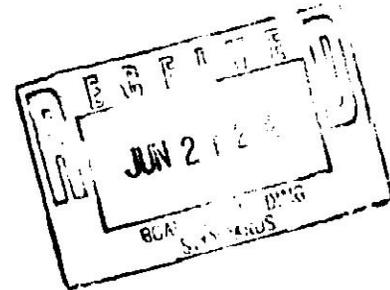




**Attorney General
Betty D. Montgomery**

June 25, 2002



Gerald O. Holland, Chairman
Ohio Board of Building Standards
6606 Tussing Road
P.O. Box 4009
Reynoldsburg, Ohio 43068-9009

Re: Opinion request - 2002OPR001

Dear Chairman Holland:

You have requested an opinion concerning the authority of the Board of Building Standards to certify the Summit County and Lucas County building departments to enforce the plumbing provisions of the Ohio Basic Building Code. Your specific questions are, as follows:

1. Since Summit County is a home rule county organized pursuant to Article X, Section 3 of the Ohio Constitution, can the Board of Building Standards certify the Summit County Building Department to enforce the plumbing provisions of the Ohio Building Code notwithstanding the language of Sections 3703.01 and 3781.03, R.C., limiting the Board from certifying county building departments to enforce the plumbing provisions of the state building code?
2. Did the Board have the authority to permit the Lucas County Building Department to continue enforcing the plumbing provisions of the state building code after Sections 3703.01 and 3781.03, R.C. were amended by S.B. 190, effective November 6, 1969?

Having concluded our research, we believe that, given the nature of your questions, it would be better to address your concerns by means of an informal opinion, rather than in a formal opinion of the Attorney General.

We must begin by noting that the Board of Building Standards is a creature of statute with those powers and duties assigned to it by statute. *See generally* 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("[t]he Board of Building Standards is a creature of statute with such authority, express or implied, as it is granted by statute"). Thus, whether the Board of Building Standards may certify the Summit County building department to perform plumbing inspections depends on whether the General Assembly has granted the Board such authority.

Pursuant to R.C. 3781.10(E), the Board of Building Standards shall, among other things, "[c]ertify municipal, township, and county building departments to exercise enforcement

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authority, to accept and approve plans and specifications, and to make inspections, *pursuant to* [R.C. 3781.03 and R.C. 3791.04],” (emphasis added).¹ Certification of local building departments under R.C. 3781.10(E), therefore, is subject to R.C. 3781.03 and R.C. 3791.04.²

Particularly relevant to your question is the reference in R.C. 3781.10(E) to R.C. 3781.03, in which the General Assembly has assigned to various state and local entities or officials the duty to enforce different portions of the building regulations contained in R.C. Chapter 3781 and R.C. Chapter 3791. R.C. 3781.03 provides for the enforcement of these regulations, in pertinent part, as follows:

The superintendent of the division of industrial compliance,³ the building inspector or commissioner of buildings in municipal corporations whose building departments have been certified by the board of building standards under [R.C. 3781.10], the building inspector or commissioner of buildings in townships whose building departments have been certified by the board of building standards under [R.C. 3781.10], and, in the unincorporated territory of counties outside the boundaries of townships that have adopted building regulations under [R.C. 505.75-.77], the building inspector or commissioner of buildings in *counties whose building departments have been certified by the board of building*

¹ R.C. 3781.10(E) further provides for the Board of Building Standards’ certification of persons who exercise enforcement authority, approve plans and specifications, or make inspections on behalf of local building departments.

² As a general matter, R.C. 3791.04 requires an owner, prior to construction, erection, or manufacture of a building, to obtain the approval of any such building plans and specifications from the appropriate local building department, if that department has been certified by the Board of Building Standards under R.C. 3781.10(E), or, if there is no certified local department, by the division of industrial compliance in the Department of Commerce. R.C. 3791.04 imposes upon certified local building departments and the division of industrial compliance the concomitant duty to review any plans so submitted. Because your question does not concern the approval of plans or specifications by a county building department, it is not necessary to examine in further detail the provisions of R.C. 3791.04.

³ The office of superintendent of industrial compliance is created within the Department of Commerce. R.C. 121.04. The powers and duties of the superintendent are set forth primarily in R.C. 121.083. Additional duties are imposed upon the division of industrial compliance throughout the Ohio Revised Code. *See, e.g.,* R.C. 3703.01 (plumbing inspections); R.C. 3703.03 (enforcement of plumbing rules); R.C. 3713.02 (enforcement of R.C. Chapter 3713 concerning bedding and stuffed toys).

standards under [R.C. 3781.10], shall enforce all the provisions in such chapters and any regulations adopted pursuant thereto relating to construction, arrangement, and the erection of all buildings or parts thereof, as defined in [R.C. 3781.06],⁴ including the sanitary condition of the same in relation to heating and ventilation.

