

OPINION NO. 99-016**Syllabus:**

1. If a board of county commissioners wishes to convey to a private nonprofit county historical society the title to real property consisting of an old jail facility, the board must sell the property in accordance with R.C. 307.09 and R.C. 307.10.
2. To sell real property pursuant to R.C. 307.09, the board of county commissioners must determine that the property is not needed for public use and that the interests of the county require its sale.
3. To sell real property pursuant to R.C. 307.10, a majority of the board of county commissioners must adopt a resolution authorizing the sale. The sale must be made either at public auction or pursuant to competitive bidding, after appropriate public notice.

To: Lucien C. Young, III, Noble County Prosecuting Attorney, Caldwell, Ohio
By: Betty D. Montgomery, Attorney General, February 8, 1999

We have received your request for an opinion concerning the authority of a board of county commissioners to convey title to real property to a county historical society. Specifically, you want to know whether there is a legal way in which Noble County can deed its old jail facility to the Noble County Historical Society.

Your question relates to a jail facility that was constructed in the 1880's. Noble County recently built a new jail facility and no longer has any use for the old jail. The Noble County Historical Society would like to have the old jail facility titled in its name so that the society may receive grants to renovate and hold open the building as a historical site. The Noble County Historical Society is a nonprofit organization with no governmental attributes.

To answer your question, we must consider the authority of a board of county commissioners to convey property of the county. The board of county commissioners is a creature of statute and, as such, it has only the authority that it is given by statute. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs 1 and 2).

Property of the county is held in trust for the benefit of the public. The commissioners cannot expend public money or dispose of public property without clear statutory authority. *See State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) (“[a]ll public property and public moneys ... constitute a public trust fund Said trust fund can be disbursed only by clear authority of law”); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 571-72 (1916) (“county commissioners, in their financial transactions, are invested only with limited powers The authority to act in financial transactions must be clear and distinctly granted”); 1982 Op. Att’y Gen. No. 82-024.

There is express statutory authority for a board of county commissioners to appropriate to a nonprofit county historical society limited amounts of *funds* “to be used for the

promotion of historical work within the borders of the county, and for the collection, preservation, and publication of historical material, and to disseminate historical information of the county, and in general to defray the expense of carrying on historical work in such county." R.C. 307.23; *see* 1953 Op. Att'y Gen. No. 2516, p. 156 (a county historical society may not use money received pursuant to G.C. 2457-1 (now R.C. 307.23) for the construction of buildings, but may use it to purchase a building of historical significance).¹ However, there is no statute expressly authorizing a board of county commissioners to simply deed *real property* of the county to a nonprofit county historical society. Therefore, we must consider statutes dealing generally with the conveyance of real property of a county.

The general provisions dealing with the conveyance of county real property appear in R.C. 307.09 and R.C. 307.10. R.C. 307.09 authorizes a board of county commissioners, "[i]f the interests of the county so require," to "sell any real property belonging to the county and not needed for public use." R.C. 307.09(A).

The procedure by which a county may sell real property is prescribed by R.C. 307.10. It is necessary for the sale to be authorized by a resolution adopted by a majority of the board of county commissioners. R.C. 307.10(A). The board may then either sell the property to the highest responsible bidder or offer the property for sale at a public auction. In either case, the board must first provide appropriate notice by newspaper publication. The board has authority to reject any and all bids. *Id.*²

Subsequent language in R.C. 307.10 permits the board of county commissioners to transfer real property that it does not need to federal, state, or local governmental entities, for public purposes, without advertising for bids. R.C. 307.10(B). The authority to transfer real property without competitive bidding under this provision does not extend to transfers to private entities, whether those entities are nonprofit or profit-seeking entities.

If, on the relevant facts, it is found that the property in question is not needed for public use, then the property may be sold by the county, pursuant to R.C. 307.09. It is necessary, however, for the county to comply with the provisions of R.C. 307.10 in selling the property. This conclusion is consistent with opinions rendered by prior Attorneys General. *See, e.g.,* 1965 Op. Att'y Gen. No. 65-126 (syllabus, paragraph 2) ("[b]oards of county commissioners are authorized by [R.C. 307.09] to sell real estate belonging to the county only where such real property is not needed for public use and the interests of the county require such sale and any sale of such real property made pursuant to a resolution adopted by such board must be made in accordance with [R.C. 307.10]").³ Because the county historical society is a private nonprofit organization, rather than a public entity, it is not possible for

¹ In appropriate circumstances, a historical society may receive from a library board funds or physical assets for maintaining and administering a historic building as a museum. 1987 Op. Att'y Gen. No. 87-065; *see* R.C. 3375.402.

