**Note from the Attorney General's Office:**

1964 Op. Att'y Gen. No. 64-978 was overruled in part by 1980 Op. Att'y Gen. No. 80-066.

## OPINION NO. 978

**Syllabus:**

1. Boards of city or general health districts do not have authority, pursuant to Sections 3709.20 and 3709.21, Revised Code, to require approval of plans and specifications for sewage treatment works, public water supply facilities, and garbage and refuse disposal plants and facilities, as defined in Chapters 6117, 6103, and 343, Revised Code, respectively, but by implication have such authority over fa-

cilities for the use of a private residence or separate commercial facilities.

2. Municipalities under Section 3, Article XVIII, Constitution of Ohio, have no authority to require local approval of plans and specifications for sewage treatment and public water supply facilities, but do have such authority in regard to garbage disposal plants pursuant to Section 3701.19, Revised Code.

3. Boards of county commissioners, pursuant to Sections 6117.01, 6103.02, and 343.01, Revised Code, have authority to require approval of plans and specifications for sewage treatment, water supply and garbage and refuse disposal plants and facilities, which are to be owned and operated by the county or which are to be operated on a public utility basis and installed or constructed outside of municipal corporations.

4. Once county commissioners have approved plans and specifications, relative to sewage treatment and water supply works, and sewage disposal facilities, they have no authority through their county sanitary engineer to require submission and approval of more detailed "shop-drawings".

5. Boards of County Commissioners pursuant to Sections 6117.01, 6103.02 and 343.01, Revised Code, in the establishment of rules, regulations or standards relative to the approval of plans and specifications of sewage treatment, water supply and garbage disposal facilities may not impose conditions which are inconsistent with the laws of the state or the rules and regulations of the State Department of Health.

6. Pursuant to Sections 6117.01, 6103.02 and 343.01, Revised Code, any person, firm, or corporation proposing or constructing such improvements shall pay to the county all reasonably related expenses incurred by the board in connection therewith and said expenses shall be presumed to be reasonable until the contrary is shown. Opinion No. 3531, Opinions of the Attorney General, for 1963, Syllabus three, approved and followed.

7. Inspectors acting under the authority of county commissioners relative to sewagework construction and maintenance may not also inspect for relevant plumbing under alleged authority delegated them by local health authorities, but may do so provided the provisions of Section 307.15, Revised Code, are complied with.

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**To: Edwin T. Hofstetter, Geauga County Pros. Atty., Chardon, Ohio**
**By: William B. Saxbe, Attorney General, April 10, 1964**

I have your request for my opinion which reads as follows:

> "1. Relative to the approval of plans and specifications for sewage treatment, water supply, or disposal

facilities; once approval for same have been granted by the Ohio State Department of Health, under authority of ORC sections 3701.18-.19, to such submitted by a private developer; to what extent can subsequent approvals or permits be required from city or general health district boards of health, under authority of ORC sections 3709.20-.21, or from local political subdivisions such as incorporated communities or counties, the latter under their county sanitary engineering authority provided for in ORC sections 6117.01, 6103.02-and 343.01 or their county building inspection authority provided for in ORC sections 307.37-.40. Is there an implied sequence of required approvals apart from what may be currently required under the regulations or policies of the State Department of Health? More specifically and by way of example, if the county commissioners have approved plans and specifications prior to approval by the Ohio Department of Health, can they through their county sanitary engineer require subsequent submission and approval of more detailed 'shop-drawings?'

"2. Depending upon the opinion relative to the first question; to what extent may any of the political subdivisions mentioned above require conditions somewhat at variance with or more stringent than those required by the Ohio State Department of Health? Relative to the jurisdiction of county commissioners, to what extent is this second question governed by the clause in ORC sections 6117.01, 6103.01, and 343.01 that 'such rules and regulations shall not be inconsistent with the laws of this state or the rules and regulations of the department of health?'

"3. What authority or duties do the city or general health district boards of health have with regard to applications for and approval of plans and specifications for wastewater treatment, garbage and refuse disposal, or water supply facilities apart from or distinct from the sanitary engineering or building inspection authority of incorporated communities or counties, the latter covered by ORC sections 6117.01, 6103.01, 343.01, and 307.37-.40? ORC section 6103.01 restricts the county commissioners' jurisdiction to public water supply facilities leaving by implication water wells for individual home sites or individual commercial facilities

to the local boards of health. Can a similar distinction be made between sewage treatment facilities for individual homes or separate commercial facilities and group, small community, or outright public wastewater collecting, treatment, and disposal facilities in light of the unspecific language of ORC section 6117.01? Similarly who has jurisdiction over private garbage and refuse collection and disposal companies and the attendant sanitary landfill operations in light of the language of ORC section 343.01?

