**OPINION NO. 2009-012**

**Syllabus:**

2009-012

A county auditor must have express or implied statutory authority to place on the tax list and duplicate any charge or penalty imposed and certified by a municipal corporation; a municipal ordinance purporting to bestow such authority on the county auditor is insufficient to empower the auditor to act.

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**To: Gary A. Nasal, Miami County Prosecuting Attorney, Troy, Ohio**
**By: Richard Cordray, Ohio Attorney General, May 5, 2009**

You have requested an opinion about the authority of a county auditor to place on the tax duplicate certain charges that have been levied by municipalities but remain unpaid. As described more fully below, two municipal corporations have enacted ordinances that impose charges on city property owners and require that delinquent amounts be certified to the county auditor for placement on the tax duplicate. You ask whether the county auditor has the authority or duty under these ordinances to place the delinquent amounts on the tax list and duplicate.[1]

First, a non-chartered municipal corporation in Miami County has adopted an ordinance that creates a ''stormwater management utility program'' and imposes ''stormwater service charges.'' These charges are ''assessed to users and contributors of flow to the City's stormwater collection, impounding, and transportation system.'' The ordinance further states that if a stormwater service charge is not paid within ninety days after it is due and payable, it ''shall be certified to the Auditor of the county in which the property is located, who shall place the same on the tax duplicate of said County with the interest and penalties allowed by law and be col-

[1] The county auditor is required to prepare the general tax list of real and public utility property in the county. R.C. 319.28; R.C. 5709.01(D). The auditor provides a ''duplicate'' of the tax list to the county treasurer, who uses it to collect taxes and assessments levied against the property. R.C. 319.28; R.C. 5705.03(C). *See also* R.C. 321.24. The collection process is set forth in R.C. Chapter 323. *See also* R.C. Chapter 5721 (collection of delinquent taxes).

lected as other taxes are collected.'' The municipal corporation has sent to the Miami County auditor a list of the stormwater service charges that are past due, and has requested that the auditor place the charges upon the tax list and duplicate of the county for collection in the same manner as taxes levied against the real estate are collected.

Secondly, a chartered municipal corporation in Miami County has adopted an ordinance creating ''civil offenses,'' which the ordinance defines as ''any violation of the nuisance, zoning, and property maintenance codes'' of the city. The ordinance imposes monetary penalties for such offenses, and states that any civil penalty that is not paid when due ''shall be deemed delinquent and may be assessed on the property taxes.'' City officials have notified the Miami County auditor that they intend to certify to him unpaid civil penalty amounts with the request that the amounts be placed on the county tax list and duplicate for collection in the same manner as real estate taxes are collected.

You pose the following questions:

1. Is it legally permissible for charges such as the ''stormwater utility charges,'' which the non-chartered city purports to impose by ordinance, to be assessed against the properties burdened by the same, to be certified to the Miami County Auditor, and to be placed upon the county tax lists and duplicate for collection in the same manner in which taxes upon said real estate are collected?

2. Is the Miami County Auditor legally obligated, empowered, and/or required to accept the certification of such charges and to place them upon the tax lists and duplicate of the county for collection in the same manner in which taxes levied against the charged real estate are collected?

3. Is it legally permissible for ''civil penalties,'' such as those which the chartered city purports to impose by ordinance, to be assessed against the properties which are the subject of such charges, to be certified to the Miami County Auditor, and to be placed upon the county tax lists and duplicate for collection in the same manner in which taxes upon said real estate are collected?

4. Is the Miami County Auditor legally obligated, empowered, and/or required to accept the certification of such ''civil penalties'' and to place them upon the county tax lists and duplicate for collection in the same manner in which taxes levied against the charged real estate are collected?

As an initial matter, we emphasize that this opinion will address only the authority or duty of the county auditor to place the delinquent charges and penalties on the tax list and duplicate. The Attorney General has no authority to interpret or determine the constitutionality of specific municipal ordinances, and cannot opine on the legality of the charges and penalties that have been imposed by the two cities in Miami County. 2007 Op. Att'y Gen. No. 2007-035. This function rests ultimately with the courts. 2006 Op. Att'y Gen. No. 2006-054. *See also Northern Ohio Sign Contractors Ass'n v. City of Lakewood,* 32 Ohio St. 3d 316, 317-18, 513 N.E.2d 324 (1987) (''[i]t is well-settled that courts will presume the constitutionality of a municipal ordinance and that the party challenging a legislative act of a municipality bears the burden of demonstrating its unconstitutionality''). After examining the source from which county officers derive their powers and duties, however, we must also examine generally the nature of a municipality's power and determine how that power relates to the authority of a county auditor to act.

