

**OPINION NO. 92-043****Syllabus:**

1. A board of health of a general health district may, but has no continuing duty to inspect plumbing within the district, except in those circumstances where a plumbing condition constitutes a nuisance under R.C. 3707.01.
2. A board of county commissioners is without authority to adopt plumbing regulations or to perform plumbing inspections.

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**To: R. David Picken, Madison County Prosecuting Attorney, London, Ohio**  
**By: Lee Fisher, Attorney General, September 22, 1992**

You have requested my opinion as to whether a general health district has a duty to conduct plumbing inspections within the county, and, if not, whether the board of county commissioners has any such duty. Information provided by your staff indicates that the board of health of the general health district has been performing plumbing inspections within the county, but now wishes to discontinue this practice. You question whether the board of health has a statutory duty to continue performing plumbing inspections within the county, and, if not, whether the county has a duty to perform such inspections.

**Creation and Organization of General Health Districts**

General health districts are created in various ways under R.C. Chapter 3709. Each general health district is governed by a board of health,<sup>1</sup> R.C. 3709.02, and a district advisory council, R.C. 3709.03. As a creature of statute, a

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<sup>1</sup> In Madison County, the general health district is a combined health district. R.C. 3709.07-.071 discusses the formation and administration of a general health district formed by the union of a city health district and a general health district, as in the situation you describe. The combining districts provide by contract for the administration of the combined district by the board of health or health department of the city, the board of health of the original general health district, or the combined board of health; which then assumes all the powers and duties of a board of health of a general health district. For ease of discussion, I will refer to the governing body of a general health district simply as the board of health.

general health district has only those powers and duties assigned to it, either expressly or impliedly, by the General Assembly. 1983 Op. Att'y Gen. No. 83-067.

### **Powers and Duties of General Health Districts**

Certain powers and duties of general health districts are set forth in R.C. 3709.21, which states, in part:

The board of health of a general health district *may* make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances. Such board may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or watercourse without a permit therefor having been secured from the board under such terms as the board requires. All orders and regulations not for the government of the board, but intended for the general public, shall be adopted, recorded, and certified as are ordinances of municipal corporations.... (Emphasis added.)

Prior Attorney General opinions have interpreted R.C. 3709.21 as empowering, but not requiring, general health districts to regulate plumbing within the district.<sup>2</sup> 1966 Op. Att'y Gen. No. 66-172; 1960 Op. Att'y Gen. No. 1245, p. 229; and 1953 Op. Att'y Gen. No. 2761, p. 270. R.C. 3709.21, therefore, imposes upon a general health district the duty to inspect plumbing only to the extent the district has elected to adopt regulations so requiring.

R.C. 3707.01 imposes further duties upon a general health district, stating in part that a general health district "*shall* abate and remove all nuisances within its jurisdiction." (Emphasis added.) In addition, R.C. 3707.01 makes specific reference to plumbing as follows:

Except in cities having a building department, or otherwise exercising the power to regulate the erection of buildings, the board *may* regulate the location, construction, and repair of water closets, privies, cesspools, sinks, plumbing, and drains....

The board *may* regulate the location, construction, and repair of yards, pens, and stables, and the use, emptying, and cleaning of such yards, pens, and stables and of water closets, privies, cesspools, sinks, plumbing, drains, or other places where offensive or dangerous substances or liquids are or may accumulate.

When a building, erection, excavation, premises, business, pursuit, matter, or thing, or the sewerage, drainage, plumbing, or ventilation thereof is, in the opinion of the board, in a condition dangerous to life or health, and when a building or structure is occupied or rented for living or business purposes and sanitary plumbing and sewerage are feasible and necessary, but neglected or refused, the board may declare it a public nuisance and order it to be removed, abated, suspended, altered, or otherwise improved or purified by the owner, agent, or other person having control thereof or responsible for such condition, and may prosecute him for the refusal or neglect to obey such order. (Emphasis added.)

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<sup>2</sup> A general health district's authority to adopt plumbing regulations is subject to that portion of R.C. 3703.01 which removes from the district's jurisdiction the inspection of plumbing in types of buildings for which the district does not have an approved plumbing inspector. See generally note 4, *infra*.

Thus, except in those instances where a plumbing problem constitutes a nuisance, R.C. 3707.01 permits, but does not require, a general health district to regulate plumbing in the circumstances described therein. *See generally State ex rel. John Tague Post No. 188 v. Klinger*, 114 Ohio St. 212, 151 N.E. 47 (1926) (where the words "shall" and "may" are used within the same statute, the legislature intended the words to have different meanings, the use of "may" referring to permissive or discretionary action).

Finally, R.C. 3709.36 states:

The board of health of a city or general health district hereby created shall exercise all the powers and perform all the duties formerly conferred and imposed by law upon the board of health of a municipal corporation, and all such powers, duties, procedure, and penalties for violation of the sanitary regulations of a board of health of a municipal corporation are transferred to the board of health of a city or general health district by [R.C. 3701.10, 3701.29, 3701.81, 3707.08, 3707.14, 3707.16, 3707.47, and 3709.01-36].

