April 2, 2004

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

SYLLABUS: 2004-012

A board of county commissioners and board of education may enter into an agreement whereby the county agrees to lease to the school district a building and underlying land that are no longer needed for the county's use, with an option for the school district to purchase the property for a nominal amount at the end of the lease. The board of county commissioners is not required to competitively bid the conveyance. Payments may not extend for more than five years, however, and the board of education must secure voter approval of a special tax levy under R.C. 5705.21 or otherwise provide for levying and collecting a tax to meet future payments. (1986 Op. Att'y Gen. No. 86-031; 1957 Op. Att'y Gen. No. 398, p. 118; 1945 Op. Att'y Gen. No. 143, p. 110; and, 1939 Op. Att'y Gen. No. 1267, vol. III, p. 1867, overruled due to statutory change.)

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OPINION NO. 2004-012

The Honorable Richard D. Welch
Morgan County Prosecuting Attorney
109 East Main Street
McConnelsville, Ohio 43756-1125

Dear Prosecutor Welch:

You have asked whether the Morgan County board of commissioners and the board of education of the Morgan Local School District may enter into an agreement whereby the board of commissioners would lease to the board of education a county-owned building with an option to purchase. If they may, you ask whether the transaction must be competitively bid, and whether the term of the lease is subject to limitation.

Lease-Purchase Agreement

In order to address your questions, we must first examine the nature of the proposed transaction. You have explained that, almost forty years ago, the Morgan County board of commissioners purchased real estate and constructed a building in which to house its department of public welfare, now known as the department of job and family services (department). In 2002 the building became vacant when the department relocated, and the Morgan Local School District has expressed its desire to acquire the building and underlying land by lease or purchase. The board of county commissioners has offered to enter into a lease agreement for a term of 119 months (9 years and 11 months), and the school district has agreed to pay $825 per month for the duration of the lease. The lease also contains a clause granting the school district an "option to purchase" the property for the sum of one dollar when the lease expires.

This type of "lease-purchase" agreement is typically considered to be a method of financing the purchase of property, rather than a true lease. *See State ex rel. Kitchen v. Christman,* 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972); *State ex rel. Celebrezze v. Tele-Communications, Inc.*, 62 Ohio Misc. 2d 405, 415, 601 N.E.2d 234 (Ct. Claims 1990) (inclusion of an option to purchase, especially at a nominal price, usually means the transaction is a sale, not a lease); 2000 Op. Att'y Gen. No. 2000-019 at 2-117 (a lease with option to purchase is a "type of financial transaction that commonly constitutes a form of purchase by installment payments"); 1958 Op. Att'y Gen. No. 2820, p. 597, 598 (a "lease-purchase contract" is "in essence" a purchase on an installment plan); 1939 Op. Att'y Gen. No. 1267, vol. III, p. 1867,

1871. *See also Black's Law Dictionary*, 900-901 (7th Edition 1999) (defining a "lease-purchase agreement" as a "rent-to-own purchase plan under which the buyer takes possession of the goods with the first payment and takes ownership with the final payment…. Such a lease is usu. treated as an installment sale"); *cf. Black's Law Dictionary,* 898 (defining "lease" as "[a] contract by which a rightful possessor of real property conveys the right to use and occupy that property in exchange for consideration, usu. rent"). A "true lease" may also include an option to purchase, but rental payments are not credited, in whole or part, towards the purchase price, and at the end of the lease term, the purchase price is not nominal in amount but reflects the current market value of the property. *See State ex rel. Celebrezze v. Tele-Communications, Inc.,* 62 Ohio Misc. 2d at 416 ("[c]ertainly an option to purchase for the market value of the property would indicate that a true lease exists, especially when the remaining value after the term of the lease is very high"); 1964 Op. Att'y Gen. No. 64-1522 (a lease-purchase agreement, where portions of the rental payments apply to the purchase price of the building, is to be distinguished from a true lease with option to purchase agreement where no portion of the rental payments apply to the prospective purchase price of the building); 1963 Op. Att'y Gen. No. 501, p. 513; 1958 Op. Att'y Gen. No. 1604, p. 22. A lease-purchase agreement creates a debt, that is, a present, continuing obligation to make specific future payments of money, while a lease does not, being considered a current expense. *See State ex rel. Kitchen v. Christman*; *State ex rel. Ross v. Donahey,* 93 Ohio St. 414, 113 N.E. 263 (1916); *State ex rel. Celebrezze v. Tele-Communications, Inc.*; 1958 Op. Att'y Gen. No. 1604, p. 22. *See also* note 3, *infra.*

With these principles in mind, we turn next to examine the respective powers of a board of county commissioners and board of education to convey and acquire property in order to determine whether each has the authority to enter into the proposed lease-purchase agreement.