² A similar procedure by which a board of county commissioners may sell unused park lands at public auction appears in R.C. 307.82.

³ 1965 Op. Att'y Gen. No. 65-126 was questioned in 1987 Op. Att'y Gen. No. 87-069 (syllabus, paragraph 1) on issues relating to continuing contracts. Those issues are not relevant to the matters for which 1965 Op. Att'y Gen. No. 65-126 is cited as authority in this opinion.

the county to transfer real property to the historical society without competitive bidding, pursuant to R.C. 307.10(B) or any other existing statutory provision.⁴

Current statutes thus compel the conclusion that, if a board of county commissioners wishes to convey to a private nonprofit county historical society the title to real property consisting of an old jail facility, the board must sell the property in accordance with R.C. 307.09 and R.C. 307.10. To sell real property pursuant to R.C. 307.09, the board of county commissioners must determine that the property is not needed for public use and that the interests of the county require its sale. To sell real property pursuant to R.C. 307.10, a majority of the board of county commissioners must adopt a resolution authorizing the sale. The sale must be made either at public auction or pursuant to competitive bidding, after appropriate public notice.

Because the county commissioners must sell real property either by auction or through competitive bidding, it cannot be guaranteed that the property will be sold to a particular entity, such as the county historical society. *See, e.g.*, 1965 Op. Att'y Gen. No. 65-126, at 2-286 ("it is clear that if the board of county commissioners determines in the exercise of its sound discretion that the described land is not needed for public use and is to be sold, there could be no assurance that the sale could legally be made to the corporation to which you have referred. It is possible that such corporation would not be the highest responsible bidder"); *see also* 1957 Op. Att'y Gen. No. 318, p. 91 (syllabus, paragraph i) (sale pursuant to R.C. 307.10 "cannot be for nominal consideration if there is any higher bid"); 1935 Op. Att'y Gen. No. 4198, vol. I, p. 487 (syllabus, paragraph 1) ("[w]here authority is extended by statute to public officers or boards to sell and dispose of public property, and the statute fixes the manner of consummating the sale, the terms of the authorization must be strictly complied with"). This result is consistent with the fact that real property may be sold pursuant to R.C. 307.09 only "[i]f the interests of the county so require" and only if the real property is "not needed for public use." R.C. 307.09(A); *see* 1965 Op. Att'y Gen. No. 65-126.

In considering a county's inability to assure the sale of real property to a particular charitable recipient, prior Attorneys General pointed to the county's ability to assure a

⁴ Other provisions permit the county to transfer real property for particular purposes without following the competitive bidding requirements of R.C. 307.10. *See, e.g.*, R.C. 307.084 (authorizing board of county commissioners to procure real estate and donate it to the state, the Department of Rehabilitation and Correction, or the United States Bureau of Prisons for the construction of state or federal correctional facilities); R.C. 307.091 (authorizing board of county commissioners to sell, lease, or transfer a county-owned hospital or medical facility to a state-supported medical school or college); R.C. 307.092 (authorizing board of county commissioners to sell, lease, or transfer county-owned real property to a nonprofit senior citizens' organization); R.C. 307.81 (authorizing board of county commissioners to sell or lease unimproved and unused park lands to a political subdivision); R.C. 3375.08 (authorizing board of county commissioners to transfer, convey, or lease county property to a free public library). These provisions, however, do not authorize the conveyance of real estate to a private nonprofit county historical society.

