

March 30, 2023

The Honorable Colleen M. O'Toole
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, OH 44047

SYLLABUS:

2023-005

1. Because the board of county commissioners has express and implicit statutory authority to control and care for county-owned buildings and offices and is responsible for allocating county funds, a county official cannot perform maintenance or make repairs and improvements over the objection of the board of county commissioners.
2. If the board of county commissioners determines that funds allocated expressly for maintenance, repairs, or improvements on county-owned buildings and offices are not being used in the manner for which they were appropriated, the board of county commissioners may stop the repairs and the expenditure of funds.
3. The use of "Furtherance of Justice" funds is discretionary and limited in use to expenses related to official duties and in the furtherance of justice, and whether these funds

can be used for maintenance, repairs, or improvements is a question of fact beyond the scope of this opinion.

4. Because the board of county commissioners has express and implicit statutory authority to control and care for county-owned buildings and offices, members of the board of county commissioners have the ability to access county-owned buildings and offices to oversee maintenance and repairs.



DAVE YOST

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March 30, 2023

OPINION NO. 2023-005

The Honorable Colleen M. O'Toole
Ashtabula County Prosecuting Attorney
25 West Jefferson Street
Jefferson, OH 44047

Dear Prosecutor O'Toole:

You have requested an opinion regarding whether a county official has the authority to perform maintenance on or make repairs and improvements to county-owned buildings and office spaces occupied by county officials. I have framed your questions as follows:

1. Do county officials have authority, over the objection of the board of county commissioners, to perform maintenance on or make repairs and improvements to their office spaces, which are owned by the county, provided that they do not diminish the value of the property?
2. If the board of county commissioners makes an allocation from the county general fund to a county official to perform maintenance on or make repairs and improvements to their office spaces, which are owned by the county, does the board of county commissioners have

authority to stop the maintenance, repairs, or improvements from being performed?

3. Can the county prosecutor or county sheriff use Furtherance of Justice (FOJ) funds under R.C. 325.12 and 325.071 to perform maintenance on or make repairs and improvements to their county-owned office spaces?
4. Does the board of county commissioners have authority to enter a county-owned building or office space that it is required to provide to county officials under R.C. 307.01(A) for purposes of overseeing maintenance, repairs, or improvements, without permission from the county official occupying the county building or office space?

I

As a creature of statute, the board of county commissioners has “only those powers that are expressly set forth in a statute or that are implied as necessary in order to carry out an express power.” 2018 Op. Att’y Gen. No. 2018-007, Slip Op. at 2; 2-62 to 2-63, citing *Shriver v. Bd. of Commrs.*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs 1-2); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917).

Pursuant to R.C. 307.01(A), the board of county commissioners is required to provide office space to county officials when it deems necessary, and to furnish equipment that “it considers reasonably necessary for the proper and convenient conduct of county offices, and such facilities as will result in expeditious and economical administration of such offices.” R.C. 307.01(A); *Campanella v. Cuyahoga Cty.*, 57 Ohio Misc. 20, 23, 387 N.E.2d 254, 257 (C.P.1977). The statute gives considerable discretion to the board of county commissioners to determine what buildings and equipment are “reasonably necessary” to provide to a county office for the “proper and convenient conduct” of said office. 2015 Op. Att’y Gen. No. 2015-019, Slip Op. at 11; 2-194; 1988 Op. Att’y Gen. No. 88-058, at 2-288.

Additionally, the board of county commissioners is expressly authorized by statute to “construct, enlarge, improve, rebuild, equip, and furnish a courthouse, county offices, jail...or other necessary buildings,” “order or contract in relation to the building, furnishing, repairing, or insuring of public buildings,” review and approve plans for repairs or improvements on county courthouses or jails, and employ “janitors, and other employees as are necessary for the care and custody of the court house, jail, and other county buildings, bridges, and other property under its jurisdiction and control.” R.C. 307.02; R.C. 305.07(A); R.C. 153.36; R.C. 305.16; 1917 Op. Att’y Gen. No. 80, vol. I, p. 187; 1941 Op. Att’y Gen. No. 4006, p. 585, at 585 to 586; *see* R.C. 153.21.

Implicit in the express statutory requirements to provide offices and equipment to county officers and to

acquire and maintain property for county use is the duty “to perform acts to preserve or to benefit the corporate property of the county over which they have control”—a duty county commissioners may fulfill by expending money on maintenance and capital improvements. 1927 Op. Att’y Gen. No. 1221, vol. III, p. 2160 at 2162; 1983 Op. Att’y Gen. No. 83-081, at 2-326 (authority to expend funds for maintenance and capital improvements comes from R.C. 307.02); *accord* 2022 Op. Att’y Gen. No. 2022-010, Slip Op. at 7; 2-53 citing *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 11-12, 112 N.E. 138 (1915).

