

OPINION NO. 89-104**Syllabus:**

1. Pursuant to R.C. 6117.02, all moneys collected as rents for the use of sewers or sewerage treatment or disposal works or as connection charges within a single sewer district shall be kept in a separate and distinct fund to the credit of that sewer district and may be expended only for the use and benefit of that sewer district.
2. Within a single sewer district, the board of county commissioners may charge such rates as it determines to be reasonable and is not precluded from allocating among all residents of a district the cost of a facility serving a portion of the sewer district or the cost of contracted services provided for a portion of the sewer district.
3. The board of county commissioners may consolidate existing sewer districts into a single larger sewer district and, in doing so, may consolidate the funds of the districts to the extent that such consolidation is consistent with any resolutions authorizing or providing for the security and payment of bonds, any indenture or trust agreement securing the bonds, any contracts or grants that may affect the availability of funds for particular purposes, the provisions of R.C. 5705.09, the provisions of R.C. 5705.14-.16, and the provisions of R.C. Chapter 6117. The fact that wastewater treatment for a certain sewer district is provided through contract with a municipal corporation does not prevent that district from being consolidated into a larger sewer district.
4. Moneys may be transferred from one fund of a subdivision to another pursuant to R.C. 5705.14-.16 and in accordance with the procedures set forth therein.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1989

I have before me your request for an opinion concerning the consolidation of various sewer funds. Your letter sets forth the following facts:

Richland County currently operates fourteen waste water treatment plants and two collector sewer systems. They are maintained as separate, "stand alone" accounts within the County Auditor's bookkeeping system. Each waste water treatment plant and collector sewer system was created individually and user rates are based upon the costs of each plant and collector sewer system. In the future, the County envisions operating procedures, preventive maintenance, repairs, and major equipment purchases which will be common to all the waste water treatment plants and collector sewer systems. Furthermore, a proposed sewer project will result in the abandonment of several waste water treatment plants.

You have stated that the county has retained an engineering firm to establish a cohesive, coordinated user rate structure that balances the burden of operational overhead equally among its customer base. You have asked the following questions:

1. May separate sewer funds, which were created to pay for the operation of individual sewer/waste water treatment plants, be consolidated into one unified sewer fund for the purpose of equally charging common expenses to all rate users?
2. Can sewer funds that finance the operation of sewer/waste water

treatment plants with outstanding indebtedness be consolidated with sewer funds that finance the operation of sewer/waste water treatment plants without outstanding indebtedness?

3. What effect, if any, would surcharges, which are levied by the cities of Mansfield and Bellville for conveyance, treatment, and debt service, have on consolidation of all of the individual sewer accounts into one unified sewer account?

A member of your staff informed one of my assistants that the county has acted pursuant to R.C. Chapter 6117 in establishing and operating the various sewer systems and wastewater treatment plants. R.C. 6117.01 authorizes a board of county commissioners to establish one or more sewer districts within the county, outside of municipal corporations, and to acquire, construct, maintain, and operate sewers and treatment or disposal works. R.C. 6117.02 authorizes the board of county commissioners to "fix reasonable rates to be charged" for the use of such facilities "by every, person, firm, or corporation whose premises are served by a connection to such sewers or sewerage treatment or disposal works" when the facilities are owned or operated by the county, and to change such rates as it deems advisable. R.C. 6117.02 requires that the rates "be at least sufficient to pay all the cost of operation and maintenance of improvements for which the resolution declaring the necessity thereof shall be passed after July 1, 1958." R.C. 6117.02 also authorizes the collection of connection charges.

With respect to the disposition of moneys received, R.C. 6117.02 states:

All moneys collected as rents for use of such sewers or sewerage treatment or disposal works or as connection charges in any sewer 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 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, which cost may include, in accordance with a cost allocation plan adopted under division (B) of this section, payment of all allowable direct and indirect costs of the district, the sanitary engineer or sanitary engineering department, or a federal or state grant program, incurred for the purposes of this chapter; and shall be used second for the payment of interest or principal of any outstanding debt incurred for the construction of such sewers or sewerage treatment or disposal works or for the creation of a sinking fund for the payment of such debt. Any surplus thereafter remaining in such fund may be used for the enlargement, extension or replacement of such sewers and sewerage treatment or disposal works. Money so collected shall not be expended otherwise than for the use and benefit of such district.

