

OPINION NO. 2013-042**Syllabus:**

2013-042

A board of directors of a port authority created pursuant to R.C. 4582.22(A) is not a county board for purposes of R.C. 309.09(A) and is not entitled to legal representation by the county prosecuting attorney, regardless of whether the port authority is composed of a single county or multiple political subdivisions.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio

By: Michael DeWine, Ohio Attorney General, December 19, 2013

You have requested an opinion whether a board of directors of a port authority created pursuant to R.C. 4582.22(A) is a county board that is entitled to legal representation by the county prosecuting attorney. You are concerned, in particular, with a port authority that consists of a single county. You explain that only Erie County participated in the creation of the port authority and that the territorial boundaries of the port authority are coextensive with those of Erie County, excluding the territorial limits of each municipal port authority within the county.

Pursuant to R.C. 4582.22(A), a port authority may be created by any municipal corporation, township, county, “or any combination of a municipal corporation, municipal corporations, township, townships, county, or counties, no one of which has been included in a port authority in existence on December 16, 1964[.]” A port authority is created to enhance, provide, or promote, *inter alia*, transportation, economic development, and housing within the jurisdiction of the port authority. *See* R.C. 4582.21(B)(1). A port authority created in accordance with R.C. 4582.22(A) is governed by a board of directors. A board of directors of a port authority has the power to acquire, construct, furnish, and equip real and personal property, R.C. 4582.31(A)(4), engage in research and development with respect to port authority facilities, R.C. 4582.31(A)(21), and charge and collect rentals for the use or services of any port authority facility, R.C. 4582.31(A)(23). A port authority is also authorized to employ special police officers to serve as a police force with respect to the property, grounds, buildings, equipment, and facilities under the port authority’s control. R.C. 4582.28(B)-(C).

Duty of the County Prosecuting Attorney to Represent County Boards

No statute expressly authorizes the county prosecuting attorney to serve as legal adviser to a board of directors of a port authority. R.C. 309.09, however, addresses the duty of the county prosecuting attorney to serve as legal adviser to various officers and boards. It states, in part:

(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, *all other county officers and boards*, and all tax-supported public libraries, and any of them

may require written opinions or instructions from the prosecuting attorney in matters connected with their official duties. The prosecuting attorney shall prosecute and defend all suits and actions that any such officer, board, or tax-supported public library directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in [R.C. 305.14].

R.C. 309.09(A) (emphasis added). Thus, pursuant to R.C. 309.09(A), the county prosecuting attorney serves as the legal adviser of all county officers and county boards and is required to defend suits and actions to which a county officer or a county board is a party. If the board of directors of a port authority that consists of a single county is a county board for purposes of R.C. 309.09(A), it is entitled to legal representation by the county prosecuting attorney.

Although the term “county board” is not defined by statute, it has been interpreted, for purposes of R.C. 309.09(A), by several opinions of the Attorneys General. These opinions have consistently advised that the meaning of the term “county board” is limited to entities that are “essentially a subdivision of the county or a subordinate department of the county.” 1961 Op. Att’y Gen. No. 2383, p. 366, at 369; *see also* 2013 Op. Att’y Gen. No. 2013-014, at 2-133 to 2-134; 1999 Op. Att’y Gen. No. 99-028, at 2-186; 1989 Op. Att’y Gen. No. 89-001, at 2-7. In determining whether an entity is “essentially a subdivision of the county or a subordinate department of the county,” the opinions have considered three factors: (1) whether the boundaries of the entity are coextensive with the boundaries of the county; (2) whether the county is responsible for the organization, operation, or supervision of the entity; and (3) whether the entity is funded by or through the county. 1999 Op. Att’y Gen. No. 99-028, at 2-186.

