

January 10, 1997

OPINION NO. 97-009

The Honorable Robert D. Rinfret
Holmes County Prosecuting Attorney
91 South Monroe Street
Millersburg, Ohio 44654

Dear Prosecutor Rinfret:

We are in receipt of your letter concerning the powers of the board of trustees of a county hospital. You have asked for an opinion on two questions:

1. May a county hospital lease real estate from a private party for the purpose of obtaining office space which it will in turn lease to private physicians?
2. May a county hospital lease real estate from a private party for the purpose of obtaining space which it will use as an outpatient facility for physical therapy?

In each case, the question is whether the county hospital may take the action in question through its board of trustees.

The situation with which you are concerned involves a county hospital whose board has entered, or proposes to enter, into leases with private entities for the purpose of obtaining space separate and apart from buildings currently owned by the hospital. The board in turn uses, or proposes to use, the leased space for two separate purposes: (1) to lease the space to private physicians for their private practices; and (2) to use the space for hospital outpatient facilities, at which services will be offered and billed in the name of the hospital.¹ Your letter indicates that there

¹ We have been informed that an addition to the hospital was built in 1991 and has not been completed, so that there is an unfinished shell of approximately nine thousand square feet. This information, however, does not affect the analysis and conclusions set forth in this opinion.

R.C. 339.01(B) states that the board of county commissioners may purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities. It provides that, after the hospital or facilities "have been fully completed and sufficiently equipped for occupancy, any subsequent

are existing leases for private physician office space that have been on the books for a number of years and have not been addressed in state audits, possibly because the payment amounts were small.²

In order to respond to your questions, we must first look to the statutes governing county hospitals. The board of trustees of a county hospital is a creature of statute, having only the powers that it is expressly granted by statute and those implied powers that are necessary to carry out the express powers. *See* R.C. 339.02; 1985 Op. Att'y Gen. No. 85-005, at 2-12.

The powers of a board of county hospital trustees to lease or otherwise acquire real property are set forth in R.C. 339.03. The board is given "complete charge of the selection and purchase or lease of a site or sites for a county hospital... [and of] the determination and erection of all necessary buildings on such site or sites," with the title or leasehold interest to be in the name of the county. R.C. 339.03. The board of county hospital trustees also has express authority to "construct an addition to the county hospital, acquire an existing structure for the purpose of leasing office space to local physicians, or lease real property to any person to construct facilities for providing medical services other than inpatient hospital services," if the board determines that this activity "is reasonably related to the proper operation of the county hospital." *Id.*

"County hospital" is defined to include all of the county hospital's branches and hospital facilities. R.C. 339.01(A)(2). By reference in R.C. 339.01(A)(1), hospital facilities include those facilities described in R.C. 140.01, as follows:

improvements, enlargements, or rebuilding of any such facility" must be made by the board of county hospital trustees or a hospital commission appointed under R.C. 339.14. This provision restricts the authority of the county commissioners to improve or expand hospital facilities after they have been completed and equipped. *See* Ohio Legislative Service Commission, *Summary of Enactments September, 1983 to May, 1984*, 186-187 (1984). It does not appear, however, to restrict the board of county hospital trustees in the activities addressed in this opinion.

² Your letter indicates that, in the past, the county has leased real property from a private entity to provide private physician office space in an out-of-county facility. You state that the county contemplates entering into another such lease in the future. You assert that such an out-of-county lease is authorized by R.C. 339.01(C) and you do not request a ruling on that matter. Accordingly, this opinion does not consider any questions concerning the leasing of out-of-county real estate.

"Hospital facilities" means buildings, structures and other improvements, additions thereto and extensions thereof, furnishings, equipment, and real estate and interests in real estate, used or to be used for or in connection with one or more hospitals,...diagnostic and treatment and *out-patient facilities*, facilities related to programs for home health services, clinics, laboratories, public health centers, research facilities, and rehabilitation facilities, for or pertaining to *diagnosis, treatment, care, or rehabilitation* of sick, ill, injured, infirm, impaired, disabled, or handicapped persons, or the *prevention, detection, and control of disease*...and further includes site improvements, utilities, machinery, facilities, furnishings, and *any separate or connected buildings*, structures, improvements, sites, utilities, facilities, or equipment *to be used in, or in connection with the operation or maintenance of, or supplementing or otherwise related to the services or facilities to be provided by, any one or more of such hospital facilities.*

R.C. 140.01(E) (emphasis added). This definition expressly includes outpatient facilities and has been construed to include office space for private physicians. 1990 Op. Att'y Gen. No. 90-041, at 2-166 n.1; 1986 Op. Att'y Gen. No. 86-088; 1979 Op. Att'y Gen. No. 79-052.

