

August 24, 2017

The Honorable Nicholas A. Iarocci
Ashtabula County Prosecuting Attorney
Ashtabula County Courthouse
25 West Jefferson Street
Jefferson, Ohio 44047-1092

SYLLABUS:

2017-025

Pursuant to R.C. 715.261(B)(1), a county auditor may place on the tax list and duplicate the cost incurred for abating a public health nuisance that is certified to the county auditor by the clerk of the legislative authority of a municipal corporation, when the public health nuisance is declared in accordance with a valid municipal ordinance adopted under Ohio Const. art. XVIII, § 3.



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OPINION NO. 2017-025

The Honorable Nicholas A. Iarocci
Ashtabula County Prosecuting Attorney
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25 West Jefferson Street
Jefferson, Ohio 44047-1092

Dear Prosecutor Iarocci:

You have requested an opinion whether the Ashtabula County Auditor may place on the tax list and duplicate the cost of abating a public health nuisance that is certified to the county auditor by the Clerk of Council of the City of Ashtabula, when a municipal ordinance defines the public health nuisance as a resident placing trash outside, with the expectation that the City of Ashtabula Sanitation Division will collect the trash, and failing to pay the cost of collection for a period of at least two billing cycles.

The City of Ashtabula provides trash collection services to the city's residents. In the exercise of the city's home rule powers under Ohio Const. art. XVIII, § 3, the City of Ashtabula adopted a series of ordinances (2010-181, 2010-183, and 2010-184) addressing the disposal of solid waste and the cost of collecting that solid waste in the City of Ashtabula. Ordinance 2010-183 enacted Codified Ordinance Section 951.08, which sets the rates for the cost of collecting solid waste from residential properties in the city and a late fee when collection rates are not paid when due. Ordinance 2010-184 enacted Codified Ordinance Section 951.081, which in paragraph (a) provides:

If the owner, occupant or person otherwise in control of a Residential Unit shall either fail to pay the rates due for solid waste collection as established in Section 951.08 for two (2) successive billing periods, or shall fail to provide evidence of vacancy in accordance with said Section, it shall be presumed that a Public Health Nuisance as defined in Section 951.01(f)(2) is being maintained at said Residential Unit.

Codified Ordinance Section 951.01(f) defines a "public health nuisance" as either:

(1) any accumulation of solid waste, refuse, filth, offal, garbage, or other unwanted or unused material (other than toxic waste or hazardous waste as defined in [R.C. Title 37]) in any location where such material may reasonably be expected to lead to the accumulation of stray animals feeding thereon, or to the attraction of

vermin including rats, or to the creation of odors offensive to an ordinary person, or to a deterioration of property values in the surrounding neighborhood; or

(2) the deposit of materials described in paragraph (f)(1) of this Section on any tree lawn, sidewalk, alley, or beside any public way in such a fashion that indicates an expectation that such material is to be collected by the City of Ashtabula Sanitation Division without paying or making arrangements to pay the reasonable cost thereof.

If the unpaid rates are not paid within 10 days after the final day of the publication of notice, the Clerk of Council shall certify the cost of abating the public health nuisance to the Ashtabula County Auditor for inclusion on the tax list and duplicate. Codified Ordinance Section 951.081(c). With respect to a public health nuisance as defined in Codified Ordinance Section 951.01(f)(2) (leaving solid waste to be collected by the City of Ashtabula Sanitation Division without paying the cost of collection), the “cost of abatement” is the “amount which would have been payable for rubbish disposal at the location involved in the abatement pursuant to Section 951.08, plus ten per cent (10%) to cover administrative costs involved in the collection of same[.]” Codified Ordinance Section 951.01(h).

A county auditor, as a creature of statute, has only those powers expressly provided by statute or necessarily implied therein. *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E. 112 (1935) (syllabus, paragraph 1). Each year, a county auditor compiles a general tax list of real and public utility property located in the county. R.C. 319.28(A); R.C. 5709.01(D) (“[a]ll property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property”). The county auditor certifies the general tax list and provides a copy to the county treasurer. R.C. 319.28(A). The county treasurer’s copy is known as the “duplicate” and is used in the collection of property taxes. *Id.*; R.C. 5705.03(C).