Section 1 of Article X of the Ohio Constitution delegates to the General Assembly the power to ''provide by general law for the organization and government of counties,'' and to ''provide by general law alternative forms of county government.''[2] The General Assembly has enacted legislation under Ohio Const. art. X, § 1 creating, and prescribing the duties of, county offices, including the office of county auditor. *See, e.g.,* R.C. Chapter 319. In non-charter counties, county officers may act only as prescribed by state statute—it is virtually axiomatic that a county auditor has only those powers that are expressly or impliedly conferred by statute. *State ex rel. Taraloca Land Co. v. Fawley,* 70 Ohio St. 3d 441, 639 N.E.2d 98 (1994); *Geauga County Bd. of Commissioners v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 585, 621 N.E.2d 696 (1993) (it is a ''truism'' that ''a county possesses only those powers expressly granted by the General Assembly'').

Unlike counties, the power of municipalities to act is not dependent on statutory authority bestowed by the General Assembly, but is conferred directly by the state constitution. Under Ohio Const. art. XVIII, § 3, municipalities ''have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.''[3] *See City of Canton v. State,* 95 Ohio St. 3d 149, 2002-Ohio-2005, 766 N.E.2d 963, at ¶ 7 (''[m]unicipalities derive their powers of

[2] Pursuant to Ohio Const. art. X, § 1, the General Assembly has enacted ''by general law alternative forms of county government.'' These provisions may be found in R.C. Chapter 302. Sections 3 and 4 of article X authorize counties to adopt a charter by vote of the people. Miami County does not operate under R.C. Chapter 302, nor has it adopted a charter.

[3] Ohio Const. art. XVIII, § 7 authorizes a municipality to ''frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.'' A municipality need not adopt a charter to exercise home rule authority under § 3. *State ex rel. City of Bedford v. Cuyahoga County Bd. of Elections*, 62 Ohio St. 3d 17, 577 N.E.2d 645 (1991); *Northern Ohio Patrolmen's Benevolent Association v.*

self-government directly from Section 3, Article XVIII of the Ohio Constitution''); *Village of West Jefferson v. Robinson,* 1 Ohio St. 2d 113, 205 N.E.2d 382 (1965).

Despite these broad powers of local self-government, municipalities have no power under Ohio Const. art. XVIII, § 3 or § 7 to bestow authority or responsibility on, or direct the activities of, the officers of other political subdivisions. *See, e.g., Cuyahoga Metropolitan Housing Authority v. City of Cleveland,* 63 Ohio App. 3d 353, 578 N.E.2d 871 (Cuyahoga County 1989) (a metropolitan housing authority is not subject to regulation by a municipality, absent express authorization by the General Assembly). *See also State ex rel. Mill Creek Metropolitan Park District Bd. of Commissioners v. Tablack,* 86 Ohio St. 3d 293, 714 N.E.2d 917 (1999) (municipal corporations had no authority under their powers of local self-government to withdraw from a park district established under R.C. Chapter 1545 and exempt their residents from the park district tax); *Prudential Co-Operative Realty Co. v. City of Youngstown,* 118 Ohio St. 204, 207, 160 N.E. 695 (1928) (Article XVIII of the Ohio Constitution confers no ''extra-territorial authority'' upon municipalities). Nothing in § 3 or § 7 authorizes municipalities to supplement the General Assembly as a source of authority for county officers. *Cf. Cupps v. City of Toledo,* 170 Ohio St. 144, 149-50, 163 N.E.2d 384 (1959) (the authority granted to municipalities by Sections 3 and 7 of Article XVIII ''does not include the power to regulate the jurisdiction of courts established by [article IV of] the Constitution or by the General Assembly thereunder''); *State ex rel. Cherrington v. Hutsinpiller,* 112 Ohio St. 468, 474, 147 N.E. 647 (1925) (Ohio Const. art. IV, § 1 grants the General Assembly the power to establish inferior courts, and ''supersedes the general power of local self-government, as granted in Section 3, Article XVIII'').

Although a municipality has no power under § 3 or § 7 to bestow upon itself, by charter or ordinance, the authority to add to the statutory duties of the county auditor, the General Assembly may require the county auditor to act at the direction, or on behalf, of a municipality. *See Bernhard v. O'Brien,* 97 Ohio App. 359, 369-70, 126 N.E.2d 349 (Hamilton County 1953) (under a statute similar to what is now R.C. 727.33, ''the legislative intent was to make the county treasurer the representative of the municipality in actions to collect assessments''); *Hilling v. City of Cincinnati,* 54 Ohio App. 293, 296-97, 7 N.E.2d 1 (Hamilton County 1936) (when the city certified an assessment to the county auditor for collection by the county treasurer under a statute similar to what is now R.C. 727.33, ''the city constituted the auditor and treasurer its agents or representatives in all matters relating to the collection''); *Guardian Savings & Trust Co. v. City of Cleveland,* 28 Ohio Ct.