Your staff has informed my assistant that one of the sewer systems about which you are concerned was financed by an issue of revenue bonds expiring in 1996. *See generally* R.C. 133.07-.08 (formerly R.C. 133.05-.06, *see* Sub. H.B. 230, 118th Gen. A. (1989) (eff. Oct. 30, 1989)). The bond fund for that issue is separate and there is no proposal to consolidate it. There is, however, interest in consolidating the operating fund for that system. Further, two of the systems have special assessments that are maintained in separate funds. Again, there is no proposal to consolidate the special assessment funds, but there is interest in consolidating the operating funds for those systems.

Your staff has also informed my assistant that Richland County has a number of different sewer districts. In some instances, a sewer district was created pursuant to R.C. Chapter 6117 to provide for the construction and operation of a particular facility. In other instances, there is a contract between the county and a municipal corporation for the provision of sewer services to residents of the sewer district. *See generally* R.C. 6117.41-.43; 1987 Op. Att'y Gen. No. 87-083 at 2-557 n. 1; 1956 Op. Att'y Gen. No. 6981, p. 617. The information provided to my staff

indicates that there are fewer sewer districts than there are sewer accounts, leading to the conclusion that in some instances a sewer district encompasses more than one treatment plant or sewer system and has more than one account. Your staff has stated that the various sewer systems contribute moneys to a single county operating fund that pays the salaries of employees who maintain all the systems. Service charges are currently calculated separately for the various sewer systems.

Provisions governing the establishment of funds by a county appear in R.C. Chapter 5705. R.C. 5705.09 requires that each subdivision (including a county),¹ see R.C. 5705.01(A) establish the following funds:²

- (A) General fund;
- (B) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds;
- (C) Bond retirement fund, for the retirement of serial bonds, notes, or certificates of indebtedness;
- (D) A special fund for each special levy;
- (E) A special bond fund for each bond issue;
- (F) 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;
- (G) A special fund for each public utility operated by a subdivision;
- (H) A trust fund for any amount received by a subdivision in trust.

It is, thus, clear in the situation with which you are concerned that, as proposed, there must be separate funds for the bond issue and the special assessments. Further, R.C. 6117.02 states expressly that moneys collected as rents or connection charges in any sewer district shall be kept in a separate and distinct fund to the credit of that district. That fund is subject to any resolution authorizing bonds or any indenture or trust agreement securing the bonds. Subject to such provisions, the fund shall be used first for the cost of management, maintenance, and operation of the sewers of the district and treatment or disposal works used by the district and shall be used second for the payment of interest or principal of any outstanding debt or for the creation of a sinking fund for the payment of such debt. If surplus remains, the surplus may be used for the enlargement, extension, or replacement of the sewers or treatment or disposal works. R.C. 6117.02 specifies that moneys collected by a sewer district as rents or connection charges may not be expended except for the use and benefit of the district. *Accord* 1984 Op. Att'y Gen. No. 84-085; 1977 Op. Att'y Gen. No. 77-010 at 2-37 ("[i]t is clear then that all moneys collected by the county as a result of its operation of a sewer district 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"). It is clear under

¹ R.C. 6117.311 authorizes a board of county commissioners to levy a tax under R.C. Chapter 5705 and issue bonds, payable from taxes, under R.C. Chapter 133 for the purpose of paying part or all of the cost of an improvement under R.C. Chapter 6117 in a sewer district created under R.C. 6117.01, or in a designated subdistrict of such a sewer district. Provision is made for approval of the electors. R.C. 6117.311. For purposes of R.C. 6117.311, "such sewer district or subdistrict is constituted a 'subdivision' and 'taxing unit'; the board of county commissioners is the 'taxing authority' and 'bond authorizing authority' thereof; and the county auditor is the 'fiscal officer' thereof, within the purview of Chapters 133, and 5705, of the Revised Code." R.C. 6117.311. It appears that, for other purposes, a sewer district is not itself a "subdivision" under R.C. Chapter 5705. See R.C. 5705.01(A). See generally 1984 Op. Att'y Gen. No. 84-085.

² R.C. 5705.12 permits the taxing authority of a subdivision, with the approval of the Auditor of State, to establish funds other than those designated by R.C. 5705.09 and R.C. 5705.13 (applicable to municipal corporations and townships). There may be more than one account within a single fund. See generally 1986 Op. Att'y Gen. No. 86-056.

R.C. 6117.02 that a separate fund must be established for each sewer district, and that moneys from that fund may be expended only for the use and benefit of that district.