To fund repairs, maintenance, or improvements of county offices, the board of county commissioners can levy taxes on real and personal property to pay for current operating expenses and for acquiring or constructing permanent improvements. R.C. 5705.01(C); R.C. 5705.03(A). It may also levy a general tax to provide a general operating fund for current expenses and to help cover “the amounts necessary for the maintenance, operation, and repair of public buildings...[and] for the operation and maintenance and the acquisition, construction, or improvement of permanent improvements.” R.C. 5705.05(E). For purposes of tax levies, “current operating expenses” and “current expenses” are the “lawful expenditures of a subdivision”, and a “permanent improvement” or “improvement” is “any property, asset, or improvement with an estimated life or usefulness of five years or more.” R.C. 5705.01(F); R.C. 5705.01(E).

Once levied, these taxes are deposited in the county general fund and can be used directly by the board of

county commissioners or appropriated by the board of county commissioners to a county official for the performance of maintenance, repairs, or improvements for county buildings. R.C. 5705.38(C) (the board of county commissioners prepares the county's annual tax budget, including appropriations to county officers); R.C. 5705.09(A); 1983 Op. Att'y Gen. No. 83-053, syllabus, paragraph 2 (board of county commissioners has discretion to pay directly from the general fund or via appropriation).

II

Your first question asks whether a county official who occupies county-owned buildings or office spaces may perform maintenance or make repairs and improvements to the property over the objection of the board of county commissioners. I answer in the negative.

With caveats addressed below, boards of county commissioners have exclusive jurisdiction over the “[c]ustody and control of county property,” which includes the power to perform maintenance work and make repairs and improvements. 1989 Op. Att’y Gen. No. 89-029, at 2-122; *see also* 1949 Op. Att’y Gen. No. 1085, p. 737, syllabus, paragraph 2 (providing “suitable quarters” includes running water, toilets, heat, and light). So, when a county official requests an appropriation from the board of county commissioners for maintenance, repairs, or improvements, it is within the discretion of the board of county commissioners to determine whether the claim to expend county funds is valid. R.C. 5705.41; 2013 Op. Att’y Gen. No. 2013-035, at 2-354 to 2-355; 1986 Op. Att’y Gen. No. 86-024,

syllabus, paragraph 1; *accord* 2008 Op. Att’y Gen. No. 2008-014, at 2-157. And once an appropriation has been made, it can be transferred for use “from one appropriation item to another only by resolution of the board of county commissioners.” 2009 Op. Att’y Gen. No. 2009-044, at 2-318; R.C. 5705.40; *accord* 1994 Op. Att’y Gen. No. 94-007, at 2-27. Ultimately, if the board of county commissioners denies an appropriation from the county general fund for maintenance, repairs, or improvements, the county official cannot perform such work. Further, without a resolution by the board of county commissioners, a county official cannot use or transfer funds allocated for another specific purpose to instead pay for a maintenance, repair, or improvement project.

There are exceptions to this exclusive jurisdiction over county-owned buildings or office spaces, but, even so, the board of county commissioners maintains some authority. In county-owned buildings or office spaces provided to the courts, over which the board of county commissioners *does not* have sole control due to the separation-of-powers principle intended “to secure and safeguard the free and untrammelled exercise of their judicial function,” the board of county commissioners is required to maintain and provide janitorial services to court facilities if the court does not do so itself. 1917 Op. Att’y Gen. No. 80, vol. I, p. 187 (“[t]he county commissioners are the legal custodians of the court house and it is their duty to see that the entire building...is kept clean”); 1976 Op. Att’y Gen. No. 76-064, at 2-215; 1989 Op. Att’y Gen. No. 89-029, at 2-122; R.C. 305.16;

R.C. 307.01(B); R.C. 307.02; *see* 2001 Op. Att'y Gen. No. 2001-006, at 2-40; *State ex rel. Greene Cty. Bd. of Commrs. v. O'Diam*, 156 Ohio St.3d 458, 2019-Ohio-1676, 139 N.E.3d 393, ¶17-19; *see also Tablack v. Morley*, 7th Dist. Mahoning No. 92CA129, 1992 Ohio App. LEXIS 6564, *4 (Dec. 28, 1992). This is the same for the county jail: despite the county sheriff's day-to-day exclusive operational control over and the unique safety concerns of the facility, the board of county commissioners is responsible for its maintenance and care. R.C. 341.01 and 341.02; *see, e.g., Jenkins v. Krieger*, 67 Ohio St.2d 314, 319, 423 N.E.2d 856 (1981) ("R.C. 341.01 is a codification of the common law duty of a sheriff to employ ordinary care in keeping the prisoners confided to his custody and in protecting them from hazards that are, or should be, known to him"); R.C. 307.02 and 305.16; R.C. 341.20; *see also* R.C. 153.21; R.C. 5120.10(E) (plans to construct or renovate a jail facility must be submitted by the board of county commissioners to the Ohio Department of Rehabilitation and Correction to ensure compliance with minimum Ohio jail standards).