A Board of Directors of a Port Authority is not a County Board for Purposes of R.C. 309.09(A)

Application of these factors leads us to conclude that a board of directors of a port authority is not a county board for purposes of R.C. 309.09(A), regardless of whether the port authority is composed of a single county or multiple political subdivisions. As to the first factor, “it is well established that an entity whose boundaries exceed those of the county cannot be a ‘county board’ for purposes of R.C. 309.09.” 1999 Op. Att’y Gen. No. 99-028, at 2-186. While the port authority’s current geographic boundaries are contained within Erie County, those geographic boundaries may be expanded pursuant to R.C. 4582.26. R.C. 4582.26 permits a municipal corporation, township, county, or other political subdivision that is contiguous to a port authority to join that port authority. When a political subdivision joins a port authority pursuant to R.C. 4582.26, the jurisdiction and territory of the port authority are expanded to include the territory of the newly-joined political subdivision. Accordingly, the port authority’s current geographic boundaries are subject to expansion beyond the county’s territorial limits. Because the board of directors of the port authority may potentially exercise authority over an area exceeding the county’s territorial limits, application of the first factor weighs in favor of the conclusion that a board of directors of a port authority is not a county

board. *See* 2001 Op. Att’y Gen. No. 2001-028, at 2-163 (“[p]revious opinions of the Attorney General have concluded that a county prosecuting attorney does not serve as legal adviser to entities that may be established by political subdivisions on a multi-county basis”).

The second factor is whether the county is responsible for the organization, operation, or supervision of the port authority. In the situation you have presented, only Erie County participated in the creation of the port authority. However, as explained above, other political subdivisions may join a port authority after its establishment. R.C. 4582.26. When a political subdivision joins a port authority pursuant to R.C. 4582.26, it “shall be considered to have participated in the creation of such port authority.” *Id.* Thus, while the port authority was originally created exclusively by Erie County, the composition of the port authority is subject to change. If other political subdivisions join the port authority pursuant to R.C. 4582.26, they will be considered to have participated in its creation.

More importantly, a port authority is not subject to control or supervision by the county. A port authority created pursuant to R.C. 4582.22(A) is a body corporate and politic that is governed by a board of directors. R.C. 4582.21(A); R.C. 4582.22(A); R.C. 4582.27. Members of the board of directors of a port authority created by the exclusive action of a county are appointed by the board of county commissioners. R.C. 4582.27. However, no provision of the Revised Code permits a board of county commissioners to exercise general control or supervision over the board of directors of a port authority. *Cf.* 1994 Op. Att’y Gen. No. 94-020, at 2-92 (“no provision of R.C. 4582.21-59 provides that the board of directors [of a port authority created exclusively by a township] is subject to control or supervision by the board of township trustees in the exercise of [its] statutory powers and duties”). Rather, members of the board of directors of a port authority exercise independent statutory powers by virtue of their appointment to the board of the port authority, which is itself a separate political subdivision. 1990 Op. Att’y Gen. No. 90-060 (syllabus, paragraph 1) (“a port authority created under R.C. 4582.22(A) is a political subdivision for purposes of R.C. Chapter 2744”); *see also* R.C. 125.04(B)(1)(c) (defining “[p]olitical subdivision” to include, *inter alia*, any county or port authority); R.C. 5513.01(C)(1) (same as previous parenthetical); *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cnty. Port Auth.*, 121 Ohio St. 3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, at ¶11 (the Toledo-Lucas County Port Authority “is a political subdivision of the state of Ohio created under R.C. Chapter 4582”). A board of directors of a port authority has authority to independently “[a]dopt bylaws for the regulation of its affairs and the conduct of its business” and to adopt rules “it finds necessary or incidental to the performance of its duties and the execution of its powers.” R.C. 4582.31(A)(1), (14). Further, a board of directors of a port authority has the power, “in its sole discretion[,]” to acquire or construct real or personal property. R.C. 4582.31(A)(15)(b). Because a port authority is not organized, operated, or supervised by a county, application of the second factor of the test for determining whether an entity is a county board supports the conclusion that a board of directors of a port authority is not a county board for purposes of R.C. 309.09(A). *Cf.* 1950 Op. Att’y Gen. No. 1970, p. 446, at 449 (a board of library

trustees of a county library district is not a county board entitled to legal representation by the county prosecutor because the district is a separate body politic and corporate with management and control vested primarily in its board of trustees).

