

OPINION NO. 86-081**Syllabus:**

Permit fees collected by the county engineer from persons installing driveways or other approaches to county roads, or from persons placing utility installations across county roads, must, under R.C. 325.31 and R.C. 5705.10, be paid into the general fund of the county, unless a special fund has been established under R.C. 5705.12 for the deposit of such fees, in which case the fees are to be paid into the special fund.

To: C. Keith Plummer, Guernsey County Prosecuting Attorney, Cambridge, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, November 13, 1986

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

The Board of County Commissioners for Guernsey County has adopted, by Resolution, a procedure by which permits are issued to those persons installing driveways or other approaches to County Roads, and for utility installations across county roads. The Commissioners charge a fee for the issuance of such permits. The Guernsey County Engineer's Office collects the permit fees and they are presently being deposited in the Engineer's MVL funds. (The motor vehicle fuel excise tax funds distributed to the Engineer pursuant to Revised Code §5735.05). The issue on which I am requesting your opinion is whether the funds collected by the Engineer for the permits mentioned above should be deposited in the County's General Fund or the Engineer's MVL fund.

I note initially that both a county engineer and a board of county commissioners have only those powers expressly granted by statute and those powers which may be necessarily implied from their express powers. See, e.g., State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947).

Various statutory provisions grant the county commissioners the authority to regulate the installation of utilities beneath the surface of county roads and other obstructions or construction on such roads. See R.C. 4931.03 ("[a] telegraph company may, subject to such reasonable regulations as the board of county commissioners prescribes, construct telegraph lines, and fixtures necessary for containing and protecting them, beneath the surface of any public highway outside the limits of a municipal corporation, but shall not incommode the public in the use of such highway"); R.C. 4931.11 (extending the rights granted under R.C. 4931.03 to telephone and communications companies); R.C. 4933.14 (extending the rights granted under R.C. 4931.03 to electric light and power companies); R.C. 5547.02 ("[a] person owning land abutting a public road, not within a municipal corporation, when approved by the...board of county commissioners if upon a county road...may lay a pipe line, within the line of the road, for the purpose of conveying water for public and other purposes. The laying of such pipe line...shall be done upon such conditions as the...board of county commissioners...prescribes"); R.C. 5547.04 ("[n]o person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon"); 1980 Op. Att'y Gen. No. 80-043 (an obstruction is any object that has the potential of interfering with the highway easement, including pipes, tubing, conduits, poles, or wires); 1980 Op. Att'y Gen. No. 80-039 (a geophysical exploration firm must obtain the approval of the county commissioners pursuant to R.C. 5547.04 prior to erecting any obstruction within the bounds of a highway, other than a state highway); 1979 Op. Att'y Gen. No. 79-095 (a cable television system is a "communications business" for purposes of R.C. 4931.11, subject to regulation by a board of county commissioners within the

limited scope of R.C. 4931.03); 1974 Op. Att'y Gen. No. 74-073 (syllabus, paragraph two) ("[t]o the extent that R.C. 4931.03 and 4933.14 [authorize] telegraph, telephone and electric light and power companies to construct lines and fixtures beneath highways outside the limits of a municipal corporation, such companies are exempt from all permit fees except those charges necessary to cover the cost of enforcing the county's regulations under R.C. 4931.03").

The county engineer is, similarly, authorized by statute to oversee construction on county roads and approaches to such roads. See R.C. 5543.16 ("owners of land shall construct and keep in repair all approaches or driveways from the public roads, under the direction of the county engineer"); R.C. 5589.31 ("[n]o person, firm, or corporation shall construct a walk or dig a ditch across a public highway outside any municipal corporation without the consent of the...county engineer in the case of a county road..."). See generally R.C. 315.08 ("[t]he county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor"); R.C. 315.14 ("[t]he county engineer shall be responsible for the inspection of all public improvements made under authority of the board of county commissioners....He shall make all surveys required by law and perform all necessary services to be performed by a registered surveyor or registered professional engineer in connection with the construction, repair, or opening of all county roads or ditches constructed under the authority of the board and shall perform such other duties as the board requires"); R.C. 5543.01(A)(the county engineer shall have general charge of "[c]onstruction, reconstruction, improvement, maintenance, and repair of all bridges and highways within his county, under the jurisdiction of the board of county commissioners"); R.C. 5543.09 ("[t]he county engineer shall supervise the construction, reconstruction, improvement, maintenance, and repair of the highways, bridges, and culverts under the jurisdiction of the board of county commissioners"); 1982 Op. Att'y Gen. No. 82-025 and 1981 Op. Att'y Gen. No. 81-039 (explaining the allocation of responsibilities between property owners and a county in regard to approaches, storm sewers, culverts, and ditches).

