

**OPINION NO. 2006-009****Syllabus:**

Administrative fees retained by the county auditor and deposited into the county general fund pursuant to R.C. 319.63(C) are restricted to use by the county recorder for the administration of the housing trust fund fee.

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**To: C. David Warren, Athens County Prosecuting Attorney, Athens, Ohio**

**By: Jim Petro, Attorney General, March 13, 2006**

We have received your request for an opinion regarding the disposition of

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administrative fees retained by the county auditor pursuant to R.C. 319.63. You have asked for advice with respect to a disagreement that has arisen within your county, as follows:

The Recorder believes that the funds are to be placed in the general fund for use by the Recorder's office and the Board believes that the funds are to be placed in the general fund to be used the same as other funds placed in the general fund. Therefore we are requesting a clarification from your office as to this matter.

Your question, thus, is whether administrative fees retained by the county auditor and deposited in the county general fund pursuant to R.C. 319.63(C) are for the exclusive use of the county recorder. For the reasons discussed below, we conclude that administrative fees retained by the county auditor and deposited into the county general fund pursuant to R.C. 319.63(C) are restricted to use by the county recorder for the administration of the housing trust fund fee.

#### **History of R.C. 319.63**

R.C. 319.63 was initially enacted in 2003 as part of legislation that established forty-five new fees for county recorders to collect to fund the Low- and Moderate-Income Housing Trust Fund. *See* Am. Sub. H.B. 95, 125th Gen. A. (2003) (eff. June 26, 2003, with some provisions eff. other dates) (sec. 200, uncodified; R.C. 319.63, eff. Aug. 1, 2003); Ohio Legisl. Serv. Comm'n, Final Analysis at 129, 125th Gen. A., Am. Sub. H.B. 95 (As Passed by the General Assembly). The Low- and Moderate-Income Housing Trust Fund is created and administered pursuant to R.C. Chapter 174. *See, e.g.*, R.C. 174.02. It provides a source of revenue for various programs of the Department of Development and the Ohio Housing Finance Agency. *See, e.g.*, R.C. 122.63(D); R.C. 174.02(A); R.C. 174.03; R.C. 175.02.

The fees established by the 2003 legislation are called "housing trust fund fees" and are charged for various services that county recorders perform, such as filing maps, zoning resolutions, deeds, mortgages, and liens, and photocopying documents and records. Each housing trust fund fee is equal to the amount charged as a service fee (referred to as the base fee), so that the effect of the legislation enacting the housing trust fund fees was to double the amount of the various fees charged by the county recorder. R.C. 317.36(A); *see* R.C. 317.32; R.C. 1563.42; R.C. 1702.59; R.C. 2505.13; R.C. 4141.23; R.C. 4509.60; R.C. 5111.022; R.C. 5310.15; R.C. 5719.07; R.C. 5727.56; R.C. 5733.18; R.C. 5733.22; R.C. 6101.09; R.C. 6115.09; Ohio Legisl. Serv. Comm'n, Final Analysis at 129, 125th Gen. A., Am. Sub. H.B. 95 (As Passed by the General Assembly).

The county recorder is required to collect the housing trust fund fees as prescribed by statute and to certify them into the county treasury as housing trust fund fees to be paid to the Treasurer of State. R.C. 317.36; *see also* R.C. 325.31(A) (in general, the county recorder, auditor, treasurer, and certain other county officers are required to pay collected fees into the county treasury, to the credit of the gen-

eral county fund).<sup>1</sup> During the first thirty days of each calendar quarter, the county auditor “shall pay” to the Treasurer of State the amounts that the county recorder collected as housing trust fund fees during the previous calendar quarter. R.C. 319.63(A). If payment is made to the Treasurer of State within that thirty-day period, “the county auditor may retain an administrative fee of one percent of the amount of the trust fund fees collected during the previous calendar quarter.” R.C. 319.63(A). The county auditor is directed by statute to deposit that administrative fee “into the county general fund for the county recorder to use in administering the trust fund fee.” R.C. 319.63(C). The Treasurer of State is required to deposit into the Low- and Moderate-Income Housing Trust Fund the first fifty million dollars of housing trust fund fees received, and to deposit any additional amounts into the state general revenue fund. R.C. 319.63(B).

