

## OPINION NO. 87-083

## Syllabus:

A board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district established pursuant to R.C. Chapter 6117 where divestiture is not inconsistent with preservation and promotion of the public health and welfare, and provided that divestiture does not result in violation of the statutory provisions and administrative regulations governing the lawful operation of a sewer district, such as R.C. Chapter 6111.

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To: Steve C. Shuff, Seneca County Prosecuting Attorney, Tiffin, Ohio  
By: Anthony J. Celebrezze, Jr., Attorney General, October 30, 1987

You have requested my opinion regarding the authority of a board of county commissioners to divest itself of a county sewer district that was created pursuant to R.C. Chapter 6117. According to your letter, Seneca County established a sewer district several years ago in an area of the county outside of any municipal corporations. Such sewer district is the only one within the county established pursuant to R.C. Chapter 6117. You state that the board of county commissioners now desires to divest itself of the responsibility of overseeing the management and operation of this particular sewer district. Accordingly, you wish to know whether a board of county commissioners may divest itself of ownership and control of a county sewer district established pursuant to R.C. Chapter 6117, and, if so, how such a divestiture may be accomplished. By divestiture, I understand you to mean something other than simple abandonment of an operational sewage treatment plant, since such abandonment would cause water pollution violations. See R.C. Chapter 6111.

R.C. Chapter 6117 addresses, inter alia, the establishment and maintenance of sewer districts by boards of county commissioners within their respective counties, outside of municipal corporations. See generally 1986 Op. Att'y Gen. No. 86-087. R.C. 6117.01 states, in pertinent part, as follows:

For the purpose of preserving and promoting the public health and welfare, boards of county commissioners may by resolution lay out, establish, and maintain one or more sewer districts within their respective counties, outside of municipal corporations, and may have a registered professional engineer make such surveys as are necessary for the determination of the proper boundaries of such district. Each district shall be designated by an appropriate name or number. Any board may acquire, construct, maintain, and operate such main, branch, intercepting, or local sewer, or ditch, channel, or interceptor for the temporary retention of storm water, within any such district, and such outlet sewer and sewage treatment or disposal works within or without such district, as are necessary to care for and conduct the sewage or surface water from any part of such district to a proper outlet, so as to properly treat or dispose of same. Any such board may employ a registered professional engineer for such time and on such terms as it deems best, and may authorize such registered professional engineer to employ necessary

assistants upon such terms as are fixed by said board. The board may create and maintain a sanitary engineering department, to be under its supervision and in charge of a registered professional engineer, to be appointed by such board, for the purpose of aiding it in the performance of its duties under sections 6117.01 to 6117.45 of the Revised Code, or its other duties regarding sanitation provided by law. (Emphasis added.)

R.C. 6117.01 further provides that a board of county commissioners "may adopt, publish, administer, and enforce rules for the construction, maintenance, protection, and use of sewers and sewer improvements in its county outside of municipal corporations," provided that such rules are not inconsistent with the laws of the State of Ohio or the rules of the Director of Environmental Protection.

Other provisions in R.C. Chapter 6117 set forth the manner in which a county sewer district shall actually be established, and authorize a board of county commissioners to provide a county sewer district with appropriate services and facilities. See, e.g., R.C. 6117.011 (surveys of district water works or sewerage systems); R.C. 6117.02 (fixing of rates and assessments); R.C. 6117.04 (authority of board of county commissioners in regard to sewer districts); R.C. 6117.06 (plan of sewerage); R.C. 6117.07 (resolution to proceed with construction of sewer improvements); R.C. 6117.08 (issuance of bonds to pay for cost of sewer improvements); R.C. 6117.27 (execution of a written contract for the construction of sewer improvements); R.C. 6117.38 (the board of county commissioners may purchase sewers to serve territory within a sewer district). Finally, opportunities are provided whereby landowners may challenge all such actions on the part of the board of county commissioners. See, e.g., R.C. 6117.09 (providing for an appeal to the probate court by an owner of property that is to be assessed or taxed for a sewer improvement); R.C. 6117.11 (providing for an appeal when the petition for a sewer improvement is dismissed); R.C. 6117.13-.24 (addressing various matters of procedure germane to appeals taken under R.C. Chapter 6117).<sup>1</sup>

