

OPINION NO. 86-087

Syllabus:

1. If the conditions set forth in R.C. 6117.51 are satisfied, a board of county commissioners may, pursuant to that section, order an occupant of

premises within a sewer district in the county to connect the premises to the sewer.

2. Local officials may enforce the provisions of 4 Ohio Admin. Code 3701-29-02(L) and (M), which require the connection of premises to an accessible sanitary sewerage system, as authorized by R.C. 3701.56.

To: Stanley E. Flegm, Crawford County Prosecuting Attorney, Bucyrus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 19, 1986

You have requested legal advice on the question whether a county can compel residents of a "sanitary sewer sub-district" to "tap in" to the sewer system. I have been informed that your question concerns a situation in which houses in a subdivision were constructed with septic systems. A sewer district was later established and a sewer was constructed. Most of the homeowners have tapped into the sewer, but a few have been reluctant to do so. I understand the term "sanitary sewer sub-district" to refer to a sewer district established under R.C. 6117.01, and I further understand that the district consists of land outside of municipal corporations. See generally R.C. 6117.03. I assume that there is no connection ban in effect under 4 Ohio Admin. Code Chapter 3745-11 that might interfere with the proposed connection to the sewer.

R.C. 6117.01 authorizes boards of county commissioners, by resolution, to "lay out, establish, and maintain one or more sewer districts within their respective counties, outside of municipal corporations." The board of county commissioners may then:

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.

R.C. 6117.01. The board is further authorized to "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...including the establishment and use of connections," provided that the rules shall not be inconsistent with the laws of the State or the rules of the Director of Environmental Protection. R.C. 6117.01. Other provisions in R.C. Chapter 6117 authorize the board of county commissioners to take action to provide the sewer district with appropriate services and facilities. See, e.g., R.C. 6117.06 (the board of county commissioners shall have the county sanitary engineer prepare a general plan of sewerage and sewage disposal for a sewer district, and then detailed plans and estimates of costs of an improvement, together with tentative assessments of property owners; a hearing shall be held); R.C. 6117.251 ("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 within the sewer district...and that such sewer and sewage disposal improvements...shall be constructed"); R.C. 6117.27 ("[a]fter

the issuance and sale of bonds or certificates of indebtedness...the board of county commissioners shall enter into a written contract" for construction of the improvements); R.C. 6117.38 (the board of county commissioners may purchase sewers to serve territory within a sewer district). Opportunities are provided for landowners to challenge such action. See, e.g., R.C. 6117.09 (providing for appeal to the probate court by an owner of property to be assessed or taxed for an improvement); R.C. 6117.11 (providing for appeal when the petition for an improvement is dismissed); R.C. 6117.19-.21.

R.C. 6117.51 sets forth specific circumstances in which a board of county commissioners may require an occupant of premises located in a sewer district to connect the premises to the sewer. R.C. 6117.51 states:

If the board of health of the health district within which a new public sewer construction project is proposed or located passes a resolution stating that the reason for such project is to reduce or eliminate an existing health problem or a hazard of water pollution or, if the project is within a special sanitary district designated under section 1541.21 of the Revised Code, if the director of environmental protection certifies that the reason for such project is to reduce or eliminate an existing health problem or a hazard of water pollution, the board of county commissioners of such county may, by resolution, order the owner of any premises located in a sewer district in the county, his agent, lessee, or tenant, or any other occupant of the premises, to connect the premises to the sewer for the purpose of discharging sewage or other waste that the board determines is originating on the premises, to make use of the connection, and to cease the discharge of the sewage or other waste into a cesspool, ditch, private sewer, privy, septic tank, or other outlet if the board finds that the sewer is available for use and is accessible to the premises following a determination and certification to the board by a registered professional engineer designated by it as to the availability and accessibility of the sewer. This section does not apply to:

(A) Any discharge authorized by a permit issued under section 6111.03 of the Revised Code;

(B) Wastes resulting from the keeping of animals;

(C) Any premises in which the foundation wall of the structure from which sewage or other waste originates is more than two hundred feet from the nearest boundary of the right of way within which the sewer is located.

The board shall not direct an order under this section to a resident tenant unless it determines that the terms of the tenancy are such that the owner lacks sufficient rights of access to permit the owner to comply with the terms of the order.

