

OPINION NO. 89-102

Syllabus:

A prosecuting attorney is not required by the terms of R.C. 309.09(A) to serve as legal adviser to a joint solid waste management district board of directors.

To: W. Allen Wolfe, Muskingum County Prosecuting Attorney, Zanesville, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 29, 1989

You have requested my opinion on two questions pertaining to the board of directors of a joint solid waste management district. First, you wish to know whether any of the prosecuting attorneys of the several counties that comprise a joint solid waste management district have a statutory duty to render legal counsel

to the district's board of directors. Assuming an affirmative answer to the foregoing question, you further wish to know whether the members of the board of directors of a joint solid waste management district are subject to any personal liability with regard to any of the statutory duties they perform in that capacity. You have informed a member of my staff that the board of directors of the newly formed joint solid waste management district of which Muskingum County is a part has been forwarding questions to you regarding the various duties, powers, and responsibilities that are conferred upon the board and the individual members thereof by the provisions of R.C. Chapter 343 (county solid waste management districts) and R.C. 3734.50-.57 (solid waste management plans). Among such questions is that regarding personal liability that members of the joint solid waste management district board of directors may incur as a result of their actions and conduct as board members.

I shall consider first whether the prosecuting attorney of a county that has joined in the establishment of a joint solid waste management district has a statutory duty to render legal advice to the joint solid waste management district board of directors. R.C. 309.09 addresses specifically the duty of the prosecuting attorney to act as legal adviser to various governmental officers and boards. As pertains herein, R.C. 309.09(A) reads as follows:

The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code. (Emphasis added.)

Thus, the prosecuting attorney is, pursuant to R.C. 309.09(A), required to provide legal assistance and counsel to all county officers and all county boards.

Accordingly, whether the prosecuting attorney must act as legal adviser to a joint solid waste management district board of directors and the individual members thereof will depend upon whether the board of directors is a county board, and whether the individual board members are county officers. *See, e.g.,* 1983 Op. Att'y Gen. No. 83-064 at 2-267. Resolution of those two issues requires that I review briefly the statutory scheme that governs the formation and functioning of a joint solid waste management district, and the role assigned thereby to the joint solid waste management district board of directors.

Provisions governing the formation and operation of solid waste management districts appear at R.C. 343.01-.08 and R.C. 3734.50-.57. In particular, R.C. 343.01 and R.C. 3734.52 require the boards of county commissioners throughout the state to establish and maintain either county solid waste management districts or joint solid waste management districts. R.C. 343.01(A); R.C. 3734.52(A), (B). Thus, R.C. 343.01(A) states that the board of county commissioners of each county shall either "[e]stablish, by resolution, and maintain a county solid waste management district under [R.C. Chapter 343] that consists of all the incorporated and unincorporated territory within the county," R.C. 343.01(A)(1), or "[w]ith the boards of county commissioners of one or more other counties establish, by agreement, and maintain a joint solid waste management district under [R.C. Chapter 343] that consists of all the incorporated and unincorporated territory within the counties comprising the joint district," R.C. 343.01(A)(2). The general mission of each such county or joint solid waste management district, as stated in R.C. 3734.54(A), is to "prepare, adopt, submit to the director of environmental protection for review and approval, and implement a solid waste management plan for the district." *See also* R.C. 3734.53 (contents of county and joint solid waste management district plans); R.C. 3734.55 (draft plan review and approval procedures; implementation of plan); R.C. 3734.56 (periodic submission of amended plan and certification). *See generally, e.g.,* 1989 Op. Att'y Gen. No. 89-054; 1989 Op. Att'y Gen. No. 89-020; 1988 Op. Att'y Gen. No. 88-099 at 2-491 and 2-492.