<sup>1</sup> In a conversation with a member of my staff, you have indicated that the sewer district in question has been in existence for approximately ten years, and serves thirty parcels of land. You have also stated that, in the event the board of county commissioners decides to divest itself of the responsibility to manage and maintain this sewer district in that area of the county, it shall select one of two proposals for providing sanitary sewer services to the affected property owners. One proposal is for the board to delegate the entire management and operation of the county sewer district to a private association comprised of the property owners whose lands are currently served by the existing facilities of the sewer district. In the alternative, the board is considering arranging to have those property owners tap into the municipal sewer system of the City of Fostoria. The latter proposal would appear to be permitted by the terms of R.C. 6117.41-.43, which authorize a board of county commissioners to enter into a contract with any other county or municipal corporation "to connect any sewers of such county or municipal corporation with any sewers constructed, or to be constructed, by any other county or municipal corporation, and to provide for the joint use by such contracting parties of such sewers

I now direct my attention to your specific question. You wish to know whether a board of county commissioners may divest

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and of any sewage treatment or disposal works of such county or municipal corporation." R.C. 6117.41. See R.C. 715.40 (any municipal corporation may open, construct, and keep in repair, sewage disposal works, treatment plants, and sewage pumping stations, together with facilities and appurtenances necessary and proper therefor, sewers, drains and ditches); R.C. 727.44 (the legislative authority of a municipal corporation may by ordinance establish in the municipal corporation such number of districts as may be deemed necessary by it for the purpose of providing efficient sanitary sewerage, storm sewerage, or water supply); R.C. 729.11 (the legislative authority of a municipal corporation may levy assessments upon benefited property whenever it has determined by ordinance that it is necessary to construct, enlarge, or improve a system of storm or sanitary sewerage for the municipal corporation or any part thereof); R.C. 743.12 (a municipal corporation may extend its public utility services to persons living outside the corporate limits); Stow v. Cuyahoga Falls, 7 Ohio App. 3d 108, 454 N.E.2d 561 (Summit County 1982); 1957 Op. Att'y Gen. No. 590, p. 164 at 170 (there are apparently no direct statutory provisions directing the manner in which a municipal corporation may extend sewers beyond the corporate limits for the purpose of serving property in an unincorporated area; assuming, however, that a municipal corporation may so proceed under the general power conferred upon it by Ohio Const. art. XVIII, §§4 and 6, the authority to determine to follow such a course must by necessary implication be vested in the legislative authority of such municipal corporation); 1956 Op. Att'y Gen. No. 6981, p. 617 (discussing the authority conferred upon a board of county commissioners by R.C. 6117.41-.43). See also R.C. 307.15 (authorizing a board of county commissioners to enter into an agreement with the legislative authority of any municipal corporation, inter alia, whereby the municipal corporation assumes responsibility for undertaking and performing a particular function of government that the county is otherwise authorized to perform or render); 1952 Op. Att'y Gen. No. 1330, p. 284 (the contracting authority provided by G.C. 2450-2, the statutory predecessor of R.C. 307.15, encompasses any power, function, or service that the contracting subdivision or its legislative authority may exercise, perform, or render).

Because your request does not raise the question, I specifically express no opinion about the propriety of a board of county commissioners delegating or transferring its responsibilities for the management and operation of a county sewer district to a private association of property owners. I am aware that such authority may be implied, in part, by R.C. 307.09(B), which states that a board of county commissioners may grant leases, rights, and easements to a nonprofit corporation for sewer purposes, on or in lands owned by the county. As I recently discussed in 1987 Op. Att'y Gen. No. 87-034, however, the authority of a public body to delegate official duties to another entity, whether public or private, is limited, and, in the absence of specific statutory authority therefor, may only be exercised with respect to purely ministerial duties. In

itself of the responsibility of managing and maintaining a county sewer district established pursuant to R.C. Chapter 6117. I note initially that R.C. Chapter 6117 does not impose a mandatory duty upon a board of county commissioners to establish a county sewer district. Rather, under the pertinent provisions of R.C. Chapter 6117, the responsibility of a board of county commissioners to establish, manage, and maintain a county sewer district is discretionary in nature, and in the reasonable exercise of that discretion a board of county commissioners may determine that a county sewer district need not be established. Such result is clearly evident from the plain language of R.C. 6117.01, which states that, "[f]or the purpose of preserving and promoting the public health and welfare," a board of county commissioners "may by resolution lay out, establish, and maintain one or more sewer districts within" the county. (Emphasis added.) See generally Dorrian