An owner, agent, lessee, tenant, or occupant shall comply with the order of the board within ninety days after the completion of service of the order upon him as provided in this section. The board may, upon written application filed prior to the expiration of the ninety-day period, waive compliance with any order either temporarily or permanently and conditionally or unconditionally.

In its resolution, the board shall direct its

clerk, or his designee, to serve its order upon the owner, agent, lessee, tenant, or occupant. Service of the order shall be made personally, by leaving the order at the usual place of residence with some person of suitable age and discretion then residing therein, or by certified mail addressed to the owner, agent, lessee, tenant, or occupant at his last known address or to the address to which tax bills are sent. If it appears by the return of service or the return of the order forwarded by certified mail that the owner, agent, lessee, tenant, or occupant cannot be found, he shall be served by publication of the order once in a newspaper of general circulation within the county, or if he refuses service, he shall be served by ordinary mail addressed to him at his last known address or to the address to which tax bills are sent. The return of the person serving the order or a certified copy of the return, or a returned receipt for the order forwarded by certified mail accepted by the addressee or anyone purporting to act for him, is prima-facie evidence of the service of the order under this section. The return of the person attempting to serve the order, or the return to the sender of the order forwarded by certified mail with an indication of the return of the refusal of the addressee to accept delivery, is prima-facie evidence of the refusal of service.

No owner, agent, lessee, tenant, or occupant shall violate an order issued under this section. Upon request of the board, the prosecuting attorney shall prosecute in a court of competent jurisdiction any owner, agent, lessee, tenant, or occupant who violates an order issued under this section. Each day that a violation continues after conviction for the violation of an order issued under this section and the final determination thereof is a separate offense. The court may, for good cause shown, grant a reasonable additional period of time for compliance after conviction.

Any owner, agent, lessee, tenant, or occupant violating an order issued under this section may also be enjoined from continuing in violation. Upon request of the board, the prosecuting attorney shall bring an action in a court of competent jurisdiction for an injunction against the owner, agent, lessee, tenant, or occupant violating an order.

The Ohio water development authority created under section 6121.02 of the Revised Code, in addition to its other powers, has the same power and shall be governed by the same procedures in a waste water facilities service area or in any area adjacent to a public sewer operated by the authority, as a board of county commissioners in a county sewer district under this section, except that the authority shall act by order, and the attorney general, upon request of the authority, shall prosecute any person who violates an order of the authority issued under this section. (Emphasis added.)

The situation with which you are concerned does not appear to involve a special sanitary district designated under R.C. 1541.21. Therefore, the county commissioners may act under R.C. 6117.51 only if "the board of health of the health district within which a new public sewer construction project is proposed or located passes a resolution stating that the

reason for such project is to reduce or eliminate an existing health problem or a hazard of water pollution." Further, the commissioners may order connection to the sewer under R.C. 6117.51 only if they find, following a determination and certification by a registered professional engineer, that the sewer "is available for use and is accessible to the premises." The commissioners may not, however, act under R.C. 6117.51 in circumstances that come within the exceptions set forth in divisions (A), (B), and (C). I conclude, therefore, that, if the situation with which you are concerned satisfies the conditions set forth in R.C. 6117.51, the county commissioners may, pursuant to that provision, require an occupant of premises within a sewer district in the county to connect the premises to the sewer.

I note, however, that, even if all the conditions set forth in R.C. 6117.51 are not satisfied, it may be possible to compel connection with a sewage system. R.C. 3701.02 and R.C. 3701.33 provide for the establishment of a Public Health Council within the Department of Health. R.C. 3701.34 authorizes the Council to adopt rules, as follows: "The public health council shall: (A) Adopt, and may amend or rescind, sanitary rules to be of general application throughout the state. The sanitary rules shall be known as the sanitary code." Pursuant to this authority, the Public Health Council has adopted 4 Ohio Admin. Code 3701-29-02, which states, in part:

(L) No household sewage disposal system shall be installed, maintained, or operated on property accessible to a sanitary sewerage system.

(M) Whenever a sanitary sewerage system becomes accessible to the property, a household sewage disposal system shall be abandoned and the house sewer directly connected to the sewerage system.