### Construction of R.C. 319.63

Your question concerns the proper disposition of administrative fees that, in accordance with R.C. 319.63, are retained by the county auditor from housing trust fund fees. With regard to amounts retained as administrative fees, the Revised Code states:

(C) The county auditor *shall deposit* the administrative fee that the auditor is permitted to retain pursuant to division (A) of this section *into the county general fund for the county recorder to use in administering the trust fund fee.*

R.C. 319.63 (emphasis added).

As your request indicates, R.C. 319.63(C) requires the county auditor to deposit the administrative fees into the county general fund. *See* R.C. 325.31; R.C. 5705.09 (each subdivision shall establish various funds, including the general fund). In addition, R.C. 319.63(C) specifies that the administrative fee moneys shall be deposited into the county general fund “for the county recorder to use in administering the trust fund fee.” R.C. 319.63(C).

R.C. 319.63(C) thus states clearly that the administrative fees retained by the county auditor from the housing trust fund fees “shall” be deposited by the county auditor into the county general fund “for the county recorder to use in

<sup>1</sup> R.C. 325.31(A) states:

(A) On the first business day of each month, and at the end of the officer’s term of office, each officer named in section 325.27 of the Revised Code [including the county recorder and the county auditor] shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances, and perquisites collected by the officer’s office during the preceding month or part thereof for official services, except the fees allowed the county auditor by division (B) of section 319.54, which shall be paid into the county treasury to the credit of the real estate assessment fund hereby created.

administering the trust fund fee.” Use of the word “shall” indicates that the statutory directive is mandatory. *See Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) (“when it is used in a statute, the word ‘shall’ denotes that compliance with the commands of that statute is mandatory” unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage); *Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1); *State ex rel. Justice v. Thomas*, 35 Ohio App. 250, 258, 172 N.E. 397 (Marion County 1930) (the county auditor, as a ministerial officer, is strictly limited by statutory requirements); 2004 Op. Att’y Gen. No. 2004-022 at 2-190.

The plain language of the statute specifies that administrative fee money is to be used by the county recorder in administering the trust fund fee, and a straightforward reading of the statute compels the conclusion that this language restricts the purpose for which the money may be used. *See, e.g.*, R.C. 1.47 (“[i]n enacting a statute, it is presumed that: ... [t]he entire statute is intended to be effective”); *Provident Bank v. Wood*, 36 Ohio St. 2d 101, 105-06, 304 N.E.2d 378 (1973) (“[i]t is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly” (citations omitted)). The administrative fee is thus limited to the purpose prescribed by statute – that is, use by the county recorder in administering the trust fund fee.

The conclusion that administrative fees may be used only by the county recorder and only for the purpose of administering the housing trust fund fee is consistent with the name of the fee. It is designated as the “administrative fee,” and it is reasonable to conclude that it should be used for the costs of administration of the housing trust fund fee, from which it is derived. R.C. 319.63; *see State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004-Ohio-5718, 817 N.E.2d 76, at ¶27 (a basic principle of statutory construction requires the presumption that, in enacting a statute, the legislature says what it means and means what it says).

The conclusion that the statutory language restricts the use of administrative fee money, even though the money is deposited into the general fund, is consistent with the manner in which the general fund is administered. The term “general fund” suggests that moneys in the fund may be used for general expenses of the county, and many of the moneys in the county general fund are available for those purposes. *See, e.g.*, R.C. 5705.05 (general levy for current expenses); R.C. 5705.10 (general fund); *see also, e.g.*, R.C. 325.14(A) and R.C. 325.31 (in general, fees collected by certain county officers are paid into the county treasury to the credit of the general county fund); 2000 Op. Att’y Gen. No. 2000-044 at 2-266; 1988 Op. Att’y Gen. No. 88-101 at 2-497 to 2-498 n.1; 1986 Op. Att’y Gen. No. 86-081 at 2-458 to 2-459; 1981 Op. Att’y Gen. No. 81-035.

