

**Note from the Attorney General's Office:**

1960 Op. Att'y Gen. No. 60-1842 was limited by  
1979 Op. Att'y Gen. No. 1979-107.

1842

JURISDICTION—COUNTY COMMISSIONERS, PUBLIC UTILITIES COMMISSION OVER WATER AND SEWAGE SYSTEM IN UNINCORPORATED PORTIONS OF COUNTY—RATES—MORTGAGE ON PLANT BOUGHT OR RECEIVED AS GIFT—NO AUTHORITY TO PAY MORTGAGE OUT OF COUNTY FUNDS—§§6103.02, 6117.01, 4905.02, 4905.03, 5301.24 R.C., Chapter 4905, R. C.

## SYLLABUS:

1. Under the provisions of Sections 6103.02 and 6117.01, Revised Code, a board of county commissioners has jurisdiction over a private corporation proposing to construct a water and sewerage system in unincorporated portions of the county for the purpose of approving or disapproving the plans and specifications for such system.
2. Under the provisions of Sections 4905.02 and 4905.03, Revised Code, the Public Utilities Commission of Ohio has jurisdiction over a water-works company once it has been placed in operation for the purpose of exercising general supervision over such company; however, the Commission has no jurisdiction over a sewerage company or the sewerage operations of a water-works company.
3. The Public Utilities Commission, under the provisions of Chapter 4905., Revised Code, and a board of county commissioners, under the provisions of Section 6103.02, Revised Code, have jurisdiction over a water-works company operating in unincorporated portions of the county regarding the rates charged by such company for water.
4. Where a board of county commissioners acquires a sewage treatment plant from a private corporation, either by purchase under the provisions of Section 6117.01, Revised Code, or by gift under the provisions of Section 9.20, Revised Code, and such plant is subject to an existing valid mortgage or lien, then under the provisions of Section 5301.24, Revised Code, the mortgage or lien is not affected by such acquisition; and there is no authority for the board of county commissioners to spend county funds to pay such existing valid mortgage.

5. There is no authority for a board of county commissioners to authorize operation of a county-owned sewage treatment and/or water treatment plant by a private individual or corporation.

6. In passing on an application for permission to construct private water supplies under the provisions of Section 6103.02, Revised Code, or to construct private sewers or sewage treatment works under the provisions of Section 6117.01, Revised Code, the board of county commissioners is limited to a consideration of the plans and specifications for such construction.

Columbus, Ohio, November 22, 1960

Hon. Earl W. Allison, Prosecuting Attorney  
Franklin County, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The construction and contemplated construction of residential developments in the unincorporated area of this county has given rise to many questions concerning publicly and privately owned water and sewage systems. Certain officials of this county have expressed reservations about permitting a private developer to build, maintain and operate a sewage facility to serve his development, under the provisions of Chapter 6117., Revised Code, for several reasons, one of which is that such developer might become bankrupt or for some other reason might voluntarily or involuntarily abandon the project either before or after completion. One private corporation which desires to build a few thousand homes in the unincorporated area of this county has attempted to answer this argument by saying that its sewage facility would be operated under the jurisdiction of the Public Utilities Commission of Ohio. I can find no such authority in the P.U.C.O.

“Since the authority and jurisdiction of a state agency is involved, we request that you consider and answer the following questions which have been presented to this office:

(1) If a privately owned system of facilities, including well fields, water treatment plants, water distribution lines, sewerage lines, and sewage treatment plant, were placed in operation in the unincorporated portions of Franklin County, would the Public Utilities Commission of Ohio have jurisdiction over the operation? If so, what would be the extent of the P.U.C.O. control over the well fields, treatment plants, distribution lines, sewage lines, sewage treatment plant and operation thereof?

(2) If a private corporation were to build a sewage treatment plant and offer it for sale to the Board of County Commissioners for one dollar and other considerations, would the Board have the authority to make such a purchase?

(3) If the sewage treatment plant mentioned in question (2) has been used by the private corporation to secure a mortgage equivalent to the construction cost of the plant, and said mortgage was still outstanding, how would this affect the legality of such a purchase?

