

**OPINION NO. 85-016****Syllabus:**

A board of county commissioners may lay out, establish, and maintain county sewer districts pursuant to R.C. Chapter 6117 for the purpose of planning, designing, constructing, financing, operating, and maintaining improvements to sewage disposal facilities which are contained entirely upon the property of individual landowners, provided that such facilities are necessary to care for and conduct sewage from any part of such a district to a proper outlet, so as to properly treat or dispose of the sewage, and provided that the ownership of the facilities and the responsibility for maintenance of the facilities rests with the county.

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**To: Fred W. Crow, III, Meigs County Prosecuting Attorney, Pomeroy, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, May 14, 1985**

I have before me your opinion request, which reads, in relevant part, as follows:

Meigs County has received a grant from U.S. EPA to pay for a portion of the costs associated with the design and construction of improvements to approximately 90 individual sewage disposal systems in an unincorporated area of the County known as Tupper Plains. The project does not consist of conventional sanitary sewers but, rather, involves upgrading or replacement of malfunctioning septic tanks, home aerators, leach fields and discharge pipes. It is the first project of this type to be funded in Ohio under EPA's Construction Grants Program.

The Board of Commissioners currently is considering options with respect to constructing, financing, operating, and maintaining the improvements. One of the options under consideration is establishment of a Tupper Plains Sewer District pursuant to Chapter 6117 of the Ohio Revised Code, levying special assessments against benefited properties, issuing notes in anticipation of the sale of special assessment bonds, and selling special assessment bonds.

We are hereby respectfully requesting a legal opinion from your office with respect to the following question:

"May boards of county commissioners lay out, establish, and maintain county sewer districts pursuant to the provisions contained in Chapter 6117 of the Revised Code for the purpose of planning, designing, constructing, financing, operating, and maintaining improvements to individual sewage disposal systems?"

Your question has arisen from the fact that the functions of sewer districts established under R.C. Chapter 6117 have traditionally been directed toward conventional sewer systems, consisting of sewer lines and centralized sewage treatment facilities. See, e.g., 1955 Op. Att'y Gen. No. 6059, p. 677. I do not, however, find that the language of R.C. Chapter 6117 requires that the functions of sewer districts be so restricted.

R.C. 6117.01 states, in part:

For the purpose of preserving and promoting the public health and welfare, boards of county commissioners may by resolution lay out, establish, and maintain one or more sewer districts within their respective counties, outside of municipal corporations. . . . Any board may acquire, construct, maintain, and operate such main, branch, intercepting, or local sewer, or ditch, channel, or interceptor for the temporary retention of storm water, within any such district, and such outlet sewer and sewage treatment or disposal works within or without such district, as are necessary to care for and conduct the sewage or surface water from any part of such district to a proper outlet, so as to properly treat or dispose of same. . . . The board may adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and of sewers and sewer improvements within municipal corporations in its county wherever such sewers are constructed or operated by such board or discharge into sewers or sewage treatment plants constructed or operated by such board, including the establishment and use of connections. Such rules shall not be inconsistent with the laws of this state or the rules of the director of environmental protection. No sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm, or corporation until the plans and specifications for the same have been approved by the board, and any such construction shall be done under the supervision of the county sanitary engineer. Any person, firm, or corporation proposing or constructing such improvements shall pay to the county all expenses incurred by the board in connection

therewith. The county sanitary engineer may enter upon any public or private property for the purpose of making surveys or examinations necessary for the laying out of sewer districts or designing sewers or treatment works, and may make such surveys and examinations.

