

March 17, 2016

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
4th Floor Administration Building  
160 High Street N.W.  
Warren, Ohio 44481-1092

SYLLABUS:

2016-009

1. Pursuant to R.C. 6103.02(G), all revenue related to a county sewer district's water supply facilities shall be paid into the district's water fund. Pursuant to R.C. 6117.02(C), all revenue related to a county sewer district's sanitary facilities shall be paid into the district's sanitary fund. Pursuant to R.C. 6117.02(D), all revenue related to a county sewer district's drainage facilities shall be paid into the district's drainage fund.
2. An expense of a county sanitary engineering department may be paid with moneys comprising the water fund, sanitary fund, or drainage fund of a county sewer district, provided that the expense is a necessary and reasonable expense related to the proper and efficient administration of the county sewer district and is properly attributable to the particular fund. Moneys from the water fund, sanitary fund, or drainage fund of a county sewer district may not be used to pay an expense of another county sewer district.
3. A board of county commissioners may establish a special fund in the county treasury for the purpose of paying the expenses of the county sanitary engineering department pursuant to R.C. 5705.09(F) or R.C. 5705.12.
4. Moneys that have been deposited into the water fund, sanitary fund, or drainage fund of a county sewer district may be transferred to another special fund in the county treasury established pursuant to R.C. 5705.09(F) or R.C. 5705.12 for the purpose of paying expenses related to the county sanitary engineering department so long as the requirements of R.C. 5705.15 and R.C. 5705.16 have been met. Restrictions imposed upon the use of sewer district moneys by R.C. 6103.02(G), R.C. 6103.02(H), R.C. 6117.02(C), R.C. 6117.02(D), and R.C. 6117.02(E) apply to moneys that are transferred to the special fund.

5. Questions related to accounting for moneys that may have been expended in violation of R.C. 6103.02(G) and R.C. 6103.02(H) or R.C. 6117.02(C), R.C. 6117.02(D), and R.C. 6117.02(E) cannot be resolved by an opinion of the Attorney General.



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March 17, 2016

OPINION NO. 2016-009

The Honorable Dennis Watkins  
Trumbull County Prosecuting Attorney  
4th Floor Administration Building  
160 High Street N.W.  
Warren, Ohio 44481-1092

Dear Prosecutor Watkins:

You have requested an opinion about the creation of a fund in a county treasury for the purpose of paying the payroll and benefit expenses of the county sanitary engineering department. According to your letter, approximately thirty years ago, the county sanitary engineer established a special fund in the county treasury into which moneys from Trumbull County's sewer districts have been deposited for the purpose of paying expenses of the sanitary engineering department and expenses for items that are shared by all of the districts.<sup>1</sup>

You explain that the county sanitary engineering department does not receive an appropriation from the county general fund. Instead, it is supported solely by revenues generated from the rates charged and collected in the county sewer districts. For each fiscal year, each sewer district contributes to the sanitary engineer fund an estimate of the district's share of the cost of the payroll and benefit expenses of the sanitary engineering department and other expenses that benefit all the districts (*e.g.*, accounting software or trucks). A sewer district's share of the expenses is based upon the number of customers served by the facilities of the district.

In the years since the creation of the sanitary engineer fund, some sewer districts have been unable to contribute their share of the county sanitary engineer's expense estimate for a fiscal year. To compensate for the deficiency created by a district's inability to contribute its share, surplus moneys in the sanitary engineer fund were used or the other sewer districts contributed a greater share. The use of surplus moneys and larger contributions were not considered loans and there was no expectation of

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<sup>1</sup> Your letter describes this fund as "the 600 Fund." It is our understanding that "600" is a code utilized by the Auditor of State for a fund that is established for revenue from a public utility service provided by a county. For the purpose of this opinion, we will refer to this fund as "the sanitary engineer fund."

repayment. Other expenses of the sewer districts, such as debt obligations, operating and maintenance expenses, and the cost of bulk water purchases for each district, are paid by each district individually.<sup>2</sup>

We have summarized your specific questions about the sanitary engineer fund as follows:

1. Has the sanitary engineer fund been created and contributed to in accordance with law or in violation of R.C. 6103.02(G) and (H) and R.C. 6117.02(C) and (E)?
2. Is the use of surplus moneys in the sanitary engineer fund or the contribution of a greater share to cover a district's inability to contribute its share of the estimate of expenses lawful under R.C. 6103.02(G) and (H) and R.C. 6117.02(C) and (E)?
3. If the creation of the fund, the contributions to the fund, the expenditure of surplus moneys, or the larger contributions from other sewer districts were not lawful, should the expenditure of surplus and contributed moneys by the districts that were unable to contribute their share be considered a loan that should be repaid to the contributing districts?
4. If the moneys should be repaid, how far in the past should the Trumbull County sanitary engineering department examine the contributions of the districts to determine whether a repayment is owed to the other districts?

Your questions ask us to determine whether the sanitary engineer fund was established in the county treasury in accordance with the law as it existed thirty years ago. You also ask us to advise you whether county sewer district moneys have been lawfully deposited in that fund and thereafter expended for proper purposes in the years since the fund's creation. "It is beyond the scope of the opinion process to resolve 'questions of fact regarding the lawfulness of actions taken in the past or the rights or liabilities of particular individuals or governmental entities.'" 2011 Op. Att'y Gen. No. 2011-009, at 2-73 (quoting 2005 Op. Att'y Gen. No. 2005-043, at 2-472); *see also, e.g.*, 2015 Op.