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*City of Parma,* 61 Ohio St. 2d 375, 402 N.E.2d 519 (1980). A non-charter municipality must, however, ''in the passage of legislation, follow the procedure prescribed by statutes enacted pursuant to the mandate of Section 2 of Article XVIII of the Constitution.'' *Northern Ohio Patrolmen's Benevolent Association v. City of Parma* (syllabus, paragraph 1). (Ohio Const. art. XVIII, § 2 states in part: ''General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same.'')

App. 265, 269-70, 1918 Ohio Misc. LEXIS 83, at **8, 10 (Cuyahoga County March 4, 1918) (under statutes similar to what are now R.C. 727.30 and R.C. 727.33, the legislature "tendered to the cities of the state the services of the county auditor and treasurer" to collect assessments; the county auditor and treasurer "are at most simply the agencies afforded by the Legislature to municipalities for the speedy, effectual collection of these assessments"). *See also Sanders v. Snyder,* 113 Ohio App. 370, 374, 178 N.E.2d 174 (Williams County 1960) (the village did not enact its ordinances in accordance with state statute, "and therefore exercised its authority under the home-rule amendment to enact the ordinances;" because the village did not comply with the provisions of the statute, the village had no authority "to make the provisions of the ordinances applicable to territory beyond the village limits"). *See generally Prudential Co-Operative Realty Co. v. City of Youngstown,* 118 Ohio St. at 207 (a municipality may exercise extra-territorial authority only as conferred by statute). Thus, a county auditor may place on the tax list and duplicate charges that are certified by a municipality if the General Assembly has enacted a statute authorizing the auditor to do so. *See, e.g.,* R.C. 727.30; R.C. 727.33; R.C. 735.29; R.C. 743.04 (note 6, *infra*). [4]

**Stormwater Service Charges**

Because you have asked about charges imposed by a municipality for stormwater sewer services, we must also examine another "home rule" amendment to the state constitution—section 4 of article XVIII. A municipality, whether chartered or non-chartered, is given express authority under Ohio Const. art. XVIII, § 4 to own and operate public utilities, "within or without its corporate limits." A storm drainage or sewer system is a public utility for purposes of § 4. *City of Wooster v. Graines,* 52 Ohio St. 3d 180, 556 N.E.2d 180 (1990). Under § 4, a municipality may charge owners of real property their portion of the cost of the utility services it supplies. *Amherst Builders Ass'n v. City of Amherst,* 61 Ohio St. 2d at 347 (in order to exercise its power under § 4 to own and operate public utilities, "a municipality must be able to impose charges upon the users of the system to defray the costs of both its construction and operation"); *Pfau v. City of Cincinnati* (syllabus, paragraph 4); *Colley v. Village of Englewood,* 80 Ohio App. 540, 71 N.E.2d 524 (Montgomery County 1947) (a municipality may act under its § 4 authority to impose charges on properties served by a sewerage system, regardless of whether the properties tap into the system, even though state statute (R.C. 729.49, note 8, *infra*) authorizes a municipality to charge only persons whose premises are served by a connection to the sewerage system).

[4] Although the auditor's authority may be granted expressly by statute, as in the statutes cited, it also may be implied from statutes that authorize municipalities to certify their charges to the auditor for placement on the tax list and duplicate. *See, e.g.,* R.C. 729.11 (an assessment levied by an ordinance under that section, which authorizes a municipality to levy an assessment for the purposes of paying the costs of planning the construction or improvement of a system of storm or sanity sewerage, "shall be certified to the county auditor for collection as other taxes"). *See also* note 8, *infra.*

Like sections 3 and 7 of article XVIII, however, section 4 does not supply authority to a municipality to direct the duties of the county auditor. A county auditor may place on the tax list and duplicate a delinquent utility charge certified by a municipality only if he has the statutory authority to do so. If a municipal corporation certifies an amount pursuant to its constitutional home rule authority, rather than as authorized by statute, the county auditor would have no authority to place the amount on the tax list and duplicate unless expressly authorized by statute to do so.[5] *See Sanders v. Snyder,* 113 Ohio App. at 374.

