April 17, 1996

OPINION NO. 96-025

The Honorable David A. Sams
Madison County Prosecuting Attorney
23 West High Street
London, Ohio 43140-1099

Dear Prosecutor Sams:

You have requested an opinion concerning whether a board of county commissioners is authorized to compensate the county engineer for performing the county sanitary engineer's duties. You have stated that the compensation for performing the county sanitary engineer's duties is in addition to his official salary as county engineer.

In *State ex rel. Mikus v. Roberts*, 15 Ohio St. 2d 253, 239 N.E.2d 660 (1968), the Ohio Supreme Court held that, "in the absence of express statutory provision therefor, no compensation, in addition to his fixed statutory salary, may be paid to the county engineer where the county commissioners require him to serve as county sanitary engineer." *Id.* at 258, 239 N.E.2d at 663-64. The court reasoned that, insofar as a board of county commissioners may assign the duties of the county sanitary engineer to the county engineer, article II, § 20 of the Ohio Constitution, which forbids any change in the compensation of an officer during the officer's existing term, prohibits the county engineer from receiving additional compensation for performing the duties of county sanitary engineer. In this regard, the court stated:

> [Ohio Const. art. II, § 20] has been held to prevent any increase in the compensation paid to ... an officer during his term of office.
> A necessary effect of having the county pay Roberts $4,800 per year compensation as sanitary engineer is that he receives from the county $4,800 more than the salary fixed for him as a county officer. Performance of his additional duties as sanitary engineer will certainly have a tendency to require employment by the county of others to assist in the performance of duties of the county engineer which he, as county engineer, would otherwise have been able to perform himself.
> Approval of such additional employment of a county officer by the county, with additional compensation therefor, would enable the county and the officer to do indirectly what they are prohibited from doing by the foregoing constitutional provision.

> Section 315.14, Revised Code, specifically provides that the county engineer "shall perform such other duties as the board [of county commissioners] requires." The effect of that statute and Section 6117.01, Revised Code (authorizing commissioners to employ a sanitary engineer), is to provide the county commissioners with an option either to assign the duties of the sanitary engineer to the county engineer or to employ another person, who is a competent sanitary engineer, to perform those duties.
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> Thus, one of the burdens of the office of county engineer is that the commissioners may impose upon him the performance of those of their duties, for the performance of which they are authorized by Section 6117.01, Revised Code, to employ a competent sanitary engineer.
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> As stated in the opinion "by the Court" in *Donahey v. State, ex rel. Marshall, supra*, (101 Ohio St. 473), 476 *et seq.*:
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> "* * * It is a familiar rule that when a public officer takes office he undertakes to perform all of its duties, although some of them may be called into activity for the first time by legislation passed after he enters upon his term. As said by Bradbury, J., in *Strawn v. Commissioners of Columbiana County*, 47 Ohio St. 404, at page 408: _The fact that a duty is imposed upon a public officer will not be enough to charge the public with an obligation to pay for its performance, for the Legislature may deem the duties imposed to be fully compensated by the privileges and other emoluments belonging to the office_ * * *
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> "* * * _A public officer takes his office *cum onere*, and so long as he retains it he undertakes to perform its duties for the compensation fixed, whether such duties be increased or diminished._ * * *"

Id. at 257-58, 239 N.E.2d at 663 (citations omitted).

Subsequent to the rendering of the decision in *State ex rel. Mikus v. Roberts*, the General Assembly amended the duties of the county engineer. R.C. 315.08, which sets forth the general duties of the county engineer, was amended by 1991-1992 Ohio Laws, Part III, 3534, 3536 (Am. Sub. H.B. 201, eff. June 30, 1991) to read, in pertinent part, that "[t]he county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor, *except those duties described in Chapters 343., 6103., and 6117. of the Revised Code*." (Emphasis added.) In addition, R.C. 315.14, as amended by 1991-1992 Ohio Laws, Part III, 3534, 3537 (Am. Sub. H.B. 201, eff. June 30, 1991) and 1991-1992 Ohio Laws, Part II, 3046, 3046-47 (Am. Sub. H.B. 118, eff. June 1, 1992), provides that the county engineer

shall make all surveys required by law and perform all necessary services to be performed by

> a registered surveyor or registered professional engineer in connection with the construction, repair, or opening of all county roads or ditches constructed under the authority of the board and shall perform such other duties as the board requires, *provided that the duties described in Chapters 343., 6103., and 6117. of the Revised Code shall be performed only pursuant to an agreement between the county engineer and the board. The board shall determine the compensation for performance of the*

> *duties described in Chapters 343., 6103., and 6117. of the Revised Code and shall pay the county engineer from funds available under such chapters or from the general fund of the county.* The performance of the duties described in Chapters 343., 6103., and 6117. of the Revised Code shall not constitute engaging in the private practice of engineering or surveying. (Emphasis added.)