(4) If a private corporation were to build a sewage treatment plant and offer it as a gift to the Board of County Commissioners, could the Board accept it, subject to any liens and encumbrances?

(5) Is a board of county commissioners empowered to authorize operation of a county-owned sewage treatment and/or water treatment plant by a private individual or corporation, through a contractual arrangement or by any other means? 'Operation' is meant to include all administrative, clerical, technical, supervisory, and other activities incident to maintaining the plant, assuring its functioning, collecting fees from the persons served by the plant, keeping records of costs and receipts, making reports as necessary to official agencies, and all other managerial functions associated with this sewage treatment and/or water plant.

(6) Section 6117.01, Revised Code, provides in part:

' . . . 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 . . . '

"A similar statutory provision pertaining to water supplies and water pipes or mains is to be found in Section 6103.02, Revised Code.

"In passing on an application for permission for such private construction under either statute, may the board of county commissioners consider, in addition to the plans and specifications, other problems such as the effect of the contemplated subdivision on the finances, taxes and population of the school district concerned and expressions of opinions by persons and municipal corporations in the vicinity of the proposed project, etc.?"

The following statutes deal with the jurisdiction of a board of county commissioners over a privately owned water and sewerage system in unincorporated portions of a county.

Section 307.73, Revised Code, provides in part as follows:

"The board of county commissioners for any unincorporated portion of the county, upon application by any individual, organization, or agency of private enterprise, may grant permission to such individual, organization, or agency to construct water or sewer lines, or both, *under the supervision of the board.*"

(Emphasis added)

Section 6103.02, Revised Code, provides in part as follows :

“\* \* \* No public water supplies or water pipes or main shall be constructed in any county outside of municipal corporations by any person, firm, or corporation, except for the purpose of supplying water to such municipal corporations, until the plans and specifications for the same have been approved by the board. Any such construction shall be done under the supervision of the sanitary engineer. Any person, firm or corporation proposing or constructing such improvements shall pay to the county all expense incurred by the board in connection therewith. \* \* \*

“\* \* \* When the source of supply is owned by a municipal corporation or any person, firm, or private corporation, the schedule of rates to be charged by such municipal corporation, person, firm, or private corporation shall be ratified by the board at the time any contract is entered into for the use of water from such municipal corporation, person, firm, or private corporation.\* \* \*”  
Section 6117.01, Revised Code, provides in part as follows :

“\* \* \* No sewers or sewage treatment works shall be constructed in any county outside of municipal corporation 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.\* \* \*”

Section 6117.02, Revised Code, provides in part as follows :

“\* \* \* When the sewerage treatment or disposal works is owned by a municipal corporation or any person, firm, or private corporation the schedule of rates to be charged by such municipal corporation, person, firm, or private corporation for the use of such facilities shall be ratified by the board at the time any contract is entered into for such use. \* \* \*”

It is apparent from the provisions of the foregoing statutes that a board of county commissioners has certain jurisdiction over a privately owned water and sewerage system in unincorporated portions of its county.

Proceeding now to the question of the jurisdiction of the P.U.C.O. over a privately owned water and sewerage system in an unincorporated portion of a county, Section 4905.02, Revised Code, provides that the references in Section 4905.03, Revised Code, are public utilities which are subject to regulations of the P.U.C.O. Said Section 4905.03 reads in part as follows :

“As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code:

“(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

“\* \* \*

“(8) A water-works company, when engaged in the business of supplying water through pipes or tubing, or in a similar manner, to consumers within this state;

“\* \* \*”

The P.U.C.O., therefore, has jurisdiction over a privately owned water system. In regard to a privately owned sewerage system, however, I note that companies engaged in operating sewerage lines and sewerage treatment plants are not among the thirteen different types of companies defined as public utilities under Sections 4905.02 and 4905.03, *supra*. It is my opinion, therefore, that under the maxim “*expressio unius est exclusio alterius*,” the P.U.C.O. has no jurisdiction over a company which is engaged solely in operating sewerage lines and sewage treatment plants.