The statutes referenced above provide authority for a county to establish a permit system for the installation of driveways or other approaches to county roads and for utility installations beneath county roads. See Op. No. 74-073. See generally 1956 Op. Att'y Gen. No. 7442, p. 833 (finding that the authority to require a building permit is implied from the authority to enforce building regulations). No statutory provisions expressly authorize the imposition of fees in connection with the establishment of such a permit system. It has, however, been stated generally that, where a governmental entity has been given the authority to inspect and regulate a particular matter, "the further authority to charge a reasonable fee to cover the cost of inspection and regulation will be implied." Prudential Co-Operative Realty Co. v. City of Youngstown, 118 Ohio St. 204, 214, 160 N.E. 695, 698 (1928). This general principle has been applied by my predecessors in a number of opinions, and provides a basis for a fee requirement of the sort here under consideration. See, e.g., Op. No. 74-073; 1974 Op. Att'y Gen. No. 74-023; 1973 Op. Att'y Gen. No. 73-116; 1966 Op. Att'y Gen. No. 66-172; 1962 Op. Att'y Gen. No. 2955, p. 288; 1960 Op. Att'y Gen. No. 1462, p.

398; 1956 Op. No. 7442.¹ Cf. R.C. 5515.01 (authorizing the Director of Transportation to grant permits "to use or occupy such portion of a road or highway on the state highway system as will not incommode the traveling public," but providing that "no condition shall be prescribed which imposes the payment of a money consideration for the privilege granted"). The implied authority to charge a fee pursuant to the authority to regulate extends, however, only to the authority to charge a fee in such amount as is reasonable to cover the cost of inspection and regulation.² See Prudential Co-Operative

¹ I am aware that there is some question concerning the circumstances in which the principle of implying the authority to charge a fee may be applied. See, e.g., Cooperative Pure Milk Association v. Board of Health, 20 Ohio App. 2d 109, 114, 252 N.E.2d 182, 185 (Clermont County 1969) ("the powers of [a county board of health] to regulate wagons or other vehicles delivering food and drink do not include the power to impose an inspection fee..."); Brunner v. Rhodes, 95 Ohio App. 259, 115 N.E.2d 105 (Franklin County 1953); 1974 Op. Att'y Gen. No. 74-073. An argument might be made that the statutory scheme governing counties indicates that expenses of overseeing and regulating obstructions and construction on county roads are not to be charged to individual landowners unless there is express authority for the imposition of a fee. Cf., e.g., R.C. 315.33 ("[c]ounty engineers, chainmen, and markers shall receive a fee for services rendered under [R.C. 315.28-.32], but the fee shall not exceed the actual cost incurred by the county for labor, equipment, and materials"). See also R.C. 519.12 ("[t]he board of township trustees may require that the owner or lessee of property filing an application to amend the [township] zoning resolution pay a fee therefor to defray the cost of advertising, mailing, and other expenses. If the township trustees require such a fee, it shall be required generally, for each application"); R.C. 3709.09 ("[t]he board of health of a city or general health district may, by rule, establish a uniform system of fees to pay the costs of any services provided by the board for which no fee is prescribed by law or by the public health council"); R.C. 3781.102(C) (the political subdivision associated with each municipal, township, and county building department certified by the Board of Building Standards under R.C. 3781.10(E) "may prescribe fees for the acceptance and approval of plans and specifications, and for the making of inspections, pursuant to [R.C. 3781.03 and 3791.04]"). It is my understanding that the practice of charging a permit fee in the circumstances outlined in your request is not widespread, and I attribute that circumstance, at least in part, to the fact that the legal authority for the imposition of such a fee has not been clearly established.

² I note that fees collected by the county engineer do not constitute additional compensation to the engineer. The county engineer's salary is established in accordance with the schedule set forth in R.C. 325.14, and it "shall be in lieu of all fees, costs, per diem or other allowances, and all other perquisites, of whatever kind, which any engineer collects and receives." R.C. 325.14. See R.C. 325.27; State ex rel. Enos v. Stone, 92 Ohio St. 63, 110 N.E. 627 (1915); State ex rel. Crowell v. Myers, 80 Ohio App. 357, 73 N.E.2d 218 (Montgomery County 1947).

Realty Co. v. City of Youngstown; Op. No. 74-023 at 2-114 ("[t]he fee [a board of health] could charge for registering [rendering plants or collectors of rendering materials] would have to be nominal, because such registration would involve nothing more than a list of names and addresses").

I turn now to your specific question concerning the fund to which fees collected pursuant to a permit requirement of the sort discussed above must be deposited. It appears that your question is addressed by R.C. 325.31, which states, in part:

On the first business day of each month, and at the end of his term of office, each officer named in section 325.27 of the Revised Code [county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer, and county recorder], shall pay into the county treasury, to the credit of the general county fund, on the warrant of the county auditor, all fees, costs, penalties, percentages, allowances, and perquisites collected by his office during the preceding month or part thereof for official services.... (Emphasis added.)

See also R.C. 325.27 ("[a]ll the fees, costs, percentages, penalties, allowances, and other perquisites collected or received by law as compensation for services by a...county engineer...shall be received and collected for the sole use of the treasury of the county..."). Clearly, permit fees covering the costs of inspection by the county engineer constitute fees for official services within the meaning of R.C. 325.31. They should, therefore, be paid into the county treasury, to the credit of the general fund, pursuant to R.C. 325.31. See R.C. 5705.09 (providing for the establishment by a subdivision of a general fund and certain other funds).