Conveyance of Property by a Board of County Commissioners

A board of county commissioners is authorized, "[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 board may sell "all or portions of buildings acquired by the board to house county offices, or may lease or rent the same, but no such lease shall be for a longer term than five years, unless such lease is part of a lease-purchase agreement, in which case the lease may be for a period not exceeding twenty-five years." *Id.* Also, a board of county commissioners is authorized to grant leases, rights, and easements to the federal government, the state, and governmental subdivisions of the state "for public purposes … on or in lands owned by the county where such lease, right, or easement is not deemed by the board to be inconsistent with the need of such land for public use by the county." R.C. 307.09(B). Although a lease of county property is generally limited to a five-year term, or twenty-five year term if the lease is part of a lease-purchase agreement, a county's lease to a governmental entity under R.C. 307.09(B) "may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the county." *Id.*

Any conveyance of real property by the board of county commissioners under R.C. 307.09 must comply with the procedural requirements set forth in R.C. 307.10. If a board of

county commissioners authorizes the sale of property, it "may either deed the property to the highest responsible bidder, after advertisement once a week for four consecutive weeks in a newspaper of general circulation in the county or offer the real property for sale at a public auction, after giving at least thirty days' notice of the auction by publication in a newspaper of general circulation in the county." R.C. 307.10(A). Not all transactions are required to be competitively bid, however. Division (B) of R.C. 307.10 authorizes a board of county commissioners to "transfer real property in fee simple belonging to the county and not needed for public use" to the federal government, the state, or a political subdivision of the state "for public purposes upon the terms and in the manner that it may determine to be in the best interests of the county, without advertising for bids." Also, division (A) of R.C. 307.10 permits a board of county commissioners, as a general matter, to lease its real property without advertising for bids, while division (C) of R.C. 307.10 authorizes a board of county commissioners to grant a lease, right, or easement to the federal government, the state, or a political subdivision of the state without advertising for bids.

As discussed above, a lease-purchase agreement is a method for financing the purchase of property; however, the agreement itself is not a transfer of real property in fee simple.[1] *Cf. Rawson v. Brown,* 104 Ohio St. 537, 136 N.E. 209 (1922) (syllabus, paragraph one) ("[a] permanent leasehold estate renewable forever is not a fee simple although under the Ohio statutes it has many of the incidents thereof"). *See generally Masheter v. Diver*, 20 Ohio St. 2d 74, 253 N.E.2d 780 (1969) (syllabus, paragraph one) ("[a] fee simple is the highest right, title and interest that one can have in land. It is the full and absolute estate in all that can be granted"). Also as discussed above, a lease-purchase agreement is not truly a lease. *See also* 2000 Op. Att'y Gen. No. 2000-019 at 2-117 to 2-118 (a lease with option to purchase is "not included within either the term 'lease' or the term 'purchase,'" and "[w]here no express authority to enter into a lease with option to purchase is granted, such authority cannot be found in a general grant of authority to purchase or lease"). Nor does a lease-purchase agreement grant an easement or other, lesser, right in the county's property. *See Stearns v. Devecka*, 2002-Ohio-3839, 2002 Ohio App. LEXIS 3889 at ¶ 42 (Tuscarawas County) ("an easement is defined as an interest in the land in the possession of another which 'entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists'" (citation omitted)); 1992 Op. Att'y Gen. No. 92-016 at 2-56 (distinguishing between a lease and a license in land); 1974 Op. Att'y Gen. No. 74-073 (a board of county commissioners may, pursuant to R.C. 307.09 and R.C. 307.10, grant a governmental subdivision or one of the listed public utilities the right to dig in county real estate).