III

You next ask whether the board of county commissioners has the authority to stop the performance of maintenance, repairs, or improvements that are funded by a valid appropriation by the board of county commissioners from the county general fund. My answer is "yes."

A previous opinion held that, because the board of county commissioners is statutorily-required to review, approve, and allocate funds to the county engineer for its engineering plans, the board of county commissioners has the final say in decision-making “and in deciding which method and materials to use under the statutory scheme at issue.” 2021 Op. Att’y Gen. No. 2021-009, Slip Op. at 3-6; 2-35 to 2-37; *see also* 1972 Op. Att’y Gen. No. 72-080, at 2-318 to 2-319.

Here, the board of county commissioners has both express and implicit statutory authority to approve, fund, and oversee county building repairs, maintenance, or improvements, and it is solely responsible for preparing the county budget, allocating funds, and transferring appropriations between line items. R.C. 307.01; R.C. 307.02; 2013 Op. Att’y Gen. No. 2013-035, at 2-355; 2-358; R.C. 5705.41; R.C. 5705.40. This provides the board of county commissioners with the “final-say authority” for all of the actions listed above regarding buildings and office spaces under the control of the board of county commissioners.

If the board of county commissioners directly pays for or allocates funding to a county official to pay for repairs, maintenance, or improvements on a county-owned building or office space, and it later finds that the appropriated funds are not being used for the specifically-approved purpose, the board of county commissioners has the authority to stop the work. *See, e.g.*, R.C. 5705.40; 1981 Op. Att’y Gen. No. 81-035, at 2-135 (the county general fund may only be used for a proper county purpose); 2009 Op. Att’y Gen. No. 2009-044, at 2-318, citing 1994 Op. Att’y Gen. No. 94-007, at 2-27.

IV

The third question posed is whether a county prosecutor or county sheriff may use the office's respective FOJ funds under R.C. 325.12 and 325.071 for maintenance, repairs, or improvements of the county-owned property that the county official occupies.

Relevantly, both R.C. 325.12 and 325.071 limit the use of FOJ funds to cover expenses that the official incurs *only* "in the performance of [his or her] official duties and in the furtherance of justice." R.C. 325.12 and 325.071; 1967 Op. Att'y Gen. No. 67-120, at 2-188. What constitutes an expense in either performing official duties or in furthering justice is left to the discretion of the official, and a court will not step in to stop the expenditure if it is "reasonable and not manifestly arbitrary." 2017 Op. Att'y Gen. No. 2017-018, Slip Op. at 11; 2-195; *accord* 1988 Op. Att'y Gen. No. 88-100, p. 2-496; 1929 Op. Att'y Gen. No. 1111, vol. III, p. 1669, at 1673 ("If, in the opinion of the prosecutor, any expenditure from those funds is in the performance of his official duties and in the furtherance of justice, it is almost impossible for anyone to say, as a matter of law, that the expenditures are illegal"); *see also Stokes v. St. Paul Fire & Marine Ins. Co.*, 35 Ohio App.3d 97, 519 N.E.2d 850, 852 (1st Dist.1987). Accordingly, if a request to purchase equipment made to the board of county commissioners was deemed not "reasonably necessary" in its estimation under R.C. 307.01(A) and 307.02, the FOJ funds can be used to cover this expense if the county prosecutor or county sheriff *does*

deem it necessary. 1988 Op. Att'y Gen. No. 88-100, at 2-496 (if the board of county commissioners does not deem the equipment requested to be reasonably necessary, "a county sheriff may expend funds for expenses, including meals for staff and retirement mementos, which are incurred by him in the performance of his official duties and which he determines are in the furtherance of justice").

