October 27, 1997

OPINION NO. 97-051

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624-1680

Dear Prosecutor Bates:

You have requested an opinion concerning whether a county board of mental retardation and developmental disabilities may provide funds to a nonprofit entity for the purpose of setting up a trust or charitable foundation to develop residential services for the board's clients. Additional information concerning the proposal was provided to us by the director of the board, who informed us that the board has certain unused moneys derived from the manufactured home tax levied under R.C. 4503.06 and appropriated to it by the board of county commissioners. The board proposes to contribute these moneys to a private nonprofit entity that will use such moneys to develop residential services, as well as supported living, for persons who are eligible to receive services from the county board of mental retardation and developmental disabilities.

In order to answer your question, it is necessary to examine the nature of a county board of mental retardation and developmental disabilities ("county MR/DD board") and the manner in which moneys are appropriated to and expended by such a board. As a creature of statute, a county MR/DD board has only those powers granted by statute or necessarily implied therefrom. *See Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980). Accordingly, a county MR/DD board may provide moneys to a nonprofit entity for the purposes described only if it has statutory authority to do so.

The statutory scheme governing the establishment and operation of a county MR/DD board is set forth in R.C. Chapter 5126. A majority of the powers and duties of a county MR/DD board are prescribed by R.C. 5126.05.[1] The specific authority of a county MR/DD board with respect to residential services and supported living is set forth in R.C. 5126.051, which states in pertinent part:

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[1] R.C. 5126.05 states in pertinent part:

(A) Subject to the rules established by the director of mental retardation and

> (A) *To the extent that resources are available*, a county board of mental retardation and developmental disabilities *may provide for or arrange residential services and supported living* for individuals with mental retardation and developmental disabilities.
> *A county board may acquire, convey, lease, or sell property for residential services and supported living and enter into loan agreements, including mortgages, for the acquisition of such property*. A county board is not required to comply with provisions of [R.C. Chapter 307] providing for competitive bidding or sheriff sales in the acquisition, lease, conveyance, or sale of property under this division, but the acquisition, lease, conveyance, or sale must be at fair market value determined by appraisal of one or more disinterested persons appointed by the board.
> ....
> (C) *To the extent that resources are available*, a county board may provide services to an individual with mental retardation or other developmental disability in addition to those provided pursuant to this section, [R.C. 5126.05], or any other section of this chapter. The services shall be provided in accordance with the individual's habilitation or service plan and *may be provided in collaboration with other entities of state or local government*.[2] (Emphasis and footnote added.)

> developmental disabilities pursuant to [R.C. Chapter 119] for programs and services offered pursuant to this chapter, and subject to the rules established by the state board of education pursuant to [R.C. Chapter 119] for programs and services offered pursuant to [R.C. Chapter 3323 (education of handicapped children)], the county board of mental retardation and developmental disabilities *shall*:
> (1) *Administer and operate facilities, programs, and services* as provided by this chapter and [R.C. Chapter 3323] and establish policies for their administration and operation;
> ....
> (C) Any county board *may enter into contracts* with other such boards and *with public or private, nonprofit, or profit-making agencies or organizations* of the same or another county, *to provide the facilities, programs, and services authorized or required*, upon such terms as may be agreeable, and in accordance with this chapter and [R.C. Chapter 3323] and rules adopted thereunder and in accordance with [R.C. 307.86 and R.C. 5126.071].
> ....
> (G) The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation and developmental disabilities to perform its functions and duties, and may utilize any available local, state, and federal funds for such purpose. (Emphasis added.)

[2] R.C. 5126.01(G) defines "[r]esources," as used in R.C. Chapter 5126, as meaning "available capital and other assets, including moneys received from the federal, state, and local governments, private grants, and donations; appropriately qualified personnel; and appropriate capital facilities and

It is clear, therefore, that R.C. 5126.051 authorizes a county MR/DD board, in its discretion and "[t]o the extent that resources are available," to provide for or arrange residential services and supported living.[3] *See generally Dorrian v. Scioto Conservancy Dist.*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) (stating in part, "[i]In statutory construction, the word _may_ shall be construed as permissive ... unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage").