Although conveyances of county property to other governmental entities by means of a lease-purchase agreement are not expressly exempted from competitive bidding requirements, it would be anomalous to conclude that a board of county commissioners may grant to the board of

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[1] A lease-purchase agreement is distinguishable from an arrangement, typically called an installment purchase, where title passes immediately to the purchaser, who agrees to pay for the property in installments over a period of years. *See* 1957 Op. Att'y Gen. No. 398, p. 118.

education a fee simple interest, lease, or other, lesser, interest in county property without competitive bidding, but must bid a transaction conveying to the board of education immediate use and possession of the property, and ultimately a fee simple interest. *See Mechanical Contractors Association of Cincinnati, Inc. v. University of Cincinnati,* 141 Ohio App. 3d 333, 340, 750 N.E.2d 1217 (Franklin County 2001) (holding that a project to be constructed by a private entity and then leased, and ultimately conveyed, to the University of Cincinnati was under the University's ultimate use and control, and thus was "owned" by the University and subject to R.C. Chapter 153 governing the construction of public improvements). *See generally* R.C. 1.47(C) ("[i]n enacting a statute, it is presumed that: [a] just and reasonable result is intended"). The nature of the proposed transaction, coupled with the General Assembly's obvious intent to exempt from competitive bidding conveyances of county property to other governmental entities,[2] leads us to conclude that a board of county commissioners has the authority to transfer county property to a board of education by means of a lease-purchase agreement, and that such transaction is not required to be competitively bid.

Acquisition of Property by a Board of Education

We turn now to an examination of whether the board of education is authorized to enter into a lease-purchase agreement to acquire real property from the county. R.C. 3313.17 broadly states that the board of education of each school district is "capable" of "contracting and being contracted with, acquiring, holding, possessing, and disposing of real and personal property, and taking and holding in trust for the use and benefit of such district, any grant or devise of land and any donation or bequest of money or other personal property." More specifically, division (A)(1) of R.C. 3313.37 authorizes a board of education to purchase or lease sites for necessary schoolhouses and to rent suitable schoolrooms. Division (B)(1) of R.C. 3313.37 authorizes a board of education to "acquire land … by purchase," and provides a number of options for

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[2] Prior to 1978, there was no exemption from competitive bidding for a county's transfer of real property in fee simple to other governmental agencies. *See* 1931 Ohio Laws 87 (H.B. 194, filed April 24, 1931). 1957 Op. Att'y Gen. No. 318, p. 91 accordingly concluded that a board of county commissioners was required to competitively bid a sale of land, even though the state adjutant general was interested in buying the property. The opinion went on to recognize, however, that "the value to the county of having an armory or a similar public or charitable building might be far higher than the amount of the highest bid. In short, one dissenting individual making a bid at such a sale could frustrate the purpose of the county in making land available for public or charitable purposes." *Id.* at 93. *See also* 1999 Op. Att'y Gen. No. 99-016 at 2-124 (where a board of 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"). The value of a county's desire to make land for which it has no use available to another governmental agency for a public purpose was subsequently recognized by the General Assembly—the exemption from competitive bidding for transfers in fee simple to governmental entities was enacted in 1977-1978 Ohio Laws, Part II, 2967, 2969 (Am. H.B. 567, eff. Jan. 16, 1978).

financing acquisition of the land, stating that, "[l]ands purchased may be purchased for cash, by installment payments, with or without a mortgage, by entering into lease-purchase agreements, or by lease with an option to purchase, provided that if the purchase price is to be paid over a period of time, such payments shall not extend for a period of more than five years." A special tax levy may be authorized by voters in accordance with R.C. 5705.21 to provide a special fund to meet the future time payments. *Id.*[3]

Therefore, a board of education has the authority, pursuant to R.C. 3313.37, to enter into a lease-purchase agreement to acquire real property from the county.[4] Payments may not,

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[3] The authorization in R.C. 3313.37(B) for a board of education to secure voter approval of a special tax levy under R.C. 5705.21 to meet future time payments relates to the constitutional bar against the creation of debt. Ohio Const. art. XII, § 11 prohibits the state or a political subdivision from incurring "bonded indebtedness" unless, in the legislation under which the indebtedness is incurred, "provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity." In *State ex rel. Kitchen v. Christman,* 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972), the court found that a city's "lease" of a swimming pool was actually a contract for the purchase of the pool, with installment payments to be made over a ten-year period, and that the entire contract price was a present indebtedness of the city. The court held that the agreement formally obligating the city to make specific future payments constituted a "bond" of the city and created a "bonded indebtedness" in violation of Ohio Const. art. XII, § 11. *Id.*, 31 Ohio St. 2d at 73. *See generally* 1993 Op. Att'y Gen. No. 93-039 at 2-208 (a "written agreement to make specific future payments of money constitutes a bond, and creates bonded indebtedness for purposes of Ohio Const. art. XII, § 11"); 1980 Op. Att'y Gen. No. 80-042 at 2-178 ("[i]n the event bonded indebtedness is created, the enabling legislation must provide for the levy of a tax for the liquidation of the debt"). Both a lease-purchase and installment purchase, *see* note 1, *supra,* create a debt. *See* 1986 Op. Att'y Gen. No. 86-031; 1980 Op. Att'y Gen. No. 80-042.