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contrast, any duty or undertaking that requires the exercise of judgment or discretion may not be delegated to an entity other than the entity originally entrusted therewith. Id. See also Burkholder v. Lauber, 6 Ohio Misc. 152, 216 N.E.2d 909 (C.P. Fulton County 1965); Kelley v. City of Cincinnati, 7 Ohio N.P. 360 (C.P. Hamilton County 1900); 1985 Op. Att'y Gen. No. 85-008; 1984 Op. Att'y Gen. No. 84-074. Further, the presumption exists that the General Assembly has delegated duties to a public body or agency named in a statute because that body or agency "is deemed competent to exercise the judgment and discretion necessary for performance of the duties." 1979 Op. Att'y Gen. No. 79-067 at 2-223. Thus, to the extent that the management and operation of a county sewer district requires the exercise of discretion and judgment by a board of county commissioners, the board's responsibility therefor may not be delegated to a private or public entity, provided specific statutory authority for such delegation, see, e.g., R.C. 307.15; R.C. 6117.41-.43, does not otherwise exist. But cf. Doud v. City of Cincinnati, 152 Ohio St. 132, 137, 87 N.E.2d 243, 246 (1949)(for purposes of immunity from tort liability, "[a] municipality is not obliged to construct or maintain sewers, but...in the performance of such duty the municipality is in the exercise of a ministerial or proprietary function and not a governmental function"); State v. Bowling Green, 63 Ohio Op. 2d 109 (C.P. Wood County 1972), affirmed, 38 Ohio St. 2d 281, 313 N.E.2d 409 (1974)(same).

Finally, there may be questions raised regarding the authority of a board of county commissioners to transfer property of a county sewer district to a private association, as well as the appropriate procedure to accomplish such a transfer. See, e.g., R.C. 307.09; R.C. 307.10; R.C. 307.12; 1985 Op. Att'y Gen. No. 85-016 at 2-64 n. 3 (a county may not use the mechanism of R.C. Chapter 6117 to construct facilities as public improvements for the purpose and with the intent of conveying such facilities to individual landowners; thus, absent specific statutory authority to the contrary, a county may not convey to others sewage facilities that it constructs under R.C. Chapter 6117 until such time as the facilities are no longer needed for public use). You have not requested my opinion on such questions, however, and, accordingly, I express no opinion with respect thereto.

v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971)(syllabus, paragraph one)(the use of the word "may," in a statute shall be construed as discretionary and permissive unless there is indicated a clear and unequivocal legislative intent to the contrary); 1987 Op. Att'y Gen. No. 87-043 at 2-282; 1987 Op. Att'y Gen. No. 87-040 at 2-266. Thus, where a board of county commissioners, in the reasonable exercise of its discretion, determines that the establishment of a county sewer district, pursuant to the terms of R.C. Chapter 6117, will preserve and promote the public health and welfare, R.C. 6117.01, it may pursue such course of action. In the absence of such a finding, however, R.C. Chapter 6117 imposes no mandatory obligation upon a board of county commissioners to establish, manage, and maintain a county sewer district. See e.g., State ex rel. Bowman v. Board of Commissioners, 124 Ohio St. 174, 177 N.E. 271 (1931)(syllabus, paragraphs five and six)(it is a gross abuse of the discretion reposed in county commissioners to establish, pursuant to G.C. 6602-1 (now R.C. 6117.01), a sewer district outside of a municipality where there is not a present population sufficiently large and compact to cause a substantial menace to health).