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<sup>2</sup> Your letter states that Trumbull County has nine water districts and two sanitary sewer districts. We understand your reference to "sanitary sewer districts" to mean county sewer districts with sanitary facilities established pursuant to R.C. 6117.01(B)(1), and the reference to "water districts" to mean water supply facilities established in a county sewer district pursuant to R.C. 6103.02(A). *See generally* R.C. 6103.01(A) (defining "water supply facilities" for purposes of R.C. Chapter 6103); R.C. 6117.01(A)(1) (defining "sanitary facilities" for purposes of R.C. Chapter 6117). Drainage services in Trumbull County are administered by the Trumbull County Engineer rather than the Trumbull County sanitary engineering department. In this opinion, when we use the term "sewer district," we are referring to county sewer districts established under R.C. Chapter 6117 with water supply facilities, sanitary facilities, and drainage facilities.

Att’y Gen. No. 2015-030, slip op. at 2 (“[w]hether the board of health acted in accordance with the law in the past must be determined by local officials or, ultimately, the judiciary”). In this opinion, therefore, we address the authority of a board of county commissioners to establish a fund in the county treasury to pay the expenses of a county sanitary engineering department and to expend or transfer moneys from a county sewer district’s funds under the law as it currently exists.

### **County Sewer Districts and a County Sanitary Engineering Department**

To preserve the public health and welfare, a board of county commissioners may establish and maintain one or more sewer districts in the county. R.C. 6117.01(B)(1). Within any sewer district, the board may operate sanitary and drainage facilities that the board deems necessary and appropriate. *Id.* The board may also maintain and operate water supply facilities for one or more sewer districts. R.C. 6103.02(A). To assist a board of county commissioners with the performance of its duties under R.C. Chapters 6103 and 6117, the board may employ a county sanitary engineer and create a sanitary engineering department. R.C. 6103.02(B); R.C. 6117.01(C). The “sanitary engineering department ... shall be under [the] supervision [of the board of county commissioners] and ... shall be headed by the county sanitary engineer[.]” R.C. 6117.01(C). The board of county commissioners is required to “provide for and pay the compensation of the county sanitary engineer and all authorized necessary expenses of the county sanitary engineer and the sanitary engineering department.” *Id.* The board is also required to pay the compensation of clerks and assistants that the county sanitary engineer appoints. *Id.*

### **Deposit and Expenditure of Moneys Collected in County Sewer Districts**

A board of county commissioners shall set reasonable rates for using and connecting to the sanitary facilities in a sewer district. R.C. 6117.02(A), (B). In addition, a board of county commissioners shall also set “reasonable rates, including penalties for late payments, for water supplied to public agencies and persons when the source of supply or the facilities for its distribution are owned or operated by the county[.]” R.C. 6103.02(F). A board of county commissioners has discretion to set “reasonable charges to be collected for the privilege of connecting to the [water supply] distribution facilities” owned by the county, R.C. 6103.02(F), and reasonable rates and charges for connecting to and using drainage facilities that are owned or operated by the county, R.C. 6117.02(D).

All moneys collected pursuant to R.C. 6103.02(F), R.C. 6117.02(A), R.C. 6117.02(B), and R.C. 6117.02(D) shall be paid into separate funds in the county treasury that are established by the board of county commissioners. R.C. 6103.02(G); R.C. 6117.02(C); R.C. 6117.02(D). Moneys collected for supplying water “shall be paid to the county treasurer and kept in a separate and distinct water fund established by the board [of county commissioners] to the credit of the [sewer] district.” R.C. 6103.02(G). Moneys collected in relation to sanitary facilities “shall be paid to the county treasurer and kept in a separate and distinct sanitary fund established by the board to the credit of the [sewer] district.” R.C. 6117.02(C). Similarly, moneys collected in relation to drainage facilities “shall be paid to the county treasurer and kept in a separate and distinct drainage fund established by the board to the credit of the [sewer] district.” R.C. 6117.02(D). Thus, a board of county commissioners

shall establish in the county treasury a water fund, a sanitary fund, and a drainage fund for each county sewer district. All revenues collected in a county sewer district in relation to a particular type of facility shall be paid into the respective fund for that sewer district.

The General Assembly explicitly restricts the use of moneys comprising a water fund, sanitary fund, and drainage fund to certain purposes and sets forth the priority in which the moneys shall be expended. R.C. 6103.02(G); R.C. 6117.02(C), (D). Moneys comprising the water fund “shall be applied first to the payment of the cost of the management, maintenance, and operation of the water supply facilities of, or used or operated for, the sewer district[.]” R.C. 6103.02(G). Likewise, moneys comprising the sanitary and drainage funds shall be used for “the payment of the cost of the management, maintenance, and operation of the [sanitary and drainage facilities] of, or used or operated for, the district[.]” R.C. 6117.02(C), (D).