[4] The language now in division (B) of R.C. 3313.37, including the authority for a board of education to enter a lease-purchase agreement or purchase land by installment payments, was enacted in 1961 Ohio Laws 463 (Am. S.B. 447, eff. Oct. 12, 1961). Opinions of the Attorney General written prior to this statutory grant of authority thus concluded that a board of education could not purchase real property through a lease-purchase agreement or installment purchase. *See* 1957 Op. Att'y Gen. No. 398, p. 118; 1945 Op. Att'y Gen. No. 143, p. 110; 1939 Op. Att'y Gen. No. 1267, vol. III, p. 1867. These opinions are overruled to the extent that they conflict with R.C. 3313.37 as it currently reads.

Also, 1986 Op. Att'y Gen. No. 86-031 concluded that, "[a] board of education of a local school district may not acquire a building through a lease-purchase agreement" (syllabus). In that instance, the board of education considered having a building constructed on land that it already owned. The board proposed to lease its land to a contractor who would construct a building on the property and lease back the land and the building to the board. The proposed

however, extend for longer than five years, and the board of education also must secure voter approval of a special tax levy under R.C. 5705.21 or otherwise provide for levying and collecting a tax to retire the debt.[5] *See* 1964 Op. Att'y Gen. No. 64-1522 (a board of education may, pursuant to R.C. 3313.37, purchase a building and underlying land by entering into a lease-purchase agreement provided that payments may not extend over a period of five years, and so long as a special tax levy is authorized by the voters to meet future time payments).

Considering the relative authority of the board of county commissioners and board of education, and the manner in which their respective powers overlap, we conclude that the board of county commissioners and board of education may enter into a lease-purchase agreement, under which the county commissioners lease a building and the underlying land to the board of education, and grant the board of education an option to purchase the property at the end of the lease for a nominal sum. The board of county commissioners is not required to competitively

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lease was for a term of twenty years, and at the expiration thereof the board would regain possession of the land and have the right to purchase the building for one dollar. The opinion's conclusion that the board lacked authority to agree to the contract was based primarily on the lack of express provision for a board of education to acquire a *building* by means of a lease-purchase agreement, in contrast to the language in R.C. 3313.37(B) granting a board of education the express authority to acquire *land* thereby. (In this instance, the board of education seeks to acquire improved land, not merely a building.)

In 1995, the General Assembly enacted R.C. 3313.375 (1995-1996 Ohio Laws, Part I, 900, 1169 (Am. Sub. H.B. 117, eff. June 30, 1995)), which sets forth express authorization for a board of education to enter into a lease-purchase agreement providing for "construction; enlarging or other improvement, furnishing, and equipping; lease; and eventual acquisition of a building or improvements to a building for any school district … purpose" through a series of one-year renewable lease terms totaling not more than thirty years, at the end of which title to the property vests in the school district. The agreement may require the school district to pay a lump sum, in addition to the rental payments, as a condition of obtaining title. In conjunction with the agreement, the board of education may grant leases for underlying land under the board's control for terms not exceeding five years beyond the final renewal term of the lease-purchase agreement. Payments under the agreement are considered to be current operating expenses. *See also* R.C. 3313.374 (also enacted in Am. Sub. H.B. 117, authorizing a board of education to "enter into an installment payment contract for the construction and purchase of office facilities on land owned by the board to be used for administrative offices of the school district"). R.C. 3313.375 is inapplicable to an analysis of your question since the board of education is not proposing to construct, lease, and eventually acquire a building on district-owned land. 1986 Op. Att'y Gen. No. 86-031 is overruled, however, in light of the enactment of R.C. 3313.375.

[5] *See, e.g.,* R.C. 5705.06(A) (special levy within the ten-mill limitation for permanent improvements).

bid the conveyance. Payments may not extend for longer than five years, however, and the board of education must provide for the levy of a tax to meet future payments.