The Auditor of State has provided guidance on the use of FOJ funds, indicating that they are to be used "for any purpose the officer, in his judgment, feels is an expense in the performance of his official duties and in the furtherance of justice" as long as the funds are not "used to circumvent compliance with competitive bidding requirements or prevailing wage laws." Ohio Auditor of State Bulletin No. 97-014 at 3 (Aug. 12, 1997); see R.C. 307.86 (the board of county commissioners must comply with competitive bidding requirements); R.C. 153.26 (the building commission, appointed by the board of county commissioners, must comply with competitive bidding requirements). The Auditor of State has outlined an exception to the limited statutory use of FOJ funds: "if a situation arises in which monies are needed immediately and the usual procedure for obtaining prior appropriated and unencumbered monies is too time consuming, the expenditure may be made from the FOJ fund." Auditor of State Bulletin No. 97-014 at 3. This expense may then be reimbursed via normal appropriations in the future. *Id.*; R.C. 5705.41.

The discretion to spend the FOJ funds is necessarily tempered, however, by the statutory authority given to both offices. Like the board of county commissioners, “a county prosecuting attorney and a county sheriff are creatures of statute and have only those powers provided expressly by statute or necessarily implied therein.” 2017 Op. Att’y Gen. No. 2017-018, Slip Op. at 11; 2-195, citing 2010 Op. Att’y Gen. No. 2010-013, at 2-91; 1994 Op. Att’y Gen. No. 94-051, at 2-254; *accord* 2023 Op. Att’y Gen. No. 2023-001, Slip Op. at 15, citing 1992 Op. Att’y Gen. No. 92-080, at 2-332. Yet, unlike the board of county commissioners, neither the county prosecutor nor the county sheriff has express or implied statutory authority to maintain, repair, or improve county-owned buildings and office spaces.

It follows that maintenance of county-owned buildings and office spaces is not an official duty of either the county prosecutor or county sheriff, and therefore likely cannot be funded by the FOJ funds absent exceptional circumstances. And that proves dispositive. Because FOJ funds are public money, they “constitute a public trust fund...[which] can only be disbursed by clear authority of the law.” 1944 Op. Att’y Gen. No. 7255, p. 694, at 697, citing *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918). County officials would likely breach their fiduciary duties by using FOJ funds to pay for most maintenance of county-owned buildings. Additionally, because the board of county commissioners is authorized by statute to appropriate funds for a certain purpose, if that certain purpose is for maintenance or repairs then this money

must be used before the FOJ funds. Ohio Auditor of State Bulletin No. 97-014 at 3, citing Ohio Auditor of State Bulletin Circular No. 81-007 at 1 (Oct. 30, 1981); R.C. 5705.40 and 5705.41; *see* 1976 Op. Att’y Gen. No. 76-069, syllabus, paragraph 5 (if another provision of the Revised Code covers an expenditure, it must be used instead of the FOJ funds).

A definitive answer as to what spending is permissible using FOJ funds is a question of fact determined on a case-by-case basis, and “[w]hether a determination is manifestly arbitrary or unreasonable is a matter for a court rather than the Attorney General to decide.” 1988 Op. Att’y Gen. No. 88-100, at 2-495; 1969 Op. Att’y Gen. No. 69-159, at 2-337. This opinion also does not address other independent funds held by county officials, as many of these have their own, unique stipulations and limitations for use. *See* 2021 Op. Att’y Gen. No. 2021-006, Slip Op. 11; 2-29 (opinions “cannot answer to the potential existence of any alternative statutes” that may be relevant here). Questions for guidance about specific expenditures would be better directed to the Auditor of State.

V

Your final question asks whether members of the board of county commissioners can make entry into a county-owned office space used by another county official. I conclude that, for limited purposes, they may.

“That the board of county commissioners, under the law, have control and custody of...public buildings of the county, there can be no question, because by virtue

of their office the care and maintenance of public property within its jurisdiction is lodged in that body.” 1989 Op. Att’y Gen. No. 89-029, at 2-122, citing *Dittrick v. Barr*, 22 Ohio L. Rep. 289, 289-290 (Ct. App. Cuyahoga County 1924).

As stated above, “full control is vested in the commissioners only as to facilities *not* occupied by the court.” 1989 Op. Att’y Gen. No. 89-029, at 2-122; *State ex rel. Hottle v. Bd. of Cty. Commrs.*, 52 Ohio St.2d 117, 370 N.E.2d 462 (1977). Despite this, as long as the board of county commissioners does not interfere with the operation of the courts, the board of county commissioners *does* have “some jurisdiction over the *entire* [court] building.” (Emphasis added.) *State ex rel. Bittikofer v. Babst*, 97 Ohio St. 64, 119 N.E. 136, p. 137; see R.C. 153.36 (board of county commissioners to approve plans to repair or improve courthouses and jails). To this end, it may make policies controlling all aspects of the county property, including the court space, “for the purpose of preserving and protecting county property.” 1987 Op. Att’y Gen. No. 87-039, syllabus, paragraph 1; see generally 2018 Op. Att’y Gen. No. 2018-027 (a board of county commissioners shall fund security measures in a courthouse if it is reasonably necessary); 1989 Op. Att’y Gen. No. 89-029, at 2-122 (the board of county commissioners can hire personnel to clean the courts if the courts do not do so). This includes entering areas occupied by courts to “confiscat[e] privately-owned appliances in order to enforce safety rules governing the use of appliances...if the rules are proper and if the confiscation procedure does not interfere with the proper and efficient operation of the courts.” 1987 Op. Att’y Gen. No. 87-039, at 2-264.