The final factor is whether the port authority is funded by or through the county. A port authority may receive funding from any political subdivision that participated in its creation. R.C. 4582.25(A). Accordingly, a port authority created by the exclusive action of a county may receive funding from the county. A port authority may, however, receive funding from a variety of other sources. It may receive and accept grants or loans from any state or federal agency, R.C. 4582.31(A)(20), collect rentals and other charges for the use or services of any its facilities, R.C. 4582.43, sell its facilities "under such terms as it may determine," R.C. 4582.47(A)(2), and issue revenue bonds, R.C. 4582.48. Pursuant to R.C. 4582.39, the board of directors of a port authority shall prepare the port authority's annual budget, and "[r]ents and charges received by the port authority shall be used for the general expenses of the port authority and to pay interest, amortization, and retirement charges on money borrowed."

Upon voter approval, a port authority may also levy a tax upon property within its jurisdiction. R.C. 4582.40.¹ A port authority may maintain such funds as it considers necessary, R.C. 4582.31(A)(11), and disbursements may be made from those funds only in accordance with rules adopted by the port authority. R.C. 4582.41. Further, all moneys, funds, properties, and assets acquired by a port authority "shall be held by it in trust for the purposes of carrying out [the port authority's] powers and duties . . . and *shall at no time be part of other public funds.*" R.C. 4582.53 (emphasis added). A port authority's treasury is thus separate and distinct from the county treasury. *See* R.C. 4582.41. Application of the final factor used for determining whether an entity is a county board weighs in favor of the conclusion that a board of directors of a port authority is not a county board for purposes of R.C. 309.09(A).

Thus, an examination of all three factors leads us to conclude that a board of directors of a port authority is not a county board, regardless of whether the port authority is composed of a single county or multiple political subdivisions. *Cf.* 1994

¹ We are aware that the resolution creating the Erie County Port Authority restricts the statutory powers of the port authority in certain ways, including eliminating the port authority's power to levy a tax under R.C. 4582.40. *See generally* R.C. 4582.22(B) (at the time a port authority is created pursuant to R.C. 4582.22(A), the subdivision or subdivisions creating such port authority may restrict the powers granted the port authority pursuant to R.C. Chapter 4582 by specifically setting forth such restrictions in the resolution or ordinance creating the port authority). However, the county may, at any time, adopt a resolution granting the port authority the power to levy a tax under R.C. 4582.40. *See* R.C. 4582.22(C) (the subdivision or subdivisions that created a port authority whose powers have been restricted pursuant to R.C. 4582.22(B) may, at any time, adopt a resolution or ordinance granting additional powers to the port authority, so long as the powers granted do not exceed those permitted by R.C. Chapter 4582).

Op. Att’y Gen. No. 94-082, at 2-407 (a regional transit authority is not entitled to legal representation by the county prosecutor, even where the regional transit authority consists of a single county, because single county transit authorities have the same statutory powers that are given to regional transit authorities composed of multiple subdivisions, and “[r]egardless of its size or the number of its participants, a regional transit authority has statutory powers that make it a separate political subdivision, rather than a county board”). That a board of directors of a port authority is not entitled to legal representation by the county prosecuting attorney is further evidenced by the fact that the General Assembly has granted port authorities the power to retain and fix the compensation of attorneys as necessary. R.C. 4582.31(A)(19); *cf.* 1994 Op. Att’y Gen. No. 94-082, at 2-406 n.1 (“[i]t is apparent that the General Assembly was aware that, as created pursuant to statute, a regional transit authority would not be entitled to legal representation by the county prosecuting attorney, for the legislators expressly granted such an authority the power to employ and fix the compensation of attorneys”); 1990 Op. Att’y Gen. No. 90-073, at 2-317 (“[t]his express grant of authority to hire attorneys suggests that a regional water and sewer district is not otherwise entitled to representation by, or the advice of, the county prosecuting attorney”).

Conclusion

It is, therefore, my opinion, and you are hereby advised that a board of directors of a port authority created pursuant to R.C. 4582.22(A) is not a county board for purposes of R.C. 309.09(A) and is not entitled to legal representation by the county prosecuting attorney, regardless of whether the port authority is composed of a single county or multiple political subdivisions.