April 19, 2004

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
Courthouse
105 South Market Street
Lisbon, Ohio 44432-1295

SYLLABUS: 2004-016

A board of county commissioners is authorized by Ohio Const. art. VIII, § 13 and R.C. 307.85 to receive from the Ohio Department of Development moneys provided through the federal Small Cities Community Development Block Grant program and lend those moneys to a private for-profit business enterprise for purposes of economic development.

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OPINION NO. 2004-016

The Honorable Robert L. Herron
Columbiana County Prosecuting Attorney
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105 South Market Street
Lisbon, Ohio 44432-1295

Dear Prosecutor Herron:

We have received your request for an opinion concerning the authority of a board of county commissioners to participate in the Small Cities Community Development Block Grant program for economic development. Your question is whether a board of county commissioners may receive from the Ohio Department of Development moneys provided through the Small Cities Community Development Block Grant program and lend those moneys to a private for-profit business enterprise for purposes of economic development.

Background

As you have described the situation, Columbiana County recently received grant moneys from the Ohio Department of Development for the specific purpose of lending the grant moneys to a local private for-profit business renovation project. The business applied to the county for the loan and, upon closing, executed several documents that provided security for the loan, including a mortgage, promissory note, security agreement, and financing statement, all in favor of Columbiana County as the lending agency. The documents were standardized forms provided by the Ohio Department of Development, and the moneys came from the Small Cities Community Development Block Grant program.

Your office questioned the legal authority of the board of county commissioners to enter into the arrangement. The response from the Ohio Department of Development was that the arrangement is authorized by Ohio Const. art VIII, § 13 and R.C. 307.85, and that this type of arrangement is common around the state. You continue to be concerned, however, about the county commissioners' authority to enter into an arrangement of this nature.

Federal Small Cities Community Development Block Grant program

Community Development Block Grants are federal moneys provided to the states for distribution to units of local government to be used for the establishment and maintenance of viable urban communities, by providing decent housing, a suitable living environment, and expanded economic opportunities, principally for persons of low and moderate income. 42 U.S.C.A. § 5301(c) (West 2003); *see also* 42 U.S.C.A. §§ 5302 to 5321 (West 2003); 24 C.F.R. §§ 570.1 to 570.913 (2003). The Community Development Block Grant (CDBG) program was instituted by the Housing and Community Development Act of 1974. 24 C.F.R. § 570.1 (2003). Some state moneys are provided as matching funds to pay costs of administering the CDBG program. *See* Am. Sub. H.B. 95, 125th Gen. A. (2003) (eff. June 26, 2003) (section 38.10, uncodified).

Your question concerns a grant under the Small Cities Community Development Block Grant program. The Ohio Department of Development administers this program, which makes federal moneys available to certain cities and counties in Ohio for housing rehabilitation, economic development, and public works improvements that benefit persons with low and moderate incomes or eliminate blighted areas and improve the quality of life. *See* 24 C.F.R. § 570.420 (2003); R.C. 122.011; R.C. 122.02; Ohio Department of Development Web site, http://www.odod.state.oh.us/cdd/ohcp/cdp.htm and /cdd/ohcp/fapn.htm.

Authority of board of county commissioners to participate in Small Cities Community Development Block Grant program

It is firmly established that a board of county commissioners has only the powers that it is granted by law, either expressly by provision of constitution or statute, or by implication as necessary to carry out a power expressly granted. *See Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 582-83, 621 N.E.2d 696 (1993); *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6 (1917); 2002 Op. Att'y Gen. No. 2002-031, at 2-206.[1] With regard to financial matters, the power of a county official to act must be clearly and distinctly granted, and any doubt regarding the authority to spend public money will be resolved against the grant of authority. *See State ex rel. A. Bentley & Sons Co. v. Pierce* (syllabus, paragraph 3) (in case of doubt regarding the authority to expend public moneys, the doubt "must be resolved in favor of the public and against the grant of power"); *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916). Hence, for the board of county commissioners to lawfully enter into the economic development arrangement you have

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[1] This opinion does not consider the powers of a county that has acquired home rule powers pursuant to Ohio Const. art. X, § 1 or has adopted a charter pursuant to Ohio Const. art. X, §§ 3 and 4. *See Geauga County Bd. of Comm'rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 583 n.2, 621 N.E.2d 696 (1993); 2002 Op. Att'y Gen. No. 2002-031, at 2-206 n.1.

described, there must be a clear grant of authority. *See, e.g.,* 2002 Op. Att'y Gen. No. 2002-031, at 2-206 to 2-207.