R.C. 343.01(A) vests in the board of county commissioners responsibility for the general management of a county solid waste management district, and

implementation of the district solid waste management plan that is prepared in accordance with the terms of R.C. 3734.53--56. In the case of a joint solid waste management district, such responsibility rests, pursuant to R.C. 343.01(B), with the boards of county commissioners of the counties that establish the joint district, which constitute, collectively, the board of directors of the joint solid waste management district. R.C. 343.01(B) thus states that the initial agreement to establish and maintain a joint solid waste management district "shall be ratified by resolution of the board of county commissioners of each participating county," and that "[u]pon ratification, the board of directors shall take control of and manage the joint district subject to [R.C. Chapter 343]." R.C. 343.01(C)-(G) further delineate additional duties, powers, and responsibilities variously conferred upon the governing board of a county solid waste management district and the board of directors of a joint solid waste management district. *See, e.g.*, R.C. 343.01(C) (a joint solid waste management district board of directors may acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate such solid waste collection systems within the district and such solid waste transfer, disposal, recycling, or resource recovery facilities within or outside the district as are necessary for the protection of the public health); R.C. 343.01(D) (a joint solid waste management district board of directors may employ financial advisers and any other professional services it considers necessary to assist it in the construction, financing, and maintenance of solid waste collection, transfer, disposal, recycling, or resource recovery facilities); R.C. 343.01(E) (a joint solid waste management district board of directors may issue bonds or bond anticipation notes to pay the cost of preparing general and detailed plans and other data required for the construction of solid waste transfer, disposal, recycling, or resource recovery facilities in connection with the district); R.C. 343.01(F) (rule-adopting and enforcement authority of a joint solid waste management district board of directors); R.C. 343.01(G) (a joint solid waste management district board of directors may enter into a contract with any person, municipal corporation, township, or other political subdivision for the operation and maintenance of any solid waste disposal, recycling, or resource recovery facilities).

It is evident, therefore, that a joint solid waste management district is an autonomous legal entity distinguishable from the individual counties that, pursuant to R.C. 343.01(A)(2) and R.C. 3734.52(A) and (B), participate in its creation. *Cf.*, *e.g.*, 1985 Op. Att'y Gen. No. 85-071 at 2-277 ("[a] joint fire district, as a separate legal entity created [under R.C. 505.371] by participating townships and municipalities, is neither a subdivision nor a subordinate department of a county"). In such a situation, the proposition is well established that the governing board or officers of such a regional, multicounty entity cannot, for purposes of R.C. 309.09(A), be considered a county board or county officers:

While the terms "county board" and "county officers" are not statutorily defined, it has been opined by several of my predecessors that, when a joint-county entity is created, by virtue of the fact that such board or officers may exercise authority over an area exceeding the territorial limits of any one county, such board or officers may not be considered a county board or county officers. For example, in 1979 Op. Att'y Gen. No. 79-019, one of my predecessors concluded that a multicounty felony bureau was not a county board for purposes of R.C. 309.09 and that the director of such bureau was not a county officer for purposes of R.C. 309.09. Op. No. 79-019 states, at 2-69:

Moreover, there is ample authority for the proposition that the term "county board" as used in R.C. 309.09, does not apply to any entity established on a multi-county basis. 1975 Op. Att'y Gen. No. 75-014 (joint county community mental health and retardation board); 1964 Op. Att'y Gen. No. 95, p. 157 (joint county airport facility); 1958 Op. Att'y Gen. No. 2736, p. 567 (regional planning commission). Accordingly, I am of the opinion that a Multi-County Felony Bureau is not a "county board" for purposes of R.C. 309.09.

Op. No. 83-064 at 2-268 (thus concluding that a joint board of county commissioners formed pursuant to R.C. 2151.34 and R.C. 2151.65 for the purpose of establishing a multicounty juvenile detention and rehabilitation district is not a county board for

purposes of R.C. 309.09(A)). *See also* 1986 Op. Att'y Gen. No. 86-068 at 2-374 ("[a] regional council of governments is formed of the various political subdivisions that participate in its establishment, *see* R.C. 167.01, and is, therefore, not a county board. It appears, as a result, that a county prosecutor is under no duty to advise such a council"); 1985 Op. Att'y Gen. No. 85-012 at 2-45 ("[s]ince a regional organization for civil defense is not a county agency or board, it is not entitled under R.C. 309.09 to the representation of a prosecuting attorney. In this respect, it is similar to other regional bodies created pursuant to statute which are not entitled to the general legal counsel of a prosecuting attorney"); 1981 Op. Att'y Gen. No. 81-059 at 2-237 ("a joint recreation district created pursuant to R.C. 755.14(C), its board of trustees, its officers, and its employees, are not included with the clientele for whom the prosecuting attorney must act as legal adviser under R.C. 309.09").