“[T]he cost of the management, maintenance, and operation” of water supply, sanitary, and drainage facilities is statutorily defined to include, *inter alia*, “all allowable direct and indirect costs of the district, the county sanitary engineer or sanitary engineering department, or a federal or state grant program, incurred for [water supply, sanitary, or drainage purposes under R.C. Chapters 6103 and 6117][.]” R.C. 6103.02(G); R.C. 6117.02(C), (D). Expenditures for those types of costs shall be made in accordance with the cost allocation plan that has been adopted by the board of county commissioners for each district. R.C. 6103.02(G); R.C. 6117.02(C), (D).

A cost allocation plan adopted for expenditures from a water fund

shall authorize payment from the fund of only those costs incurred by the district, the county sanitary engineer or sanitary engineering department, or a federal or state grant program, and those costs incurred by the general and other funds of the county for a common or joint purpose, that are necessary and reasonable for the proper and efficient administration of the district under [R.C. Chapter 6103].

R.C. 6103.02(H). The same requirement is imposed upon the cost allocation plan for expenditures from a sanitary fund and a drainage fund. R.C. 6117.02(E) provides, in pertinent part:

The [cost allocation] plan shall authorize payment from [the sanitary and drainage] funds of only those costs incurred by the district, the county sanitary engineer or sanitary engineering department, or a federal or state grant program, and those costs incurred by the general and other funds of the county for common or joint purpose, that are necessary and reasonable for the proper and efficient administration of the district under [R.C. Chapter 6117] and properly attributable to the particular fund of the district.

The requirements of R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) that revenues from each type of facility be paid into a separate fund for that type of facility are in keeping with the mandate of R.C. 5705.09(F) that a county establish “[a] special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose[.]” *See also* R.C. 5705.10(D). The requirements of R.C. 6103.02(H) and R.C. 6117.02(E)

that moneys in a specific type of sewer district fund be used to pay expenses attributable to that fund are consistent with the mandate of R.C. 5705.10(I) that “[m]oney paid into any fund shall be used only for the purposes for which such fund is established.” The “general government expense[s] required to carry out the overall governmental responsibilities of a county” may not be paid with moneys from a water fund, a sanitary fund, or a drainage fund. R.C. 6103.02(H); R.C. 6117.02(E).

The second priority for moneys in the water, sanitary, and drainage funds of a county sewer district is to pay “debt charges payable on any outstanding public obligations issued or incurred for the acquisition or construction of [the pertinent] facilities for or serving the district, or for the funding of a bond retirement or other fund established for the payment of or security for the obligations.” R.C. 6103.02(G); R.C. 6117.02(C), (D). If moneys remain in the funds after payment of the first and second priorities, the surplus may be used to pay for “the acquisition or construction of [the pertinent] facilities or for the payment of contributions to be made, or costs incurred, for the acquisition or construction of those facilities under cooperative contracts.” R.C. 6103.02(G); R.C. 6117.02(C), (D). Moneys in the water, sanitary, and drainage funds of a county sewer district “shall not be expended other than for the use and benefit of the district.” R.C. 6103.02(G); R.C. 6117.02(C), (D).

In summary, to pay an expense with moneys comprising a county sewer district’s water fund, sanitary fund, or drainage fund, the expense shall be (1) reasonable and necessary to the administration of the sewer district, and (2) either a cost incurred by the district, the county sanitary engineer or sanitary engineering department, a federal or state grant program, or the general or other fund of the county for a purpose that is shared by the districts. R.C. 6103.02(H); R.C. 6117.02(E). An expense of the sanitary engineering department may be paid with moneys comprising a county sewer district’s water fund, sanitary fund, or drainage fund, provided that the expense is a necessary and reasonable expense related to the proper and efficient administration of the county sewer district and is properly attributable to the particular fund. R.C. 6103.02(G) (water fund moneys shall be used for a cost “incurred for the purposes of [R.C. Chapter 6103]”); R.C. 6103.02(H); R.C. 6117.02(C) (sanitary fund moneys shall be used for a cost “incurred for sanitary purposes under [R.C. Chapter 6117]”); R.C. 6117.02(D) (drainage fund moneys shall be used for a cost “incurred for drainage purposes under [R.C. Chapter 6117]”); R.C. 6117.02(E) (the cost allocation plan shall authorize payment of costs that are “properly attributable to the particular fund of the district”). Finally, moneys in a county sewer district’s water fund, sanitary fund, or drainage fund shall be used only for expenses of the county sanitary engineering department that are “for the use and benefit of the district.” R.C. 6103.02(G); R.C. 6117.02(C); R.C. 6117.02(D). Expenses of the county sanitary engineering department include compensation and benefits for the county sanitary engineer and his employees. *See* R.C. 6117.01(C) (the board of county commissioners is required to “provide for and pay the compensation of the county sanitary engineer” and any assistants and clerks to the county sanitary engineer).<sup>3</sup>

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<sup>3</sup> An appropriation by a board of county commissioners for the expenses of the sanitary engineer or sanitary engineering department, including expenses related to the compensation of the engineer and his employees may be made from the county’s general fund or from the water, sewer, and drainage funds of the county’s sewer districts in accordance with the statutory restrictions on the

### **Establishment of the Sanitary Engineer Fund in the Trumbull County Treasury**

We now shall consider whether the law authorizes a board of county commissioners to establish in the county treasury a sanitary engineer fund as described in your letter. In determining the scope of authority of a board of county commissioners, we begin by noting that “a board of county commissioners is a creature of statute that may exercise only those powers conferred upon it expressly by statute or as may be implied by necessity in order to facilitate the exercise of another express power.” 2015 Op. Att’y Gen. No. 2015-007, at 2-73 (quoting 2009 Op. Att’y Gen. No. 2009-040, at 2-296); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917). In order for a board of county commissioners to take action in a financial matter, “[t]he authority to act ... must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county.” *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); accord 2015 Op. Att’y Gen. No. 2015-007, at 2-73; see also 1984 Op. Att’y Gen. No. 84-093, at 2-317.