Thus, a board of county commissioners which has established a sewer district may "acquire, construct, maintain, and operate...such outlet sewer and sewage treatment or disposal works within or without such district, as are necessary to care for and conduct the sewage...from any part of such district to a proper outlet, so as to properly treat or dispose of same." While this language has commonly been applied to conventional sewer systems, it is not, by its terms, so limited. Rather, it encompasses all sewage treatment or disposal works which are necessary to care for and conduct sewage to a proper outlet, so as to properly treat or dispose of such sewage. The terms "outlet sewer and sewage treatment or disposal works" and "proper outlet" are not defined by statute for purposes of R.C. Chapter 6117. Definitions appearing elsewhere in the Revised Code indicate, however, that these are general and inclusive terms. See, e.g., R.C. 6111.01<sup>1</sup>; R.C. 6112.01; R.C. 6119.01; R.C. 6121.01. See also R.C. 6117.51 (indicating that a cesspool, ditch, private sewer, privy, or septic tank is considered to be an "outlet"). Thus, if it is determined that, in a particular instance, facilities of the sort which you have described—i.e., septic tanks, home aerators, leach fields, or discharge pipes—constitute facilities which are necessary to provide for the proper treatment or disposal of sewage, such facilities may be acquired, constructed, maintained, and operated pursuant to R.C. 6117.01 and related provisions. The fact that certain of the facilities may be contained entirely upon the property of an individual landowner does not, in my judgment, remove them from the scope of R.C. Chapter 6117, if they are facilities which carry out the purposes of that chapter. See generally Limpert v. Day, 7 Ohio Misc. 231, 218 N.E.2d 209 (P. Ct. Cuyahoga County 1966) (recognizing that proper sewage disposal may benefit the health and welfare of numerous persons far away from the immediate site of a sewage problem), modified sub nom. Graham v. Day, 12 Ohio App. 2d 9, 230 N.E.2d 453 (Cuyahoga County 1967). I conclude, therefore, that a board of county commissioners which has established a sewer district under R.C. Chapter 6117 may acquire, construct, maintain, and operate facilities which are contained entirely upon the property of

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<sup>1</sup> R.C. 6111.01 states, in part:

As used in Chapter 6111. of the Revised Code:

.....  
 (B) "Sewage" means any liquid waste containing animal or vegetable matter in suspension or solution, and may include household wastes as commonly discharged from residences and from commercial, institutional, or similar facilities.

.....  
 (E) "Sewerage system" means pipelines or conduits, pumping stations, and force mains, and all other constructions, devices, appurtenances, and facilities used for collecting or conducting water-borne sewage, industrial waste, or other wastes to a point of disposal or treatment, but does not include plumbing fixtures, building drains and subdrains, building sewers, and building storm sewers.

(F) "Treatment works" means any plant, disposal field, lagoon, dam, pumping station, building sewer connected directly to treatment works, incinerator, or other works used for the purpose of treating, stabilizing, or holding sewage, industrial waste, or other wastes, except as otherwise defined.

(G) "Disposal system" means a system for disposing of sewage, industrial waste, or other wastes, and includes sewerage systems and treatment works. (Emphasis added.)

an individual landowner if such facilities are necessary to care for and conduct sewage from any part of such district to a proper outlet, so as to properly treat or dispose of the sewage.

It is, however, my understanding that the arrangement with which you are concerned would not provide for the county commissioners to construct the facilities in question as public improvements, to be owned and maintained by the county pursuant to R.C. Chapter 6117, but, rather, that it would provide for the facilities, although constructed by the county pursuant to R.C. Chapter 6117, to be owned and maintained by the individual owners of the land upon which the various facilities are located. See 1955 Op. Att'y Gen. No. 5419, p. 285 at 289 ("both the right and obligation of maintenance goes with the ownership of the sewer lines"). I do not believe that R.C. Chapter 6117 authorizes this sort of an arrangement.

R.C. 6117.06 sets forth the procedure which is to be followed, after a sewer district is established, to have a general plan of sewerage and sewage disposal prepared, and then to have detailed plans, specifications, and estimates of cost prepared for particular improvements. Pursuant to R.C. 6117.06, the board of county commissioners may not proceed to construct an improvement for a sewer district unless it has determined that such improvement "is necessary for the preservation and promotion of public health and welfare." See R.C. 6117.19. The resolution which declares the necessity of the improvement must state "what part of the cost will be paid by the county at large and what part will be specially assessed against the benefited property within the district."