The next question is whether the P.U.C.O. has any jurisdiction over a privately owned sewerage system when such system is operated by a water-works company. In order to answer the foregoing question in the affirmative, it would be necessary to find that the jurisdiction over the sewerage system is necessarily implied from the express jurisdiction delegated to the P.U.C.O. over the water system. 44 Ohio Jurisprudence, 2d, Public Officers, Section 60, pages 546-547. I am reluctant to imply such jurisdiction for two reasons. First, the legislature has already given express jurisdiction over privately owned sewerage systems in the unincorporated portion of counties to the boards of county commissioners of the respective counties. Secondly, the term “water-works” neither denotes nor connotes a system of sewers or the treatment of sewage. The business of a water-works company is the supplying of water to consumers. See Section 4905.03, *supra*; *People, ex rel. Groves & Sons Co. v. Hamilton*, 227 App. Div. 356, 238 N.Y.S. 81. A water-works company sells a commodity, i.e., water, whereas a sewerage company sells a service, i.e., the removal and disposal of sewage. While a sewerage company must necessarily supply its customers with water in order to flush the sewer, such supplying of water is only incidental to the sewerage service. Also, it will be noted that a water-works company is not necessarily required

to supply its customers with sewerage service. It is my opinion, therefore, that the P.U.C.O. does not have jurisdiction over a sewerage system operated by a water-works company.

Although both the P.U.C.O. and the several boards of county commissioners have jurisdiction over water-works companies, such jurisdiction is not identical. For example, a board of county commissioners has jurisdiction over water-works companies only in the unincorporated portions of their county, whereas the P.U.C.O. has jurisdiction in all parts of the county. See Section 4905.05, Revised Code. The P.U.C.O. has no jurisdiction over a non-profit water-works company, whereas a board of county commissioners has jurisdiction over both profit and non-profit type water-works companies. A board of county commissioners has jurisdiction to approve or disapprove plans and specifications for the construction of a water-works, whereas the P.U.C.O. has no jurisdiction over such construction. The P.U.C.O. has general supervision over a water-works company, Section 4905.06, Revised Code, whereas a board of county commissioners is limited to ratifying the rates to be charged by such company. It is my opinion, therefore, that the P.U.C.O. would have jurisdiction to exercise general supervision over well fields, water treatment plant and water distribution lines once they were placed in operation by a private corporation organized for profit in the unincorporated portions of the county. It is my further opinion that the P.U.C.O. would have no jurisdiction over sewerage lines and sewage treatment plants whether they were placed in operation by a company solely engaged in sewerage operations or by a water-works company as part of a system of facilities, including well fields, water treatment plant, and water distribution lines. There remains one final problem before proceeding to your next question and that is the fact that both the P.U.C.O. and the boards of county commissioners have jurisdiction regarding water rates. Your attention, therefore, is directed to paragraph one of the syllabus of *Trumbull County Board of Education v. The State, ex rel. Van Wye*, 122 Ohio St., 247, reading as follows:

“1. Where power is given under the statutes to two different governmental boards to act with reference to the same subject-matter, exclusive authority to act with reference to such subject-matter is vested in the board first acting under the power.”

In regard to your second question, it should be noted that under the provisions of Section 6117.01, Revised Code, any board of county com-

missioners is authorized to *acquire* as well as construct sewage treatment works. It is my opinion, therefore, that a board of county commissioners has authority to purchase a sewage treatment plant from a private corporation. (Note that sewers, as distinguished from the sewage plant, may not be purchased at a cost exceeding the "present value" of such sewers, as that term is defined in Section 6117.38, Revised Code, if the purpose in purchasing such sewers is to provide sewerage for territory outside the subdivision for which such sewers were constructed).