The division of industrial compliance in the department of commerce or the boards of health of health districts, or the certified departments of building inspection of municipal corporations, subject to the applicable provisions of [R.C. Chapter 3703], shall enforce such chapters and regulations relating to plumbing. (Emphasis and footnotes added.)

In accordance with R.C. 3781.03, personnel within a county building department that has been certified under R.C. 3781.10,⁵ have a duty, within the unincorporated areas of the county, to enforce the provisions of R.C. Chapter 3781 and R.C. Chapter 3791 relating to “construction, arrangement, and the erection of all buildings or parts thereof, as defined in [R.C. 3781.06].” Specifically concerning the plumbing provisions of R.C. Chapter 3781 and R.C. Chapter 3791, however, R.C. 3781.03 provides for enforcement only by “the division of industrial compliance in the department of commerce or the boards of health of health districts,⁶ or the certified

⁴ R.C. 3781.06 specifies the types of buildings to which R.C. 3781.06-.18 and R.C. 3791.04 apply. With certain exceptions, R.C. 3781.06 applies generally to public buildings, but not to “single-family, two-family, and three-family dwelling houses, and accessory structures incidental to those dwelling houses.” For ease of discussion, the use of the term “building” or “buildings” in this opinion refers to buildings as defined in R.C. 3781.06.

⁵ See generally R.C. 307.37(E) (stating in part, “[u]pon certification of the building department under [R.C. 3781.10], the board [of county commissioners] may direct the county building department to exercise enforcement authority and to accept and approve plans pursuant to [R.C. 3781.03 and R.C. 3791.04] for any other kind or class of building in the unincorporated territory of the county”).

⁶ In accordance with R.C. 3709.01, the townships and villages in each county are combined into a general health district, governed by a board of health, R.C. 3709.02. Among the powers and duties of a board of health of a general health district is the authority to regulate plumbing. R.C. 3707.01. See generally 1992 Op. Att’y Gen. No. 92-043 (syllabus, paragraph one) (“[a] board of health of a general health district may, but has no continuing duty to inspect plumbing within the district, except in those circumstances where a plumbing condition constitutes a nuisance under R.C. 3707.01”).

departments of building inspection of municipal corporations, subject to the applicable provisions of [R.C. Chapter 3703]" (footnote added).⁷

It is well established that, "[u]nder the general rule of statutory construction *expressio unius est exclusio alterius*, the expression of one or more items of a class implies that those not identified are to be excluded." *State v. Droste*, 83 Ohio St. 3d 36, 39, 697 N.E.2d 620, 622 (1998). Accordingly, because R.C. 3781.03 separately identifies those responsible for enforcement of the provisions of R.C. Chapter 3781 and R.C. Chapter 3791 relating to "construction, arrangement, and the erection of all buildings or parts thereof, as defined in [R.C. 3781.06]," and those responsible for the enforcement of the plumbing provisions of those chapters, the General Assembly clearly intended to impose upon only those officials or entities named the duty to enforce the specified portions of R.C. Chapter 3781 and R.C. Chapter 3791. *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) (the General Assembly, "[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended").

Thus, pursuant to R.C. 3781.03, the Board of Building Standards' certification of a county building department under R.C. 3781.10(E) confers no authority on such department with respect to the performance of plumbing inspections. Rather, as stated in 1999 Op. Att'y Gen. No. 99-009 at 2-68, "[b]asic authority to regulate and inspect plumbing rests with the Division of Industrial Compliance in the Department of Commerce, with boards of health of health districts, and with certified departments of building inspection in municipal corporations."

In light of this statutory scheme, you question the Board's duty with respect to a charter county's building department that has been assigned the performance of plumbing inspections. Unlike other counties, a charter county has authority to establish its own form of government in

⁷ Pursuant to R.C. 3703.01, the division of industrial compliance has a general duty, with numerous exceptions set forth therein, to inspect and enforce plumbing regulations. R.C. 3703.01 also limits the authority of general health districts and certified municipal building departments to perform plumbing inspections, in part, as follows:

A municipal corporation does not have jurisdiction to inspect plumbing or collect fees for the inspection of plumbing in types of buildings for which it has not been certified by the board of building standards under [R.C. 3781.10] to exercise enforcement authority for plumbing in such types of buildings. A board of health of a health district does not have jurisdiction to inspect plumbing or collect fees for the inspection of plumbing in types of buildings for which it does not have an approved plumbing inspector for such types of buildings.

accordance with the requirements and limitations of Ohio Const. art. X, § 3.⁸ *See State ex rel. O'Connor v. Davis*, 139 Ohio App. 3d 701, 705, 745 N.E.2d 494, 497 (Summit County 2000) (“while the powers and duties of county government are established by the general laws of the state of Ohio, the charter document provides for the ‘form’ as well as the ‘exercise’ and ‘performance’ of those powers and duties”).