The statutory scheme seems to contemplate that any improvement constructed by a board of county commissioners for a sewer district under R.C. Chapter 6117 is to belong to the county, rather than to any landowners whom it might benefit, and that the responsibility for maintenance is to rest with the county, rather than with any other persons or entity. See R.C. 6117.01 ("board [of county commissioners] may acquire, construct, maintain, and operate" facilities which serve a sewer district); R.C. 6117.02 (moneys collected as rents or connection charges shall, except as otherwise provided, "be used first for the payment of the cost of the management, maintenance, and operation of the sewers of the district and sewerage treatment or disposal works used by the district and second for the payment of interest or principal of any outstanding debt. . . or for the creation of a sinking fund"); R.C. 6117.05; R.C. 6117.25; R.C. 6117.251 ("[a]fter the establishment of any sewer district the board of county commissioners may determine by resolution that it is necessary to provide sewer and sewage disposal improvements and to maintain and operate the same"); R.C. 6117.29; R.C. 6117.34; R.C. 6117.39 (authorizing the county commissioners to purchase or appropriate real estate, a right of way, or an easement for the construction, maintenance, or operation of any improvement authorized by R.C. Chapter 6117, or to purchase or appropriate the right to construct, maintain, and operate any such improvement on property inside or outside of the district). See generally 1955 Op. No. 5419, at 289 ("it would appear that if the owners of the premises located within the sewer district desire to have the service of disposal of their sewage they must accomplish it by a contract whereby they convey their installation to the county on terms agreed upon"). R.C. 6117.02 expressly recognizes the power of the board of county commissioners "to levy special assessments upon benefited properties for operation and maintenance whenever the rents and other funds available are not sufficient to pay all the cost thereof." See R.C. 6117.32 (authorizing the board "at such intervals as it deems expedient," to make assessments and levy taxes "to pay the cost of the maintenance and operation of any such improvement, including disposal of sewage, after completion thereof, and for the purpose of keeping clean and in repair ditches, drains and watercourses serving such improvements"). But see R.C. 929.03 (limiting the authority of a county to levy special assessments on real property which is within an agricultural district established pursuant to R.C. 929.02). See

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<sup>2</sup> You have not asked about any state or local approval requirements that might apply to the proposed project, and I am not considering such requirements.

generally Schiff v. City of Columbus, 9 Ohio St. 2d 31, 38, 223 N.E.2d 54, 59 (1967) ("[t]he enhancement in the value of property that results from a public improvement is the special benefit that will support an assessment against that property to pay for the improvement").

It is true that certain provisions of R.C. Chapter 6117 recognize that some sewage facilities which are used within a sewer district may be owned by an entity other than the county. See, e.g., R.C. 6117.01 ("[t]he board [of county commissioners] may adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and . . . within municipal corporations . . . wherever such sewers are constructed or operated by such board"); R.C. 6117.02 (discussing ratification of rates to be charged "[w]hen the sewerage treatment or disposal works is owned by a municipal corporation or any person, firm, or private corporation"). It is, however, my judgment that these provisions merely reflect the fact that it is possible for an individual or a private or public entity other than a county to construct sewage facilities. See, e.g., R.C. 307.73; R.C. 6111.44; R.C. 6117.38 (authorizing the board of county commissioners to acquire sewers which "have been constructed by a corporation, individual, or public institution at its own cost for the purpose of providing sewerage for any allotment, development, subdivision, or similar enterprise, or for any institution"); R.C. Chapter 6112 (private sewer systems); 3 Ohio Admin. Code Chapter 3701-29 (household sewage disposal systems); 4 Ohio Admin. Code Chapter 3745-31 (permits to install new sources of pollution); 1955 Op. No. 5419. See generally Security Sewage Equipment Co. v. Beebe, 5 Ohio Misc. 178, 183, 214 N.E.2d 853, 858 (C.P. Lake County 1965) ("the authority of the county to make and enforce regulations and to supervise construction of . . . plants [within the county outside of municipal corporations] is limited to those instances when the plant is to be operated by the county as a part of the sewer complex within the sewer district"). I find nothing in R.C. Chapter 6117 which suggests that a board of county commissioners may, pursuant to that chapter, construct facilities for ownership by an entity other than the county. See generally 1984 Op. Att'y Gen. No. 84-085 (a sewer district

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3 Certain provisions of R.C. Chapter 6117 provide for cooperation between a county and a municipality with respect to the construction of sewage facilities. See R.C. 6117.03, 6117.04, 6117.40, 6117.41. It is, however, my understanding that these provisions are not relevant to the situation with which you are presented, and I am not considering them herein.