Numerous opinions of the Attorney General, while not specifically addressing § 4, have concluded that a county auditor must have statutory authority to place on the tax list utility charges certified by a municipality. *See, e.g.,* 1934 Op. Att'y Gen. No. 2636, vol. I, p. 612, 613 (''the county auditor has no duty, power or authority to place any items upon the tax duplicate other than those for which authority is granted by the legislature''); 1929 Op. Att'y Gen. No. 1203, vol. III, p. 1788, 1790 (''[t]here is no authority which authorizes the certification of delinquent water rentals to the county auditor by a city. Neither is there any authority authorizing the county auditor to place such certification upon the tax duplicate for collection''); 1912 Op. Att'y Gen. No. 357, vol. I, p. 243.[6] *See also* 1981 Op. Att'y Gen. No. 81-030 (a city is not authorized to certify unpaid water bills to the county auditor for collection); 1962 Op. Att'y Gen. No. 3418, p. 916 (R.C. 729.49 authorizes a municipal corporation to certify unpaid rates or charges of sewer rents to the county auditor, but there is no authority under which a municipality may certify unpaid tap-in charges to the auditor); 1934 Op. Att'y Gen. No. 2561, vol. I, p. 528 (''there is no authority for the certification of delinquent water rents to the county auditor by a city,'' although G.C. 4361 [R.C. 735.29] authorizes a village to do so). *Cf. Burden v. Village of Waynesfield,* 1987 Ohio App. LEXIS 6761, at *13 (Auglaize County May 13, 1987) (R.C. 735.29 constituted ''sufficient legislation to support the act of the [village] Board of Public Affairs in certifying the delinquent accounts to the auditor''); 1936 Op. Att'y Gen. No. 6168, vol. III, p. 1503, 1506 (G.C. 3891-1

[5] *See, e.g.,* R.C. 715.261 (if a municipality repairs or removes an unsafe building under R.C. 715.26 or ''pursuant to Section 3 of Article XVIII, Ohio Constitution,'' it may collect the costs of doing so by certifying the costs to the county auditor, ''who shall place the costs upon the tax duplicate'').

[6] R.C. 743.04 was amended in 1984 to authorize county auditors to place on the tax list and duplicate overdue water rents or charges certified by a city, if the unpaid rents or charges arose under a service contract made between the city and owner who occupies the property served. (The statute also authorizes cities to certify such delinquencies to the county auditor. R.C. 743.04(A).) *See* 1983-1984 Ohio Laws, vol. I, 263 (Am. Sub. S.B. 118, eff. July 4, 1984). *See also* 1985-1986 Ohio Laws, vol. III, 5687 (Am. Sub. H.B. 754, eff. Sept. 25, 1986). The amount constitutes a lien on the property served ''from the date placed on the list and duplicate and shall be collected in the same manner as other taxes.'' R.C. 743.04(A). Division (B) was also added to R.C. 743.04 by Am. Sub. S.B. 118, and authorizes a city to collect the delinquent rents or charges ''by actions at law, in the name of the city from an owner, tenant, or other person who is liable to pay the rents or charges.''

[R.C. 729.49] gives "unqualified authority for a city to certify delinquent sewer rental charges to the county auditor to be extended by him on the county tax duplicate").

Thus, the county auditor must have statutory authority in order to place on the tax list delinquent storm sewer charges certified by a municipality—such authority may be express or implied from a statute authorizing municipalities to certify the amounts to the county auditor.[7] *See, e.g.,* R.C. 729.49.[8] Authority for the auditor to act may not be supplied solely by municipal charter or ordinance.

**Penalties for Civil Offenses**

The second municipal corporation about which you have asked has enacted

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[7] Case law and previous Attorney General opinions have concluded that, where a statute requires the county auditor to place a tax, assessment, or other charge on the tax list and duplicate, the auditor, as a ministerial officer, has a mandatory duty to do so; he has no discretion to refuse, based on his belief that the tax, assessment, or other charge is without authority of law or otherwise invalid. *See State ex rel. Donahey v. Roose,* 90 Ohio St. 345, 107 N.E. 760 (1914); 1985 Op. Att'y Gen. No. 85-084. *See also State ex rel. Taraloca Land Co. v. Fawley,* 70 Ohio St. 3d 441, 639 N.E.2d 98 (1994). Where no statute authorizes a county auditor to place charges on the tax list, however, the auditor's refusal to do so would not constitute the exercise of discretion—he would simply have no authority to act.