Insofar 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. A board of county commissioners may determine, for example, that, as a result of changed circumstances, the sewer district in question no longer serves the statutory purpose of preserving and promoting the public health and welfare. In this regard, a more efficient and sanitary means of sewage disposal may be available to residents and businesses within the affected area as an alternative to the services and facilities provided by the county sewer district. If such is, in fact, the case, then a board of county commissioners, having made such a determination, may divest itself of the responsibility for the control, management, and maintenance of the county sewer district. In 1921 Op. Att'y Gen. No. 2071, vol. I, p. 387, one of my predecessors reached a similar conclusion in the course of addressing the jurisdiction of a board of county commissioners over a portion of a county sewer district created pursuant to G.C. 6602-1, now R.C. 6117.01, in an area of the county that is annexed to a municipal corporation, or in which a new municipal corporation is created. 1921 Op. No. 2071 states as follows at 390-91:

If the county commissioners are permitted to exercise discretion in laying out and establishing sewer districts, it is not a violation of deductive reasoning to say they may also modify and abandon districts they have created where their action does not transgress vested rights. This is an inherent or necessary implied right in matters involving the exercise of sound judgment, honestly and justly arrived at. In a recent opinion of this department-1920 Vol. 1, page 428-it is held that county commissioners may discontinue a road improvement after issue and sale of bonds. From this opinion the following is quoted:

"No statute has been found expressly authorizing the discontinuance of road proceedings; hence any authority the

commissioners may have in that connection must be ascribed to implication. \* \* \*

Upon the whole, in the absence of express statute or judicial precedent, about the only rule that suggests itself as a guide in your situation, is that the proceedings may be discontinued unless private property rights will be adversely affected."

The necessary preliminary proceedings in the issuance of bonds, levying of assessments on benefited property, advertisements, etc., are similar in the case of road improvements and of the construction of sewers in a sewer district. So that if a road improvement may be abandoned after issue and sale of bonds, with greater force of reason a portion of a sewer district may be abandoned to a municipality when no bonds are issued or assessments made and no private property rights affected.<sup>2</sup> (Emphasis and footnote added.)

I concur in the reasoning of 1921 Op. No. 2071, and, insofar as the current provisions of R.C. Chapter 6117 pertaining to county sewer districts differ in no material respect from the General Code provisions discussed therein,

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<sup>2</sup> 1921 Op. Att'y Gen. No. 2071, vol. I, p. 387 and 1920 Op. Att'y Gen. No. 1146, vol. I, p. 428 both state that certain governmental activities may be discontinued unless vested private property rights will be adversely affected thereby. Neither opinion, however, elaborates upon the questions of when, and the manner in which, private property rights shall be deemed to have become vested for such purposes. Black's Law Dictionary (5th ed. 1979) 1402 defines "vested rights," in part, as "interests which it is proper for state to recognize and protect and of which individual cannot be deprived arbitrarily without injustice," or a right so complete and consummated, and of such character that "it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy." In this case, one may be able to adduce support for the proposition that the property owners in question have acquired vested rights to having sewer service made available to their land. Assuming, without deciding the question, that this may be true, I am unaware of any authority for the proposition that one may also acquire a vested right to the manner and mode by which such service is actually furnished. See, e.g., DeMoise v. Dowell, 10 Ohio St. 3d 92, 461 N.E.2d 1286 (1984) (discussing the authority of a local board of health to require the abandonment of a private septic system by a homeowner and the connection of the house sewer directly to a sanitary sewer constructed pursuant to R.C. 307.73). In this case, the property owners in question will presumably continue to have access to sanitary sewer service, albeit provided through the auspices of an entity other than the board of county commissioners. See note one, supra. Accordingly, I am unable to discern any basis for concluding that the rights of these property owners will be adversely affected in the event the board of county commissioners decides to divest itself of responsibility for the management and operation of this particular county sewer district.

find it applicable to the question raised in your letter. Thus, insofar as R.C. Chapter 6117 confers upon a board of county commissioners discretionary authority to establish a county sewer district for the purpose of preserving and promoting the public health and welfare, R.C. 6117.01, I conclude that concomitant authority on the part of the board to divest itself of the responsibility for the control, management, and maintenance of such district may also be fairly implied therefrom. See generally State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947)(a board of county commissioners, as a creature of statute, may exercise only those powers expressly granted to it by statute, or that may be necessarily implied therefrom); 1986 Op. Att'y Gen. No. 86-109; 1986 Op. Att'y Gen. No. 86-084. Accordingly, a board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district established pursuant to R.C. Chapter 6117.<sup>3</sup>