In 2009 Op. Att’y Gen. No. 2009-012, at 2-100, the Attorney General concluded that “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.” (Footnote omitted.) Authority for the county auditor to place a certified charge on the tax list and duplicate may be conferred expressly, or by implication, in a statute. *Id.* at 2-100 n.4. The Attorney General further concluded that “[i]f 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.” *Id.* at 2-101 (footnote omitted).

R.C. 715.261(B) sets forth three methods that a municipal corporation may use to collect the total cost of abatement activities. One of those methods is to certify the total cost of abatement to the county auditor for placement on the tax list and duplicate. R.C. 715.261(B)(1). Pursuant to R.C. 715.261(B)(1), when a municipal corporation certifies the total cost of an abatement activity to the

county auditor, the county auditor shall place the cost on the tax list and duplicate.¹ The abatement of a nuisance by a municipal corporation constitutes an “abatement activity” for the purpose of R.C. 715.261. R.C. 715.261(A)(2)(c). Thus, a county auditor has express statutory authority to place on the tax list and duplicate the cost of abating a nuisance that is certified to the county auditor by a municipal corporation.

In your situation, the City of Ashtabula Codified Ordinance Section 951.01(f)(2) and Codified Ordinance Section 951.081(a) declare that a public health nuisance exists when solid waste is placed on “any tree lawn, sidewalk, alley, or beside any public way in such a fashion that indicates an expectation that such material is to be collected by the City of Ashtabula Sanitation Division without paying or making arrangements to pay the reasonable cost” of collecting the solid waste for two billing periods. The cost of abating that public health nuisance is the “amount which would have been payable for rubbish disposal at the location involved in the abatement ... plus ten per cent (10%) [.].” Codified Ordinance Section 951.01(h). Codified Ordinance Section 951.081(c) directs the Clerk of

¹ A municipal corporation shall not certify, and a county auditor shall not place upon the tax list and duplicate, the cost of any abatement activity if:

(a) The abatement activity occurred on land that has been transferred or sold to an electing subdivision as defined in section 5722.01 of the Revised Code, regardless of whether the electing subdivision is still the owner of the land, and the abatement activity occurred on a date prior to the transfer or confirmation of sale to the electing subdivision.

(b) The abatement activity occurred on land that has been sold to a purchaser at sheriff’s sale or auditor’s sale, the abatement activity occurred on a date prior to the confirmation of sale, and the purchaser is not the owner of record of the land immediately prior to the judgment of foreclosure nor any of the following:

(i) A member of that owner’s immediate family;

(ii) A person with a power of attorney appointed by that owner who subsequently transfers the land to the owner;

(iii) A sole proprietorship owned by that owner or a member of that owner’s immediate family;

(iv) A partnership, trust, business trust, corporation, or association of which the owner or a member of the owner’s immediate family owns or controls directly or indirectly more than fifty per cent.

(c) The abatement activity is taken on land that has been forfeited to this state for delinquent taxes, unless the owner of record redeems the land.

Council to certify any unpaid costs of abatement to the Ashtabula County Auditor for placement on the tax list and duplicate in accordance with R.C. 715.261(B)(1).²

Whether the Ashtabula County Auditor may place the cost of abating the nuisance described in Codified Ordinance Section 951.01(f)(2) on the tax list and duplicate pursuant to R.C. 715.261(B)(1), depends upon whether the nuisance as defined in Codified Ordinance Section 951.01(f)(2) constitutes a “nuisance” for purposes of R.C. 715.261(A)(2)(c). In all sections of the Revised Code that relate to nuisances, a “nuisance” is defined as any of the following:

- (1) That which is defined and declared by statutes to be a nuisance;
- (2) Any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives, film or plate positives, films designed to be projected on a screen for exhibition films, or glass slides either in negative or positive form designed for exhibition by projection on a screen, are photographed, manufactured, developed, screened, exhibited, or otherwise prepared or shown, and the personal property and contents used in conducting and maintaining any such place for any such purpose. This chapter shall not affect any newspaper, magazine, or other publication entered as second class matter by the post-office department.
- (3) Any room, house, building, boat, vehicle, structure, or place where beer or intoxicating liquor is manufactured, sold, bartered, possessed, or kept in violation of law and all property kept and used in maintaining the same, and all property designed for the unlawful manufacture of beer or intoxicating liquor and beer or intoxicating liquor contained in the room, house, building, boat, structure, or place, or the operation of such a room, house, building, boat, structure, or place as described in division (C)(3) of this section where the operation of that place substantially interferes with public decency, sobriety, peace, and good order. “Violation of law” includes, but is not limited to, sales to any person under the legal drinking age as prohibited in [R.C. 4301.22(A)] or [R.C. 4301.69(A)] and any violation of [R.C. 2913.46 or R.C. 2925.03].