"4. In view of the language of ORC sections 6117.01, 6103.01, and 343.01 that 'any person, firm, or corporation proposing or constructing such improvements shall pay to the county all expenses incurred by the board in connection therewith' relative to the approval of plans and specifications and the supervision of construction of such improvements; what limitations are there to the fees that can be collected relative to the applications for and the review, inspection, and approval of said improvement plans and specifications and the subsequent supervision and inspection of construction by the appropriate political subdivision?

"5. In the interests of administrative economy, to what extent can inspectors acting under the authority of the county commissioners relative to sewageworks construction and maintenance also inspect for relevant plumbing if the appropriate health authorities grant them this power on either a permanent or project-by-project basis?"

Section 3701.18, Revised Code, provides that no municipal corporation, county, public institution, corporation or officer or employee thereof, or other person shall provide or install a water supply or sewerage or purification or treatment works for water supply or sewage disposal or make any changes in said works until the plans have been submitted to and approved by the State Department of Health. This section of the Revised Code, applies to all such works for water or sewerage of a municipal corporation or part thereof, and unincorporated community, a county sewer district, or other land outside of a municipal corporation, or publicly or privately owned building or buildings or place used for such purposes as specified in said section, but does not apply to works for water or sewage to be installed for the use of a private residence or to water supply facilities for industrial purposes and not intended for human consumption.

In addition, see Section 6119.35, Revised Code, per-

taining particularly to plans submitted by regional water and sewer districts, which is as follows:

> "Upon completion of plans for the proper purification, filtration, and distribution of water or proper collection and treatment of sewerage, the board of county commissioners, the regional planning commission, the county planning commission, or any regional water and sewer district which has prepared such plans shall file a copy thereof with the department of health, which may approve or reject any provisions thereof. If such department rejects such plans or refers them back for amendment, other or amended plans shall be prepared. If the department approves such plans, it shall certify a copy of its action and thereafter any district may proceed to carry such plans into effect."

At this point it is necessary to refer to several sections of the Revised Code which are pertinent to the topic of sewage treatment works, but not included in Chapter 3701, Revised Code. An analysis of these sections will be deferred until later in the opinion.

Section 6112.02, Revised Code, provides as follows:

> "For the purpose of preventing, controlling, and abating new or existing pollution of the waters of the state, the department of health, upon application made to the department by any person and determination by the department that such action will be conducive to the public health, safety, convenience, and welfare, may grant approval for general plans to such person for the construction and installation of a disposal system for the disposal of sewage, industrial waste, or other wastes to serve any geographical area in one or more counties, whether or not said geographical area is part of one or more than existing sewer districts established under Chapter 6117. of the Revised Code, provided that said geographical area is not then being served by a disposal system for the disposal of sewage, industrial waste, or other wastes.
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> "Upon receipt of any application for approval of the department as provided for in this section, the department shall notify the board of county commissioners in any county in which any part of said geographical area is situated that such application has been filed. The board of county commissioners shall certify to the department, within thirty days after

receipt of such notice, whether said geographical area is or is not then being served by a disposal system for the disposal of sewage, industrial waste, or other wastes.

"There shall be submitted with such application such data required by the department to establish the need therefor to serve the public health, safety, convenience, and welfare, and such surveys, topographic maps, and profiles as are necessary for the determination of the proper boundaries of such geographical area. Surveys accompanying applications requesting the approval of general plans provided for in this section shall have been made under the supervision of and certified by a registered engineer or surveyor."

"Treatment works" is defined in Section 6112.01(E), Revised Code:

"(E) 'Treatment works' means any plant, disposal field, lagoon, dam, pumping station, incinerator, or other works used for the purpose of treating, stabilizing, or holding sewage, industrial waste, or other wastes."

"Other wastes" is defined in subsection (C) of the above referred to section:

"(C) 'Other wastes' means garbage, refuse, decayed wood, sawdust, shavings, bark, and other wood debris, lime (except hydrated or dehydrated lime), sand, ashes, offal, night soil, oil, tar, coal dust, or silt, and other substances which are not included within the definitions of sewage and industrial waste set forth in this section, which pollute the waters of the state."

"Person" is defined in subsection (H), Section 6112.01, Revised Code:

"(H) 'Person' means a person, firm, partnership, association, or corporation, other than a county township, municipal corporation, or other political subdivision."