It is appropriate now to apply the law to your particular questions. The question whether the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining office space to lease to private physicians is addressed by R.C. 339.03, which states expressly that the board may acquire an existing structure for the purpose of leasing office space to local physicians. To answer your question, it is necessary to determine whether the word "acquire," as used in this statutory provision, encompasses the leasing of real estate from a private party.

The word "acquire" is used in connection with county hospitals in various contexts. For example, R.C. 339.01(B) authorizes a board of county commissioners to "purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities thereof," and R.C. 339.01(C)(1) uses the same series of words in authorizing a board of county hospital trustees to "purchase, acquire, lease, appropriate, or construct an outpatient health facility in another county, which may include office space for physicians." The inclusion of "acquire" in this series of terms indicates either that "acquire" means to obtain through a means other than purchase, lease, appropriation, or construction, or that it is a general word that overlaps some of the other terms. Related statutes refer to "the selection and purchase or lease" of sites, R.C. 339.03, and the "construction or leasing" of the hospital, R.C. 339.06(A). One statutory provision authorizes the board of county hospital trustees to expend funds "for the acquiring of, leasing, or construction of permanent improvements." R.C. 339.06(B). Another provision authorizes the board of county commissioners to "lease, acquire, operate, and maintain" as a county hospital the lands, buildings, and equipment of a general hospital owned by a municipal corporation. R.C. 339.12. Thus, it does not appear that the word "acquire" has a single specialized meaning as used in R.C. Chapter 339.

The word "acquire" can be used to encompass the purchase or lease of an object or service, and it appears to be used in this sense in the passage in question. *See generally, e.g.,* R.C. 125.01(F) ("[_p]urchase_ means to buy, rent, lease, lease purchase, or otherwise acquire supplies or services").

In the statute here under consideration, the board of county hospital trustees is authorized to "acquire an existing structure for the purpose of leasing office space to local physicians." R.C. 339.03. The focus is upon obtaining the structure for the purpose of leasing it, and the statutory language does not restrict the means by which the structure may be obtained. As discussed above, the term "county hospital" includes hospital facilities, such as office space for private physicians. R.C. 140.01(E); R.C. 339.01(A)(1)-(2). Reading "acquire" to include purchase or lease is consistent with the first paragraph of R.C. 339.03, which authorizes the board of county hospital trustees to have charge of "the selection and *purchase or lease* of a site or sites for a county hospital." R.C. 339.03 (emphasis added). It is, further, a reasonable interpretation. It would not make sense to require a county hospital to own a structure to lease as office space to private physicians, while permitting it to obtain its other buildings and facilities by lease. More specifically, the interpretation that "acquire" includes "lease" extends to the board's in-county operations the authority that the board has outside the county to "purchase, acquire, lease, appropriate or construct" an outpatient facility, including office space for physicians. R.C. 339.01(C)(1).

Your letter suggests that the word "acquire" might be read narrowly, to exclude acquisition by lease, on the basis of 1990 Op. Att'y Gen. No. 90-041. I conclude, however, that such an application of 1990 Op. Att'y Gen. No. 90-041 is unwarranted. That earlier opinion concluded that a board of county hospital trustees lacked authority to lease real property of the hospital to a private organization for the organization to construct an office building on the property and lease office space to physicians. The opinion thus addressed the lease of property to a private entity for subsequent lease by that entity. It did not consider whether the board of trustees might acquire an existing structure by lease and then itself rent office space to physicians.

Further, after the issuance of 1990 Op. Att'y Gen. No. 90-041, R.C. 339.03 was amended to expressly authorize the board of county hospital trustees to "lease real property to any person to construct facilities for providing medical services other than inpatient hospital services," if the board determines that this action is reasonably related to the proper operation of the county hospital. *See* 1991-1992 Ohio Laws, Part II, 3434, 3440 (Am. Sub. H.B. 185, eff. June 30, 1991, with amendment to R.C. 339.03 eff. July 1, 1991). This amendment indicates that it is permissible for a board of county hospital trustees to lease real property to a private organization in the prescribed circumstances. The discussion in 1990 Op. Att'y Gen. No. 90-041 concerning the board's authority to lease real property thus has been affected by legislative changes and can no longer be directly adopted and applied. Rather, the statutory amendment appears to authorize the arrangement that was proposed in 1990 Op. Att'y Gen. No. 90-041, thereby effectively overruling that opinion. Hence, it is appropriate to answer your question by construing current statutory language, rather than applying arguments contained in 1990 Op. Att'y Gen. No. 90-041 that addressed a different set of facts and were based on a statute that has since been amended.