The provisions of R.C. Chapter 6117 were considered recently by the Ohio Supreme Court in *Huber v. Denger*, 38 Ohio St. 3d 162, 527 N.E.2d 802 (1988). That case involved a situation in which a number of sewer districts had been consolidated into a single sewer district. The new sewer district included two sewer plants that were not interconnected. One plant was built after the districts had been consolidated; during the period at issue in the litigation, that plant had bonded indebtedness outstanding. The other plant was built before consolidation of the districts; its indebtedness was retired prior to the period at issue. The case related to a period during which the sewer rates charged all residents were the same, and a portion of the rate money was applied to the retirement of the bonded indebtedness. Residents of the area served by the plant with no outstanding bonded indebtedness challenged the legality of this arrangement but the Supreme Court upheld it, stating in the syllabus: "R.C. Chapter 6117 authorizes a board of county commissioners to allocate the cost of a facility serving a portion of a sewer district among all residents of the district." The court quoted the relevant portions of R.C. 6117.01 and 6117.02 and analyzed the provisions as follows:

It is apparent from a review of these two sections that the rates assessed for maintenance of the sewer works of a district are not dependent upon the fact that the ratepayer be physically attached to the particular facility for which debt servicing is required. Rather, reasonable rates may be charged to ratepayers for any facility operated and maintained by the district. In other words, the sewers and sewerage works for which reasonable rates may be assessed pursuant to R.C. 6117.02 are those described in R.C. 6117.01 as constructed or maintained by the district. There is nothing in either of these sections which precludes a county from assessing a ratepayer for a treatment plant servicing another part of the district. An important criterion for determining whether the rate is justified is whether it is reasonable or not.

....
This approach appears to be eminently sensible. To hold otherwise would result in the Balkanization of financial support for treatment plants by constricting the base upon which the cost of the facility would be spread. It would defeat the purposes of a unified sewer district envisioned by R.C. Chapter 6117 and virtually foreclose the possibility of generating the local capital necessary to construct or improve the facilities so as to conform to state and federal environmental laws. Indeed, it is not inconceivable that the cost of any future improvements to the Beaver Creek plant would be shared by residents served by the Sugar Creek facility.

36 Ohio St. 3d at 164, 527 N.E.2d at 804-05. I note that, in the *Huber* case, the court addressed the use of moneys received as rate payments under R.C. 6117.02. In that case, the bonded indebtedness in question was incurred after creation of the consolidated sewer district and the court did not consider whether the consolidation of funds established for different sewer districts was possible.

It is apparent under R.C. 6117.02 and the *Huber* case that a board of county commissioners has a great deal of discretion, within a single sewer district, to establish rates and use proceeds to pay for expenses of the district as a whole. See also *Haymes v. Holzemer*, 3 Ohio App. 3d 377, 380, 445 N.E.2d 681, 685 (Lucas County 1981) ("the Revised Code does make it clear that governmental authorities shall have as much leeway as possible in establishing fees and rates and in maintaining financing schemes to support...sewer systems. Such fees and rates must be reasonable, but the methods and manner of financing such systems are largely left with the authorities"); cf. *Hixson Oil Co. v. Dumford*, No. CA84-12-015 (Ct. App. Fayette County July 15, 1985) (LEXIS, Ohio library, App file) (discussing a sewer district that consolidated a number of districts with different developments and stating: "it would [not] be logical to expect that consolidation of divisions, functionally and geographically distinct, would require uniformity of rates throughout the consolidated district. In our view to do so would create in all

probability actionable inequalities"). *See generally* R.C. 6111.032(A) ("the governing board of a county...owning or operating a publicly owned treatment works or sewerage system shall, subject to compliance with the exercise of lawful authority granted to or rules adopted by the director of environmental protection..., exercise primary authority to adopt, modify, and repeal, and to administer and enforce rules with respect to:...(2) The establishment and modification of rates or charges to be made of users of its sewerage systems, treatment works, and disposal systems, which need not be uniform throughout the territory served by such systems or works...").

While R.C. Chapter 6117 does not expressly discuss the consolidation of sewer districts, it is evident that such consolidation is possible. *See Huber v. Denger; Hixson Oil Co. v. Dumford* (describing an instance in which sewer districts were consolidated "in order to increase efficient administration and minimize maintenance costs"); 1921 Op. Att'y Gen. No. 2071, vol. I, p. 387 at 390 ("[i]f the county commissioners are permitted to exercise discretion in laying out and establishing sewer districts, it is not a violation of deductive reasoning to say they may also modify and abandon districts they have created where their action does not transgress vested rights. This is an inherent or necessarily implied right in matters involving the exercise of sound judgment, honestly and justly arrived at"). *See generally* Op. No. 87-083; Op. No. 84-085. The provisions of R.C. 6117.02 regarding the expenditure of moneys collected as rents or charges pertain to each sewer district. If a number of districts are consolidated into a new district, the provisions of R.C. 6117.02 then apply to the moneys received by the new sewer district as a whole. It may, thus, be possible for Richland County to simplify the financial structure of its sewer funds by consolidating its sewer districts. Pursuant to R.C. 6117.02, moneys collected by the consolidated district as rents or connection charges may be expended for the use and benefit of the consolidated district. The rates charged must be reasonable but may, as discussed in *Huber v. Denger*, be determined with consideration for the district as a whole rather than solely on the basis of individual projects within the district.

