

**OPINION NO. 89-106****Syllabus:**

1. R.C. 311.17 imposes a duty upon a charter county to provide the services of the sheriff specified therein for the fees specified and therefore, pursuant to Ohio Const. art X, §3, any home-rule authority adopted in the charter does not include the authority to set such fees at a rate in excess of the amount set by statute.
2. R.C. Chapter 317 imposes a duty upon a charter county to provide the services of the county recorder specified therein for the fees specified and therefore, pursuant to Ohio Const. art X, §3, any home-rule authority adopted in the charter does not include the authority to set such fees at a rate in excess of the amount set by statute.

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**To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1989**

I have before me your request for my opinion regarding the extent to which county home-rule authority includes the setting of fees for the services of certain county officers. Specifically, you ask:

1. By detailing the sheriff's fees for services in O.R.C. §311.17, has Ohio pre-empted counties from exercising home rule in setting such fees at a rate in excess of the amount set by statute?
2. By detailing the recorder's fees for services in O.R.C. [Chapter] 317, has Ohio pre-empted counties from exercising home rule in setting such fees at a rate in excess of the amount set by statute?

In answering your questions, it is helpful to first examine the home rule authority of a charter county as established by the Ohio Constitution. Ohio Const. art X, §3, states, in pertinent part:

The people of any county may frame and adopt or amend a charter as provided in this article....[The charter] shall provide for the exercise of all powers vested in, and the performance of all duties imposed upon counties and county officers by law. Any such charter may provide for the concurrent or exclusive exercise by the county, in all or in part of its area, of all or of any designated powers vested by the constitution or laws of Ohio in municipalities....

Thus, while a charter county may exercise any or all municipal powers in addition to statutorily granted county powers, Ohio Const. art. X, §3 expressly requires that the charter must provide for all county powers and duties. *State ex rel. Howland v. Krause*, 130 Ohio St. 455, 457, 200 N.E. 512, 513 (1936) ("the constitutional provision above quoted [Ohio Const. art. X, §3] authorizes the adoption of a county charter. It directs what such charter shall provide and then what it may provide"). See also 1985 Op. Att'y Gen. No. 85-047 at 2-172 ("because Summit County is a charter county which has adopted those powers vested in municipal corporations, it has the authority to impose powers and duties not provided by statute upon its officers...[and] could through a charter amendment or through a council ordinance or resolution, impose additional powers and duties") (citation omitted, emphasis added); 1985 Op. Att'y Gen. No. 85-039 ("[a] county is not restricted in its method of distributing, in its charter, the county's power. It must provide, however, for the exercise of all of the county's and county officers' powers and duties").

In 1857, the Ohio Supreme Court explained the difference between counties and municipalities as political units as follows:

A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy.

*Board of Comm'rs v. Mighels*, 7 Ohio St. 109, 119 (1857); see also *State ex rel. Guilbert v. Yates*, 66 Ohio St. 546, 64 N.E. 570 (1902) (syllabus, paragraph one) ("[c]ounty officers are not local officers, but are a part of the permanent organization of the government of the state"). By requiring that a charter county maintain all the powers and duties given to counties by statute, Ohio Const. art. X, §3 protects this historical governmental function of county administration of state policy from any authority which might be asserted by a charter county pursuant to adopted municipal powers. As stated by the 1970-77 Ohio Constitutional Revision Commission in its Final Report at 292:

The intention of this provision seems to be to make it clear that even counties having charters continue to be administrative arms of the state for purposes of carrying out certain functions throughout the state. While, therefore, a county could by charter change its form of government and expand the powers which it may exercise and be less inhibited by statutory provisions in the manner of the exercise of those powers, those duties required by general law of counties and county officers would still have to be carried out.

Thus, Ohio Const. art. X, §3 provides that the powers and duties statutorily delegated to counties and county officers in their capacity as administrative arms of the state are not affected by the adoption of municipal powers, including the municipal home-rule authority provided in Ohio Const. art. XVIII, §3 (municipalities have "powers of local self-government" and local police power, within prescribed limitations).<sup>1</sup>

With these principles in mind, I now examine the fees to which you refer in your questions. As you have indicated, these fees have been set by statute. R.C. 311.17(A) (sheriff to charge fixed amounts for service of certain writs and orders); R.C. 311.17(B) (sheriff may charge fixed amounts for mileage, taking bail bond, jail fees, poundage, making or executing deeds of land sold on court order); R.C. 317.32 (general schedule of county recorder fees for recording, indexing, and copying written instruments); R.C. 317.09 (county recorder fees for notices and discharges of

<sup>1</sup> I note, however, that the analysis of whether a matter falls within the meaning of "powers vested in" or "duties imposed upon counties and county officers by law" for purposes of Ohio Const. art. X, §3 is similar to the state-wide concern doctrine applicable in home-rule analysis. See generally *Village of Beachwood v. Board of Elections*, 167 Ohio St. 369, 148 N.E.2d 921 (1958) (syllabus, paragraph one) (municipal home-rule power pursuant to Ohio Const. art. XVIII "relates solely to the government and administration of the internal affairs of the municipality"); *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 81, 90, 100 N.E.2d 225, 230 (1951) ("authority of the state is supreme over the municipality and its citizens as to matters and relationship not embraced within the field of local self-government"). As a practical matter, I believe either analysis leads to the same result. The distinction is primarily a matter of theory and applicable terminology.

federal tax liens). *See also* R.C. 317.10 (fees for bankruptcy matters as in R.C. 317.32); R.C. 317.22 (fees for conveyances of land, minerals, mineral rights as in R.C. 317.32); R.C. 317.12 (no fee for preparing receipts); R.C. 317.24 (no fee for recording military discharges).