The current language of R.C. 339.03 indicates the General Assembly's intent that the board of hospital trustees should be able to obtain office space to lease to local physicians. Rather than requiring the General Assembly to specifically consider and name each permissible means of obtaining property, it is appropriate to construe "acquire" in its general sense to encompass the acquisition of facilities though the lease of real estate. It follows that, pursuant to R.C. 339.03, the

board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining office space which it will in turn lease to private physicians, if the board determines that such activity is reasonably related to the proper operation of the county hospital.³

Let us now consider your second question, which asks whether a county hospital may lease real estate from a private party for the purpose of obtaining space which it will use as an outpatient facility for physical therapy. Under existing statutory language, the board of county hospital trustees has authority to select and purchase or lease "a site or sites for a county hospital." R.C. 339.03. By definition, the county hospital includes all of the county hospital's branches and hospital facilities, and hospital facilities include outpatient facilities and facilities relating to treatment and rehabilitation. R.C. 140.01(E); R.C. 339.01(A)(1)-(3). Thus, the board is authorized to select and lease sites for outpatient facilities for physical therapy. It may be concluded, accordingly, that pursuant to R.C. 339.03, the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining space that it will use as an outpatient facility for physical therapy. Again, this is a reasonable result because the board of county hospital trustees has express authority to lease an outpatient health facility in another county. *See* R.C. 339.01(C)(1); note 3, *supra*.

A contrary conclusion was reached in 1966 Op. Att'y Gen. No. 66-127. At that time, however, R.C. 339.03 and related provisions did not authorize a board of county hospital trustees to obtain hospital real estate by lease. Like 1990 Op. Att'y Gen. No. 90-041, 1966 Op. Att'y Gen. No. 66-127 was decided under statutes that have since been amended and can no longer be directly adopted and applied. To the extent that 1966 Op. Att'y Gen. No. 66-127 concludes that the board of trustees of a county hospital cannot lease real estate for the purpose of obtaining space to use as outpatient facilities, it must be overruled.

It is important to note that the conclusion that a county hospital may lease real property from a private party to lease as office space to private physicians or to use as an outpatient facility does not mean that every proposed lease for such a purpose is permissible. A board of county hospital trustees may acquire an existing structure for the purpose of leasing office space to local physicians

³ Just because a board of county hospital trustees is authorized to enter into leases does not mean that every lease makes good financial sense. In determining whether to enter into a particular arrangement, the board of county hospital trustees must decide whether that type of arrangement is reasonably related to the proper operation of the hospital so that it is permitted by statute, and also whether the arrangement is prudent and sound as a financial matter. The fact that a type of arrangement might be legally permissible does not mean that it is a wise choice for a particular board of county hospital trustees. The board is responsible for deciding whether a particular arrangement is appropriate, taking into consideration the facts surrounding the proposed arrangement. *See, e.g.*, 1966 Op. Att'y Gen. No. 66-127, at 2-248 to 2-249 (describing certain dangers in permitting a board of county hospital trustees to enter into a lease agreement for property to be used for hospital purposes). It is not possible to use a formal opinion as a means of determining whether a particular lease or other arrangement is reasonable or prudent. *See, e.g.*, 1996 Op. Att'y Gen. No. 96-051.

only if the board determines that the purpose is reasonably related to the proper operation of the county hospital. R.C. 339.03. Similarly, the decision to acquire an outpatient facility must be made pursuant to the board's statutory authority and as a reasonable exercise of the board's discretion. *Id.*; see 1985 Op. Att'y Gen. No. 85-005; note 3, *supra*.

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Pursuant to R.C. 339.03, the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining office space which it will in turn lease to private physicians, if the board determines that such activity is reasonably related to the proper operation of the county hospital. (1990 Op. Att'y Gen. No. 90-041 overruled on the basis of legislative changes.)
2. Pursuant to R.C. 339.03, the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining space that it will use as an outpatient facility for physical therapy. (1966 Op. Att'y Gen. No. 66-127 overruled on the basis of legislative changes.)

Respectfully,

BETTY D. MONTGOMERY
Attorney General.

January 10, 1997

The Honorable Robert D. Rinfret
Holmes County Prosecuting Attorney
91 South Monroe Street
Millersburg, Ohio 44654

SYLLABUS:

97-009

1. Pursuant to R.C. 339.03, the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining office space which it will in turn lease to private physicians, if the board determines that such activity is reasonably related to the proper operation of the county hospital. (1990 Op. Att'y Gen. No. 90-041 overruled on the basis of legislative changes.)

2. Pursuant to R.C. 339.03, the board of trustees of a county hospital may lease real estate from a private party for the purpose of obtaining space that it will use as an outpatient facility for physical therapy. (1966 Op. Att'y Gen. No. 66-127 overruled on the basis of legislative changes.)