This conclusion is consistent with the following language of R.C. 325.14:

When [the county] engineer performs service in connection with ditches or drainage works, he shall charge and collect the per diem allowances or other fees provided by law and shall pay all such allowances and fees, monthly, into the county treasury to the credit of the general county fund. The engineer shall pay into the county treasury all allowances and fees collected when he performs services under [R.C. 315.28-.34 (surveying corners, establishing lost, destroyed, uncertain, or agreed corners, taking depositions, recording plats and certificates of surveys)]. (Emphasis added.)

While R.C. 325.14 references only specific types of fees, it does not appear to preclude the establishment of fees for other services provided by the county engineer and the deposit of those fees in accordance with R.C. 325.31. See R.C. 325.14 (the compensation established by R.C. 325.14 "shall be in lieu of all fees, costs, per diem or other allowances, and all other perquisites, of whatever kind, which any engineer collects and receives"); R.C. 325.28 ("[e]ach...county engineer...shall charge and collect the fees, costs, percentages, allowances, and compensation allowed by law, and shall give to the person making such payment an official receipt"). See also R.C. 325.32; R.C. 325.36.

In further support of this conclusion, I note that R.C. 5705.10 states:

All revenue derived from the general levy for current expense within the ten-mill limitation, from any general levy for current expense authorized by vote in excess of the ten-mill limitation, and from sources other than the general property tax, unless its use for a particular purpose is prescribed by law, shall be paid into the general fund.

....

All revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose. All revenue derived from a source other than the general property tax, for which the law does not prescribe use for a particular purpose, including interest earned on the principal of any special fund, regardless of the source or purpose of the principal, shall be paid into the general fund. (Emphasis added.)

Thus, where the law does not prescribe a particular purpose³ for which the money is to be used, R.C. 5705.10 mandates that revenue derived from permit fees "shall be paid into the general fund." (Emphasis added.) See generally Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (in construing a statute, the word "shall" is to be interpreted as mandatory, absent a clear and unequivocal legislative intent that it is to be construed otherwise).

I note, however, that, if the county wishes to restrict the use of the permit fees in question to a particular purpose, it may seek to establish a special fund for that purpose pursuant to R.C. 5705.12. R.C. 5705.12 provides that, in addition to establishing the funds provided for in R.C. 5709.09 and R.C. 5709.13, "the taxing authority of a subdivision may establish, with the approval of the auditor of state, such other funds as are desirable, and may provide by ordinance or resolution that money derived from specified sources other than the general property tax shall be paid directly into such funds." See 1981 Op. Att'y Gen. No. 81-037; 1962 Op. No. 2955 (fees for building permits collected by the board of county commissioners should be paid into the county's general fund unless a special fund has been established for the deposit of such fees). See generally R.C. 5705.14-.16 (governing the transfer of funds).

³ Ohio Const. art. XII, §5a restricts the purposes for which funds derived from highway related fees, excises, or license taxes may be used. See 1986 Op. Att'y Gen. No. 86-054; 1982 Op. Att'y Gen. No. 82-031. That provision extends, however, only to "moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles." Permit fees intended to cover the cost of inspecting and regulating approaches and utility installations on county roads do not come within this provision. I find, therefore, that the moneys in question are not restricted to the uses set forth in Ohio Const. art. XII, §5a.

Your letter of request asks specifically whether the county engineer may deposit permit fees in the fund containing moneys derived from the motor vehicle fuel excise tax imposed by the State under R.C. 5735.05 and distributed to the county under R.C. 5735.27. See R.C. 5735.23. There is no authority for the county engineer to place moneys collected as permit fees into such fund. The county engineer's office is provided and equipped at the cost of the county. R.C. 315.11. The county engineer's salary is paid out of the general county fund or out of the county's share of the fund derived from the receipts of motor vehicle licenses, distributed in accordance with R.C. 4501.04, and the county's share of the fund derived from the motor vehicle fuel tax, distributed in accordance with R.C. 5735.27. R.C. 325.14. Two-thirds of the cost of operation of the county engineer's office, including the salaries of all of the employees and the cost of maintenance of the office, shall be paid out of the county's share of the funds derived from R.C. 4501.04 and R.C. 5735.27. R.C. 315.12. See generally Board of County Commissioners v. Scioto County Budget Commission, 17 Ohio St. 2d 39, 244 N.E.2d 888 (1969). Thus, the county engineer's office is funded at least partially from moneys derived by the motor vehicle fuel tax collected by the State. There is, however, no authority for the county engineer to direct moneys collected as permit fees into this fund. R.C. 5705.10 and R.C. 325.31 are mandatory provisions directing that such receipts be paid into the county's general fund.

It is, therefore, my opinion, and you are advised, that permit fees collected by the county engineer from persons installing driveways or other approaches to county roads, or from persons placing utility installations across county roads, must, under R.C. 325.31 and R.C. 5705.10, be paid into the general fund of the county, unless a special fund has been established under R.C. 5705.12 for the deposit of such fees, in which case the fees are to be paid into the special fund.