Additional statutes clearly provide that the sheriff and county recorder have a mandatory duty to collect these fees and pay them into the county general fund. R.C. 325.28 ("sheriff...and county recorder shall charge and collect the fees, costs, percentages, allowances, and compensation allowed by law"); R.C. 325.27 ("fees...collected or received by law as compensation for services by a...sheriff...or county recorder, shall be received and collected for the sole use of the treasury of the county"); R.C. 325.31 (requiring such fees to be credited to the county general fund); *see also* R.C. 325.32 ("[n]o county officer named in section 325.27 of the Revised Code, shall make any reduction, abatement, or remission of any fees, costs...required to be charged and collected by him"); R.C. 325.36 ("[n]o salaried county official, shall remit a fee or part thereof, or shall collect a fee other than that prescribed by law"). *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("the word 'shall' shall be construed as mandatory").

The fees governed by the above statutes have been established by the state with respect to duties imposed upon counties for purposes of administering state-wide policies. The services of the sheriff listed in R.C. 311.17 arise in the context of the litigation of civil and criminal cases in the state court system. The sheriff is required to perform these services as an officer of the court. *See generally* R.C. 1907.53(A) (county sheriff is ministerial officer of the county court). The fees of the county recorder, established in R.C. Chapter 317, arise in the context of administering a state-wide recording system. These fees are associated with services which every county recorder in the state is required to provide in connection with the recording and cataloging of written instruments, particularly those related to real property. *See, e.g.*, R.C. 317.08 (listing records required to be kept); R.C. 317.18-.201 (requiring or authorizing various types of registers and indexes).

I note that there are no statutes which provide counties with discretionary authority to adjust the fees of either the sheriff or the county recorder in order to provide for local variations in the expense of providing the required services or in the need for general revenue funds. This fact evidences legislative intent that individuals throughout the state should be subject to a uniform fee scale with respect to these services. The case law discussing sheriff and constable fees similar to those currently imposed by R.C. 311.17 recognizes that the policy behind such fees is not simply to cover actual local expenses or revenue needs. R.C. 311.17 establishes a particular type of fee known as "costs", the amount of which is binding not only on the sheriff, but on the court itself. R.C. 311.17 ("the sheriff shall charge the following fees, which the court or clerk thereof shall tax in the bill of costs").<sup>2</sup> The fixing of the amount of costs represents the decision of the legislature as to what part of the expense of maintaining the state judicial system should be borne by individual litigants and what part should be provided from public funds. *See generally Ella Van Dyke St. Clair Home For The Aged v. Jaffe*, 27 Ohio Law Abs. 367, 370 (Ct. App. Darke County 1938) (noting with respect to a constable's expenses not statutorily chargeable as costs that "if there is no authority of law to pay the same, the officer must consider such expenditures as incident to the office"); *State ex rel. Judson v. Coates*, 11 Ohio Dec. 670, 672-73 (C.P. Cuyahoga County 1901) (noting that the policy of judicial administration has always required individual suitors to pay at least part of the expenses of the courts while other costs are absorbed by the public treasury). Although there is no corresponding case law with

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<sup>2</sup> *See generally State ex rel. Comm'rs. v. Guilbert*, 77 Ohio St. 333, 338-39, 83 N.E. 80, 81 (1907) (defining "costs" as "the statutory fees to which officers, witnesses, jurors, and others are entitled for their services in an action or prosecution and which the statutes authorize to be taxed...they are allowed only by statute"); *accord Centennial Ins Co. v. Liberty Mut. Ins. Co.*, 69 Ohio St. 2d 50, 430 N.E.2d 925 (1982).

respect to the fee structure for services by the county recorder, this analysis is equally applicable to the recorder's fee. Like the fixing of the sheriff's fees, the fixing of the recorder's fees also functions to apportion the cost of this state-wide system between individuals using it and the recorder's office which provides the service, thereby relegating part of the expense to public funds.

Ohio Const. art X, §3 provides that a county charter must provide for "the performance of all duties imposed upon counties and county officers by law." Clearly, the services of the sheriff and county recorder associated with the fees in question are duties imposed by this constitutional mandate. The state, by setting the fees for these services has fixed the cost of these services to individuals who are directly benefitted by them. Thus, the duty imposed upon the county is not simply to provide the services, but to provide the services at the individual cost specified in the statutes.

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

1. R.C. 311.17 imposes a duty upon a charter county to provide the services of the sheriff specified therein for the fees specified and therefore, pursuant to Ohio Const. art X, §3, any home-rule authority adopted in the charter does not include the authority to set such fees at a rate in excess of the amount set by statute.
2. R.C. Chapter 317 imposes a duty upon a charter county to provide the services of the county recorder specified therein for the fees specified and therefore, pursuant to Ohio Const. art X, §3, any home-rule authority adopted in the charter does not include the authority to set such fees at a rate in excess of the amount set by statute.