Section 6112.03, Revised Code, is as follows:

"Applications for approval of plans for the construction and installation of such facilities shall be made in manner and form prescribed by the department of health, shall be accompanied by plans,

> specifications, and other data as may be required by the department, relative to the facilities for which approval of plans is requested. Thereafter, the application shall be acted upon by the department pursuant to section 3701.18 of the Revised Code and regulations promulgated by the department. No final detailed or construction plans shall be approved by the department before the department has received written notice from the public utilities commission that a certificate of public convenience and necessity has been issued by it authorizing the construction, installation, and operation of such facilities. Thereafter, any person making application to the public utilities commission to abandon, withdraw, or close for service any main sewer or sewage disposal works serving such district shall, within five days thereafter, notify the department of health of its having filed such application with the public utilities commission."

By virtue of Section 3701.19, Revised Code, no municipal corporation, county, public institution, corporation, or officer or employee thereof, or other person shall establish any garbage disposal plant or other industrial facility in the operation of which an industrial waste is produced as defined in said section or make a change in or enlargement of such a facility whereby an industrial waste is produced or materially increased or changed in character or install works for the treatment of disposal of any such waste until the plans for the disposal of such waste have been submitted to and approved by the department of health.

The State Department of Health, however, is precluded by express provision in Section 3701.19, Revised Code, from exercising any authority under this section, in any municipal corporation wherein ordinances or resolutions have been adopted and are being enforced by the proper authorities to make Section 3701.19, Revised Code, effective.

The question initially posed in your request letter is whether certain local political subdivisions of the state or quasi-administrative entities have the authority to require their approval, in addition to the approval of the State Department of Health, prior to the installation "on-side" or construction of these public health facilities.

The legislature, by Chapter 3709, Revised Code, has provided for the division of the state into health districts. Each city constitutes a health district known as a "city health district", and the townships and villages in each county are combined into a health district known as a "general health district". There are, in addition, provisions for the combination of several health districts into one, or for the abolishment of several districts within a county and the establishment of a county health department.

Section 3709.20, Revised Code, provides in pertinent part as follows:

> "The board of health of a city 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. * * *"

Section 3709.21, Revised Code, pertaining to the board of a general health district contains a similar provision, with the addition of the following clause which is not directly on point, but which is included to avoid possible misunderstanding. Said Section reads in part as follows:

> "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 boards may require that no human, animal, or household wastes from sanitary installations within the district be discharged into a storm sewer, open ditch, or water course without a permit therefor having been secured from the board under such terms as the board requires. * * *" (Emphasis added)

It is apparent from Sections 3709.20, and 3709.21, Revised Code, that no specific statutory authority is vested in boards of health districts relative to the approval of plans and specifications of the facilities with which we are concerned. These statutes deal only with orders and regulations for public health, prevention or restriction of disease, and abatement or suppression of nuisances.

However, the case law and treatises on the subject of health districts are virtually unanimous in their expression that the boards of these districts have broad implied powers and by the nature of their purpose, are vested with police powers. See, Schlenker v. Board of Health, 171 Ohio St. 23, 176 N.E. 2d 920, and 26 Ohio Jurisprudence 2d, Health, Section 13, p. 674. In addition, Section 3709.22, Revised Code, which enumerates certain duties of the boards of city and general health districts, specifies, in particular, that the boards, "* * * may take such steps as are necessary to protect the public health and to prevent disease. * * *"

This broad grant of authority to act in the field of public health, would seem therefore to be dispositive of the issue were it not for other considerations, such as the vestment of more specific authority in alternative political subdivisions of the state, or preemption by the state itself. I will, therefore, defer my specific answer in regard to health districts, until I have examined the specific powers and duties of the alternative political subdivisions referred to in your request.

Municipalities, by the Home-Rule provisions of the Ohio Constitution, Article XVIII, Section 3, cited hereinafter, are vested with police power:

> "Municipalities shall 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."

By section 715.37, Revised Code, municipal corporations are authorized "to provide for the public health."

However, there is considerable question whether the provisions of the Ohio Constitution and general laws previously referred to constitute authority for municipal corporations to require local approval of the plans and specifications pertaining to the health facilities with which we are concerned in addition to the approval of the State Department of Health. Due to the provisions of Section 3701.19, Revised Code, in regard to garbage disposal plants as defined in said section, the State Department of Health is precluded from exercising any authority where municipal corporations have provided a proper system of approval. Our concern is limited to sewage treatment works and water supply facilities at this point.

Although municipal corporations have authority to adopt police, sanitary and other similar regulations, it is well established that there may be no conflict with the general state statutes or administrative rules authorized by state statutes. See Struthers v. Sokol, 108 Ohio St., 263 and Neil House Hotel Co. v. Columbus, 144 Ohio St., 248.