The legislative authority of a county is required to establish the following eight funds:

- (A) General fund;
- (B) Sinking fund whenever the subdivision has outstanding bonds other than serial bonds;
- (C) Bond retirement fund, for the retirement of serial bond, notes, or certificates of indebtedness;
- (D) A special fund for each special levy;
- (E) A special bond fund for each bond issue;
- (F) A special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose;
- (G) A special fund for each public utility operated by a subdivision;
- (H) A trust fund for any amount received by a subdivision in trust.

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use of the moneys in those funds. See R.C. 6103.02(G) (a sewer district’s water fund moneys shall be applied to, *inter alia*, “in accordance with a cost allocation plan ... payment of all allowable direct and indirect costs of ... the county sanitary engineer or sanitary engineering department ... incurred for the purposes of [R.C. Chapter 6103]” and that are “for the use and benefit of the district”); R.C. 6117.02(C) (a sewer district’s sanitary fund moneys shall be applied to, *inter alia*, “in accordance with a cost allocation plan ... payment of all allowable direct and indirect costs of ... the county sanitary engineer or sanitary engineering department ... incurred for sanitary purposes under [R.C. Chapter 6117]” and that are “for the use and benefit of the district”); R.C. 6117.02(D) (sewer district’s drainage fund moneys shall be applied to, *inter alia*, “in accordance with a cost allocation plan ... payment of all allowable direct and indirect costs of ... the county sanitary engineer or sanitary engineering department ... incurred for drainage purposes under [R.C. Chapter 6117]” and that are “for the use and benefit of the district”).



R.C. 5705.09. A county may establish other funds in accordance with R.C. 5705.13 (a reserve balance fund, a special revenue fund for payment of leave and compensatory time upon termination, and a capital projects fund) and R.C. 5705.131 (a nonexpendable trust fund).

In addition to the foregoing funds, a board of county commissioners “may establish, with the approval of and in the manner prescribed by the auditor of state, such other funds as are desirable[.]” R.C. 5705.12. When a fund is established pursuant to R.C. 5705.12, a board of county commissioners may specify in the resolution establishing the fund that “money derived from specified sources other than the general property tax shall be paid directly into [the fund].” R.C. 5705.12. It is important to bear in mind that “a special fund may be established under R.C. 5705.12 only for a purpose for which the moneys placed into the fund may properly be used.” 1988 Op. Att’y Gen. No. 88-018, at 2-73. Thus, a special fund, like the sanitary engineer fund, may be established in the county treasury pursuant to R.C. 5705.09(F) or R.C. 5705.12.<sup>4</sup>

We now consider whether revenue generated by a county’s sewer districts for the water, sanitary, and drainage services they provide may be deposited into a special fund, like the sanitary engineer fund, that is established pursuant to R.C. 5705.09(F) or R.C. 5705.12 for the purpose of paying the expenses of the sanitary engineering department. As discussed above, R.C. 6103.02 and R.C. 6117.02 state that all revenues of a county sewer district “shall be paid to the county treasurer” and deposited in the pertinent separate and distinct funds of the sewer district. R.C. 6103.02(G) (water fund); R.C. 6117.02(C) (sanitary fund); R.C. 6117.02(D) (drainage fund). That the statutes employ the phrase “[a]ll moneys collected” means that the General Assembly intends that the entire amount of moneys collected in each county sewer district be paid into the pertinent fund established for that district in the county treasury. See *Merriam-Webster’s Collegiate Dictionary* 31 (11th ed. 2005) (defining “all” as “the whole amount, quantity, or extent of ... every member or individual component of”). There is no other language in R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) that indicates that the General Assembly’s use of the word “shall” is intended to be read as anything other than a mandate. See *Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) (unless the context indicates otherwise, “the word ‘shall’ denotes that compliance with the commands of [the] statute is *mandatory*”); 2001 Op. Att’y Gen. No. 2001-018, at 2-106.