In some instances, however, moneys in the county general fund are restricted to certain purposes. *See, e.g.*, R.C. 311.171(F) (“[a]ll fees paid to a sheriff under this section shall be paid into the county treasury to the credit of the county

general fund and shall be allocated to the sheriff to be used to defray the costs of registering sex offenders and child-victim offenders and providing community notification under Chapter 2950. of the Revised Code”); R.C. 2929.28(C)(1) (reimbursements paid by an offender pursuant to court order under R.C. 2929.28 are paid into the county’s general fund, and the county “shall use the amounts deposited in the fund” to pay the costs incurred pursuant to certain sanctions or in operating a facility to confine certain offenders); 2000 Op. Att’y Gen. No. 2000-039 at 2-239 to 2-240.<sup>2</sup>

It has been recognized that, when particular moneys in the county general fund are collected for specified purposes, their expenditure is restricted to those purposes. *See, e.g.*, 2000 Op. Att’y Gen. No. 2000-039 at 2-240 (“[i]t is a long-established principle that where the expenditure of public moneys is limited by statute, the moneys may only be spent in accordance with the statutory provisions”). For example, R.C. 5301.691(B)(1) authorizes the legislative authority of a municipal corporation, board of commissioners of a county, or board of trustees of a township to purchase agricultural easements with certain moneys, including “moneys in the political subdivision’s general fund not required by law or charter to be used for other specified purposes.” *See also, e.g.*, 1999 Op. Att’y Gen. No. 99-022 at 2-148 (“revenues from the sales and use taxes have been placed in the [county] general fund and earmarked, at least in part, for the operation of the jail”); 1981 Op. Att’y Gen. No. 81-035 at 2-135 (discussing various moneys in the county general fund that are restricted to particular uses and stating that, “where the use of money paid into the general fund is not restricted to a specific use, the use is limited only to a proper county purpose”).<sup>3</sup> *See generally* 2 Ohio Admin. Code 117-5-01 (county accounting); 2004 Op. Att’y Gen. No. 2004-017 at 2-141 (“it is appropriate for funds

<sup>2</sup> The Revised Code provides for certain moneys that are restricted to particular purposes to be placed in special funds for those purposes. *See* R.C. 5705.09 (each subdivision shall establish various funds, including the general fund and including also “[a] special fund for each class of revenues derived from a source other than the general property tax which the law requires to be used for a particular purpose”); R.C. 5705.10 (“[a]ll revenue derived ... from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund”; except as provided in R.C. 3315.01, “all revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose”); R.C. 5705.12 (approval of additional special funds). To the extent of any conflict, the specific language of R.C. 319.63(C) stating that the administrative fees are to be deposited into the county general fund and used as directed prevails over more general statutory provisions. *See* R.C. 1.51.

<sup>3</sup> The ability of a public body to earmark moneys for particular uses was discussed in 2004 Op. Att’y Gen. No. 2004-017, at 2-139 n.3, as follows:

[O]ur research has disclosed instances in which moneys are identified by their source for indefinite periods of time to earmark the moneys for particular uses. *See, e.g.*, 1981 Op. Att’y Gen. No. 81-

and accounts to be structured to enable public officials to expend public moneys in accordance with the provisions of law governing the expenditure of those moneys’); 1997 Op. Att’y Gen. No. 97-017 at 2-260 n.5. Therefore, in accordance with its plain language, R.C. 319.63(C) must be construed as imposing the requirement that administrative fee moneys be deposited into the county general fund and used for the restricted purpose specified by statute.

### Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that administrative fees retained by the county auditor and deposited into the county general fund pursuant to R.C. 319.63(C) are restricted to use by the county recorder for the administration of the housing trust fund fee.

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022 (tax revenue may remain earmarked for a particular use for an indefinite period of time, and may not be diverted to any other use). *See generally* 1999 Op. Att’y Gen. No. 99-002, at 2-14 (amounts within a fund may be earmarked for particular purposes); 1983 Op. Att’y Gen. No. 83-055, at 2-224 (“even though interest derived from a gift to a county children services board or department of welfare may be credited to the county general fund, if that interest has lawfully been made subject to restricted use, it may not be expended in violation of such restriction”).

*See also, e.g.*, R.C. 503.49 (township trustees shall deposit fees from massage establishment permits and masseur and masseuse licenses “in the township general fund and first use the fees for the cost of administering and enforcing” regulations dealing with that subject); R.C. 503.58 (same, adult cabaret permits). R.C. 2929.28(C)(2) (reimbursements paid by an offender pursuant to court order under R.C. 2929.28 are paid into the municipality’s general fund, and the municipality “shall use the amounts deposited in the fund” to pay the costs incurred pursuant to certain sanctions or in operating a facility to confine certain offenders).