Similarly, in this instance I am of the opinion that a joint solid waste management district board of directors is not a county board, and the individual members of such board are not county officers, for purposes of R.C. 309.09(A). A joint solid waste management district is, pursuant to R.C. 343.01(A)(2) and R.C. 3734.52(A) and (B), a multicounty entity comprised of the incorporated and unincorporated territory of all the counties that join in its creation and, accordingly, is neither an administrative subdivision nor a subordinate department of any of those counties. In that regard the statutory provisions set forth above confer upon a joint solid waste management district board of directors powers, duties, and responsibilities that affect, and are to be exercised with respect to, the joint solid waste management district as a whole, and not merely the individual counties included as a part thereof. Insofar as a joint solid waste management district board of directors exercises its authority on a district-wide basis, one cannot reasonably characterize the board and its individual members as a county board and county officers for purposes of R.C. 309.09(A).¹

It follows, therefore, that a prosecuting attorney is not required by the terms of R.C. 309.09(A) to serve as legal adviser to a joint solid waste management district board of directors.² This is not to say, however, that a joint

¹ While the individual members of a joint solid waste management district board of directors are not, by virtue of their board positions, county officers for purposes of R.C. 309.09(A), they are, in their capacity as county commissioners, entitled to the legal advice and representation of the prosecuting attorneys of their respective counties with respect to their duties as county commissioners, including any county duties that relate to the activities of the joint solid waste management district. The responsibility of a prosecuting attorney to provide legal counsel to county commissioners who, pursuant to R.C. 343.01(B), serve upon the board of directors of a joint solid waste management district encompasses, however, only such matters as arise from, and pertain directly to, their statutory responsibilities as county commissioners, and does not include all matters that come within the purview of a joint solid waste management district's statutory mission. *See, e.g.*, 1985 Op. Att'y Gen. No. 85-071 at 2-278 ("[t]he duty of the county prosecutor to serve as legal adviser of township trustees who serve on a board of fire district trustees extends, however, only to matters arising from their positions as township trustees, and not to all matters before the joint fire district"). *See also* 1983 Op. Att'y Gen. No. 83-064 at 2-268 ("[t]he prosecutor will, of course, retain the responsibility of advising the commissioners of his county with respect to any county functions they may have in relation to the activities of a [joint board of county commissioners formed for the purpose of establishing a multicounty juvenile detention and rehabilitation district]"). A question regarding the personal liability that members of a joint solid waste management district board of directors may incur as a result of their actions and conduct as board members does not relate or pertain to any of the duties or functions those individuals perform in their capacity as county commissioners.

² Certain provisions in R.C. 343.01(B) and (D), as well as the specific terms of R.C. 343.03, furnish additional support for this conclusion. R.C.

solid waste management district board of directors must carry out its statutory duties and responsibilities without the benefit of legal counsel. In prior opinions I have noted that in those situations in which a prosecuting attorney is not required to provide legal representation to a particular agency or unit of local government, authority on the part of such governmental entities to retain the services of legal counsel other than the prosecuting attorney may, in the appropriate circumstances, be reasonably inferred from the particular powers expressly conferred upon those entities by their governing statutes. In the case of a board of fire district trustees of a joint fire district, for example, I stated the following in Op. No. 85-071 at 2-278:

Apart from the limited involvement of the county prosecutor as legal adviser to township trustees who serve on a board of fire district trustees, in matters arising from their positions as township trustees, the Revised Code makes no express provision for a joint fire district to obtain legal advice. A board of fire district trustees is, however, vested with a number of powers which may, in their exercise, create a need for legal advice, as, for example, the power to own, lease, and maintain property, the power to employ firefighters, and the power to levy a tax. See R.C. 505.37; R.C. 505.371. It is a general rule that public officials have both such powers as are expressly conferred by statute and such powers as may be reasonably and necessarily inferred from the statutory powers. See *State ex rel. Finley v. Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). It follows that when a board of fire district trustees is in need of legal advice in order to carry out its statutory functions, it may employ legal counsel to provide such advice.