That R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) identify the particular funds into which county sewer district revenues shall be paid reflects the General Assembly’s intent that the revenue may not be paid directly into a fund of another type. See *State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620 (1998) (“[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to

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<sup>4</sup> Insofar as neither a county sanitary engineer nor a sanitary engineering department is a public utility, we do not believe R.C. 5705.09(G) authorizes the creation of the sanitary engineer fund described in your letter. See 1982 Op. Att’y Gen. No. 82-052, at 2-151 to 2-152 (discussing the determination of what constitutes a “public utility”).

be excluded”); 2007 Op. Att’y Gen. No. 2007-009, at 2-66 to 2-67; *cf.* 1986 Op. Att’y Gen. No. 86-081 (syllabus) (“[p]ermit fees collected by the county engineer from persons installing driveways or other approaches to county roads, or from persons placing utility installations across county roads, must, under R.C. 325.31 and R.C. 5705.10, be paid into the general fund of the county, unless a special fund has been established under R.C. 5705.12 for the deposit of such fees, in which case the fees are to be paid into the special fund”); 1981 Op. Att’y Gen. No. 81-037, at 2-146 (where a statute specifies that moneys shall be paid into a specific special fund, the moneys shall be deposited accordingly; however, where a statute does not specify a specific purpose for which the moneys shall be used, the moneys may be paid into the general fund or a special fund established pursuant to R.C. 5705.12). A statute that is clear and unambiguous shall be applied as written. 2001 Op. Att’y Gen. No. 2001-018, at 2-106.

R.C. 6103.02(G) directs that all revenue related to a county sewer district’s water supply facilities be paid into the district’s water fund. R.C. 6117.02(C) directs that all revenue related to a county sewer district’s sanitary facilities be paid into the district’s sanitary fund. R.C. 6117.02(D) directs that all revenue related to a county sewer district’s drainage facilities be paid into the district’s drainage fund.<sup>5</sup> Therefore, revenues of a county sewer district may not be deposited directly into a special fund unless the fund is the water fund, sanitary fund, or drainage fund of the county sewer district.

Having concluded that county sewer district revenues may not be deposited directly into a special fund other than the water fund, sanitary fund, or drainage fund of the county sewer district, we now consider whether county sewer district revenues that have been deposited into the water fund, sewer fund, or drainage fund of each county sewer district may be transferred to another special fund in the county treasury established under R.C. 5705.09(F) or R.C. 5705.12 for the purpose of paying

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<sup>5</sup> We do not believe R.C. 5705.12 authorizes a board of county commissioners to specify that county sewer district revenues may be deposited directly into a special fund established pursuant to R.C. 5705.12 that is not the water fund, sanitary fund, or drainage fund of the district. R.C. 5705.12 is a general provision that addresses the establishment of funds in a county treasury. R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D), requiring that county sewer district revenues be paid into a water fund, a sanitary fund, and a drainage fund, respectively, are special provisions that specifically address the deposit of sewer district moneys into certain funds established in the county treasury. A special provision controls over a general provision, “unless the general provision is the later adoption and the manifest intent is that the general provision prevail.” R.C. 1.51. Insofar as R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) are the later adopted and special provisions, a board of county commissioners may not specify that county sewer district revenues may be deposited directly into a special fund established pursuant to R.C. 5705.12 that is not the water fund, sanitary fund, or drainage fund of the county sewer district. *See* 1999-2000 Ohio Laws, Part III, 6189, 6218 (Sub. H.B. No. 549, eff. March 12, 2001).

the expenses of the county sanitary engineering department.<sup>6</sup> Moneys comprising one fund established in the county treasury may be transferred to another fund in the county treasury in accordance with R.C. 5705.14-16. R.C. 5705.14 states as a general rule that “[n]o transfer shall be made from one fund of a subdivision to any other fund,” unless the transfer is authorized by divisions (A) through (I) of that section. A county sewer district water fund, sanitary fund, and drainage fund are special funds for “revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose[.]” R.C. 5705.09(F). Under certain circumstances, “[t]he unexpended balance in any special fund, other than an improvement fund, existing in accordance with [R.C. 5705.09(D), (F), or (G) or R.C. 5705.12], may be transferred to the general fund or to the sinking fund or bond retirement fund[.]” R.C. 5705.14(D). Insofar as the sanitary engineer fund is not the general fund, a sinking fund, or a bond retirement fund, moneys comprising the water fund, sanitary fund, or drainage fund of a county sewer district may not be transferred to such a special fund pursuant to R.C. 5705.14.

R.C. 5705.15 is an additional source of authority for a board of county commissioners to transfer moneys from one fund to another fund in the county treasury so long as the board satisfies the requirements of R.C. 5705.16.<sup>7</sup> A board of county commissioners, after passing a resolution stating the necessity of a transfer, shall create a petition to be filed in the court of common pleas and forward a copy of the petition to the Tax Commissioner. R.C. 5705.16. Upon approval of the Tax Commissioner, the petition may be filed in the court of common pleas. *Id.* After a hearing, when “the court finds ... that the petition states sufficient facts, that there are good reasons, or that a necessity exists, for the transfer, and that no injury will result therefrom, it shall grant the prayer of the petition and order the petitioners to make such transfer.” *Id.* Thus, moneys that have been paid into a county sewer district water fund, sanitary fund, or drainage fund may be transferred to another special fund in the county treasury established pursuant to R.C. 5705.09(F) or R.C. 5705.12 for the purpose of paying expenses of the county sanitary engineering department so long as the requirements of R.C. 5705.15 and R.C. 5705.16 have been met.

