

May 3, 2021

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS:

2021-009

1. A board of county commissioners has the final-say authority over the recommended road repair and road improvement projects prepared by a county engineer under R.C. 315.08 and presented as part of a R.C. 5543.02 annual report. Furthermore, a board of county commissioners has the final-say authority on projects done in accordance with Revised Code Chapter 5555.
2. A board of county commissioners' authority is not limited to the appropriation of the reasonable funding necessary for the county engineer's operation to properly maintain the county roads as determined by the county engineer.



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OPINION NO. 2021-009

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You requested an opinion regarding the authority of a board of county commissioners and a county engineer with respect to county road maintenance and repair projects. Specifically, you ask:

1. What is the extent or limitation of a board of county commissioners' authority to determine what road projects (maintenance and repair) to undertake—including details such as materials and methods to be used or whether to undertake a project at all—even if such decisions disregard the county engineer's recommendations?
2. Is a board of county commissioners' authority limited to appropriating the funding necessary for the county engineer's operation to properly maintain the county system of highways as determined by the county engineer, so long as it is done within the budgeted appropriation to that office and in a fiscally responsible manner?

In answering these questions, we must keep in mind that engineers and commissioners are both creatures of statute. As such, they have “only those powers explicitly granted to him by statute or as may be necessarily implied in order to accomplish the exercise of an express power.” *E.g.*, 2017 Op.

Att’y Gen. No. 2017-008, Slip Op. at 5; 2-65; 2018 Op. Att’y Gen. No. 2018-009, Slip Op. at 2; 2-81.

I

May a board of county commissioners determine what road projects to undertake, and how to undertake them, even when its decisions run counter to the recommendations of the county engineer? In general, the answer is “yes.”

A

“The statutory scheme governing the construction, improvement, and repair of streets and roads within Ohio is complex and confusing.” 2006 Op. Att’y Gen. No. 2006-051, at 2-489, quoting 1988 Op. Att’y Gen. No. 88-036, at 2-175; *see* 2017 Op. Att’y Gen. No. 2017-008, Slip Op. at 6; 2-65 (“[t]he powers and duties of a county engineer are set forth in R.C. Chapter 315 and within R.C. Title 55”); *see also* 2012 Op. Att’y Gen. No. 2012-029, Slip. Op. at 3; 2-248 (setting forth numerous sections of the Revised Code that deal with the responsibilities of an engineer and Commissioners in regard to road maintenance and repair). Given the complexity and breadth of statutes governing the specific procedures to be followed regarding roadwork projects, I caution that the statutory scheme governing any specific project requires a close analysis. In order to accurately address a particular project, it would be necessary to thoroughly examine all statutes relevant to that type of project. That task requires a detailed analysis that exceeds the scope of this opinion. Thus, this opinion addresses general principles applicable to the type of road projects referenced in your request. After analyzing the Revised Code and your request, I am able to narrow the focus of this opinion to a specific-statutory scheme.

Based on your request, and as reiterated during additional correspondence with your office, your

county uses a procedure in which your Engineer proposes road projects to your Commissioners. Your Commissioners will then agree or disagree with the specific procedures, methods, or materials proposed. And in some cases, your Commissioners will disagree with the entire proposed project. Upon my review of the Revised Code, your county's procedure comports with the procedures set forth in R.C. 315.08 and 5543.02.

R.C. 315.08 states that, with certain exceptions, "[t]he county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor[.]" Among those duties, "[t]he engineer shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county." R.C. 315.08. R.C. 5543.02 states that the engineer shall report to the commissioners "on or before the first of June in each year, the condition of the county roads, bridges, and culverts, and estimate the probable amount of funds required to maintain and repair or to construct any new roads, bridges, or culverts required within the county."

The procedure outlined in your request follows this to a tee. Just as the Revised Code envisions, your Engineer makes recommendations for roadwork and maintenance, prepares plans, specifications, details, and estimates of cost, pursuant to R.C. 315.08. Then, your Engineer submits that recommendation to your Commissioners in a report, pursuant to R.C. 5543.02.

But what if the Commissioners and the Engineers disagree? Who holds final-say authority? While the statutes never say specifically, the Commissioners do: the practice of preparing recommendations for

their review is plainly geared toward obtaining their approval. And so they have final-say authority. That is consistent with opinions from my office dating back to 1972. *See* 1972 Op. Att’y Gen. No. 72-080, at 2-318 to 2-319; *See also id.* at 2-320; *see also* 1935 Op. Att’y Gen. No. 4767, vol. II, p. 1300, at paragraph nine of the syllabus; *see also* 1931 Op. Att’y Gen. No. 3820, vol. III, p. 1457, at 1458 (nothing in General Code 2792 [now R.C. 315.08] binds commissioners to the findings of the county surveyor [now engineer], nor does it prevent the commissioners from changing or rejecting the engineer’s submission).

