June 10, 2009

OPINION NO. 94-044

Frances S. Buchholzer, Director
Department of Natural Resources
Fountain Square
Columbus, Ohio 43224-1387

Dear Director Buchholzer:

You have requested an opinion on the following question: "Does the Public Health Council or a board of health have authority to regulate public bathing beaches in state parks, thus imposing licensure requirements or operating fees on the Division [of Parks and Recreation] for the operation of public bathing areas?" Your opinion request questions the possible application of either R.C. Chapter 3749, which governs public swimming pools, public spas, and special use pools, or 7 Ohio Admin. Code 3701-31-10, concerning the regulation of "public bathing places" by boards of health, to "public bathing beaches" located in state parks.

I. Regulation of Public Swimming Pools, Public Spas, and Special Use Pools

A. Licensors

Chapter 3749 of the Revised Code establishes licensing requirements, fees, and other regulations for public swimming pools, including public spas and special use pools. For example, R.C. 3749.04(A) prohibits any person from operating or maintaining a public swimming pool, public spa, or special use pool without a license issued by the licensor having jurisdiction. *See also* R.C. 3749.03 (prohibiting any person from constructing, installing, or altering a public swimming pool, public spa, or special use pool without approval of the plans by the Director of Health). For purposes of R.C. Chapter 3749, a "licensor" is a city board of health or a general health district, an authority having the duties of a city board of health under R.C. 3709.05, or the Director of the Department of Health, acting pursuant to R.C. 3749.07.[1] R.C. 3749.01(D). Pursuant to R.C.

[1] R.C. 3749.07 requires the Director of Health to conduct an annual survey of each health district that licenses public swimming pools, public spas and special use pools to determine whether the health district is in substantial compliance with R.C. Chapter 3749 and applicable rules. If the Director determines that a health district is not in substantial compliance, he shall perform the duties

3749.04, each licensor may establish licensing and inspection fees to be collected with "any additional amount determined by rule of the public health council."

B. Facilities Regulated by R.C. Chapter 3749

---

of a health district in that district until the Director determines that the health district is in substantial compliance.

In order to be subject to regulation under R.C. Chapter 3749, a facility must fall within the definition of a "public swimming pool," which includes "public spas"[2] and "special use pools."[3] As used in R.C. 3749.01-.10, the phrase "public swimming pool" means:

> any indoor or outdoor structure, chamber, or tank containing a body of water for swimming, diving, or bathing that is intended to be used collectively for swimming, diving, or bathing and is operated by any person whether as the owner, lessee, operator, licensee, or concessionaire, regardless of whether or not fee is charged for use, but *does not mean any public bathing area* or private residential swimming pool.

R.C. 3749.01(G) (emphasis added). Expressly excluded from the definition of a public swimming pool is a "public bathing area," which is defined as "an impounding reservoir, basin, lake, pond, creek, river, or other similar natural body of water." R.C. 3749.01(J). Thus, to the extent that any of the facilities to which you refer as "public bathing beaches" fall within the definition of a public bathing area, as defined in R.C. 3749.01(J), they are not subject to regulation under R.C. Chapter 3749 as public swimming pools.

C. Persons Subject to Regulation Under R.C. Chapter 3749

Pursuant to R.C. 3749.09(A): "No *person* shall violate [R.C. 3749.01-.09] or any rule adopted thereunder." (Emphasis added.) *See generally* R.C. 3749.99 ("[w]hoever violates [R.C. 3749.09(A)] is guilty of a misdemeanor of the fourth degree"). As used in R.C. 3749.09, the word "person" is broadly defined as meaning "*the state*, any political subdivision, special district, public or private corporation, individual, firm, partnership, association, or any other entity." R.C. 3749.01(C) (emphasis added). The state, therefore, is subject to regulation as a person under R.C. Chapter 3749 with respect to its public swimming pools, public spas, and special use pools.

D. Rule 3701-31-10 of the Ohio Administrative Code

Pursuant to R.C. 3749.02, "[t]he public health council shall, subject to [R.C. Chapter 119], adopt rules of general application throughout the state governing the issuance of licenses, approval of plans, layout, construction, sanitation, safety, and operation of *public swimming pools, public spas, and special use pools.*" (Emphasis added). As mentioned in your letter, 7 Ohio Admin. Code 3701-31-10 reads as follows:

---

[2] R.C. 3749.01(H) defines the term "public spa" as meaning "any *public swimming pool* that is typically operated as a smaller, higher temperature pool for recreational or nonmedical uses." (Emphasis added.)

[3] R.C. 3749.01(I) defines a "special use pool" as meaning, with certain exceptions, "a *public swimming pool* containing flume slides, wave generating equipment, or other special features that necessitate different design and safety requirements." (Emphasis added.)

> No person shall operate or maintain a *public bathing place* other than a public swimming pool or private residential swimming pool without written authorization from the board of health of the health district in which the bathing place is located. The terms, conditions, and expiration date for operation of the bathing place shall be set forth in the written authorization and failure to comply with such terms, conditions, and expiration date shall constitute a violation of these rules. (Emphasis added.)

Your concern appears to be whether the term "public bathing place," as used in rule 3701-31-10, encompasses what you refer to in your opinion request as "public bathing beaches" that are located in the state parks.

