OPINION NO. 75-090

Syllabus:

A board of county commissioners may not legally enter into an agreement with a subdivision developer-owner of a water system, whereby the county agrees to operate the system for a specified time, collect water service charges, and pay the revenue from such charges, over and above the costs of operation and maintenance (and an additional 20 percent), to the developer-owner. All monies collected by a county from charges for operation of water supply facilities may only be expended for the use and benefit of the subject district and for the related purposes, all of which are specifically identified in R.C. 6103.02.

To: Nicholas A. Carrera, Greene County Pros. Atty., Xenia, Ohio
By: William J. Brown, Attorney General, December 18, 1975

I have before me your request for my opinion concerning an agreement made between the board of county commissioners and a subdivision developer. Specifically, you state that in Greene County a developer will construct a water system for his own subdivision which the county will maintain and operate as a temporary water supply facility. It is clear, reading from the agreement, that the county bills and collects water service charges from the customers in the subdivision who are serviced by the water system. Pursuant to the agreement, the county will first apply the revenues collected from the operation of the water system to cover the costs of the expense of operation and maintenance. The county will then retain 20 percent of the remaining revenue, and turn over any other remaining revenue to the developer, all pursuant to the agreement. During the time period in question, the developer retains ownership of the water system and merely gives the county an easement for the control and maintenance of the system. Further, the county agrees to abandon the water system and return control to the developer-owner upon completion of a township water project. You then inquire:

> "If funds collected from the billing of this water service from the development are returned to the developer-owner of the system, after all costs of operation and maintenance have been paid for, would this be in violation of Section 6103.02 of the Ohio Revised Code, in that, it is not for the use and benefit of such district. In other words, would it be legal for funds so collected to be paid to the owner in accordance with an agreement signed by the owner and the County Commissioners, a copy of which is enclosed with this letter."

It is well-settled in Ohio that county commissioners are vested only with such powers as have been granted to them by statute. As administrative boards, their powers are necessarily limited to such powers as are clearly and expressly granted by statute, and such implied powers as are necessary to carry into effect the powers expressly granted. Elder v. Smith, 103 Ohio St. 369 (1921); State, ex rel. Clarke v. Cook, 103 Ohio St. 465 (1921); 1974 Op. Atty. Gen. No. 74-015. Further, these powers must be strictly construed. See, State, ex rel. Locker v. Menning, 96 Ohio St. 97 (1916); State, ex rel. Noel v. Goebeaux, 110 Ohio St. 287 (1924). Thus, the power for the county commissioners to enter into such agreement, as in question here, must be expressly granted or necessarily implied by statute.

R.C. 6103.02 defines the powers of the county commissioners with regard to the provisions of a water system for its county. It reads, in pertinent part, as follows:

> "For the purpose of preserving and promoting the public health and welfare, and providing fire protection, any board of county commissioners may by resolution acquire, construct, maintain, and operate any water supply

> or water-works system within its county for any sewer district, and may provide for the protection thereof and prevent the pollution and unnecessary waste thereof. By contract with any municipal corporation, or any person, firm, or private corporation furnishing a public water supply within or without its county, the board may provide such supply of water to such district from the water-works of such municipal corporation, person, firm, or private corporation."

While 6103.02 does indeed grant the board of county commissioners power to contract for a water supply system in certain circumstances, specifically for the furnishing of a water supply to the county. However, I am unable to find any statutory authorization for the county commissioners to enter into a contract with a developer who is the owner of a water system operated by the county, which provides that such developer-owner will receive all funds collected by the county from the billing of the water service, after the costs of operation and maintenance and additional monies have been taken from such funds. But C.f., R.C. 307.73.

Moreover, R.C. 6103.02, provides, in pertinent part, as follows:

> "The board shall fix reasonable rates to be charged for water supplied when the source of supply or distributing pipes are owned or operated by the county which shall be at least sufficient to pay for all the cost of operation and maintenance of improvements for which the resolution declaring the necessity thereof shall be passed after July, 1958. . . ." (Emphasis added.)

Thus, it is clear that the county commissioners may make a reasonable charge for water service even though the county may not actually own the water supply or distributing pipes themselves, so long as the source of supply or distributing pipes are operated by the county.

R.C. 6103.02 is then very specific as to the disposition of the moneys collected for such service. It reads in pertinent part:

> "All money collected as rents, tap in charges or for water-works purposes in any district shall be paid to the county treasurer and kept in a separate and distinct fund to the credit of such district. Except as otherwise provided in any resolution authorizing or providing for the security and payment of any bonds outstanding on July 1, 1958 or thereafter issued, or in any indenture or trust agreement securing such bonds, such fund shall be applied first to the conduct, management, and operation of such water supply or water-works system, second to the payment of interest or principal of any loan, indebtedness or liability incurred in connection therewith, or for the creation of a sinking fund for the li-

> quidation of any debt created in connection therewith, and any surplus thereafter remaining may be applied to the enlargement, replacement or extension of such water supply or water-works system: but in no case shall money so collected be expended otherwise than for the use and benefit of such district." (Emphasis added.)

Thus, it is equally clear that all monies collected by the county as a result of its operation of a water system are to be kept in a distinct fund and expended only for such purposes as are specifically enumerated or as would otherwise be for the use and benefit of the district.

The question, then, narrows to whether the disposition of the monies in the instant situation constitutes an expenditure "for the use and benefit of such district."

From your request, from the language in the contract and from telephone conversations between this office and yours no facts have been shown to support payment to a developer-owner of a water system of all monies collected by the county, after the cost of maintenance and operation of the system (and an additional 20 percent) has been deducted from such fund, as an expenditure which is "for the use and benefit of such district." Rather, such payments are merely for the benefit and gain of the developer-owner.

In 1966 Op. Atty. Gen. No. 66-119, my predecessor had occasion to discuss a contract between the board of county commissioners and an individual realty company, whereby the individual company was to construct at its own expense a water supply line to furnish water to its own subdivision, and then be reimbursed for a portion of that cost from tap-in charges. In concluding that county commissioners would not legally enter into such a contract, it was stated that, "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."

The instant situation is analogous. Payment by the county to the developer of all the revenues from the water service bills, over and above the costs of operation and maintenance (and an additional 20 percent), operates to allow a developer to install a water system for his own subdivision with part, if not total, cost reimbursement. In light of the foregoing, I must conclude that the county commissioners may not legally enter into such agreement.

In specific answer to your question, it is my opinion and you are so advised that a board of county commissioners may not legally enter into an agreement with a subdivision developer-owner of a water system, whereby the county agrees to operate the system for a specified time, collect water service charges, and pay the revenue from such charges, over and above the costs of operation and maintenance (and an additional 20 percent), to the developer-owner. All monies collected by a county from charges for operation of water supply facilities may only be expended for the use and benefit of the subject district and for the related purposes, all of which are specifically identified in R.C. 6103.02.