In sum, commissioners, not an engineer, hold final-say authority in both choosing road projects and in deciding which method and materials to use under the statutory scheme at issue.

B

To be clear, our Office’s opinions make it clear that an engineer, despite lacking final-say authority, retains important responsibilities. For instance, as stated in the 1972 opinion, R.C. 5543.02 requires that the commissioners obtain approval from the engineer on the bills to be paid for the purchase of materials when road projects are to be done by force account. 1972 Op. Att’y Gen. No. 72-080, at paragraph one of the syllabus. In addition, “[w]here the county commissioners have awarded a [competitive-bid] contract on a road project, the county engineer may refuse to approve the estimates of payment of the contract should he determine that the work contemplated has not been satisfactorily completed pursuant to the terms of the contract.” *Id.* at paragraph three of the syllabus. Although these two examples show that an engineer retains vital responsibilities, such responsibilities do not include final-say authority over recommended road repair and road improvement projects prepared under R.C. 315.08 and presented pursuant to R.C. 5543.02.

C

In addition to an engineer lacking final-say authority under the procedure set forth above, I also draw your attention to Revised Code Chapter 5555. An analysis under Revised Code Chapter 5555, in reference to the matter at issue, provides the same result as my analysis above. This determination comes from a 1987 Attorney General Opinion, 1987 Op. Att'y Gen. No. 87-070.

When asked in a 1987 opinion if the engineer has the authority to order a contractor to stop work on a road paving contract that was entered into by the commissioners, the opinion found in the negative. *See* 1987 Op. Att'y Gen. No. 87-070, at 2-444 to 2-445. Particularly, the opinion found that, once the plans and specifications for a county road improvement project are selected under the procedure outlined in R.C. 5555.06 and 5555.07, and the commissioners enter into a contract under R.C. 5555.61, the engineer cannot direct the contractor to deviate from the plans and specifications. *See* 1987 Op. Att'y Gen. No. 87-070, at syllabus. Also, the engineer cannot order the contractor to stop the project simply because the engineer disagrees with the plans and specifications. *See id.*

While the 1987 opinion dealt with an already-executed contract, the same analysis ought to apply to the matter at issue. The fact that the commissioners and the engineer shall act together and constitute a board when presented with an alternative submission, R.C. 5555.06, changes nothing. Even under that process, the engineer *still* lacks final-say authority. For if the commissioners vote opposite the engineer, the commissioners' vote prevails. Furthermore, in addition to R.C. 5555.06, other sections in Revised Code Chapter 5555, in reference to the matter at issue, show that the final-say authority rests with the commissioners. *See, e.g.*, R.C. 5555.022; R.C.5555.07; R.C. 5555.13; R.C. 5555.61; R.C. 5555.67 (commissioners may for good

cause extend the time allowed to complete a contract); R.C. 5555.68; R.C. 5555.69. Thus, both the analysis set forth in the 1987 opinion and the multiple sections found within Revised Code Chapter 5555 show that the commissioners hold final-say authority. For this reason, *if* your Commissioners and your Engineer proceeded under Revised Code Chapter 5555, the Commissioners, not the Engineer, hold final-say authority.

II

Your second question asks if the commissioners' authority is limited to the appropriation of the reasonable funding necessary for the engineer's operation to properly maintain the county roads. For the matter at issue, given my findings set forth above, I find no reason to conclude that the commissioners' authority is limited to the funding appropriation necessary for the engineer's office to properly maintain roads. As such, I conclude that my answer to your first question nullifies your second question.

Conclusion

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

1. A board of county commissioners has the final-say authority over the recommended road repair and road improvement projects prepared by a county engineer under R.C.315.08 and presented as part of a R.C. 5543.02 annual report. Furthermore, a board of county commissioners has the final-say authority on projects done in accordance with Revised Code Chapter 5555.
2. A board of county commissioners' authority is not limited to the appropriation of the reasonable funding necessary for the county engineer's operation to properly maintain the

The Honorable Kevin J. Baxter

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county roads as determined by the county
engineer.

Respectfully,

A handwritten signature in blue ink that reads "Dave Yost". The signature is written in a cursive style with a large, looping "D" and "Y".

DAVE YOST
Ohio Attorney General