In *Wetterer v. Hamilton County Board of Health*, 167 Ohio St. 127, 146 N.E.2d 846 (1957), the court concluded that although R.C. 3709.36 extends to boards of health of city and general health districts all the duties formerly imposed upon the board of health of a municipal corporation, R.C. 3709.36 does not extend to any power that is neither expressly nor impliedly set forth in either R.C. 3707.01 or R.C. 3709.21. With respect to the situation you describe, because neither R.C. 3707.01 nor R.C. 3709.21 imposes upon a general health district the duty to inspect plumbing, such duty cannot be read as arising under R.C. 3709.36.

#### **General Health District Has No Continuing Duty to Inspect Plumbing Absent a Nuisance**

Therefore, in answer to the first portion of your question, I conclude that the board of health of a general health district has no continuing duty to inspect plumbing, except in those circumstances where a plumbing condition constitutes a nuisance under R.C. 3707.01. *Cf.* 1987 Op. Att'y Gen. No. 87-083 at 2-560 ("[i]nsofar as a board of county commissioners is, in the first instance, not required to establish a county sewer district, it follows that in the event a board has exercised its discretionary authority and established such a sewer district, it may thereafter exercise a similar discretion in deciding to divest itself of responsibility for the control, management, and maintenance of that district").

#### **County Commissioners May Not Regulate Plumbing**

In the event that a general health district has no duty to inspect plumbing, you ask whether the board of county commissioners has any responsibility to see that plumbing inspections are performed within the county. A board of county commissioners is also a creature of statute with those powers and duties either expressly or impliedly imposed by statute. *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). R.C. 307.37 authorizes a board of county commissioners to adopt regulations pertaining to the "erection, construction, repair, alteration, redevelopment, and maintenance" of one, two, and three-family dwellings in the unincorporated areas of the county, and R.C. 307.38 authorizes the county to hire employees to administer and enforce those regulations. Neither R.C. 307.37-38 nor any other statute of which I am aware, however, empowers or requires a board of county commissioners to adopt plumbing regulations or to hire anyone to perform inspections for the purpose of administering or enforcing plumbing regulations. *See* 1960 Op. No. 1245. Thus, the fact that the board of health within the county no longer chooses to perform plumbing inspections does not empower the board of county commissioners to adopt plumbing regulations

or to perform plumbing inspections. *Id.* at 233.

#### State Regulation of Plumbing

The General Assembly has specifically provided for the regulation and inspection of plumbing by the Ohio Department of Health in R.C. Chapter 3703. R.C. 3703.01 states, in pertinent part:

*The department of health shall:*

(A) *Inspect all buildings* within the meaning of section 3781.06 of the Revised Code;

(B) *Condemn all unsanitary or defective plumbing* that is found in connection with such places;

(C) *Order such changes in plumbing as are necessary to insure the safety of the public health.*

....  
The department shall not inspect plumbing or collect fees for inspecting plumbing in particular types of buildings in any health district which has employed one or more approved plumbing inspectors to enforce Chapters 3781. and 3791. of the Revised Code and the regulations adopted pursuant thereto relating to plumbing in such types of buildings.

....A board of health of a health district does not have jurisdiction to inspect plumbing or collect fees for the inspection of plumbing in types of buildings for which it does not have an approved plumbing inspector for such types of buildings.

....  
The department shall make a plumbing inspection of any building or other place that there is reason to believe is in such a condition as to be a menace to the public health. (Emphasis added.)

R.C. 3703.01, therefore, imposes upon the Ohio Department of Health the duty to inspect all buildings within the meaning of R.C. 3781.06, to condemn unsanitary or defective plumbing in those buildings, and to order changes in plumbing as are necessary to insure the safety of the public health. An exception to this duty of inspection arises under R.C. 3703.01 which expressly prohibits the Department of Health from inspecting plumbing in certain buildings within a general health district "which has employed one or more approved plumbing inspectors<sup>3</sup> to enforce [R.C. Chapters 3781 and 3791] and the regulations adopted pursuant thereto relating to plumbing in such types of buildings." (Footnote added.) To carry out its duty of inspection, R.C. 3703.04 empowers the Department of Health to "appoint such number of plumbing inspectors as is required."<sup>4</sup> Thus, pursuant to the statutory scheme set forth in R.C. Chapter 3703, the Ohio Department of Health has general responsibility for the performance of plumbing inspections within the state, subject to the exceptions prescribed by R.C. 3703.01.

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<sup>3</sup> R.C. 3703.01 requires the Public Health Council to prescribe minimum standards for the Director of Health to use in approving persons to perform plumbing inspections within health districts. *See generally* 4 Ohio Admin. Code Chapter 3701-37 (plumbing inspectors).

<sup>4</sup> Within R.C. Chapter 3781 which sets forth general provisions governing building standards in the state, the General Assembly has stated: "The department of health or the boards of health of health districts, or the certified department of building inspection of municipal corporations, subject to the applicable provisions of [R.C. Chapter 3703], shall enforce such chapters and regulations relating to plumbing." R.C. 3781.03.

**Conclusion**

It is, therefore, my opinion, and you are hereby advised that:

1. A board of health of a general health district may, but has no continuing duty to inspect plumbing within the district, except in those circumstances where a plumbing condition constitutes a nuisance under R.C. 3707.01.
2. A board of county commissioners is without authority to adopt plumbing regulations or to perform plumbing inspections.