However, the primary question is whether municipal corporations have any authority to require approval in any event. What has become the "state-wide concern" doctrine was established in the case of City of Bucyrus v. State Department of health, 120 Ohio St., 426, at p. 428.

> "It is a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease within the municipality, for the municipality is of the public of the state; and it is equally a matter of concern to the whole state whether a municipality so dispose of its sewage as to breed disease without and in the vicinity of its own territory, and whether having bred disease in either situation, it disseminate it throughout the state."

At page 427, Judge Robinson states the following:

> "The surrender of the sovereignty of the state to the municipalities by that Article XVIII, Section 111 was a partial surrender only, and with refer-

ence to sanitary regulations, was expressly limited to such sovereignty as the state itself had not or thereafter has not exercised by the enactment of general laws."

Further, at page 429, is the following summation of Judge Robinson of the Court's position in the field of public health:

"The preservation of the health of the public is within the police power of the sovereignty of the state and, in that respect, extends to that part of the state lying within the municipalities as well as that part lying without -- the power of the municipalities in respect to the subject being limited to such additional local sanitary regulations as are not in conflict with state legislation and as may be determined by the municipality to be necessary or wise for the preservation of the health of its own public and to meet its own local situation."

This decision of the Ohio Supreme Court has never been overruled in the field of public health. If the manner in which a municipality disposes of its sewage is of state-wide concern it certainly would also be a matter of the same interest to insure that the state is unhampered in its approval of the sewage treatment and water supply works, whether publicly or privately owned within the municipality.

I note in passing that there are various decisions in the field of municipal police and fire departments culminating in the case of Canada v. Phillips, 168 Ohio St., 191, which has laid to rest the "state-wide concern" doctrine in these areas. There is also a line of cases dealing with meat inspection which have recognized local authority.

However, a recent case having to do with licensing of watercraft on public or private waters, and sustaining the doctrines of premption of the state and "state-wide concern" is State ex rel., McElroy v. City of Akron, 173 Ohio St., 189. This indicates the Supreme Court of Ohio is disposed to continue to recognize these doctrines in certain areas. Sympathy with the concept of home-rule is no basis on which to ignore the clear mandate of our Court in City of Bucyrus v. State Department of Health, supra. Accordingly, I find that the state by virtue of Section 3701.18, Revised Code, has preempted the field of approval of plans for sewage treatment and water supply works. The treatment of sewage and pure water supplies are matters of state-wide concern and municipal corporations have no authority to require local approval in addition to that required by the State Department of Health. A system of dual approval, without the express sanction of the legislature could conceivably hamper the State Department of Health.

Section 6117.01, Revised Code, reads, in part as follows:

> "* * * The board may make, publish and enforce rules and regulations for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations, and of sewers and sewer improvements within municipal corporations in its county wherever such sewers are constructed or operated by such board or discharged into sewers or sewage treatment plants constructed or operated by such board, including the establishment and use of connections. Such rules and regulations shall not be inconsistent with the laws of this state or the rules and regulations of the department of health. No sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm, or corporation until the plans and specifications for the same have been approved by the board, and any such construction shall be done under the supervision of the county sanitary engineer. * * *" (Emphasis added)

"Sewage treatment works" is not specifically defined in Chapter 6117, Revised Code, and in particular in Section 6117.01, supra. A careful analysis of Section 6117.02, Revised Code, leads to but one conclusion that the sewage treatment works referred to in the above quoted statute are either those to be owned by the county or those in which a fee or service charge is involved, i.e., a public utility. The plans and specifications of those facilities for strictly private use would not be subject to approval by the county.

Section 6103.02, Revised Code, reads in pertinent part as follows:

> * * * The board may make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of public water supplies in the county outside of municipal corporations, and of public water supplies within municipal corporations in its county wherever such water supplies are constructed or operated by such board, or are supplied with water from water supplies constructed or operated by such board, including the establishment of connections. Such rules and regulations shall not be consistent with the laws of the state or the rules and regulations of the department of health. No public water supplies or waterpipes or mains shall be constructed in any county outside of municipal corporations by any person, firm, or corporation, except for

the purpose of supplying water to such municipal corporations, until the plans and specifications for the same have been approved by the board. Any such construction shall be done under the supervision of the sanitary engineer. * * *"
(Emphasis added)

"Public water supply" is defined in Section 6103.01, Revised Code, as follows:

"As used in sections 6103.02, to 6103.20, inclusive, of the Revised Code, 'public water supply' means wells, springs, streams, or other sources of water supply, pumping equipment, treatment or purification plants, distributing mains, cisterns, reservoirs, necessary equipment for fire prevention, other equipment, and lands, rights of way, and easements, necessary for the proper development and distribution of the supply."

