April 24, 1996

OPINION NO. 96-028

The Honorable C. Keith Plummer
Guernsey County Prosecuting Attorney
139 Court House Square
P.O. Box 640
Cambridge, Ohio 43725-0640

Dear Prosecutor Plummer:

You have requested an opinion concerning the authority of a board of health of a combined general health district to incorporate a nonprofit corporation that is exempt from federal income taxation under 26 U.S.C. § 501. You also wish to know whether the members of the board of health may constitute a majority of the members or trustees of that nonprofit corporation.

I note initially that 26 U.S.C. § 501 does not authorize the incorporation of nonprofit corporations. Rather, that section enumerates the organizations that are exempt from federal income taxation.[1] I must, therefore, examine state law in order to determine whether the board of health of a combined general health district is authorized to incorporate a nonprofit corporation.

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[1] The laws relating to the imposition of federal income taxes are set forth in subtitle one of the Internal Revenue Code of 1986, 26 U.S.C. §§ 1-1564, as amended. In general, a corporation is subject to taxation unless it qualifies for exemption under 26 U.S.C. § 401(a) or 26 U.S.C. § 501(c), (d). 26 U.S.C. § 501(a).

With respect to your specific inquiry, information provided indicates that the nonprofit corporation would apply for tax exempt status under 26 U.S.C. § 501(c)(3). Pursuant to this subsection, the following corporations are exempt from federal taxation:

> Corporations ... organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, ... no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in [26 U.S.C. § 501(h)], and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

A combined general health district may be created under R.C. 3709.07, which provides for the union of one or more city health districts and a general health district into a single district pursuant to contract for the administration of health matters in the combined district, or R.C. 3709.071, authorizing the combination of one or more city health districts and a general health district into a single general health district, upon approval of the electors. A combined general health district constitutes a general health district, and its board of health has all the powers and duties of a board of health of a general health district. R.C. 3709.07; *see also* R.C. 3709.071.

In Ohio, it is well-settled that boards of health are creatures of statute which exercise only those powers expressly conferred by statute or necessarily implied from those expressly granted. *Browning-Ferris Indus. of Ohio v. Mahoning County Bd. of Health*, 69 Ohio App. 3d 96, 100, 590 N.E.2d 61, 63 (Franklin County 1990), *appeal dismissed*, 60 Ohio St. 3d 704, 573 N.E.2d 122 (1991); 1991 Op. Att'y Gen. No. 91-015 at 2-76. No statute of which I am aware expressly empowers a board of health to incorporate a nonprofit corporation.

In addition, no provision within R.C. Chapter 1702 (nonprofit corporation law) authorizes a governmental entity to incorporate a nonprofit corporation. Pursuant to R.C. 1702.04(A), any person, singly or jointly with others, may form a nonprofit corporation. R.C. 1702.01(J) defines "person," for purposes of R.C. Chapter 1702, as follows: "_Person_ includes, but is not limited to, a nonprofit corporation, a corporation for profit, a partnership, an unincorporated society or association, and two or more persons having a joint or common interest." This definition does not, in and of itself, expressly include or exclude boards of health. It is a general rule, however, that, unless the purpose, language, or context of a statute indicates otherwise, the term "person," when used in a statute, does not encompass governmental entities such as boards of health, or the officers thereof. *See* 1990 Op. Att'y Gen. No. 90-045 at 2-192; 1979 Op. Att'y Gen. No. 79-062 at 2-209; 1962 Op. Att'y Gen. No. 2781, p. 70.

Nothing in the language of R.C. Chapter 1702 indicates that it was the General Assembly's intention to include the state or any political subdivision, instrumentality, or agency of the state within the definition of "person" set forth in R.C. 1702.01(J). *See* 1979 Op. Att'y Gen. No. 79-055 at 2-184. Moreover, if the General Assembly had intended for a governmental entity to be included within R.C. 1702.01(J)'s definition of "person," it could easily have communicated that intention expressly, having defined governmental entities as persons in other instances. *See, e.g.*, R.C. 1518.20(E) (as used in R.C. 1518.20-.27 (ginseng management program), "_[p]erson_ includes any legal entity defined as a person under [R.C. 1.59(C)][2] and any political subdivision, instrumentality, or agency of this state" (footnote added)); R.C. 4981.01(A) (as used in R.C. 4981.01-.34 (rail development commission), "person" means, in addition to the meaning in R.C. 1.59(C), any unit of local government). *See generally Lake Shore Elec. Ry. Co. v. PUCO*, 115 Ohio St. 311, 319, 154 N.E. 239, 242 (1926) (had the legislature intended a term to have a particular meaning, it could easily have found language to express that purpose, having used such language on other occasions).

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[2] Pursuant to R.C. 1.59(C), the term person means "an individual, corporation, business trust, estate, trust, partnership, and association."

Accordingly, the word "person," as defined in R.C. 1702.01(J), does not include governmental entities or the officers thereof. *See* 1979 Op. Att'y Gen. No. 79-055 at 2-184.

Because a board of health and the members thereof in their official capacities do not come within the definition of "person" set forth in R.C. 1702.01(J), I find that R.C. 1702.04(A) does not authorize a board of health or its members acting in their official capacities to incorporate a nonprofit corporation.[3] Thus, no statute, either expressly or by necessary implication, authorizes a board of health of a combined general health district, or the members thereof in their official capacities, to incorporate a nonprofit corporation. It follows, therefore, that a board of health and the members thereof acting in an official capacity are not empowered to take such action.

You have also asked, if the board of health is authorized to form a nonprofit corporation, whether the members of that board of health may constitute a majority of the members or trustees of the nonprofit corporation. Insofar as I have determined that a board of health is not statutorily authorized to incorporate a nonprofit corporation, it is unnecessary to answer this question.

Based upon the foregoing, it is my opinion, and you are advised, that no statute, either expressly or by necessary implication, authorizes a board of health of a combined general health district, or the members thereof in their official capacities, to incorporate a nonprofit corporation.

Respectfully,

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[3] Because a county prosecuting attorney has a duty to advise members of a board of health only in their official capacities and not in their individual capacities, *see* R.C. 3709.33; 1913 Op. Att'y Gen. No. 231, vol. II, p. 1222, it is inappropriate for the Attorney General to determine the authority of such members to act in their individual capacities. *See generally* 1988 Op. Att'y Gen. No. 88-008 (the authority of the Attorney General to advise extends only to matters that relate to the official duties of the office being advised). Therefore, I have not considered whether the members of a board of health in their individual capacities may incorporate a nonprofit corporation. It is clear, however, that individuals are "persons" who may establish nonprofit corporations pursuant to R.C. Chapter 1702. 1979 Op. Att'y Gen. No. 79-055 at 2-185.

BETTY D. MONTGOMERY
Attorney General

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