[8] R.C. 729.49 authorizes a municipal corporation to "establish just and equitable rates or charges of rents" for the use of sewerage systems, pumping works, and sewage treatment or disposal by every person whose premises are served by a connection. "Such charges shall constitute a lien upon the property served by such connection and if not paid when due shall be collected in the same manner as other municipal corporation taxes." *Id.* R.C. 729.49 applies to a storm drainage or sewer system, *City of Wooster v. Graines,* and has been interpreted as authorizing a county auditor to enter unpaid charges on the tax duplicate after certification by a city. *Union Properties Inc. v. City of Cleveland,* 38 Ohio L. Abs. 246, 49 N.E.2d 571 (Cuyahoga County 1943), *aff'd,* 142 Ohio St. 358, 52 N.E.2d 335 (1943); 1936 Op. Att'y Gen. No. 6168, vol. III, p. 1503.

Therefore, if a municipality enacted an ordinance pursuant to R.C. 729.49, it would have the authority to certify delinquent charges to the county auditor, and the auditor would have the authority to place the charges on the tax duplicate. If, however, a municipality enacted an ordinance pursuant to its home rule power, and not under R.C. 729.49 or other statute authorizing certification of the charges to the auditor, the auditor would have no authority to place the charges on the duplicate. *See Colley v. Village of Englewood,* 80 Ohio App. 540, 71 N.E.2d 524 (Montgomery County 1947) (R.C. 729.49 [then G.C. 3891-1] is not exclusive, and a municipality, under Ohio Const. art. XVIII, § 4, may impose rental charges on all properties within the limits of the village with access to the system, regardless of whether the properties are connected to the sewer system, and even though such charges are not authorized by R.C. 729.49).

an ordinance subjecting any person who violates the city's property maintenance, building, zoning, or nuisance code to a civil penalty in lieu of criminal prosecution. You have stated that city officials have indicated to the Miami County Auditor that they intend to certify to him the unpaid civil penalty amounts assessed pursuant to the ordinance with the request that the amounts be added to the tax lists and duplicate of the county and collected as taxes upon the real estate are collected.

The principles discussed above apply in this instance as well. The county auditor has the authority to place the delinquent charges on the tax duplicate only if he has the express or implied statutory authority to do so—an attempt by a municipality to bestow such authority on the auditor by charter or ordinance is insufficient to empower the auditor to act.

As discussed above, a municipality does not need statutory authority in order to exercise powers of local self-government or the police power within its limits. *Village of West Jefferson v. Robinson*. Nonetheless, the General Assembly has enacted numerous statutes that "authorize" municipalities to regulate land use, some of which also authorize municipalities to certify charges to the county auditor for placement on the tax duplicate. *See, e.g.,* R.C. 715.261; R.C. 731.51-.54. Again, the county auditor may place on the tax list and duplicate charges certified by a municipality only if he has authority to do so under one of such statutes.

**Other Remedies**

Our conclusion does not mean, of course, that the municipalities are unable to collect the delinquent charges and penalties. A person liable under one of the ordinances may be treated as any other debtor of the city. *See Guardian Savings & Trust Co. v. City of Cleveland,* 28 Ohio Ct. App. at 269-70, 1918 Ohio Misc. LEXIS 83 at **8-9 (municipalities have "the power to collect [assessments] wholly independent of the county auditor and county treasurer's offices" . . . . a municipality need not certify delinquent installments "for the same may be collected by suit at law just the same as any other debt"). *Cf.* R.C. 715.261(B)(2) (to collect the costs of removing or repairing unsafe structures, a municipal corporation "may commence a civil action to recover the total costs from the owner"); R.C. 735.29(B) (a village may collect overdue water rents "by actions at law in the name of the village from an owner, tenant, or other person who is liable to pay the rents or charges"); R.C. 743.04(B) (same for cities).[9] A city may reduce its claim to judgment, file a certificate of judgment with the clerk of the common pleas court, and receive a judgment lien on the defendants' "lands and tenements." R.C. 2329.02. *See also, e.g.,* R.C. 2716.03 (garnishment of personal earnings). Municipalities also have the option of pursuing legislation that would authorize them to certify specific charges to the county auditor for placement on the tax list and duplicate, and would provide that such charges constitute a lien upon the property served.

[9] *See also* R.C. 718.12(A) (civil actions to recover municipal income taxes). The ordinances of both municipalities about which you ask provide that all municipal income taxes are collectible by suit "as other debts of like amounts are recoverable."

In conclusion, it is my opinion, and you are hereby advised, that a county auditor must have express or implied statutory authority to place on the tax list and duplicate any charge or penalty imposed and certified by a municipal corporation; a municipal ordinance purporting to bestow such authority on the county auditor is insufficient to empower the auditor to act.