June 8, 2009

The Honorable Juergen A. Waldick
Allen County Prosecuting Attorney
204 North Main Street, Suite 302
Lima, Ohio 45801

SYLLABUS: 2009-023

A board of county commissioners is not empowered to reorganize a veterans memorial building constructed and operated by a Veterans Memorial Board of Trustees (VMBT) under R.C. Chapter 345 into a convention facility operated by a Convention Facilities Authority (CFA) under R.C. Chapter 351. However, to the extent permitted under R.C. Chapters 345 and 351, a VMBT and a CFA may cooperate in procuring and operating facilities.

RICHARD CORDRAY
OHIO ATTORNEY GENERAL

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OPINION NO. 2009-023

The Honorable Juergen A. Waldick
Allen County Prosecuting Attorney
204 North Main Street, Suite 302
Lima, Ohio 45801

Dear Prosecutor Waldick:

We have received your request for an opinion on the question whether the Board of Commissioners of Allen County is empowered to reorganize the Veterans' Memorial Civic & Convention Center of Lima/Allen County (VMCCC) to operate as a convention facility under R.C. Chapter 351. You have asked, if this reorganization is possible, what steps are necessary to implement it. You have informed us that the VMCCC was constructed by Allen County under R.C. Chapter 345, was funded through the issuance of bonds under R.C. 345.02, and is currently financed primarily through the county and from revenue generated by shows and events at the VMCCC.

For the reasons set forth in this opinion, we conclude that a board of county commissioners is not empowered to reorganize a veterans memorial building constructed and operated by a Veterans Memorial Board of Trustees (VMBT) under R.C. Chapter 345 into a convention facility operated by a Convention Facilities Authority (CFA) under R.C. Chapter 351. To understand why a board of county commissioners cannot undertake this reorganization, it is necessary to understand the differences between a memorial building under R.C. Chapter 345 and a convention facility under R.C. Chapter 351.

Veterans Memorial Building Constructed Under R.C. Chapter 345

R.C. Chapter 345 authorizes the erection, operation, and maintenance of a memorial to commemorate the services of members and veterans of the United States armed forces. R.C.

345.01, .02, .12-14.[1] A veterans memorial is maintained and operated by a veterans memorial board of trustees (VMBT) appointed by the board of county commissioners, with at least a majority of the members being honorably discharged veterans of the armed forces of the United States. R.C. 345.08. Veterans memorials may be funded by bonds or tax levies and may receive other moneys from the county. R.C. 345.01-.07, .14; 1956 Op. Att'y Gen. No. 6462, p. 314. Moneys arising from a tax levy or the issuance of bonds are placed in the Memorial Fund and are paid out on the order of the VMBT, certified by the president and secretary of the VMBT. R.C. 345.11. The VMBT may also receive rental fees and charges for the use of the memorial. R.C. 345.13; *see also* R.C. 345.14.

By statute, a veterans memorial established under R.C. 345.01 "shall be maintained so as to commemorate the services of all members and veterans of the armed forces of the United States," and the VMBT must make rules for the use, administration, and maintenance of the memorial in a manner that is fitting and necessary to carry out its purposes. R.C. 345.13; *see also* R.C. 345.01. When the memorial is a building, more specific requirements are imposed by R.C. 345.13:

> When such *memorial* is a *building*, it shall provide *suitable apartments of sufficient dimensions to commemorate the soldiers, sailors, marines, and all members of the armed forces of the United States*, so designated by congress, both men and women of the county, who have lost their lives while in the service of the country. *Suitable tablets shall be maintained with the names of such soldiers, sailors, and marines inscribed thereon.* The building may include a public auditorium, music hall, and recreational facilities. (Emphasis added.)

Thus, a VMBT has statutory duties to include in its memorial building certain types of tributes to veterans.