See also Op. No. 83-064 at 2-269 ("it may be inferred that, since by statute the joint boards of county commissioners may engage in real estate transactions and construction agreements in order to organize and build a multicounty detention and treatment facility, see R.C. 2151.3411 (detention homes); R.C. 2151.76 (treatment facilities), the joint boards must necessarily and reasonably have the ability to

343.01(B) states, in pertinent part, that the joint solid waste management district board of directors "shall designate the county auditor of a county participating in the joint district as the fiscal officer of the district," and R.C. 343.01(D) provides that the sanitary engineer or sanitary engineering department of a county in a joint solid waste management district, as determined by the board of directors, "shall, in addition to other duties assigned to that engineer or department, assist the...directors in the performance of their duties under [R.C. Chapter 343] and [R.C. 3734.52-.57] and shall be charged with any other duties and services in relation thereto that the board prescribes." Finally, R.C. 343.03 states, in pertinent part, that the prosecuting attorney of a county where a violation of R.C. 343.01(F)(2), R.C. 343.01(F)(3), R.C. 343.01(H)(1), or R.C. 343.01(H)(2) has occurred, is occurring, or may occur, upon the request of the board of directors of the joint solid waste management district having jurisdiction, "shall prosecute to termination or bring a civil action against any person, municipal corporation, township, or other political subdivision that has violated, is violating, or is threatening to violate any of those divisions." R.C. 343.01(F)(2) and (3) and R.C. 343.01(H)(1) and (2) describe particular prohibitions that apply to solid waste management districts. See also R.C. 343.99 (penalties to be imposed for violations of R.C. 343.01(F)(2) or (3) and R.C. 343.01(H)(1) or (2)).

Had the General Assembly intended a prosecuting attorney to provide general legal counsel to a joint solid waste management district board of directors, it could have included a provision to that effect in R.C. Chapter 343, as it did, analogously, in the case of the county auditor and sanitary engineer. R.C. 343.01(B); R.C. 343.01(D). Instead, the language of R.C. 343.03 appears to indicate that the General Assembly has limited the role of the prosecuting attorney in these matters to the civil and criminal prosecution of the statutory violations therein enumerated.

employ legal counsel to advise them with respect to such matters"); 1979 Op. Att'y Gen. No. 79-019 at 2-69 and 2-70.

A joint solid waste management district board of directors must also perform a variety of statutory duties and functions that may very well require that the board consult with, or seek the assistance of, legal counsel. *See, e.g.*, R.C. 343.01(B)-(G); R.C. 343.02 (contracts for services; agreements for joint use of solid waste management facilities); R.C. 343.07(C) (bond issuing authority). In such circumstances one may reasonably infer authority on the part of the joint solid waste management district board of directors to hire legal counsel who will provide the board of directors with the advice and assistance it requires.

Finally, in view of the foregoing, I must decline to render you an opinion with respect to your second question regarding personal liability that may be incurred by the members of such a board. R.C. 109.14 authorizes the Attorney General, in pertinent part, to "advise the prosecuting attorneys of the several counties respecting their duties." R.C. 309.09(A), however, imposes no duty upon a prosecuting attorney to furnish legal advice or counsel to a joint solid waste management district board of directors. I am, therefore, unable to provide you with a formal opinion upon a question addressed to you by the board of directors of a joint solid waste management district regarding the personal liability that the board members may incur in carrying out their statutory duties and responsibilities. *See* note one, *supra*.

Based upon the foregoing, you are hereby advised that a prosecuting attorney is not required by the terms of R.C. 309.09(A) to serve as legal adviser to a joint solid waste management district board of directors.