You have also asked about the manner in which a board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district. R.C. Chapter 6117 sets forth in detail the various procedures a board of county commissioners shall follow, and the specific actions it may take, in establishing, managing, and maintaining a county sewer district. See R.C. 6117.01-.08 and R.C. 6117.25-.40 (addressing the general and specific authority of a board of county commissioners with respect to a county sewer district, such as undertaking construction associated therewith, developing plans of sewage, and fixing rates and assessments and issuing bonds to pay for costs related thereto); R.C. 6117.09-.24 (actions that may be filed in probate court by interested parties challenging the determination of a board of county commissioners to proceed with a sewer district improvement, and appeals therefrom). R.C. Chapter 6117 does not, on the other hand, specify precisely the manner in which a board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district. It is a well-established principle, however, that where statutory authority to perform an act is granted, and there is no provision governing the manner in which that authority shall be exercised, the act may be performed in any reasonable manner. Jewett v. Valley Railway Co., 34 Ohio St. 601 (1878); 1984 Op. Att'y Gen. No. 84-080; 1984 Op. Att'y Gen. No. 84-047; 1984 Op. Att'y Gen. No. 84-036. See also State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), affirmed, 241 U.S. 565 (1916)(where no direction has been given, an officer "has implied authority to determine, in the

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<sup>3</sup> Obviously, however, a board of county commissioners may not divest itself of responsibility for the control, management, and maintenance of a county sewer district as a means of circumventing or otherwise avoiding compliance with the terms of other statutory provisions and administrative regulations that apply to and govern the lawful operation of such sewer district. For example, divestiture will not relieve the county of responsibility for any existing violations of the pertinent provisions of R.C. Chapter 6111 (water pollution control) or 4 Ohio Admin. Code Chapter 3745-31 (permits to install new sewer sources) that may have resulted from sewage discharges from the system. See note four, infra.

exercise of a fair and impartial official discretion, the manner and method" of performing his duties); 1986 Op. Att'y Gen. No. 86-092; 1986 Op. Att'y Gen. No. 86-064; 1985 Op. Att'y Gen. No. 85-007; 1984 Op. Att'y Gen. No. 84-075. Thus, insofar as a board of county commissioners possesses the implied authority, pursuant to R.C. Chapter 6117, to divest itself of the responsibility for the control, management, and maintenance of a county sewer district established thereunder, such divestiture may be accomplished by a board of county commissioners in any reasonable manner that is otherwise consistent with the express terms of R.C. Chapter 6117.<sup>4</sup> Clearly, however, divestiture in a manner that results in a violation of state laws and regulations addressed to the protection of the environment and the state's natural resources is not reasonable. See, e.g., R.C. 6111.04 (prohibiting the pollution of any waters of the state except in cases where the Director of the Environmental Protection Agency has issued a valid and unexpired permit therefor under R.C. 6111.01-.08). See also notes three and four, supra.

Accordingly, based upon the foregoing it is my opinion, and you are advised that a board of county commissioners may divest itself of the responsibility for the control, management, and maintenance of a county sewer district established pursuant to R.C. Chapter 6117 where divestiture is not inconsistent with preservation and promotion of the public health and welfare, and provided that divestiture does not result in violation of the statutory provisions and administrative regulations governing the lawful operation of a sewer district, such as R.C. Chapter 6111.

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<sup>4</sup> In addition, the board of county commissioners must abide by the specific terms of whichever statutes will govern the manner and procedures by which sanitary sewer service will be provided to affected property owners after the board divests itself of responsibility for the control and management of the county sewer district. See note one, supra. Further, any alteration or modification in the manner in which sanitary sewer service is provided will require modifications of the permit otherwise issued for the disposal of sewage by the Ohio Environmental Protection Agency. See R.C. 6111.03; R.C. 6111.031; R.C. 6111.044; 4 Ohio Admin. Code Chapter 3745-31.