Recently, Am. Sub. H.B. 215, 122nd Gen. A. (1997) (eff., in pertinent part, June 30, 1997), added to R.C. 5123.18 division (W), which authorizes the Department of Mental Retardation and Developmental Disabilities to delegate to county boards of mental retardation and developmental disabilities its authority to negotiate and enter into contracts or subcontracts for residential services. The department is required by R.C. 5123.18(W) to adopt rules for the county boards' administration of such contracts and subcontracts. R.C. 5123.18(W) also provides that county MR/DD boards, in administering such contracts or subcontracts, are subject to all applicable provisions of [R.C. Chapter 5126], rather than to R.C. 5123.18(A) to (V), which govern the department's administration of such agreements when it is the contracting entity.

Further provision is made in R.C. 5126.40-.451 for the arrangement of supported living by a county MR/DD board. R.C. 5126.43(A) prescribes the manner in which the board "shall arrange for supported living," in part, as follows:

> (1) By contracting under [R.C. 5126.45] with providers selected by the individual to be served;
> (2) By entering into shared funding agreements with state agencies, local public agencies, or political subdivisions at rates negotiated by the board;
> (3) By providing direct payment or vouchers to be used to purchase supported living, pursuant to a written contract in an amount determined by the board, to the individual or a person providing the individual with protective services as defined in [R.C. 5123.55].[4] (Footnote added.)

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equipment." It is also interesting to note that R.C. 5126.44 provides for the establishment of a "community mental retardation and developmental disabilities residential services and supported living fund," which consists of moneys distributed to the county by the state department of mental retardation and developmental disabilities and any other funds the county MR/DD board deposits into the fund for this purpose. Pursuant to R.C. 5126.44(D), "[a] county board is not required to use any other money for residential services or supported living. A county board may establish a reserve balance account within this fund pursuant to [R.C. 5705.28(C)(2)]."

[3] *See generally* R.C. 5126.01(F) (defining "[r]esidential services"); R.C. 5126.01(I) (defining "[s]upported living]").

[4] R.C. 5126.43 further states:

The General Assembly, thus, has specified the various means by which a county board of mental retardation and developmental disabilities may provide supported living for its clients.

The suggestion has been made that the board's authority to donate its funds to a nonprofit entity that will develop residential services and supported living for the board's clients may be inferred from the board's authority in R.C. 5126.051(A) to "provide for or arrange" such services. Such an argument cannot stand, however, in light of the principle established in *State ex rel. A. Bentley & Sons Co. v. Pierce*, 96 Ohio St. 44, 47, 117 N.E. 6, 7 (1917), in which the court discussed the nature of statutory powers and stated: "Such grant of power, by virtue of a statute, may be either express or implied, but the limitation put upon the implied power is that it is only such as may be *reasonably necessary* to make the express power effective." (Emphasis added.) The donation of public funds to a nonprofit entity for the development of residential services and supported living is not necessary to enable the county MR/DD board to carry out its power of providing or arranging for such assistance. Rather, the General Assembly has granted the board express authority to carry out its functions by other means. *See, e.g.*, R.C. 307.851 (allowing counties that have passed levies under R.C. 5705.191 to contract with nonprofit or for-profit entities for social services, including MR/DD services, and requiring the inclusion of various contract terms, *e.g.*, auditing, reporting, with which the provider must comply); R.C. 5126.05(C) (authorizing a county MR/DD board to "*enter into contracts* with other such boards and *with public or private, nonprofit, or profit-making agencies or organizations* of the same or another county, *to provide the facilities, programs, and services authorized or required*, upon such terms as may be agreeable, and in accordance with [R.C. Chapter 5126] and [R.C. Chapter 3323] and rules adopted thereunder and in accordance with [R.C. 307.86 and R.C. 5126.071]" (emphasis added)); R.C. 5126.40-.451 (procedure for implementing supported living); R.C. 5126.47 (agreement among county MR/DD boards to establish joint county residential services consortium); R.C. 5126.51-.62 (establishment of residential facility linked deposit program, "intended to provide low-cost funds for lending purposes that will effectively reduce high interest rates [to eligible organizations] and materially contribute to remedying the shortage of suitable residential facilities for individuals with mental retardation or developmental