In addition to its other powers, a VMBT is required by R.C. 345.14 to take various actions that support veterans, as follows:

> (A) Conduct, maintain, and operate a *soldiers' memorial, for the benefit of the entire county, for community, civic, and patriotic purposes*;
>
> (B) Provide, with or without cost, suitable and convenient *county headquarters for all nationally organized veterans' organizations*, chartered by congress;
>
> (C) *Use, rent, and lease office space* in such memorial buildings to agencies of the United States and of this state or any of their political subdivisions

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[1] R.C. 345.01 authorizes a county, township, or municipal corporation to establish a memorial building. Because the VMCCC was constructed by the county, this opinion addresses R.C. Chapter 345 only as it applies to counties.

> *engaged in any activity for the benefit of the men and women of the armed forces of the United States and the honorably discharged veterans thereof,* and all earnings or receipts shall be used for the maintenance thereof;
>
> (D) Co-ordinate and assemble within a county, as nearly as possible, in *a one-stop information or service center in such memorial, all governmental agencies operated for the benefit of the honorably discharged veterans of the armed forces of the United States*. (Emphasis added.)

In appointing and employing superintendents, architects, clerks, caretakers, laborers, and other employees, the VMBT must choose honorably discharged veterans when qualified veterans are available. R.C. 345.10, .16; *see also* R.C. 345.09 (VMBT secretary must be a veteran or the surviving spouse or parent of a deceased veteran who served in time of war). Thus, in addition to being used as a public auditorium or convention facility, a memorial building established under R.C. Chapter 345 must be used to serve and honor veterans and veterans' organizations.

Convention Facility Operated Under R.C. Chapter 351

A convention facility under R.C. Chapter 351 may serve some of the same purposes as a memorial building, but it is organized and operated in a different manner. A CFA is created by resolution of the board of county commissioners as a body corporate and politic with authority to acquire or construct convention facilities. R.C. 351.02-.021, .06. A CFA is governed by an eleven-member board of directors consisting of six directors appointed by the county commissioners (one representing townships, one representing a business trade association, and one representing the convention and visitors' bureau), three directors appointed by the mayor of the municipal corporation with greatest population within the county, and two directors appointed by agreement of the mayors of the other municipal corporations. R.C. 351.04(A).

The CFA may receive funds in various manners, including through sales and use taxes, excise taxes on lodging transactions, or revenue bonds. R.C. 351.021, .03, .06, .14, .141, .18, .26; R.C. 5739.026, .09(A); R.C. 5741.023; 1998 Op. Att'y Gen. No. 98-015, at 2-77 n.1. Moneys, properties, and other assets of a CFA are held in trust by the CFA for the purposes of carrying out its powers and duties and are not included with other public funds. R.C. 351.19.

A CFA is empowered to collect rentals and other charges for the use of its facilities. R.C. 351.06(R), .09. It has no responsibilities with regard to memorializing veterans. Its only statutory duty with regard to veterans is that before it employs any full-time employees, it must adopt and implement a policy regarding hiring preferences for veterans. R.C. 351.07(A).

Authority of Board of County Commissioners

It is firmly established that a board of county commissioners has only the authority it is granted by statute, either expressly or by necessary implication. *See State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E.2d 6 (1917). With regard to a veterans memorial under R.C. Chapter 345, a board of county commissioners is authorized to submit to the voters the question of levying a tax to finance a veterans memorial, R.C. 345.01-.02, and to appoint a

VMBT to take charge of the erection of the memorial, R.C. 345.06, .08-.16. Once a VMBT is created, the VMBT is responsible for the maintenance and operation of the memorial building. R.C. 345.14; 2004 Op. Att'y Gen. No. 2004-013. The board of county commissioners is not empowered to reorganize the VMBT into a different type of board or to exercise on behalf the VMBT responsibilities that have been given to the VMBT. *See Associations Conventions Trade Shows, Inc. v. Bd. of Franklin County Comm'rs*, No. 91AP-79, 1991 Ohio App. LEXIS 3919, at *10-11 (Franklin County Aug. 15, 1991) (VMBT has statutory powers under R.C. Chapter 345 that cannot be controlled by the board of county commissioners).[2]