R.C. 3767.01(C). The situation described in Codified Ordinance Section 951.01(f)(2) does not constitute a place described in either R.C. 3767.01(C)(2) or R.C. 3767.01(C)(3). Therefore, in order

² It is beyond the scope of an Attorney General opinion to interpret or determine the lawfulness of the City of Ashtabula Codified Ordinances as that determination is within the province of the judiciary. *See* 2009 Op. Att’y Gen. No. 2009-012, at 2-98. Accordingly, for the purpose of this opinion, we have presumed the validity of the City of Ashtabula Codified Ordinances.

Codified Ordinance Section 951.081(c) actually states that the cost of abatement shall be certified in accordance with “Section 751.261(B)(1) of the Ohio Revised Code[.]” We believe that is a typographical error and that R.C. 715.261(B)(1) is the appropriate section.

for the Ashtabula County Auditor to have authority to place on the tax list and duplicate the cost of abatement certified by the City of Ashtabula pursuant to Codified Ordinance Section 951.081(c), the public health nuisance defined in Codified Ordinance Section 951.01(f)(2) must constitute a nuisance as defined in R.C. 3767.01(C)(1) (“[t]hat which is defined and declared by statutes to be a nuisance”). This requires us to determine whether “statutes” in R.C. 3767.01(C)(1) includes municipal ordinances.

The term “statutes” is not defined in the Revised Code for purposes of R.C. 3767.01. There are instances in the Revised Code where the General Assembly has used “statute” and “ordinance” in the same section, thereby indicating that the term “statute” does not always include an “ordinance.” *See, e.g.*, R.C. 2303.201(E)(2)(a); R.C. 2901.01(A)(13); R.C. 4510.01(E). However, for the purpose of applying R.C. 3767.01 to R.C. 715.261, it is reasonable to conclude that the term “statutes” in R.C. 3767.01(C)(1) includes municipal ordinances. First, it is well established that in the absence of a technical meaning, words shall be construed in accordance with their ordinary meaning. R.C. 1.42. The ordinary meaning of “statute” is “[a] law passed by a legislative body[.]” *Black’s Law Dictionary* 1633 (10th ed. 2014). A municipal ordinance clearly comes within the ordinary meaning of “statute.” *See id.* at 1273 (defining an “ordinance” as “[a]n authoritative law or decree”).

Moreover, the legislative authority of a municipal corporation may adopt municipal ordinances to prevent or abate nuisances. *See* R.C. 715.44 (a municipal corporation’s power to abate nuisances and prevent injury or annoyance from nuisances); *see McClanahan v. Cleveland*, 8th Dist. No. 40633, 1980 Ohio App. LEXIS 11358, at *4 (April 3, 1980) (“[n]o legislation can authorize the destruction of private property as a public nuisance unless such property comes within a valid legislative definition (by statute or ordinance) of a public nuisance or is expressly proscribed by valid legislation (*i.e.*, by statute or ordinance)” (quoting *Solly v. Toledo*, 7 Ohio St. 2d 16, 218 N.E.2d 463 (1966) (syllabus, paragraph 2), *superseded by statute on other grounds as recognized in Shelton v. Twin Twp.*, 12th Dist. No. CA2014-07-004, 2015-Ohio-1602, at ¶17, and *City of Englewood v. Turner*, 178 Ohio App. 3d 179, 2008-Ohio-4637, 897 N.E.2d 213, at ¶14 (Montgomery County))). A municipal corporation’s authority to prevent or abate nuisances is grounded in Ohio Const. art. XVIII, § 3. *McClanahan v. Cleveland*, 8th Dist. No. 40633, 1980 Ohio App. LEXIS 11358, at *4 (April 3, 1980) (“[u]nder common law, the State of Ohio has the authority to abate public nuisances. This authority is extended to Ohio municipalities by the Home Rule provision of the Ohio Constitution”). The methods for collecting the costs of abatement activities set forth in R.C. 715.261(B) apply “to any action taken by a municipal corporation ... pursuant to [R.C. 715.26 (regulating and inspecting buildings)] or pursuant to [Ohio Const. art. XVIII, § 3 (a municipal corporation’s powers of local self-government)].” R.C. 715.261(C). R.C. 715.261(C) indicates that the General Assembly intends that R.C. 715.261 apply to the abatement of a nuisance by a municipal corporation through the exercise of the municipal corporation’s powers of local self-government. The abatement of a nuisance includes the adoption of a municipal ordinance declaring a condition to be a nuisance. Accordingly, a municipal corporation may certify to the county auditor the cost of abating a nuisance that is declared as such in a municipal ordinance that was adopted through the exercise of the municipal corporation’s