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> (B) When the board contracts for supported living on behalf of an individual, the board may contract only with providers that are certified by the department of mental retardation and developmental disabilities and are in compliance with the quality assurance standards established in rules adopted by the department. The contract terms shall be as provided in [R.C. 5126.45].
>
> When no certified provider is willing and able to provide supported living for an individual in accordance with the terms of the individual service plan for that individual, a county board may provide supported living directly, if it complies with certification and quality assurance standards established by the department.
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> A county board may, for a period not to exceed ninety days, contract for or provide supported living without meeting the requirements of this section for an individual it determines to be in emergency need of supported living. Thereafter, the individual shall choose providers in accordance with [R.C. 5126.41-.42].

disabilities who reside in the county," R.C. 5126.52).

Because the General Assembly has established various methods of providing residential facilities and supported living for the clients of a county MR/DD board, the donation of board funds to a private entity which would use the funds for the development of residential facilities and supported living is not necessarily implied from the board's authority to provide or arrange for such services. *See* 1982 Op. Att'y Gen. No. 82-018 (finding that a county MR/DD board, although possessing authority to provide facilities and to contract for the provision of facilities, had no authority independently to purchase real estate).[5]

Moreover, as stated in *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571, 572 (1916), "[t]he authority to act in financial transactions must be clear and distinctly granted, and, if such authority is of doubtful import, the doubt is resolved against its exercise in all cases where a financial obligation is sought to be imposed upon the county." *See also* 1952 Op. Att'y Gen. No. 1713, p. 559, 565 ("[t]he mere giving away of public funds to private persons without such persons rendering any service or providing any sort of consideration in return is clearly not the expenditure of public funds for a public purpose, but rather is the expenditure of public funds for a private purpose [and] has been judicially recognized as illegal in Ohio" (citations omitted)).[6] In light of the numerous instances in which the General Assembly has expressly authorized other statutory bodies to make donations of public funds in certain circumstances and within prescribed limitations, *see, e.g.*, R.C. 307.45 (requiring counties to use money from levy under R.C. 5705.19(LL) "to provide financial support" for, among other things, "[a]ny other public agency, or private, nonprofit agency,

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[5] *See also* 1988 Op. Att'y Gen. No. 88-045 (syllabus) ("[a] community mental health board is without statutory authority to loan or donate funds to a private, nonprofit agency, which provides mental health services and facilities, for expansion of the agency's facilities"); 1988 Op. Att'y Gen. No. 88-018 (county may not distribute funds to its townships and municipalities based on the county's general concern about the financial status of subdivisions within its boundaries); 1983 Op. Att'y Gen. No. 83-069 (syllabus, paragraph two) ("[a] board of township trustees may not use funds derived from a levy adopted under R.C. 5705.19(I) to simply donate a fire station, fire equipment or apparatus, or maintenance services to a private volunteer fire company, but the board may contract with a private volunteer fire company for the provision of fire equipment, real estate, or services to the township upon any terms and conditions which the board, in the reasonable exercise of its discretion, deems appropriate. Such terms and conditions may make funds derived from a levy adopted under R.C. 5705.19(I) available for the purchase of property or maintenance services for the fire company").

[6] As explained in 1984 Op. Att'y Gen. No. 84-080 at 2-272:

> It is ... my understanding that the evil sought to be avoided by the lending credit provisions of the Ohio Constitution is ... the payment of funds to private entities where no services are to be rendered in return, or where the governmental body seeks to enter into a joint venture with the private entity. (Various citations omitted.)