Restrictions upon the expenditure of moneys comprising a county sewer district water fund, sanitary fund, and drainage fund apply to those moneys after they have been transferred to another special fund established pursuant to R.C. 5705.09(F) or R.C. 5705.12. *See In re Perry Twp.*, 52 Ohio App. 3d 1, 2-3, 556 N.E.2d 191 (Montgomery County 1988); 2008 Op. Att’y Gen. No. 2008-009, at

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<sup>6</sup> After speaking with a member of your staff and an employee of the county sanitary engineering department, it is our understanding that some or all of the moneys that have been deposited into the sanitary engineer fund were transferred to the fund from various funds of the separate county sewer districts.

<sup>7</sup> “[T]he proceeds or balances of loans, bond issues, special levies for the payment of loans or bond issues, the proceeds or balances of funds derived from any excise tax levied by law for a specified purpose, and the proceeds or balances of any license fees imposed by law for a specified purpose” may not be transferred pursuant to R.C. 5705.16. R.C. 5705.15.

2-107 (“[s]tatutory restrictions on the purposes for which particular funds may be expended cannot be disregarded when questions of transfer are presented”).<sup>8</sup> Accordingly, once moneys have been transferred to the special fund, the moneys may be used to pay the expenses of the sanitary engineering department so long as they are necessary and reasonable expenses related to the proper and efficient administration of the sewer district, they are properly attributable to the fund from which the moneys originated, and they benefit the paying sewer district.

### **Using Revenue from One Sewer District to Pay the Expenses of another Sewer District**

We now consider whether moneys comprising a county sewer district water fund, sanitary fund, or drainage fund may be used to pay expenses incurred by another county sewer district in the same county. R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) specify that moneys in a county sewer district water fund, sanitary fund, or drainage fund “shall not be expended other than for the use and benefit of *the* district.” (Emphasis added.) In R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D), “the district” does not mean any sewer district. See 2011 Op. Att’y Gen. No. 2011-047, at 2-381; 1982 Op. Att’y Gen. No. 82-077, at 2-212 (“[t]he’ (as opposed to the indefinite articles ‘a’ and ‘an’) is a definite article ‘used to refer to a particular person, thing, or group’” (quoting *Webster’s New World Dictionary* 1473 (2nd ed. 1978)); *Merriam-Webster’s Collegiate Dictionary* 1294 (11th

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<sup>8</sup> When 2008 Op. Att’y Gen. No. 2008-009 was issued, R.C. 5705.05 and R.C. 5705.06 prohibited using moneys from a township’s general levy for current expenses for road and bridge repairs. Sub. H.B. 458, 127th Gen. A. (2008) (eff. Dec. 30, 2008); 2008 Op. Att’y Gen. No. 2008-009, at 2-96 to 2-98. In light of the language of R.C. 5705.05, R.C. 5705.06, and Ohio Const. art. XII, § 5 (requiring that tax revenue be used only for the purpose for which the tax was levied), the Attorney General concluded that a board of township trustees may not transfer moneys in the general fund arising from the general levy for current expenses to the road and bridge fund. 2008 Op. Att’y Gen. No. 2008-009 (syllabus, paragraph 2). The opinion reasoned that allowing a township to transfer the moneys to the road and bridge fund would allow a township to do indirectly, what it may not do directly. *Id.* at 2-108.

After the issuance of 2008 Op. Att’y Gen. No. 2008-009, the General Assembly amended R.C. 5705.05 and R.C. 5705.06 to authorize a township to expend moneys generated by the township’s general levy for current expenses on road and bridge repairs. Sub. H.B. 458; 2009 Op. Att’y Gen. No. 2009-054, at 2-405. As a result of this legislative change, 2008 Op. Att’y Gen. No. 2008-009 was overruled in 2009 Op. Att’y Gen. No. 2009-054, at 2-405 n.3. While the conclusion of 2008 Op. Att’y Gen. No. 2008-009 (syllabus, paragraph 2) that R.C. 5705.05, R.C. 5705.06, and Ohio Const. art. XII, § 5 prohibit the transfer of general levy moneys to a township’s road and bridge fund is no longer an accurate statement of the law, the rationale of that opinion still applies with respect to other moneys. We rely upon 2008 Op. Att’y Gen. No. 2008-009, at 2-107 to 2-110 for the proposition that when a statute restricts the purpose for which certain revenues may be used, a taxing authority may not transfer the revenues to another fund pursuant to R.C. 5705.14-.16 to avoid a statutory restriction upon the use of the revenues.

ed. 2005) (defining “the” as “a function word to indicate that a following noun or noun equivalent is definite or has been previously specified by context or by circumstance”). Use of the definite article “the” as a qualifier of “district” in R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) means that the General Assembly intends that moneys in a county sewer district water fund, sanitary fund, and drainage fund shall be used only for the benefit of that county sewer district. Therefore, moneys comprising the funds of a county sewer district may not be used for the benefit of another county sewer district, even if the other county sewer district is in the same county.

As explained in your letter, on occasion, some county sewer districts have not collected sufficient revenues to pay their share of the estimate of expenses of the county sanitary engineering department. When that occurred, surplus moneys in the sanitary engineer fund were used or the other county sewer districts contributed a greater share to pay the deficiency resulting from a district’s inability to contribute its share. To the extent that the district without sufficient revenue relied upon its own surplus contributions, R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D) were not violated. However, if surplus moneys in the sanitary engineer fund were contributed by sewer districts other than the district that did not have sufficient revenue, or if the other sewer districts contributed additional moneys to cover the district’s deficiencies, the expenditure of those moneys was contrary to the plain language of R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D).