Similarly, “the fact that Ohio Revised Code 307.01(A) designates the Board of Commissioners as the agency to determine the necessity of jail construction *does not* mean that such board has any control over the operation of a county jail.” (Emphasis added.) *Copeland v. Karnes*, S.D. Ohio No. 2:09-cv-589, 2011 U.S. Dist. LEXIS 91596, at *18 (Aug. 17, 2011), citing *Saunders v. McFaul*, 71 Ohio App.3d 46, 53, 593 N.E.2d 24 (8th Dist.1990); *see also Justice v. Rose*, 102 Ohio App. 482, 484-485, 144 N.E.2d 303 (4th Dist.1957) (sheriff has a duty to keep prisoners safe); R.C. 341.01; R.C. 341.02; R.C. 5120.10(E). Yet, the board of county commissioners is authorized to conduct repairs on the jail. 1949 Op. Att’y Gen. No. 0568, p. 275, at 280 (“in addition to the duty to provide such jail, when in the judgment of the county commissioners it is needed...it may be implied that they have the added duty of maintaining the same once it is provided”); R.C. 153.36.

It is evident that, even in county buildings and office spaces that the board of county commissioners is traditionally not permitted to control—the courts and buildings (like jails) controlled by other county officials—it *can* access them for purposes of maintaining the safety and integrity of the facilities. In sum, this permits the board of county commissioners to reasonably access and enter offices of county officials for the purpose of overseeing repairs and maintenance without the express permission of the county official.

This conclusion does not mean that members of the board of county commissioners have unfettered access to all areas of county buildings, nor does it address entering secured portions of a county office for other

purposes besides maintenance, or any other possible scenarios that may arise. And other such occurrences may fall outside the scope of the Attorney General's opinion-rendering function. For instance, "[t]he Board of Professional Conduct of the Ohio Supreme Court is empowered to render opinions regarding the rules related to attorney conduct," so specific questions about securing attorney work product in a prosecutor's office would be appropriately addressed by that entity. 2016 Op. Att'y Gen. No. 2016-017, Slip Op. at 21; 2-182 to 2-183.; *see e.g.*, Bd. of Professional Conduct Advisory Opinion 2022-11, at 3 ("lawyers must always be mindful of the duty to maintain the confidentiality of information"). And policies relating to visitor access to the jails are prepared by the sheriff and must comply with minimum standards promulgated by the Ohio Department of Rehabilitation and Correction. R.C. 341.01 and 341.02; R.C. 5120.10; Ohio Adm.Code 5120:1-8-03 and 5120:1-8-07 (regulating jail safety and visitors).

Ultimately, whether the manner and purpose of the entry by the board of county commissioners is appropriate in a specific situation is a question of fact beyond the scope of the opinion-rendering function. 2015 Op. Att'y Gen. No. 2015-012, Slip Op. at 5; 2-133 to 2-134.

Conclusions

Accordingly, it is my opinion, and you are hereby advised that:

1. Because the board of county commissioners has express and implicit statutory authority to control and care for county-owned buildings and offices and is responsible for allocating county funds, a county official cannot perform maintenance or make repairs and improvements over the objection of the board of county commissioners.
2. If the board of county commissioners determines that funds allocated expressly for maintenance, repairs, or improvements on county-owned buildings and offices are not being used in the manner for which they were appropriated, the board of county commissioners may stop the repairs and the expenditure of funds.
3. The use of Furtherance of Justice funds is discretionary and limited in use to expenses related to official duties and in the furtherance of justice, and whether these funds can be used for maintenance, repairs, or improvements is a

question of fact beyond the scope of this opinion.

4. Because the board of county commissioners has express and implicit statutory authority to control and care for county-owned buildings and offices, members of the board of county commissioners have the ability to access county-owned buildings and offices to oversee maintenance and repairs.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large loop at the end of the last name.

DAVE YOST
Ohio Attorney General