Section 343.01, Revised Code, pertaining to garbage and refuse disposal facilities, contains language similar in nature to Sections 6117.01 and 6103.02, Revised Code:

"* * * * * * * * *

"The board may make, publish, and enforce rules and regulations for the construction, maintenance, protection, and use of garbage and refuse collection and disposal facilities. Such rules and regulations shall not be inconsistent with the rules and regulations of the department of health. No garbage and refuse disposal system plant or facilities shall be constructed in any county outside municipal corporations by any person, firm, or corporation until the plans and specifications for such plant or facilities have been approved by the board. Such construction shall be done under the supervision of the county sanitary engineer, * * *"
(Emphasis added)

At this point reference must be made again to pertinent sections of Chapter 6112, supra, which is supplemental to Section 3701.18 and Chapter 6117, Revised Code. The State Department of Health upon receipt of any application for approval of plans submitted pursuant to Section 6112.03, supra, is required to notify the board of county commissioners in any county affected by the application. The board of county commissioners shall certify to the department, within thirty days after receipt of such notice, whether or not said geographical area is then being served by a disposal system as defined in Chapter 6112, supra. Thereafter the department of health shall approve or disapprove in accordance with Section 3701.18, supra. It shall be noted that this procedure applies to plans for the disposal of garbage wastes as well as sewage

wastes. Opinion No. 3531, Opinions of the Attorney General for 1963, first branch of the Syllabus approved and followed:

> "1. Under Section 6117.01, Revised Code, no sewers or sewage treatment works shall be constructed in any county outside of municipal corporations by any person, firm or corporation until the plans and specifications for the same have been approved by the board of county commissioners, and such approval must be obtained prior to the submission of such plans to the department of health pursuant to Sections 6112.02 and 6112.03, Revised Code, to be acted upon by the department in accordance with Section 3701.18, Revised Code, and regulations promulgated by the department."

The apparent intention of the legislature in establishing the procedure as outlined in the above paragraph was to enable private concerns to establish disposal systems on a public utility basis even though a sewer district had been established provided the particular geographical area was not presently being served. I am informed by the Department of Health that prior to the provisions of Chapter 6112, supra, that the department would not as a matter of practice and policy, grant approval for plans of sewage treatment works if a sewer district had already been established pursuant to Chapter 6117.supra.

A comparison of these parallel statutes leads to the following conclusion. Boards of county commissioners have express statutory authority to require their approval of plans and specifications, prior to installation of sewage treatment works outside of municipal corporations which are to be owned and operated, by the county, or operated as a public utility. Similar authority is present as regards the approval of public water supplies as defined in Section 6113.02, Revised Code, except where the proposed construction is for the purpose of supplying water to municipal corporations. In the case of garbage disposal plants or facilities, approval of plans and specifications must be obtained from the board on any proposed installation outside of municipal corporations.

Section 307.37, Revised Code, referred to in your request letter, pertains to the adoption and enforcement of building regulations for residential dwellings. There is an additional clause providing for the establishment of a county building regulations department. Upon certification of said department under Section 3781.10, Revised Code, the board of county commissioners, may direct the department to exercise enforcement authority and to accept and approve plans pursuant to Sections 3781.03 and 3791.04, Revised Code. The essence of the jurisdictional question would then turn on whether the buildings involved would come within the definition of "public building" as defined in Section 3781.06, Revised Code. As this is a factual question it would be impossible for me to arrive at a conclusion in the matter other than that approval in this regard is confined to safety and sanitary features of the buildings, if the department were to conclude that such buildings were within its jurisdiction. I do conclude, however, that approval as to engineering design

criteria and feasibility of the facilities is vested in the board of county commissioners, directly, as such.

I will now return to your specific inquiry regarding health districts. Whether a board of health could make a rule that all pupils must be vaccinated before attending school was questioned but not decided in Carr v. Board of Education, 1 NP (NS) 602, 13 O D 430. In this case, the court stated that probably the board of education alone has such power, since it was improbable that the legislature having given such power to boards of education, would have given the same discretionary power to the board of health as well. (Such a result would dismiss any possibility of conflict and the omission of the power over the subject of vaccinations from the provisions of the act governing health boards was an intentional omission and intended to prevent a clash of authority between two boards clothed with the same discretionary power.)