To avoid this problem in the future, the Trumbull County Board of Commissioners and the Trumbull County Sanitary Engineering Department should consider consolidating smaller districts that do not collect adequate revenues to pay their share of the county sanitary engineering department’s expenses. Alternatively, the Trumbull County Board of Commissioners may increase the rates charged in those districts. Finally, the expenses of the sanitary engineering department, or the portion of those expenses that certain districts are unable to pay, may be paid with an appropriation by the board of county commissioners from the county general fund, provided that the available general fund moneys have not been appropriated for another purpose. *See* R.C. 6117.01(C).

### **Reimbursement of Revenue**

Your third and fourth questions ask about the reimbursement of county sewer district revenues that were used to pay the expenses of a sewer district in violation of R.C. 6103.02 and R.C. 6117.02. You inquire whether the use of surplus moneys in the sanitary engineer fund or the use of the moneys contributed by other sewer districts should be treated as a loan that the county sewer district with insufficient moneys now has an obligation to repay. If the “borrowing” sewer district has an obligation to repay the other sewer districts, you ask how far in the past the sanitary engineering department should search to determine whether such a loan has occurred.

It is well recognized that “where any public officer orders or participates in the ordering of the expenditure of public funds, which expenditure is not authorized by law, such officer is personally liable for the amount of the funds so expended.” 1952 Op. Att’y Gen. No. 1713, p. 559, 566; *accord* 2012 Op. Att’y Gen. No. 2012-023, at 2-195. To recover county moneys that have been illegally expended or misapplied, a prosecuting attorney may file a civil action against a public official who is responsible for the expenditure or misapplication. R.C. 117.28 (the county prosecuting attorney may

file a civil action when an audit report of the Auditor of State concludes that moneys have been illegally expended);<sup>9</sup> R.C. 309.12 (providing authority, independent of R.C. 117.28, for a county prosecuting attorney to file a civil action to recover county moneys that the prosecuting attorney determines have been illegally expended or misapplied); 2012 Op. Att’y Gen. No. 2012-023, at 2-196; 1976 Op. Att’y Gen. No. 76-017 (syllabus, paragraph 2).

The determination of whether an illegal expenditure has occurred and what action to take as a consequence of that expenditure may be made only after examining the circumstances of the expenditure. *See* 1998 Op. Att’y Gen. No. 98-002, at 2-11 (“[i]t is not possible to determine the potential liability of the board and its members ... without knowledge of the circumstances in which the board made such excess expenditures”). Furthermore, such determinations involve the exercise of discretion by the Auditor of State and the prosecuting attorney. *See State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 279, 119 N.E. 822 (1918) (“[p]ublic authorities have their option as to which sections they will utilize in protecting public money and public property”); 2012 Op. Att’y Gen. No. 2012-010, at 2-77 to 2-78. The Attorney General will not exercise discretion that the General Assembly has conferred upon another public official. 2004 Op. Att’y Gen. No. 2004-017, at 2-143 (“[i]t has been established that ‘[t]he Attorney General is not empowered, in rendering opinions, to exercise discretion on behalf of other public officials, nor do we find it appropriate to advise one public body on matters concerning the powers and duties of another public body’” (quoting 2001 Op. Att’y Gen. No. 2001-032, at 2-193)). We cannot reliably predict whether an audit by the Auditor of State will result in a finding that revenues of county sewer districts in Trumbull County have been illegally expended. Nor is it appropriate in an Attorney General opinion for us to advise whether a prosecuting attorney should file a civil action pursuant to R.C. 117.28 or R.C. 309.12. *See* 2011 Op. Att’y Gen. No. 2011-009, at 2-73 (“[i]t is beyond the scope of the opinion process to resolve ‘questions of fact regarding ... the rights or liabilities of particular individuals or governmental entities.’” (quoting 2005 Op. Att’y Gen. No. 2005-043, at 2-472)); 1987 Op. Att’y Gen. No. 87-074, at 2-482 (“[t]he role of assigning liability to particular individuals in a given case is one that rests exclusively within the province of the judiciary. Thus, as a member of the executive branch of government, I am unable to render any judgment about the extent to which particular persons are, or may be, civilly or criminally liable for public moneys that have allegedly been expended in a manner contrary to law”).

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<sup>9</sup> The Auditor of State may find that county moneys have been illegally expended when they have been expended in violation of an identifiable provision of the Ohio constitution, the Revised Code, or an administrative regulation. 2009 Op. Att’y Gen. No. 2009-033, at 2-228 (“[i]n order for an expenditure to be ‘illegal’ under R.C. 117.28, ‘it must violate an identifiable existing law’” (quoting *Mahoning Valley Sanitary Dist. ex rel. Montgomery v. Gilbane Bldg. Co.*, No. C2-98-785, 2001 WL 1871490, at \*7 (S.D. Ohio Oct. 18, 2001)). Upon finding that county moneys have been illegally expended, the Auditor of State shall issue a finding for recovery. 1994 Op. Att’y Gen. No. 94-048, at 2-243 (“the Auditor of State is required to make a finding for recovery if he determines that public money has been ‘illegally expended’”).