Concerning the provision of public health services in a charter county, R.C. 301.24 states:

The electors of any county may establish, *by charter provision*, a county department or agency for the administration of public health services. The authorities provided in accordance with the county charter shall exercise all the powers and perform all the duties which are vested in or imposed upon the authorities of city or general health districts. All health districts shall thereupon be abolished within the county, and *the county shall succeed to the property, rights, and obligations of such districts*. The department of health shall have the same powers with respect to a county health department or agency as it possesses with reference to a general health district. A county health department or agency may participate in any state grants for the expenses of local health administration on the same basis and to the same degree as a general health district. (Emphasis added.)

Thus, a charter county may establish, by charter provision, a department or entity that “shall exercise all the powers and perform all the duties which are vested in or imposed upon the

⁸ 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.... *Every such charter shall provide the form of government of the county* and shall determine which of its officers shall be elected and the manner of their election. It 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 charter or amendment which *alters the form and offices of county government* or which provides for the exercise by the county of power vested in municipalities by the constitution or laws of Ohio, or both, *shall become effective if approved by a majority of the electors voting thereon*. In case of conflict between the exercise of powers granted by such charter and the exercise of powers by municipalities or townships, granted by the constitution or general law, whether or not such powers are being exercised at the time of the adoption of the charter, the exercise of power by the municipality or township shall prevail. (Emphasis added.)

Gerald O. Holland, Chairman

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authorities of city or general health districts." R.C. 301.24. *See generally* 1994 Op. Att'y Gen. No. 94-095 at 2-472 ("[Summit County] could by charter amendment provide for a county agency to be created under the legislative control of the county council to perform the functions of the Summit County General Health District").

One of the powers of a general health district that may be exercised by a department or agency created under R.C. 301.24 is the inspection of plumbing in accordance with R.C. 3703.01. With certain exceptions, R.C. 3703.01 authorizes boards of health of city and general health districts, as well as municipalities that have been certified by the Board of Building Standards under R.C. 3781.10, and the division of industrial compliance to conduct plumbing inspections. R.C. 3703.01 limits the authority of general health districts to conduct plumbing inspections, in part, as follows:

A board of health of a health district does not have jurisdiction to inspect plumbing or collect fees for the inspection of plumbing in types of buildings for which it does not have an approved plumbing inspector for such types of buildings.

The superintendent of industrial compliance shall adopt rules prescribing minimum qualifications based on education, training, experience, or demonstrated ability, which the director shall use in approving plumbing inspectors to do plumbing inspections for health districts. Such minimum qualifications shall be related to the types of buildings for which a person seeks approval.

R.C. 3703.01 thus requires that plumbing inspectors for a general health district be approved by the Director of Commerce in order to perform plumbing inspections for the district. Neither R.C. 3703.01 nor any other statute of which we are aware, however, grants the Board of Building Standards authority to certify a board of health of a general health district to conduct plumbing inspections.

Accordingly, should a charter county, in accordance with R.C. 301.24, establish a department or agency for the administration of public health services, that entity succeeds to the rights and obligations of the general health district. The authority assumed by such a department or agency includes the power of the former health district to perform plumbing inspections, so long as its plumbing inspector has been approved by the Director of Commerce pursuant to R.C. 3703.01.

In answer to your first question, pursuant to R.C. 301.24, if a charter county, by charter provision, creates a department or agency for the administration of public health services, that department or agency succeeds to the rights and duties of its predecessor board of health, including the authority to perform plumbing inspections, so long as its plumbing inspector has been approved by the Director of Commerce pursuant to R.C. 3703.01.

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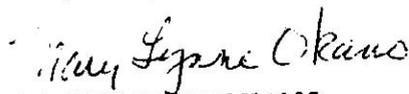
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Your second question concerns the propriety of certain actions taken by the Board of Building Standards over thirty years ago in the certification of the Lucas County building department. In order to provide the Board with useful and reliable guidance on your second question, we would have to reconstruct the statutory scheme as it existed at the time the Board certified the Lucas County building department, and then determine which of the pertinent statutory provisions were considered by the Board when it acted to certify the department. Of equal significance would be the need to determine the exact factual circumstances that were before the Board when it made its certification decision. This far removed from the events in question, it is simply not possible for us to make either of these determinations with any reasonable degree of certainty and confidence. Consequently, we regret that we are unable to answer your second question.

Please be aware that this letter is neither a formal nor informal opinion of Attorney General Montgomery. Rather, it is the informal advice of the Opinions Section, and represents our understanding of the law pertinent to your particular question. We trust that you will find it helpful. Accordingly, we will close our file on your request.

Thank you for seeking the counsel of our office in this instance. Please call or write should you have any further questions.

Respectfully,



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cc: John Brant, Executive Secretary ✓
Richard Scott, Assistant Attorney General