I find this reasoning analogous to the question you pose in regard to city and general health districts. Therefore, I must conclude that, since the express authority relative to approval and disapproval of plans and specifications of sewage treatment, water supply, and garbage disposal facilities is vested in the State Department of Health and the Boards of county commissioners. Health districts do not have such authority but by implication would have authority over facilities for private residences or separate commercial facilities. I am not unmindful of Opinion No. 821, Opinions of the Attorney General for 1959, the Syllabus of which is as follows:

> "In the adoption of standards for the installation of water supplies by a county board of health, such standards must be promulgated and published in accordance with the provisions of Section 3709.21, Revised Code, in order for them to become effective."

A complete analysis of this opinion leads to the conclusion that the question of whether or not the county board of health actually had authority to promulgate such standards was not decided in the opinion, it was merely assumed.

You also ask whether, under the authority of local political subdivisions to require approval of plans and specifications of the facilities with which we are concerned, there is an implied sequence of required approvals apart from what may be currently required under the regulations or policies of the State Department of Health? I find no basis for any implied sequence of required approvals apart from what is currently required by the State Department of Health. Further, on the basis of Sections 6117.01, 6103.02, and 343.01, Revised Code, I find no basis in law for a board of county commissioners through their county sanitary engineer, to require subsequent submission and approval of more detailed "shop drawings" subsequent to approval by the board, or to require the applicant to secure additional permits regarding the plans and specifications. "Plans and specifications" means an accurate detailed working plan showing material to be used, and the manner of construction. Jenks v. Town of Terry, 88 Miss. 364,

370, 40 So. 641. All of the statutes speak of approval by the board, with the construction to be done under the supervision of the county sanitary engineer. Once approval of plans and specifications is given by the board, subsequent approvals cannot be required.

I come now to your second basic inquiry and that is to what extent any of the political entities or subdivisions of the state, having authority to require approval of plans and specifications of the facilities with which we are concerned, may require conditions somewhat at variance with or more stringent than those required by the Ohio State Department of Health.

As we turn our attention to the problem in relation to boards of county commissioners, I must again examine Sections 6117.01, 6103.02, and 343.01, Revised Code. Prior to such a review, I feel it essential to point out several basic controlling principles:

> "Statutes relating to the public health and defining the duties of the State Department of Health are of a general nature and apply throughout the state, * * * Since the subject of public health is held to be a matter of statewide concern, enactments of the General Assembly on that subject prevail over local enactments when the latter are in conflict therewith, and there is no theory upon which a mere agency of the state, such as a municipality, (i.e., county, addition of author), has the right to litigate the right of the state to enforce, through any agency it pleases, sanitary rules and regulations for the preservation of the health and comfort of the people of the state.
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> (26 O.J. 24, Health Section 3, p. 662-663.)

> Generally speaking, a county is, * * * a constituent part of the plan of permanent organization of the state government - a wholly subordinate political division or instrumentality, created and existing almost exclusively with a view to the policy of the state at large, and serving as a mere agency of the state for certain specified purposes."
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> (14 O.J. 2d, Counties, (Section 4, p. 201.)

By authority of Section 6117.01, Revised Code, a board of county commissioners, has authority to promulgate rules and regulations for the construction, etc. of sewers and sewer improvements in its county and these rules and regulations may not be "inconsistent with the laws of this state or the rules and regulations of the department of health." Note, that whether by legislative oversight or

otherwise, the term "sewage treatment works" is not included in the statute at this point. It is included, however, in the clause following, relative to the authority to approve plans and specifications. Technically, the clause relating to the necessary consistency of the board's rules and regulations does not apply as regards the particular facility, because the board has no authority to adopt rules and regulations as to sewage treatment plants. However, my previous references, to the principles to be followed in the field of public health and the authority of counties in this respect make it clear that the board's approval must be based on criteria consistent with that applied by the State Department of Health.

The clause to which you have reference in Section 6103.02, and 343.01, Revised Code, that "rules and regulations shall not be inconsistent with the laws of the state or the rules and regulations of the department of health", properly covers the approval of plans and specifications for public water supply facilities and garbage disposal plants and need not be further elaborated upon.

My previous analysis and conclusions have disposed of the first part of your third basic inquiry.