If the board of county commissioners and board of education find these restrictions to be unsatisfactory, they have the authority to enter into a long-term lease agreement in order to accomplish their objectives. *See* 1999 Op. Att'y Gen. No. 99-016; 1958 Op. Att'y Gen. No. 1604, p. 22; 1957 Op. Att'y Gen. No. 318, p. 91, 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"). The board of county commissioners may lease the property to the board of education, without competitive bidding, and "for such length of time, upon such terms, for such purposes, and … for such renewals thereof as the board [of commissioners] deems for the best interests of the county." R.C. 307.09(B). Although the board of education may not make payments for more than five years in order to *purchase* property, there is no time limitation on the term of a school district's *lease* of property. *See* 1958 Op. Att'y Gen. No. 1604, p. 22. Nor would the board of education be required to secure approval of a tax levy, since lease payments are considered to be a current operating expense rather than a debt. *See generally* 1958 Op. Att'y Gen. No. 1604, p. 22; 1947 Op. Att'y Gen. No. 1672, p. 115 (G.C. 4834-10 [now R.C. 3313.37] authorizes a board of education "to rent a building for school purposes, and such board may make reasonable repairs and alterations therein, required to make such building suitable for use for school purposes") (syllabus, paragraph one)). A lease agreement could even be accompanied by an option to purchase, so long as the rental payments are not applied in whole or in part towards the purchase price, and the agreement requires the board of education to pay market value for the property if it decides to exercise its option to purchase. *See* 1958 Op. Att'y Gen. No. 1604, p. 22.

Your second and third questions relate to the manner in which the county originally financed construction of the building, and the effect this may have on the ability of the board of county commissioners to lease or sell the property. You have explained that the board of county commissioners sought and received state and federal funds for the cost of construction. *See generally Yoder v. Williams County,* 48 Ohio App. 2d 36, 354 N.E.2d 923 (Williams County 1976). You have also stated that, "[a]lthough it is unclear of the exact arrangement, it appears that the Board of County Commissioners and the State Department of Public Welfare [now Department of Job and Family Services] entered into various lease agreements where a formula existed to offset the moneys contributed by the state and federal authorities against the actual use of the building by the Morgan County Department of Welfare [now job and family services]." The initial lease agreement included the following language:

> It is agreed that if the welfare department moves from the building before the estimated use-life of the building, an adjustment will be made in such a way that the claim for federal and state funds will be computed on the actual period of occupancy in relation to the life of the building.

The county and state had agreed that the estimated use-life of the building was fifty years, and the county department did, in fact, move from the building before the end of its estimated use-

life. You wish to know what impact the use of state and federal funds to construct the building, and the above-quoted clause, have on the ability of the board of commissioners to lease and ultimately transfer title to the building to the school district.

We are, however, unable to provide you with an opinion interpreting the understanding between the state and county regarding the significance of the state and federal contributions to the building's construction costs and the subsequent agreement to offset costs in the event the county department of welfare terminated its occupancy prior to the building's use-life. The Attorney General may not appropriately use the opinion-rendering function to make findings of fact or determine the rights of parties to a particular agreement; only the judiciary is empowered to ultimately determine the respective rights of the parties to a contract in cases of dispute. 1989 Op. Att'y Gen. No. 89-010; 1988 Op. Att'y Gen. No. 88-076; 1983 Op. Att'y Gen. No. 83-087. Your office, along with the board of county commissioners and county department of job and family services, may wish to work with the state Department of Job and Family Services to resolve these issues as to the parties' understanding of their arrangement and respective contractual obligations.

Your final question is whether there is any violation of law, rule, or regulation if the school district uses public money to pay for the building since the building has already been constructed and paid for with public funds. We are unaware of any prohibition against a government agency using public funds to purchase a building originally constructed by another governmental agency with public money. Indeed, the fact that R.C. 307.09 and R.C. 307.10 permit a board of county commissioners to convey county property to other government agencies, on terms more liberal than those available for private purchasers, indicates that inter-governmental transactions are not prohibited.

In conclusion, it is my opinion, and you are advised, that a board of county commissioners and board of education may enter into an agreement whereby the county agrees to lease to the school district a building and underlying land that are no longer needed for the county's use, with an option for the school district to purchase the property for a nominal amount at the end of the lease. The board of county commissioners is not required to competitively bid the conveyance. Payments may not extend for more than five years, however, and the board of education must secure voter approval of a special tax levy under R.C. 5705.21 or otherwise provide for levying and collecting a tax to meet future payments. (1986 Op. Att'y Gen. No. 86-031; 1957 Op. Att'y Gen. No. 398, p. 118; 1945 Op. Att'y Gen. No. 143, p. 110; and, 1939 Op. Att'y Gen. No. 1267, vol. III, p. 1867, overruled due to statutory change.)

Respectfully,

JIM PETRO
Attorney General