Under the provisions of Section 5301.24, Revised Code, the acquisition of property by the state or any political subdivision thereof, except acquisition by judicial proceedings, does not affect an existing valid mortgage or lien on such property. Therefore, in regard to your third and fourth questions, if the board of county commissioners were to purchase or receive as a gift under Section 9.20, Revised Code, a sewage treatment plant on which a valid mortgage exists, such board would take such plant subject to the rights of the mortgagee. In this regard, your attention is directed to the fourth paragraph of the syllabus in Opinion No. 5402, Opinions of the Attorney General for 1942, page 593 reading as follows:

"4. A municipality having accepted a gift of land, has no right thereafter to expend its funds in payment of a note previously given by the donor of such land."

It is my opinion, therefore, that if the board of county commissioners takes such plant, it will be without authority to expend county funds in payment of the note and mortgage previously given.

In *Taylor v. The Commissioner of Ross County* 23 Ohio St., 22, the court stated at page 78 as follows:

"The constitution does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation. And if it should be deemed wise and economical to authorize municipalities, who own water-works, or gas-works, to lease them as a means of supplying the public needs, we know of no constitutional impediment."

Although there is no constitutional impediment to the operation of a county-owned sewage treatment and/or water treatment plant by a private individual or corporation, I can find no statutory authority for such



operation. Since the board of county commissioners has only such powers as are conferred by statute (*Elder v. Smith*, 103 Ohio St., 369), it is my opinion regarding your fifth question that the board of county commissioners is not empowered to authorize operation of a county-owned sewage treatment and/or water treatment plant by a private individual or corporation.

In regard to your sixth question, it is important to recall that the right to construct anything, including a private water and sewer plant, is guaranteed by the constitution of the United States and of Ohio subject to any legislative restriction. The only legislative restriction on the private construction of a sewage treatment works under Section 6117.01, *supra*, or water supplies under Section 6103.02, *supra*, is that no such construction shall take place in any county outside of municipal corporations by any person, firm or corporation until the plans and specifications for the sewage treatment works or water supplies have been approved by the board of county commissioners. The power of the board of county commissioners, therefore, is limited to approval or disapproval of the plans and specifications. "Plans and specifications" means a description of the character of work to be done, materials to be used, and the manner of construction. (*Jenks v. Town of Terry*, 88 Miss., 364, 40 So. 641.) In passing on an application for permission for private construction of a sewage treatment works under Section 6117.01, *supra*, or water supplies under Section 6103.02, *supra*, I can find no authority for the board of county commissioners to consider other problems, in addition to the plans and specifications.

Accordingly, it is my opinion and you are advised:

1. Under the provisions of Sections 6103.02 and 6117.01, Revised Code, a board of county commissioners has jurisdiction over a private corporation proposing to construct a water and sewerage system in unincorporated portions of the county for the purpose of approving or disapproving the plans and specifications for such system.

2. Under the provisions of Sections 4905.02 and 4905.03, Revised Code, the Public Utilities Commission of Ohio has jurisdiction over a water-works company once it has been placed in operation for the purpose of exercising general supervision over such company; however, the Commission has no jurisdiction over a sewerage company or the sewerage operations of a water-works company.

3. The Public Utilities Commission, under the provisions of Chapter 4905., Revised Code, and a board of county commissioners, under the provisions of Section 6103.02, Revised Code, have jurisdiction over a water-works company operating in unincorporated portions of the county regarding the rates charged by such company for water.

4. Where a board of county commissioners acquires a sewage treatment plant from a private corporation, either by purchase under the provisions of Section 6117.01, Revised Code, or by gift under the provisions of Section 9.20, Revised Code, and such plant is subject to an existing valid mortgage or lien, then under the provisions of Section 5301.24, Revised Code, the mortgage or lien is not affected by such acquisition; and there is no authority for the board of county commissioners to spend county funds to pay such existing valid mortgage.

5. There is no authority for a board of county commissioners to authorize operation of a county-owned sewage treatment and/or water treatment plant by a private individual or corporation.

6. In passing on an application for permission to construct private water supplies under the provisions of Section 6103.02, Revised Code, or to construct private sewers or sewage treatment works under the provisions of Section 6117.01, Revised Code, the board of county commissioners is limited to a consideration of the plans and specifications for such construction.

Respectfully,

MARK McELROY

Attorney General