Similarly, the board of county commissioners has limited authority with regard to a CFA. The board of county commissioners may pass a resolution to create the CFA and may appoint six of the eleven members of the board of directors. R.C. 351.02, .04. The board of county commissioners may participate in making certain public moneys available to the CFA, but is not generally permitted to appropriate and expend county funds to finance or subsidize the operation of the CFA. *See* R.C. 351.021, .03(A), .18, .26; R.C. 5739.026, .09(A); R.C. 5741.023. If the board of county commissioners dissolves the CFA, the properties of the CFA will be transferred to the county and the county may then expend public funds to finance or subsidize the operation of the facilities. R.C. 351.03(B).

A veterans memorial building constructed and operated by a VMBT under R.C. Chapter 345 is an entity separate and distinct from a convention facility operated by a CFA under R.C. Chapter 351, and a board of county commissioners is not empowered to change a memorial building into a convention facility. If the authority to make such a change were desired, appropriate legislation would be required. *See, e.g.*, 2009 Op. Att'y Gen. No. 2009-006, slip op. at 14 ("[t]he General Assembly is empowered to take cognizance of the consequences of existing law and, within constitutional limits, to change the law to achieve the desired results").[3]

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[2] Existing statutes do not address the dissolution or other termination of a VMBT. If termination is contemplated, the nature of the board—including its designation as a board of "trustees," its responsibility for moneys in the Memorial Fund, and its duties to veterans—requires that judicial approval be sought. *See* 1970 Op. Att'y Gen. No. 70-056 (syllabus, paragraph 3) ("[t]he dissolution of a regional airport authority, or the disposition of its assets, not having been provided for by statute, is a judicial matter which may be resolved only by a court of competent jurisdiction"); *see also* 2008 Op. Att'y Gen. No. 2008-014; 2006 Op. Att'y Gen. No. 2006-001, at 2-1 n.1; 2003 Op. Att'y Gen. No. 2003-032 (syllabus, paragraph 2) ("[a]ny proposal to transfer from the county treasurer to the board of education the ownership of real property that is held in trust by the county treasurer should be approved by an appropriate court with equitable powers"); 1992 Op. Att'y Gen. No. 92-033, at 2-127 n.1; 1980 Op. Att'y Gen. No. 80-097. The disposition of assets upon dissolution would thus be subject to approval by the court.

[3] That the General Assembly did not intend to authorize such a change is evident from a review of legislative history. The legislation that enacted R.C. Chapter 351, authorizing the

Cooperation Between VMBT and CFA

Although a board of county commissioners is not empowered to reorganize a veterans memorial constructed under R.C. Chapter 345 into a convention facility operated under R.C. Chapter 351, there are ways in which a VMBT and a CFA may cooperate in procuring and operating facilities. For example, a VMBT is authorized to rent its memorial building for use by others. R.C. 345.13-.14; *see also* 1950 Op. Att'y Gen. No. 1845, p. 324 (when VMBT and county agricultural society wished to work together to construct a veterans memorial building on the fairgrounds, a single set of bonds could not be issued on behalf of both because the two bodies were subject to different statutes and joint action was not authorized, but VMBT could construct a building located on the fairgrounds under a lease arrangement with the agricultural society).

A CFA has broad authority to acquire the use or ownership of facilities, including the authority to: "[a]cquire, purchase, construct, reconstruct, enlarge, furnish, equip, maintain, repair, sell, exchange, lease or rent to, lease or rent from, operate, or contract for the operation by others of, facilities within its territory, and make charges for the use of the facilities." R.C. 351.06(D); *see also* R.C. 351.06(L) and 351.22 (CFA may appropriate real property through eminent domain proceedings under R.C. Chapter 163); R.C. 351.141(K) (CFA may acquire by gift or purchase and hold, lease, and dispose of property and interests in property). A CFA is also authorized to rent its facilities to others or contract for their operation by others, and to make its facilities available to persons or governmental agencies on such terms and conditions as it determines. R.C. 351.06(D), (E). In appropriate circumstances, a CFA may exercise these powers to enter into agreements or transactions with a VMBT.