Your statement that Section 6103.02, Revised Code, restricts the county commissioner's jurisdiction to public water supply facilities, leaving by implication water wells for individual home sites or individual commercial facilities to the local boards of health, may or may not be a correct statement of the law. I believe that an analysis of Section 6103.02, supra, leads to the conclusion you suggest. The "public water supplies" referred to are those which are proposed to be owned by the county or those which are to be operated as a public utility. I would call your attention to Opinion No. 1842, Opinions of the Attorney General for 1960, branch one and six of the syllabus, which read as follows:

> "1. Under the provisions of Sections 6103.02 and 6117.01, Revised Code, a board of county commissioners has jurisdiction over a private corporation proposing to construct a water and sewage system in unincorporated portions of the county for purpose of approving or diapproving the plans and specifications for such system.
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> "6. In passing on an application for permission to construct private water supplies under the provisions of Section 6103.02, Revised Code, or to construct private sewers or sewage treatment works under the provisions of Section 6117.01, Revised Code, the board of county commissioners is limited to a consideration of the plans and specifications for such construction."

As you have not requested me to state my views on the subject, I will delve no further into the matter except to point out that the conclusions arrived at in Syllabus six are

questionable. There is a difference between a private corporation proposing to construct a water supply which will be operated on a public utility basis and charging fees for service and a strictly private water supply.

Similar distinctions must be reached as to "sewage treatment works" under Section 6117.01, supra, and garbage and refuse disposal systems, plants or facilities under Section 343.01, supra, based on my previous analysis.

In regard to the subject of attendant land-fill operations, I can only refer you to the case of State, ex rel., Brummett v. Board of Health of Clermont County, et al., 109 Ohio App. 57, in which the court held that the county board of health has the right to grant and revoke licenses to operate land-fills.

Your fourth inquiry is concerned with what, if any, limitations there are to the fees that can be collected relative to the application for and the review, inspection, and approval of said improvement plans and specifications and the subsequent supervision and inspection of construction by the appropriate political subdivision?

As you correctly point out, Sections 6117.01, 6103.02, and 343.01, Revised Code, all contain the provision that "any person, firm, or corporation proposing or constructing such improvement shall pay to the county all expenses incurred by the board in connection therewith." In the case of McGowen v. Shaffer, 65 O.L.A. 138, at page 152, the court stated as follows:

> "A similar rule prevails in so far as charges are made for permits, inspection and the reasonableness of license and registration fees.
>
> "Whether a fee is arbitrary, unreasonable or discriminatory is a matter of proof. The court cannot sit in judgment as to the reasons and discretion of the Board of Health in the enactment of their charges and thereby overrule their decisions, unless there is an abuse of discretion or fraud or unreasonableness of the amount of the fees charged, and such has not been proved, nor are the charges discriminatory for they are alike for each of a class within the general Board of Health District."

And, in the case of the Prudential Co-Operative Realty Company v. City of Youngstown, 118 Ohio St., 204, at pages 214 and 215, the court stated the following:

> "The fee charged must not, however, be grossly out of proportion to the cost of inspection and regulation, otherwise it will operate as an excise tax, which is clearly beyond the power of the munic-

ipality to impose. It is not to be expected that fees can be charged which will exactly balance the cost and expense and a reasonable excess will not operate to invalidate the ordinance. * * * Whether or not the surplus of fees over expenses is sufficient to render an ordinance invalid is a mixed question of law and fact. If the excess is small no question of invalidity is present, if it is enormously large it becomes a clear case of operating as an excise tax. Between these extremes there must be a twilight zone where cases must be decided upon their individual facts and where no controlling rule can be disclosed."

In passing, I refer to Opinion No. 3531, Opinions of the Attorney General, for 1963, third branch of the Syllabus which is as follows:

"3. After approval for the construction of sewage facilities has been given by the board of county commissioners pursuant to Section 6117.01, Revised Code, and by the department of health pursuant to Sections 6112.02, 6112.03 and 3701.18, Revised Code, and by the public utilities commission pursuant to Section 4933.25, Revised Code, the construction of such facilities shall be performed under the supervision of a registered engineer, in a manner acceptable to the department of health, as required by Section 6112.04, Revised Code, notwithstanding the provisions in Section 6117.01, Revised Code, that such construction shall be done under the supervision of the county sanitary engineer."

Your final inquiry poses the question to what extent can inspectors acting under the authority of the county commissioners relative to sewage works construction and maintenance also inspect for relevant plumbing if the appropriate health authorities grant them the power on either a permanent or project-by-project basis?

The Syllabus of Opinion No. 2761, Opinions of the Attorney General for 1953, states the following:

"A district board of health has authority by virtue of Section 1261-42, General Code (Section 3709.21, Revised Code), to adopt and enforce plumbing regulations in the unincorporated portion of a county, but the county commissioners do not have such authority under the provisions of Section 2840 General Code (Section 307.37, Revised Code), or under any other provision of the statutes."