Pursuant to R.C. 315.08 and R.C. 315.14, therefore, the county engineer is not required to perform the duties described in R.C. Chapters 343, 6103, and 6117, unless the board of county commissioners and the county engineer enter into an agreement whereby the board compensates the county engineer for performing the duties described in R.C. Chapters 343, 6103, and 6117.

Because the duties of a county sanitary engineer are set forth in R.C. 6117.01, a county engineer is not required to perform the duties of a county sanitary engineer, unless the board of county commissioners and the county engineer have entered into an agreement to that effect. R.C. 315.08; R.C. 315.14. Moreover, the language of R.C. 315.14 expressly authorizes a board of county commissioners to compensate a county engineer for performing the duties of a county sanitary engineer. Resolution of your question thus requires that I determine whether R.C. 315.14 nullifies the rule of law set forth in *State ex rel. Mikus v. Roberts*.[1]

It is well settled that the General Assembly has the power to enact or amend laws which modify or abrogate the common law. *In re McWilson's Estate*, 155 Ohio St. 261, 266, 98 N.E.2d 289, 292 (1951). However, "the [G]eneral [A]ssembly will not be presumed to have intended to abrogate a settled rule of the common law unless the language used in a statute clearly imports such intention." *State ex rel. Hunt v. Fronizer*, 77 Ohio St. 7, 16, 82 N.E. 518, 521 (1907); *accord In re McWilson's Estate*, 155 Ohio St. at 266, 98 N.E.2d at 292.

With respect to your specific inquiry, I find that the language of R.C. 315.14 evidences an intent on the part of the General Assembly to abrogate the rule of law set forth in *State ex rel. Mikus v. Roberts*. The language of R.C. 315.14 clearly and unambiguously states that the official duties of a county engineer do not include the duties of a county sanitary engineer. *See* R.C. 315.08. In

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[1] Section twenty of article two of the Ohio Constitution provides that "[t]he general assembly, in cases not provided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished." Because R.C. 315.14 authorizes a board of county commissioners to provide additional compensation to a county engineer, it might be argued that R.C. 315.14 is unconstitutional. The Ohio Supreme Court has stated, however, that the power to declare a law unconstitutional rests exclusively with the court. *Maloney v. Rhodes*, 45 Ohio St. 2d 319, 324, 345 N.E.2d 407, 411 (1976); *State ex rel. Davis v. Hildebrant*, 94 Ohio St. 154, 169, 114 N.E. 55, 59 (1916), *aff'd*, 241 U.S. 565 (1916). As such, it is inappropriate for the Attorney General to determine the constitutionality of R.C. 315.14, *see* 1986 Op. Att'y Gen. No. 86-010 at 2-45; 1976 Op. Att'y Gen. No. 76-021 at 2-66, and it is assumed, for purposes of this opinion, that R.C. 315.14 is constitutional.

addition, R.C. 315.14 expressly states that the board of county commissioners is required to compensate the county engineer for performing the duties of a county sanitary engineer. Since the language of R.C. 315.14 clearly imports an intention to abrogate the rule of law set forth in *State ex rel. Mikus v. Roberts*, I am constrained to find that, pursuant to R.C. 315.14, a board of county commissioners is authorized to enter into an agreement with the county engineer whereby the board compensates the county engineer for performing the duties of a county sanitary engineer.

Accordingly, it is my opinion, and you are hereby advised that, pursuant to R.C. 315.14, a board of county commissioners is authorized to enter into an agreement with the county engineer whereby the board compensates the county engineer for performing the duties of a county sanitary engineer.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

April 17, 1996

The Honorable David A. Sams
Madison County Prosecuting Attorney
23 West High Street
London, Ohio 43140-1099

SYLLABUS: 96-025

Pursuant to R.C. 315.14, a board of county commissioners is authorized to enter into an agreement with the county engineer whereby the board compensates the county engineer for performing the duties of a county sanitary engineer.