R.C. 6103.02 and R.C. 6117.02 do not address what should happen when revenues of one county sewer district have been expended unlawfully for the benefit of another county sewer district. We are not aware of a statute that requires a sewer district to reimburse another sewer district for revenue that was expended contrary to the provisions of R.C. 6103.02(G), R.C. 6117.02(C), and R.C. 6117.02(D). However, it is reasonable to conclude that the board of county commissioners' authority to make expenditures for a sewer district includes the implied authority to correct an erroneously made expenditure. *See* 2013 Op. Att'y Gen. No. 2013-026, at 2-256 ("it is logical to conclude that the power to expend moneys to compensate employees includes the implied authority to seek recovery of those moneys if they are paid illegally or erroneously"); 1984 Op. Att'y Gen. No. 84-052, at 2-174 (insofar as the statutes expressly provide how the costs of a multi-county juvenile detention and rehabilitation district are apportioned, "the district's accounts must be adjusted to reflect the statutorily mandated apportionment of costs"); *Gibbs v. Greenfield Exempted Vill. Sch. Dist. Bd. of Educ.*, Highland App. No. 01CA8, 2001-Ohio-2638, 2001 WL 1674097, at \*8 ("R.C. 117.28 does not appear to provide the only means by which a board of education may recover funds"); *Green Local Teachers Ass'n v. Blevins*, 43 Ohio App. 3d 71, 74, 539 N.E.2d 653 (Scioto County 1987); *White v. Columbus Bd. of Educ.*, 2 Ohio App. 3d 178, 180, 441 N.E.2d 303 (Franklin County 1982). If the revenue is reimbursed, a potential finding for recovery pursuant to R.C. 117.28 or the imposition of liability in a civil action filed under R.C. 309.12 may be avoided. *See* 2014 Op. Att'y Gen. No. 2014-040, at 2-360 to 2-361 (a municipal treasurer that previously withheld moneys that should have been deposited in the county law library resources fund should deposit the moneys in the fund "in order to avoid being named as a defendant in a civil action by the county prosecuting attorney pursuant to R.C. 309.12").

We recommend that the Trumbull County Board of Commissioners and the Trumbull County Sanitary Engineering Department consult the Auditor of State for the purpose of accurately tracing county sewer district revenues that may have been expended in violation of R.C. 6103.02(G), R.C. 6103.02(H), R.C. 6117.02(C), R.C. 6117.02(D), and R.C. 6117.02(E). Complicated accounting issues and questions of fact are involved in determining the correct amount of revenue that should be reimbursed and for which years a reimbursement may be made. How far in the past the board of county commissioners or the county sanitary engineer should search to determine whether a reimbursement is owed may be dictated by the condition and existence of records that enable the board and the county sanitary engineer to accurately determine the amount of moneys that should be reimbursed. These issues are beyond the scope of an Attorney General opinion and will have to be resolved by the board of county commissioners working in concert with the county sanitary engineer and the county treasurer. *See* 1998 Op. Att'y Gen. No. 98-002, at 2-11 n.6 ("the evaluation of available options cannot be made by means of an Attorney General opinion, but may more appropriately be addressed by persons with knowledge of the facts"). The board of county commissioners, county sanitary engineer, and county treasurer also may request the assistance of the Auditor of State and his staff in this endeavor. *Id.* ("[i]t may also be helpful to seek additional assistance from the office of the Auditor of State").

### **Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 6103.02(G), all revenue related to a county sewer district's water supply facilities shall be paid into the district's water fund. Pursuant to R.C. 6117.02(C), all revenue related to a county sewer district's sanitary facilities shall be paid into the district's sanitary fund. Pursuant to R.C. 6117.02(D), all revenue related to a county sewer district's drainage facilities shall be paid into the district's drainage fund.
2. An expense of a county sanitary engineering department may be paid with moneys comprising the water fund, sanitary fund, or drainage fund of a county sewer district, provided that the expense is a necessary and reasonable expense related to the proper and efficient administration of the county sewer district and is properly attributable to the particular fund. Moneys from the water fund, sanitary fund, or drainage fund of a county sewer district may not be used to pay an expense of another county sewer district.
3. A board of county commissioners may establish a special fund in the county treasury for the purpose of paying the expenses of the county sanitary engineering department pursuant to R.C. 5705.09(F) or R.C. 5705.12.
4. Moneys that have been deposited into the water fund, sanitary fund, or drainage fund of a county sewer district may be transferred to another special fund in the county treasury established pursuant to R.C. 5705.09(F) or R.C. 5705.12 for the purpose of paying expenses related to the county sanitary engineering department so long as the requirements of R.C. 5705.15 and R.C. 5705.16 have been met. Restrictions imposed upon the use of sewer district moneys by R.C. 6103.02(G), R.C. 6103.02(H), R.C. 6117.02(C), R.C. 6117.02(D), and R.C. 6117.02(E) apply to moneys that are transferred to the special fund.
5. Questions related to accounting for moneys that may have been expended in violation of R.C. 6103.02(G) and R.C. 6103.02(H) or R.C. 6117.02(C), R.C. 6117.02(D), and R.C. 6117.02(E) cannot be resolved by an opinion of the Attorney General.

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