OPINION NO. 66-119

Syllabus:

The board of county commissioners may not legally contract with a corporation or individual to construct at its own expense a water supply line to supply water to its own allotment, subdivision, or similar enterprise and be reimbursed for a portion of the cost from tap-in charges from future users of such water supply line not in such an allotment, subdivision, or similar enterprise.

To: Richard J. Wessel, Butler County Pros. Atty., Hamilton, Ohio
By: William B. Saxbe, Attorney General, July 12, 1966

Your request for my opinion reads:

"The Board of County Commissioners of Butler County have requested this office to obtain your opinion in a matter involving an agreement between the Commissioners and a private Realty Company concerning the financing of an extension of water services to a particular subdivision within the Madison-Wayne Township Sewer District in this county. A copy of the communication that this office has received from the Board of County Commissioners is enclosed as is a copy of the proposed contract.

"The Realty Company in order to obtain the extension of existing water services to a point approximating their development agree to deposit and to pay the full costs of approximately two miles of water line along which there are no or few potential users, and the Realty Company expects to be reimbursed to the extent of fifty per cent from the tap-in charges which may accrue as the result of further extension of the mains at some time in the future, and that no tap-in charges be made against the users in the Realty Company's subdivision.

"The question for determination is whether or not under the facts set forth, the county is authorized under the laws of the State of Ohio to enter into such an agreement with a private Realty Company."

The copy of the proposed contract which you enclosed provided that the Realty Company would be reimbursed over a twelve year period from tap-in charges along the main up to a total of fifty per cent of the cost plus interest at six per cent per annum. In a further communication, you have informed me that the Madison-Wayne Township Sewer District is not a district such as is contemplated by Chapter 6117: Regional Water and Sewer Districts.

The board of county commissioners has only such powers as are conferred by statute. Elder v. Smith, 103 Ohio St. 369 (1921). I have been unable to find any statutory authority for a board of county commissioners to make a contract with a person to construct a water main at his expense and to reimburse him from tap-in charges from future users.

The case of Rice v. Campbell, 71 Ohio App. 477 (1942), concerned a similar situation. A person owned property along one side of a road. He put in a water main and made a contract with the county board of commissioners to be paid a "proportionate share of the cost of construction" as the county should receive payment from persons tapping-in on the other side of the road. He sued to compel the county engineer to collect payments for proportional cost. In dismissing the petition, the court of appeals stated in its opinion at page 482:

> "Laying aside such considerations /of proper parties/, however, reference to the statutes pertinent to the powers of county commissioners over the water mains and water supply /Sections 6103.02 to 6103.99, Revised Code/ discloses no provision empowering the commissioners to make an agreement such as plaintiff contends was entered into.* * *"
> (Emphasis added)

Although the statute has been amended since the Rice case was decided, the changes made have not concerned powers to make reimbursement agreements similar to the one in question.

In addition, I note that should no one wish to tap-in until the end of the twelfth year, the maximum total reimbursement possible would be almost as great as the original cost to the Realty Company since interest at six per cent per annum is added to one-half of the cost. Certainly, the legislature does not intend for a developer to put in a water service for his own subdivision at virtually no cost to himself.

Section 6103.20, Revised Code, which empowers the board of county commissioners to purchase a water line, reads in part:

> "Whenever a water supply line has been constructed by a corporation, individual, or public institution at its own expense for the purpose of supplying water to any allotment, development, subdivision, or similar enterprise, or to any institution, and it is deemed expedient by the board to acquire said water supply line or any part thereof for the purpose of supplying water to territory outside the allotment, subdivision, development, or

> other such enterprise for which such line was constructed, and such additional territory is within a district, the county sanitary engineer shall examine it and if he finds the same properly designed and constructed, he shall make an appraisal of its present value to the district as a means of supplying water to territory outside the allotment, subdivision, development, or similar enterprise for which it was originally constructed and shall certify such value to the board. In such appraisal no allowance shall be made for the value of such water supply line to the territory for which it was originally constructed."
> (Emphasis added)

The underscored portion of the quoted portion of the statute makes it clear that no part of the cost of the water supply attributable to the Realty Company's subdivision may be paid by the county should it purchase the water supply line.

Section 6103.20, supra, was construed in Opinion No. 3781, Opinions of the Attorney General for 1954, page 223. The second paragraph of the syllabus states:

> "2. Where the commissioners of a county, for the purpose of supplying water to a territory within a sewer district but not within the allotment, subdivision, development or other enterprise for which such line was constructed, have pursuant to the provisions of Section 6103.-20, Revised Code, purchased a water supply line, constructed by a corporation or individual at its own expense, said commissioners may assess the cost of the lines so purchased, on the benefited property in such district, in the same manner as is provided in Section 6103.02 et seq., of the Revised Code, relative to the construction of an original water supply line."

The specific question in Opinion No. 3781, supra, of course, was the method of financing. A statement in that opinion sheds more light on the question before me. At page 228, it was stated:

> "* * *[W]hat you really want to do is to acquire the line, and if and when a property owner having a lot abutting thereon concludes to build, and applies for a water connection, then, and then only he should be assessed, and such 'assessment' would be spread over a period of ten years, and certified to the county auditor. This in my opinion, would not be such an assessment as is contemplated by the law."

Clearly, if the tap-in charges and reimbursement is not authorized by statute and cannot be justified as an assessment, the board of county commissioners do not have the power to enter into the agreement submitted to me.

Accordingly, it is my opinion and you are advised that the board of county commissioners may not legally contract with a cor-

poration or individual to construct at its own expense a water supply line to supply water to its own allotment, subdivision, or similar enterprise and be reimbursed for a portion of the cost from tap-in charges from future users of such water supply line not in such an allotment, subdivision, or similar enterprise.