R.C. 3701.35 provides that "[e]very provision of the sanitary code shall apply to and be effective in all portions of the state." Pursuant to R.C. 3701.56, authority to enforce rule 3701-29-02 and related provisions is granted to various local officials:

Boards of health of a general or city health district, health authorities and officials, officers of state institutions, police officers, sheriffs, constables, and other officers and employees of the state or any county, city, or township, shall enforce the quarantine and sanitary rules and regulations adopted by the department of health. (Emphasis added.)

See 1962 Op. Att'y Gen. No. 3343, p. 832 (syllabus) ("[a] health commissioner of a general health district...is authorized by [R.C. 3701.56] to enforce the sanitary rules and regulations adopted by the public health council under [R.C. 3701.34], and may institute criminal proceedings for violations of such sanitary rules and regulations"); 1951 Op. Att'y Gen. No. 691, p. 412 at 414-15 ("the public health council has been empowered to adopt sanitary rules and regulations, which were formerly adopted by the state board of health, and...a mandatory duty to enforce the sanitary rules and regulations of the public health council is imposed upon the local authorities"); 1940 Op. Att'y Gen. No. 1921, vol. I, p. 222 at 231 ("[t]he carrying out and enforcement of such orders and regulations as may be made by the State Department of Health through any of its divisions or agencies is expressly charged by law to local officials..."). The provisions of rule

3701-29-02(L) and (M) may, therefore, be enforced by local officials as authorized by R.C. 3701.56. See also 4 Ohio Admin. Code 3701-29-04(B) ("[n]o person shall maintain or operate a household sewage disposal system installed after the effective date of this rule without an operation permit obtained from the board of health"); 4 Ohio Admin. Code 3701-29-20(D) ("[r]ules 3701-29-01 to 3701-29-21 of the Ohio Sanitary Code are minimum standards. A board of health may adopt more stringent standards when local conditions indicate such standards are necessary").

I note that DeMoise v. Dowell, 10 Ohio St. 3d 92, 461 N.E.2d 1286 (1984), involved the enforcement of provisions that were virtually identical to rule 3701-29-02(L) and (M) and that had been adopted by a local board of health as its own regulations. The court considered arguments that the local board of health was not authorized to force citizens to connect to a sanitary sewer, and that its regulations "go beyond the mere protection of public health, prevention of disease, etc; that no determination of a nuisance has been made in this case; and that septic systems are a lawful method of sewage disposal." 10 Ohio St. 3d at 95, 461 N.E.2d at 1290. The court stated:

The legislative delegation of authority, under the present scheme, does not bear out this contention. Instead, it reflects a broad-based policy determination that individual household sewage disposal systems are inherently more dangerous to the public health than sanitary sewerage systems and must be replaced when possible. It is not necessary that the board make a case-by-case evaluation of the efficiency of each septic system. The determination has already been made that septic systems pose a potential hazard to the public health, and that they are a potential nuisance to be prevented when possible...The court also found that there is less likelihood that a sanitary sewer will ripen into a health nuisance, through raw sewage escaping to the surface, than will a septic system. Moreover, the particular soil conditions of the area are conducive to the rapid failure of septic systems.

The fact that septic systems are themselves lawful is immaterial. That fact merely reflects the realization that a septic system is an appropriate means of sewage disposal so long as no sanitary sewerage system is available. (Emphasis added.)

10 Ohio St. 3d at 94-95, 461 N.E.2d at 1290. The syllabus of DeMoise v. Dowell states:

A local board of health possesses the authority to require that whenever a sanitary sewerage system becomes accessible to a property, the household sewage disposal system shall be abandoned and the house sewer directly connected to the sewerage system. This authority applies regardless of the manner by which the sanitary sewerage system was constructed. Such a requirement bears a real and substantial relationship to the public health, is not unreasonable or arbitrary, and does not constitute a deprivation of due process of law.

While this case does not directly address the authority of a county to enforce rule 3701-29-02(L) and (M), it does provide

support for the validity of the provisions set forth in that rule.

Based upon the foregoing, it is my opinion, and you are hereby advised, as follows:

1. If the conditions set forth in R.C. 6117.51 are satisfied, a board of county commissioners may, pursuant to that section, order an occupant of premises within a sewer district in the county to connect the premises to the sewer.
2. Local officials may enforce the provisions of 4 Ohio Admin. Code 3701-29-02(L) and (M), which require the connection of premises to an accessible sanitary sewerage system, as authorized by R.C. 3701.56.