It is a general rule that the power to hold property includes the power to dispose of such property, as appropriate. See Reynolds' Heirs v. Stark County Commissioners, 5 Ohio 204 (1831). It is, therefore, not impossible that the county may, at some time, convey to individuals sewage facilities which it has constructed under R.C. Chapter 6117. It is, however, clear that a county may not do indirectly that which it may not do directly. See generally State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972). Thus, a county may not use the mechanism of R.C. Chapter 6117 to construct facilities as public improvements for the purpose and with the intent of conveying such facilities to individual landowners. See generally Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N.E. 28 (1898); Eighth & Walnut Corp. v. Public Library, 57 Ohio App. 2d 137, 385 N.E.2d 1324 (Hamilton County 1977). Rather, it appears that, absent specific statutory authority to the contrary, the county may not convey to others sewage facilities which it constructs under R.C. Chapter 6117 until such time as the facilities are no longer needed for public use. See, e.g., R.C. 307.09, 307.10, 307.12. Cf. Ohio Const. art. VIII, §§6, 13; R.C. 307.85.

established under R.C. Chapter 6117 is not an entity or district independent of a county). Cf. Ohio Const. art. VIII, §6, 13.<sup>4</sup> This conclusion is bolstered by the fact that, even when consenting landowners petition to have improvements constructed under R.C. Chapter 6117, the statutory scheme indicates that the county will have responsibility for maintaining and operating such improvements, as well as constructing them. See R.C. 6117.28.

It is, therefore, my opinion, and you are hereby advised, that a board of county commissioners may lay out, establish, and maintain county sewer districts pursuant to R.C. Chapter 6117 for the purpose of planning, designing, constructing, financing, operating, and maintaining improvements to sewage disposal facilities which are contained entirely upon the property of individual landowners, provided that such facilities are necessary to care for and conduct sewage from any part of such a district to a proper outlet, so as to properly treat or dispose of the sewage, and provided that the ownership of the facilities and the responsibility for maintenance of the facilities rests with the county.

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To read R.C. Chapter 6117 as permitting a county to construct sewage facilities for ownership by an individual might, in fact, raise questions concerning the constitutionality of the chapter under Ohio Const. art. VIII, §6, which prohibits a county from raising money for, or loaning its credit to, or in aid of, a joint stock company, corporation, or association. You have indicated that costs of the facilities will be paid by federal funds and by assessments for benefits conferred; thus, it might be argued that art. VIII, §6 does not come into play because the county contributes none of its funds toward the project. See generally 1982 Op. Att'y Gen. No. 82-005. Nonetheless, the fact that the county plans to issue notes in anticipation of the sale of special assessment bonds and to sell special assessment bonds indicates that, if ownership of the facilities were vested in individuals, the credit of the county would be loaned to, or in aid of, such individuals. See, e.g., R.C. 6117.061 (deferment of collection of assessments); R.C. 6117.062; R.C. 6117.07; R.C. 6117.25; R.C. 6117.251; R.C. 6117.28-.33. See generally State ex rel. Saxbe v. Brand, 176 Ohio St. 44, 197 N.E.2d 328 (1964). Whether Ohio Const. art. VIII, §6 prohibits the lending of credit to an individual where a public purpose is served has not been firmly established. See 1977 Op. Att'y Gen. No. 77-049 (recognizing an exception to the prohibitions of Ohio Const. art. VIII, §6, where the funds in question are at all times exclusively federal funds). See generally Auditor of Lucas County v. State ex rel. Boyles, 75 Ohio St. 114 (1906). An activity which is prohibited under Ohio Const. art. VIII, §6 may, however, be carried out under art. VIII, §13, if it is for industry, commerce, distribution, and research, and if it meets the other criteria set forth therein. See State ex rel. Ryan v. City Council of Gahanna, 9 Ohio St. 3d 126, 459 N.E.2d 208 (1984); State ex rel. Brown v. Beard, 48 Ohio St. 2d 290, 358 N.E.2d 569 (1976); Stark County v. Ferguson, 2 Ohio App. 3d 72, 440 N.E.2d 816 (Stark County 1981); State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (Franklin County 1974); 1984 Op. Att'y Gen. No. 84-032; 1981 Op. Att'y Gen. No. 81-095. I am not in this opinion considering whether there may be procedures other than those set forth in R.C. Chapter 6117 by which the board of county commissioners may accomplish its goals. See generally R.C. 307.85(A) (authorizing a board of county commissioners in connection with the establishment of any federal program, to take any action and adopt any procedures which are not in conflict with the statutory or constitutional law of Ohio).