In addition to setting forth the powers and duties of a CFA, R.C. Chapter 351 contains provisions that empower other public bodies to work with and assist the CFA. R.C. 351.10 states in part that a governmental agency,[4] which includes a VMBT, may cooperate with the CFA in

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creation of a CFA, did not authorize the reorganization of a VMBT as a CFA, but did address one means by which a veterans memorial may be funded, amending the provisions of R.C. 345.05 and 345.08 to permit a tax levy for a memorial under R.C. Chapter 345 to pass by a simple majority of the electors voting on the levy, rather than the sixty-five percent previously required. *See* 1985-1986 Ohio Laws, Part III, 5172, 5187 (Am. Sub. H.B. 583, eff. Feb. 20, 1986). Had the General Assembly wished to authorize a veterans memorial building to be reorganized as a convention facility under R.C. Chapter 351, it could have granted that authority by including it in Am. Sub. H.B. 583.

[4] "Governmental agency" is defined in R.C. 351.01(B) in broad terms that encompass political subdivisions of the state, including counties, and their departments, divisions, and other units, as well as any public agency having the power to acquire, construct, or operate facilities. Thus, both a county and a VMBT are included as governmental agencies for purposes of R.C.

the acquisition or construction of facilities and enter into agreements with the CFA, "with a view to effective cooperative action and safeguarding of the respective interests of the parties to the agreements," which shall provide for contributions from the parties and may authorize the construction of a facility by one party acting as agent for all parties, provided that no moneys appropriated by the state may be used for construction or operation of any facilities constructed under R.C. Chapter 351. R.C. 351.10.

Further, R.C. 351.21 authorizes any governmental agency, again including a VMBT, to lease, lend, grant, or convey real property to a CFA, stating in part:

> *Any governmental agency, notwithstanding any contrary provision of law and without the necessity for an* advertisement, auction, *order of court, or other action or formality, other than the regular and formal action of such governmental agency concerned, may lease, lend, grant, or convey to the convention facilities authority*, at its request, upon such terms as the proper authorities of such governmental agency find reasonable and fair *any real property or interests therein including improvements thereto or personal property which is necessary or convenient* to effect the authorized purposes of the convention facilities authority, including public roads, transit authority property, and *real or personal property that is devoted to public use*. (Emphasis added.)

See also R.C. 351.25 (R.C. 351.01-.25 "being necessary for the welfare of the state and its inhabitants shall be liberally construed to effect the purposes thereof").

Thus, there are various means by which a VMBT and a CFA may cooperate in procuring and operating facilities.[5] For example, there might be a rental arrangement under which the VMBT performs its veterans' functions in its memorial building and leases the building to the CFA to use for conventions and entertainment events. If the authority granted by existing statutes is insufficient to accomplish desired results, additional legislation could be pursued.

Chapter 351. *See also* 1956 Op. Att'y Gen. No. 6462, p. 314, at 315 (a VMBT is a county agency and its memorials are county buildings).

[5] In entering into any agreement, both the VMBT and the CFA are required to exercise their discretion in a reasonable manner that is consistent with applicable provisions of statute and constitution. *See State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918); 2000 Op. Att'y Gen. No. 2000-042, at 2-256 to 2-257; *see also* 1987 Op. Att'y Gen. No. 87-034 (limits on delegation of powers).

Conclusion

Therefore, it is my opinion, and you are advised, that a board of county commissioners is not empowered to reorganize a veterans memorial building constructed and operated by a Veterans Memorial Board of Trustees (VMBT) under R.C. Chapter 345 into a convention facility operated by a Convention Facilities Authority (CFA) under R.C. Chapter 351. However, to the extent permitted under R.C. Chapters 345 and 351, a VMBT and a CFA may cooperate in procuring and operating facilities.

Respectfully,

RICHARD CORDRAY
Ohio Attorney General