the purposes of which in the county include the diversion, adjudication, detention, or rehabilitation of criminals or juvenile offenders," and further requiring nonprofit agency recipient to enter into agreement for receipt of funds); R.C. 307.691 (authorizing counties and municipalities to "cooperate with, give financial assistance to, and provide equipment to" particular types of nonprofit corporations); R.C. 307.85(B) (authorizing a county to "participate in, give financial assistance to, and cooperate with public and nonprofit private agencies and organizations" for social services for the elderly and food for the needy); R.C. 505.70(B) (authorizing townships to "participate in, give financial assistance to, and cooperate with public and nonprofit private agencies and organizations in establishing and operating programs to provide necessary social services to meet the needs of older persons, in addition to those agencies and organizations receiving federal funds for this purpose"), I must conclude that, had the General Assembly intended that a county MR/DD board have authority to donate its moneys to an entity for the development of residential services and supported living, it would have expressly so provided. *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will ... be presumed that different results were intended").[7]

It has been suggested that the conclusion reached in 1985 Op. Att'y Gen. No. 85-031, that a county MR/DD board may, with certain restrictions, "give money received pursuant to a testamentary bequest to a nonprofit foundation established to aid the mentally retarded," supports the argument that such a board may donate funds to a nonprofit entity that will develop residential facilities and supported living for persons with mental retardation or other developmental disabilities. The conclusion reached in Op. No. 85-031 is readily distinguishable from the proposal you present. The moneys at issue in Op. No. 85-031 were received pursuant to a testamentary bequest, which, pursuant to R.C. 5126.05(F), a county MR/DD board may receive "for the benefit of the purposes for which the board is established" and may dispose of "according to the terms of the gift, grant, devise, or bequest."[8] The proposal you describe, however, contemplates the use of

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[7] Of course, the county MR/DD board may, in accordance with R.C. 5126.05(C), use the excess funds to contract with the nonprofit entity you describe for the provision of residential living and supported services.

[8] R.C. 5126.05(F) states:

> A county board may receive by gift, grant, devise, or bequest any moneys, land, or property for the benefit of the purposes for which the board is established and hold, apply, and dispose of the moneys, lands, and property according to the terms of the gift, grant, devise, or bequest. All money received by gift, grant, bequest, or disposition of lands or property received by gift, grant, devise, or bequest shall be deposited in the county treasury to the credit of such board and shall be available for use by the board for purposes determined or stated by the donor or grantor, but may not be used for personal expenses of the board members. Any interest or earnings accruing from such gift, grant, devise, or bequest shall be treated in the same manner and subject to the same provisions as such gift, grant, devise, or bequest.

moneys that have been appropriated to the board for specific purposes. *See generally* R.C. 5705.41(B) (prohibiting any subdivision or taxing unit from "[making] any expenditure of money unless it has been appropriated as provided in" [R.C. Chapter 5705]). Even assuming that the funds you describe have been appropriated to the county MR/DD board for residential services and supported living, the board may use such funds for those purposes only in accordance with the methods prescribed by the General Assembly for the provision of those services. *See, e.g.*, R.C. 5126.05(C); R.C. 5126.40-.451; R.C. 5126.47; R.C. 5126.51-.62.

The material enclosed with your opinion request addresses several other issues, *e.g.*, whether particular moneys appropriated by the county to the board are available for such a donation or the potential personal liability to which county MR/DD board members might be subject if they make such a donation. Because this opinion concludes that a county MR/DD board has no authority to donate funds appropriated to it by the county to a private entity for the development of residential facilities or supported living, however, it is not necessary to address these other issues.

It is, therefore, my opinion, and you are hereby advised that, a county board of mental retardation and developmental disabilities is without authority to donate to a private, nonprofit entity for the development of residential services or supported living, as those terms are defined in R.C. 5126.01(F) and (I), moneys that have been appropriated to the board by the county commissioners.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

October 27, 1997

The Honorable Julia R. Bates
Lucas County Prosecuting Attorney
Lucas County Courthouse
Toledo, Ohio 43624-1680

SYLLABUS: 97-051

A county board of mental retardation and developmental disabilities is without authority to donate to a private, nonprofit entity for the development of residential services or supported living, as those terms are defined in R.C. 5126.01(F) and (I), moneys that have been appropriated to the board by the county commissioners.