The authority of the Public Health Council to adopt rules under R.C. 3749.02 extends to the regulation of only those things that come within the definitions of "public swimming pool," R.C. 3749.01(G), "public spa," R.C. 3749.01(H), and "special use pool," R.C. 3749.01(I). Rule 3701-31-10, however, expressly excludes public swimming pools from regulation as public bathing places. Because both public spas and special use pools are defined by statute and in 7 Ohio Admin. Code 3701-31-01 as types of public swimming pools, rule 3701-31-10 has excluded from its coverage all of the facilities for which the Public Health Council may adopt rules under R.C. 3749.02. Thus, to the extent that the Public Health Council has attempted to regulate as a "public bathing place" something other than a "public swimming pool," as defined in R.C. 3749.01(G), a "public spa," as defined in R.C. 3749.01(H), or a "special use pool," as defined in R.C. 3749.01(I), it has exceeded its rule-making authority. *See generally Athens Home Telephone Co. v. Peck*, 158 Ohio St. 557, 110 N.E.2d 571 (1953) (administrative agencies are creatures of statute and possess only such rule-making power as is delegated to them by the General Assembly). It appears, therefore, that rule 3701-31-10 does not properly authorize regulation of public bathing beaches located in state parks.

II. Public Bathing Beaches in State Parks

Concerning the possible application of R.C. Chapter 3749 to public bathing beaches located in state parks, the state is included as a "person" for purposes of that chapter. Accordingly, if a public bathing beach located in a state park falls within the definition of a "public swimming pool," a "public spa," or a "special use pool," it is subject to regulation as such under R.C. Chapter 3749. It appears, however, that the exemption from regulation under R.C. Chapter 3749 for those things defined as "public bathing area[s]" in R.C. 3749.01(J) would exempt from regulation under that chapter the public bathing beaches about which you ask. Of course, whether any particular public bathing beach located in a state park constitutes a facility subject to regulation under R.C. Chapter 3749 is a question of fact that cannot be determined by means of an opinion of the Attorney General.

Pursuant to R.C. 3709.21, the board of health of a general health district "may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or supression of nuisances." Similar authority is conferred upon the board of health of a city health district by R.C. 3709.20(A). A question has arisen as to whether these statutory powers provide sufficient authority from which to

imply a local board of health's power to license and charge fees for public bathing beaches in state parks. The fact that the General Assembly, through the enactment of R.C. Chapter 3749, expressly empowered local boards of health to license certain public bathing facilities, including the state's public swimming pools, suggests that neither R.C. 3709.20 nor R.C. 3709.21 impliedly authorizes local boards of health to license the state's public bathing beaches. *See Jackson v. City of Franklin*, 72 Ohio App. 3d 431, 594 N.E.2d 1018 (Montgomery County 1991) (finding no authority, prior to the enactment of R.C. Chapter 3749, for a board of health of a general health district to adopt rules regulating swimming pools); *see generally Wetterer v. Hamilton County Board of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957) (a board of health of a general health district has neither express nor implied authority under R.C. 3707.01 (power to abate nuisances), R.C. 3709.21 (power to make orders and regulations necessary for, among other things, the public health and the prevention or restriction of disease), or R.C. 3709.36 (powers and duties of boards of health) to enact rules and regulations to provide for the licensing of plumbers). Had the authority conferred upon local boards of health by either R.C. 3709.20 or R.C. 3709.21 been sufficient to authorize such boards to license public bathing facilities, it would not have been necessary for the General Assembly to enact R.C. Chapter 3749.

Concerning the portion of your question as to the power of local boards of health to require the payment of fees for beaches in state parks, it is well established that "a charge may not be made against a state agency except pursuant to clear statutory authority." 1988 Op. Att'y Gen. No. 88-042 at 2-203. *See, e.g.,* 1986 Op. Att'y Gen. No. 86-026 (syllabus, paragraph two) ("[a]bsent express statutory authorization, local governmental entities may not assess the Adjutant General fees for permits required by the terms of local zoning, building, and fire codes"); 1985 Op. Att'y Gen. No. 85-082 at 2-329 ("in the absence of express statutory authorization, a political subdivision has no power to levy or collect a special assessment upon property of the State of Ohio"); 1955 Op. Att'y Gen. No. 5110, p. 182 (syllabus) ("[a] board of county commissioners is without authority to ... exact an inspection fee under county regulations for the inspection of buildings constructed by the Ohio Turnpike Commission and owned by the State of Ohio"). Thus, absent express statutory authority, a local board of health may not impose a fee on the Division of Parks and Recreation of the Department of Natural Resources for the operation of beaches under the jurisdiction of the Division pursuant to R.C. Chapter 1541.

III. Conclusion

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

1. A public bathing beach located in a state park is not subject to regulation under R.C. Chapter 3749 unless such beach constitutes a "public swimming pool," as defined in R.C. 3749.01(G), a "public spa," as defined in R.C. 3749.01(H), or a "special use pool," as defined in R.C. 3749.01(I).

2. Neither a board of health of a general health district nor a board of health of a city health district has authority under R.C. 3709.21 or R.C.

3709.20, respectively, to require the Division of Parks and Recreation of the Department of Natural Resources to obtain a license or pay a fee for the operation of public bathing beaches located in state parks.

Respectfully,

LEE FISHER
Attorney General

June 10, 2009

Frances S. Buchholzer, Director
Department of Natural Resources
Fountain Square
Columbus, Ohio 43224-1387

SYLLABUS: 94-044

1. A public bathing beach located in a state park is not subject to regulation under R.C. Chapter 3749 unless such beach constitutes a "public swimming pool," as defined in R.C. 3749.01(G), a "public spa," as defined in R.C. 3749.01(H), or a "special use pool," as defined in R.C. 3749.01(I).

2. Neither a board of health of a general health district nor a board of health of a city health district has authority under R.C. 3709.21 or R.C. 3709.20, respectively, to require the Division of Parks and Recreation of the Department of Natural Resources to obtain a license or pay a fee for the operation of public bathing beaches located in state parks.