As your request notes, the Ohio Constitution does not provide that clear grant of authority, but it does authorize the enactment of statutes that permit counties to lend moneys to private businesses for purposes of economic development. Section 13 of article VIII of the Ohio Constitution states that it is in the public interest and a proper public purpose for the state or its political subdivisions (including counties) to make or guarantee loans to provide moneys for the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment, and facilities within Ohio for industry, commerce, distribution, and research. Section 13 permits the issuance of bonds or other obligations, the making of guarantees and loans, and the lending of aid and credit, provided that no moneys raised by taxation are obligated or pledged to pay any bonds or other obligations or guarantees. Further, Section 13 states expressly that "[l]aws may be passed to carry into effect" the purposes set forth in Section 13. Thus, Ohio Const. art. VIII, § 13 permits an arrangement under which a board of county commissioners lends grant moneys to a private for-profit business enterprise for purposes of economic development, provided that there is statutory authority for such an arrangement.

In the instant case, as indicated by the Ohio Department of Development, the authority for a county to participate in the Small Cities Community Development Block Grant program is derived from R.C. 307.85, which empowers boards of county commissioners to participate in federal programs. R.C. 307.85(A) states:

> The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, or with any such agency or organization that is receiving federal funds pursuant to a federal program, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state.

The language of R.C. 307.85(A) does not expressly mention the federal Community Development Block Grant program. It is, however, broad enough to include that program. *See generally* 1979 Op. Att'y Gen. No. 79-053, at 2-169 ("[t]he clear purpose of R.C. 307.85 was to enable the county commissioners to exercise whatever power was necessary to participate in the operation of a federal program"). The only restriction imposed by R.C. 307.85(A) on the authority of a board of county commissioners to participate in a federal program is that the procedures adopted and action taken may not be prohibited by the Constitution of Ohio or in conflict with the laws of Ohio.

The language appearing in R.C. 307.85(A) was initially enacted in 1965 "to permit counties to participate in federal programs." 1965 Ohio Laws 206, 1649 (Am. Sub. H.B. 33, eff. Aug. 23, 1965) (title). Over the years, this language has been recognized as providing authority for boards of county commissioners to participate in a variety of federal programs, including

Community Development Block Grant programs. *See, e.g.,* 1991 Op. Att'y Gen. No. 91-028 (syllabus, paragraph 1) (National Flood Insurance Program); 1984 Op. Att'y Gen. No. 84-038 (Flood Control Act); 1979 Op. Att'y Gen. No. 79-055 (Community Development Block Grant programs); 1979 Op. Att'y Gen. No. 79-053, at 2-169 (Watershed Protection and Flood Prevention Act); 1978 Op. Att'y Gen. No. 78-060 (Medicare and Medicaid reimbursement programs); 1973 Op. Att'y Gen. No. 73-102 (Older Americans Act); 1971 Op. Att'y Gen. No. 71-092 (Omnibus Crime Control and Safe Streets Act).

It has been recognized for more than twenty years that R.C. 307.85 provides authority for a board of county commissioners to participate in federal Community Development Block Grant programs. 1979 Op. Att'y Gen. No. 79-055 states plainly, in the second paragraph of the syllabus, that "R.C. 307.85 authorizes a board of county commissioners to be members of a non-profit corporation and, as such, to vote for trustees and carry out other activities of members where such membership and activities are reasonably related to the operation of a federal program, such as the Community Development Block Grant program." The 1979 opinion concludes, in the first paragraph of the syllabus, that, because of conflicts with state law, R.C. 307.85 does not authorize a board of county commissioners to itself incorporate a nonprofit corporation to act as a conduit for federal Community Development Block Grant funds, but it also concludes that, absent constitutional conflicts, the board of county commissioners is authorized by R.C. 307.85 to receive federal funds and convey them to appropriate recipients to implement a homeowner rehabilitation loan and grant program. 1979 Op. Att'y Gen. No. 79-055, at 2-188 and syllabus, paragraph 6. Citing a number of other Attorney General opinions, 1979 Op. Att'y Gen. No. 79-055 states: "[I]t is my conclusion that R.C. 307.85 authorizes a board of county commissioners to perform acts not otherwise statutorily authorized where the performance of such acts is reasonably related to the establishment and operation of a program created by federal law." 1979 Op. Att'y Gen. No. 79-055, at 2-184; *accord* 1984 Op. Att'y Gen. No. 84-038, at 2-122; 1979 Op. Att'y Gen. No. 79-053, at 2-168; 1978 Op. Att'y Gen. No. 78-060, at 2-149; *see also State v. Lordi*, 140 Ohio App. 3d 561, 2000-Ohio-2582, 748 N.E.2d 566 (Mahoning County 2000) (board of county commissioners administered a Community Development Block Grant loan and signed appropriate documents), *adhered to on reconsideration*, 2000-Ohio-2678, 2000 Ohio App. LEXIS 6281 (Mahoning County 2000); 1984 Op. Att'y Gen. No. 84-038, at 2-123 ("[s]ince the enactment of R.C. 307.85(A), boards of county commissioners have had the authority to perform those acts not otherwise authorized in order to participate in federal programs, as long as such actions are not prohibited under state law").

