") (emphasis omitted). Furthermore, we note that, in addition to having the discretionary authority to fix sanitary rates, boards of county commissioners are specifically authorized to provide persons sixty-five years of age or older with discounted sanitary rates and connection charges. *See* R.C. 6117.02(F) (providing that a board of county commissioners "may establish discounted rates or charges or may establish another mechanism for providing a reduction in rates or charges for persons who are sixty-five years of age or older" and that the board must "establish eligibility requirements for such discounted or reduced rates or charges").

"has a great deal of discretion, within a single sewer district, to establish rates and use proceeds to pay for expenses of the district as a whole." 1989 Op. Att'y Gen. No. 89-104, at 2-509.

Properties that are merely capable of being served by the sanitary facilities of a county sewer district place no current burden on the district. Properties that are using the sanitary facilities of a county sewer district, however, necessarily place varying levels of strain on the district, depending on their level of usage. Thus, properties using county sewer facilities place a greater burden on the district than properties merely capable of being served by the district. Accordingly, when a board of county commissioners fixes rates pursuant to R.C. 6117.02(A), the board reasonably may distinguish between properties that are served by a county sewer district and properties that are capable of, but are not currently, being served by a county sewer district. The board of county commissioners ultimately may decide to impose lower sanitary rates on the latter type of properties.

Conclusions

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

1. A board of county commissioners is not permitted to waive sanitary rates for properties that are capable of, but are not currently, being served by a county sewer district established pursuant to R.C. Chapter 6117.

2. When a board of county commissioners fixes sanitary rates pursuant to R.C. 6117.02(A), the board reasonably may distinguish between properties that are served by a county sewer district and properties that are capable of, but are not currently, being served by a county sewer district. The board of county commissioners ultimately may decide to impose lower sanitary rates on the latter type of properties.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General