home rule powers.³ Pursuant to R.C. 715.261(B)(1), a county auditor may place on the tax list and duplicate the cost incurred for abating a nuisance that is certified to the county auditor by the clerk of the legislative authority of a municipal corporation, when the public health nuisance is declared in accordance with a valid municipal ordinance adopted under Ohio Const. art. XVIII, § 3.

In addition to the authority provided by R.C. 715.261(B)(1), the Ashtabula County Auditor may have authority under R.C. 343.08(A)(2) to place the unpaid solid waste collection charges on the tax list and duplicate. R.C. 343.08(A)(2) authorizes a county auditor to place on the tax list rates or charges that include the costs for a municipal corporation to provide solid waste collection service to a county solid waste management district.⁴ A board of county commissioners of a county solid waste management district may contract with a municipal corporation for the municipal corporation to furnish solid waste collection services to the district. R.C. 343.02; *see generally* R.C. 715.43 (“[a]ny municipal corporation may provide for the collection and disposition of ... garbage ... and may establish, maintain, and regulate plants for the disposal thereof”). In addition, the board of county commissioners of a solid waste management district may “fix reasonable rates or charges to be paid by every person ... that owns premises to which solid waste collection ... service[] is provided by the district[.]” R.C. 343.08(A). The rates or charges may be collected by “[p]eriodic billings made by the district directly or in conjunction with billings for public utility rates or charges by a county water district ... a county sewer district ..., or a municipal corporation[.]” R.C. 343.08(A)(1). Alternatively, the rates or charges may be collected by “[c]ertifying the rates or charges to the county auditor of the county where the lots or parcels are located, who shall place them on the real property duplicate against the lots or parcels.” R.C. 343.08(A)(2). Thus, a county auditor may place on the tax list and duplicate rates or charges that are due for solid waste collection services provided in a county solid waste management district that are certified to the county auditor pursuant to R.C. 343.08(A)(2).⁵

³ R.C. 3767.13(B) states “[n]o person shall cause or allow offal, filth, or noisome substances to be collected or remain in any place to the damage or prejudice of others or of the public.” R.C. 3767.13(B) has been construed as a statute declaring something to be a nuisance as understood in R.C. 3767.01(C)(1). 1987 Op. Att’y Gen. No. 87-097, at 2-642. Thus, even if “statutes” in R.C. 3767.01(C)(1) did not include “ordinances,” R.C. 3767.13(B) may serve as the statutory declaration of a nuisance thereby bringing the City of Ashtabula’s unpaid trash collection charges within the scope of R.C. 715.261(B)(1).

⁴ Ashtabula County maintains a county solid waste management district.

⁵ If a county solid waste management district owns or operates a solid waste facility, and the district contracts with a public authority for the collection of solid wastes in the district, the collection costs under those contracts “may be paid by rates or charges fixed and collected under [R.C. 343.08] or by rates and charges fixed under those contracts and collected by the contractors.” R.C. 343.08(A)(2).

Based on the foregoing, it is my opinion, and you are hereby advised that pursuant to R.C. 715.261(B)(1), a county auditor may place on the tax list and duplicate the cost incurred for abating a nuisance that is certified to the county auditor by the clerk of the legislative authority of a municipal corporation, when the public health nuisance is declared in accordance with a valid municipal ordinance adopted under Ohio Const. art. XVIII, § 3.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General