R.C. 1743.07 authorizes historic societies "maintained by and operating on behalf of the state" to acquire historic sites by agreement or by eminent domain, but that authority does not extend to a private nonprofit county historical society. *Cf.* R.C. 149.30 (Ohio Historical Society). Associations incorporated for the preservation of public parks and memorial sites may acquire, by agreement or by eminent domain, real estate that is a battlefield or a burial site for American soldiers. R.C. 155.27; R.C. 1743.06.

particular use of property by granting leases, rights, or easements, rather than selling the property. *See, e.g.*, 1957 Op. Att’y Gen. No. 318, p. 91, at 94 (“[b]y granting long term leaseholds on liberal terms, boards of county commissioners are able to secure to their counties the benefits of sales of county lands to governmental subdivisions and charitable corporations without being compelled to face the dilemma inherent in public sales”); *see also* 1935 Op. Att’y Gen. No. 4198, vol. I, p. 487. Various types of arrangements are possible if a county wishes to retain ownership of county real estate while permitting it to be used for particular purposes.⁵ None of these arrangements, however, would result in the conveyance of real estate to a private nonprofit county historical society, as you have proposed.⁶

⁵ *See, e.g.*, R.C. 307.03 (board of county commissioners, by resolution, may permit the use of county real estate for a public library “or any other public purpose, upon such terms as it prescribes”); R.C. 307.09(B) (leases, rights, or easements in county lands may be granted to federal, state, or local governmental entities, to certain utility companies, “or to corporations not for profit for hospital, charitable, water, sewer, or recreational purposes,” including memorial structures and parks, for the purposes and upon the terms that are in the best interests of the county, provided that the leases, rights, or easements are not inconsistent with the county’s need of the land for public use); R.C. 307.10(C) (leases, rights, or easements granted to federal, state, or local governmental entities or to certain utility companies may be entered into without competitive bidding upon resolution adopted by a majority of the board of county commissioners); R.C. 1743.10 (a county may appropriate its land to the use of a nonprofit organization organized to construct and conduct a museum for the exhibition and preservation of works of nature and art and related buildings or facilities for public meetings or entertainment, and to allow the organization to maintain and control the property upon such terms as are agreed upon); *see also* R.C. 307.28; *McGuire v. City of Cincinnati*, 22 Ohio Op. 334, 40 N.E.2d 435 (Ct. App. Hamilton County 1941), *appeal dismissed*, 139 Ohio St. 218, 38 N.E.2d 1023 (1942).

⁶ Whenever a county enters into an arrangement with a private entity, care must be taken to assure that there is no violation of Ohio Const. art. VIII, § 6, which prohibits a county from raising money for, or lending its credit to, a private enterprise. Public aid to a private nonprofit entity has been permitted under this provision, but only when it serves a public purpose. *See, e.g.*, 1988 Op. Att’y Gen. No. 88-045; 1984 Op. Att’y Gen. No. 84-096; 1983 Op. Att’y Gen. No. 83-069; 1981 Op. Att’y Gen. No. 81-093 (tax revenue contributed to a convention and visitors’ bureau may constitutionally be used to support a local historical museum); 1977 Op. Att’y Gen. No. 77-049.

We note that, for fiscal year 1998, of the money appropriated by the General Assembly to the Ohio Historical Society for Historical Grants, an amount of \$150,000 is earmarked to go to the Noble County Historical Society to be used for the renovation of the county jail. Am. Sub. H.B. 215, 122nd Gen. A. (1997) (eff. June 30, 1997) (sec. 65, uncodified). Thus, it is clear that the General Assembly has determined that renovation of the county jail by the Noble County Historical Society constitutes a public purpose. *See* R.C. 149.30 (acceptance of appropriated funds by the Ohio Historical Society constitutes an agreement to expend the funds only for the purposes for which the appropriation was made); R.C. 149.30(I), (K) (among public functions of Ohio Historical Society are “[e]ncouraging and promoting the organization and development of county ... historical societies” and “[p]roviding advisory and technical assistance to local societies for the preservation and restoration of historic ... sites”).

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

1. If a board of county commissioners wishes to convey to a private nonprofit county historical society the title to real property consisting of an old jail facility, the board must sell the property in accordance with R.C. 307.09 and R.C. 307.10.
2. To sell real property pursuant to R.C. 307.09, the board of county commissioners must determine that the property is not needed for public use and that the interests of the county require its sale.
3. To sell real property pursuant to R.C. 307.10, a majority of the board of county commissioners must adopt a resolution authorizing the sale. The sale must be made either at public auction or pursuant to competitive bidding, after appropriate public notice.