Section 307.15, Revised Code, provides as follows in pertinent part:

> "The board of county commissioners may enter into an agreement with the legislative authority of any municipal corporation, township, port authority, water or sewer district, school district, library district, health district, park district, soil conservation district, water conservancy district, or other taxing district, or with the board of any other county, and such legislative authorities may enter into agreements with the board, whereby such board undertakes, and is authorized by the contracting subdivision, to exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or its legislative authority, which such subdivision or legislative authority may exercise, perform, or render. The board may enter into an agreement with the board of township trustees of any township within the county, whereby the board or any county official designated by the board, purchases at the request of the township any materials for the construction, maintenance, or repair of any township road or for the maintenance or repair of any township building, and sells the materials to the township at the cost to the county, which cost shall include the purchase price and any expenses incurred in such purchase, providing the amount involved does not exceed one thousand dollars.
>
> "* * * * * * * * *"

While the county commissioners have no authority to adopt and enforce plumbing regulations, such a practice as you envision would be permissable provided there is an agreement as specified in Section 307.15, supra. However in the absence of such an agreement the following legal maxims would apply.

26 Ohio Jurisprudence 2d, Health, Section 4, p. 664 provides that:

> "In regard to the state's power to provide for the preservation of the public health, the state may assign or delegate such powers and the duties incident thereto to either the state authorities or the local authorities, and it has through the General Assembly, made such delegation and provision. The statutes provide for a state Department of Health and certain state health authorities and have delegated powers in regard to health and sanitation to the municipal corporations, and to local health boards and officers."

As I am compelled to conclude that boards of County Commissioners have no authority to adopt and enforce plumbing regulations in the unincorporated portions of the county, inspectors while employed by the county and acting under its authority relative to sewageworks construction in the absence of an agreement as provided in Section 307.15, supra, may not inspect for relevant plumbing even though acting pursuant to alleged authority delegated to them by local health officials. The legislature has delegated such powers and duties to the health districts and in the exercise of such functions, the following legal maxim is applicable, as cited in Words and Phrases, Volume 11, at page 625, and precludes the practice of subdelegation which you suggest:

> "The maxim delegate potestas non potest delegata, expresses the general rule that an agent in whom trust and confidence is imposed, or who is required to exercise discretion of judgment, may not entrust the performance of his duties to another without the consent of his principal and that one clothed with authority to act for a principal must ordinarily perform the act himself."
>
> (Winkleblack v. Exchange National Bank, 136 S.W. 712, 716, 155 Mo. App. 1, quoting and adopting 31 Cyc. page 1425.)

Therefore, it is my opinion and you are advised that:

1. Boards of city or general health districts do not have authority, pursuant to Sections 3709.20 and 3709.21, Revised Code, to require approval of plans and specifications for sewage treatment works, public water supply facilities, and garbage and refuse disposal plants and facilities, as defined in Chapters 6117, 6103, and 343, Revised Code, respectively, but by implication have such authority over facilities for the use of a private residence or separate commercial facilities.

2. Municipalities under Section 3, Article XVIII, Constitution of Ohio, have no authority to require local approval of plans and specifications for sewage treatment and public water supply facilities, but do have such authority in regard to garbage disposal plants pursuant to Section 3701.19, Revised Code.

3. Boards of county commissioners, pursuant to Sections 6117.01, 6103.02, and 343.01, Revised Code, have authority to require approval of plans and specifications for sewage treatment, water supply and garbage and refuse disposal plants and facilities, which are to be owned and operated by the county or which are to be operated on a public utility basis and installed or constructed outside of municipal corporations.

4. Once county commissioners have approved plans and specifications, relative to sewage treatment and water supply works, and sewage disposal facilities, they have no authority through their county sanitary engineer to require submission and approval of more detailed "shop drawings".

5. Boards of County Commissioners pursuant to Sections 6117.01, 6103.02 and 343.01, Revised Code, in the establishment of rules, regulations and standards relative to the approval of plans and specifications of sewage treatment, water supply and garbage disposal facilities may not impose conditions which are inconsistent with the laws of the state or the rules and regulations of the State Department of Health.

6. Pursuant to Sections 6117.01,6103.02 and 343.01, Revised Code, any person, firm, or corporation proposing or constructing such improvements shall pay to the county all reasonably related expenses incurred by the board in connection therewith and said expenses shall be presumed to be reasonable until the contrary is shown. Opinion No. 3531, Opinions of the Attorney General for 1963, Syllabus three, approved and followed.

7. Inspectors acting under the authority of county commissioners relative to sewagework construction and maintenance may not also inspect for relevant plumbing under alleged authority delegated them by local health authorities, but may do so provided the provisions of Section 307.15, Revised Code, are complied with.