Even if sewer districts are consolidated, however, certain restrictions may apply to the use of various moneys. R.C. 6117.02 indicates that moneys collected as rents or connection charges are subject to any resolution authorizing or providing for the security and payment of bonds, or any indenture or trust agreement securing the bonds. It is, therefore, appropriate to examine any such resolutions or agreements to determine what restrictions apply to particular funds. It is, in addition, appropriate to examine any contracts or grants that may affect the availability of funds for particular purposes. It should be noted, also, that the county commissioners remain subject to R.C. 5705.09, which requires that special funds be maintained for the purposes specified. Thus, for example, a special bond fund must be maintained for each bond issue. It appears, further, that moneys collected pursuant to statutory provisions restricting their use to purposes of a particular sewer district remain subject to that restriction. *See* R.C. 6117.02. Where appropriate, steps may be taken to transfer moneys from one fund of a subdivision pursuant to R.C. 5705.14-.16 and in accordance with the procedures set forth therein. *See generally* 1986 Op. Att'y Gen. No. 86-082. The transfer of funds pursuant to R.C. 5705.15 and 5705.16 requires a resolution passed by a majority of the members of the taxing authority of the political subdivision, a petition to the court of common pleas, and approval of the Tax Commissioner. *See* R.C. 5705.16; Op. No. 86-082; 1964 Op. Att'y Gen. No. 960, p. 2-131.

You have asked what effect a surcharge levied by a municipal corporation would have on the consolidation of the sewer accounts. Your staff has informed my assistant that certain unincorporated areas of Richland County obtain sewer service and wastewater treatment through connection with plants operated by Mansfield and Bellville. *See* R.C. 6117.41-.43; Op. No. 87-083 at 2-557 n. 1; 1956 Op. No. 6981. The surcharges in question are amounts that these municipalities charge Richland County for such service and treatment. The concern is that these charges make the provision of sewer service and wastewater treatment in these areas more expensive than they are in other unincorporated areas of the county. The fact that wastewater treatment for a certain area is provided through contract with a municipal corporation does not prevent that area from being part of a larger sewer district. The accounts that provide for payment of such contracts may be consolidated with

other accounts in the manner discussed above, with due consideration being given to appropriate resolutions, agreements, or grants and to R.C. 5705.09, 5705.14-.16, and Chapter 6117. Even as *Huber v. Denger* authorizes the cost of a facility serving a portion of a sewer district to be allocated among all residents of the district, it appears to permit the cost of contracted services provided for a portion of a sewer district to be allocated among all residents of the district, where the rates charged are reasonable. As discussed above, a board of county commissioners is authorized to establish reasonable rates for sewer service within each sewer district. The fact that actual costs of providing service to different areas within the district may vary does not prevent the commissioners from establishing uniform rates throughout the district if such rates are reasonable.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 6117.02, all moneys collected as rents for the use of sewers or sewerage treatment or disposal works or as connection charges within a single sewer district shall be kept in a separate and distinct fund to the credit of that sewer district and may be expended only for the use and benefit of that sewer district.
2. Within a single sewer district, the board of county commissioners may charge such rates as it determines to be reasonable and is not precluded from allocating among all residents of a district the cost of a facility serving a portion of the sewer district or the cost of contracted services provided for a portion of the sewer district.
3. The board of county commissioners may consolidate existing sewer districts into a single larger sewer district and, in doing so, may consolidate the funds of the districts to the extent that such consolidation is consistent with any resolutions authorizing or providing for the security and payment of bonds, any indenture or trust agreement securing the bonds, any contracts or grants that may affect the availability of funds for particular purposes, the provisions of R.C. 5705.09, the provisions of R.C. 5705.14-.16, and the provisions of R.C. Chapter 6117. The fact that wastewater treatment for a certain sewer district is provided through contract with a municipal corporation does not prevent that district from being consolidated into a larger sewer district.
4. Moneys may be transferred from one fund of a subdivision to another pursuant to R.C. 5705.14-.16 and in accordance with the procedures set forth therein.