As noted above, R.C. 307.85(A) restricts the authority of a board of county commissioners to participate in a federal program by providing that the procedures adopted and action taken may not be prohibited by the Constitution of Ohio or in conflict with the laws of Ohio. Ohio Const. art. VIII, § 13, discussed above, permits the lending of public money to private companies for purposes of economic development. Therefore, there is no constitutional prohibition against participation in the Small Cities Community Development Block Grant program. Further, our research has disclosed no conflict between the Small Cities Community Development Block Grant program and the laws of Ohio. We conclude, accordingly, that R.C. 307.85(A) permits a board of county commissioners to participate in the federal Small Cities

Community Development Block Grant program and to execute whatever documents are appropriate to carry out that participation.

Related statutory provisions

Your letter of request refers to R.C. 307.07 and raises the question whether it is necessary for a county to act under R.C. 307.07 in order to participate in economic development activities pursuant to the Small Cities Community Development Block Grant program. R.C. 307.07 authorizes a board of county commissioners to create an office of economic development, and it authorizes two or more boards of county commissioners to create a joint office of economic development, "to develop and promote plans and programs designed to assure that county resources are efficiently used, economic growth is properly balanced, and that county economic development is coordinated with that of the state and other local governments." R.C. 307.07(A); *see* R.C. 307.07(C); *see also* R.C. 307.64. An office of economic development may be managed by a director of economic development or, pursuant to agreement, by a county or regional planning commission, by the Ohio cooperative extension service using employees of the Ohio State University, or by a public or private nonprofit organization. R.C. 307.07(A). The managing entity is given statutory authority to carry out the various functions of the office. R.C. 307.07(B). In particular, the managing entity, with the approval of the board of county commissioners, may enter into agreements with public or private entities, accept grants and gifts, and "make loans or grants and provide other forms of financial assistance for the purpose of economic development … in compliance with applicable laws of this state." R.C. 307.07(B)(5); *see* R.C. 307.07(B)(3) and (6).

R.C. 307.07 was enacted in 1989 "to permit counties to establish offices or joint offices of Economic Development and hire a Director of Economic Development." 1989-1990 Ohio Laws, Part II, 2998, 3002 (Am. Sub. H.B. 173, eff. Oct. 30, 1989) (title); *see also* Ohio Legislative Service Comm'n, *Summary of Enactments January − August 1989, Part I*, 302 (Am. Sub. H.B. 173).[2] It appears that a board of county commissioners may make use of an office of economic development to participate in the implementation of the Small Cities Community Development Block Grant program. It does not appear, however, that a board of county commissioners is required to establish such an office in order to participate in the Small Cities Community Development Block Grant program. R.C. 307.07 provides a means by which a county may proceed with economic development through the creation of an office or joint office of economic development. It does not restrict the authority granted to the board of county commissioners by R.C. 307.85 to participate in federal programs, including programs for economic development. Hence, the fact that a board of county commissioners has not

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[2] R.C. 307.07 was amended in 1993 by Am. H.B. 277 (eff. Oct. 29, 1993), appearing at 1993-1994 Ohio Laws, Part III, 5263. Am. H.B. 277 enacted R.C. 307.07(A)(3), authorizing a public or private organization, by agreement, to carry out the functions and duties of a director of economic development.

established an office of economic development pursuant to R.C. 307.07 does not prevent the board of county commissioners from participating in the Small Cities Community Development Block Grant program pursuant to R.C. 307.85.[3]

Your letter refers also to a county community improvement corporation (CIC), which is a private nonprofit corporation organized under R.C. Chapter 1724. You have informed us that Columbiana County has a CIC, but the CIC has not entered into any agreement to perform the functions of an economic development director under R.C. 307.07. Further, the CIC will have no involvement with the loan process, though it has been asked to administer the loan, after closing, on behalf of the board of county commissioners. You state that the Ohio Department of Development takes the position that the county, through its board of commissioners, must act as the lending agency. This is consistent with the analysis set forth above, authorizing the board of county commissioners to participate in the Small Cities Community Development Block Grant program pursuant to R.C. 307.85.

Conclusion

For the reasons discussed above, it is my opinion, and you are advised, that a board of county commissioners is authorized by Ohio Const. art. VIII, § 13 and R.C. 307.85 to receive from the Ohio Department of Development moneys provided through the federal Small Cities Community Development Block Grant program and lend those moneys to a private for-profit business enterprise for purposes of economic development.

Respectfully,

JIM PETRO
Attorney General

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[3] We are aware that 1993 Op. Att'y Gen. No. 93-061 states, in the syllabus: "R.C. 307.07 does not authorize a board of county commissioners to pursue a county plan of economic development unless it has employed a director of development to exercise the powers enumerated in R.C. 307.07(B) or contracted with one of the entities specified in R.C. 307.07(A) to exercise such powers." That opinion concludes that a board of county commissioners may not exercise the powers described in R.C. 307.07 by any means other than those specifically set forth in R.C. 307.07. However, 1993 Op. Att'y Gen. No. 93-061 does not mention R.C. 307.85 and does not consider the authority granted to a board of county commissioners by R.C. 307.85 to participate in federal programs. Hence, the analysis set forth in 1993 Op. Att'y Gen. No. 93-061 does not preclude the conclusion reached in this opinion.