January 18, 2006

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 E. Main Street
Courthouse, 1st Floor
Eaton, Ohio 45320

SYLLABUS: 2006-001

A board of county commissioners has no authority to transfer title to county property to its office of economic development or to a nonprofit corporation operating that office for the purpose of the transferee's selling the property, without competitive bidding or public auction, to a buyer previously selected by the county commissioners at a price agreed upon by the buyer and the county commissioners, even if the transferee remits to the county commissioners the purchase price paid by the buyer.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

30 E. Broad St.
Columbus, OH 43215-3428
Telephone: (614) 752-6417
Facsimile:(614) 466-0013
www.ag.state.oh.us

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OPINION NO. 2006-001

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
101 E. Main Street
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Dear Prosecutor Votel:

You have requested an opinion concerning the authority of a board of county commissioners to use the county's economic development office, created pursuant to R.C. 307.07, to conduct a land transaction. According to your letter, the board of county commissioners would like to deed certain county property to either the county's office of economic development or the nonprofit corporation that operates that office, which would then sell the property, without competitive bidding, at a predetermined price to a specific nonprofit organization (buyer) chosen by the county commissioners for the purpose of expanding the buyer's existing facility.[1] Your specific question is: "Under R.C. 307.07, may a board of county commissioners deed property to its economic development office with the agreement that the office will sell the land to a known buyer for a predetermined price, i.e., no competitive bidding, and then remit the proceeds of sale to the county commission?"

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[1] We assume that the county property to which you refer is not being held by the county in trust for particular uses or under any other specific limitations upon the alienability of the property. *See, e.g.*, *Minamax Gas Co. v. State ex rel. McCurdy*, 33 Ohio App. 501, 507, 170 N.E. 33 (Scioto County 1929) (if a county owns property that it does not need for public purposes, "if the property is not held in trust, and not dedicated to public use, it may be aliened, because the right to alien follows necessarily as an incident to ownership"); 1960 Op. Att'y Gen. No. 1169, p. 123, 126 (real property held in trust by the county commissioners for a charitable use may not be sold without prior court approval; "[s]uch a sale without prior court approval would be a violation by the county commissioners of their obligation as trustees of a charitable trust").

Because a board of county commissioners is a creature of statute, whether it may enter into the transaction you describe depends upon whether it possesses statutory authority to do so. *See Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993) ("[c]ounties … may exercise only those powers affirmatively granted by the General Assembly"). Let us begin, therefore, by examining the powers of a board of county commissioners with respect to a county office of economic development.

Pursuant to R.C. 307.07(A), a board of county commissioners may establish an 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." The board may hire an executive director to carry out the powers and duties described in R.C. 307.07(B), with the approval, as specified therein, of the board of county commissioners.[2] R.C.

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[2] R.C. 307.07(B) states:

> (B) The director of economic development may:
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> (1) With the approval of the board, hire such staff and employ such technical and advisory personnel as he sees fit to enable him to carry out the functions and duties of the office;
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> (2) With the approval of the board, contract for services necessary to enable him to carry out the functions and duties of the office;
>
> (3) *With the approval of the board*, *enter into agreements with* federal, state, and local governments and agencies thereof, and with public, private, or *nonprofit organizations to carry out the functions and duties of the office*;
>
> (4) Maintain membership in development organizations;
>
> (5) With the approval of the board, make loans or grants and provide other forms of financial assistance for the purpose of economic development, including financial assistance for permanent public improvements, in compliance with applicable laws of this state, and fix the rate of interest and charges to be made for such financial assistance;
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> (6) *With the approval of the board*, *receive and accept* grants, gifts, and *contributions of* money, *property*, labor, and other things of value, to be held, used, and applied only for the purpose for which they are made, *from* individuals, private and public corporations, the United States government or any agency thereof, from the state or any agency thereof, or from *any political subdivision or any agency thereof*, and may *agree to repay* any contribution of money or return any property contributed or the value thereof in amounts, and on terms and conditions, excluding the payment of interest, as the director determines, and may evidence the obligations by written evidence;
>
> (7) Establish with the board any funds that are necessary for the deposit and disbursement of gifts or contributions of money accepted for economic development purposes;

307.07(A). In lieu of hiring an executive director, however, the board may enter into an agreement with a county or regional planning commission, the Ohio Cooperative Extension Service, or a nonprofit organization "to carry out all of the functions and duties of a director of economic development under division (B) of this section." R.C. 307.07(A).

It is our understanding that the Preble County Board of Commissioners, acting under R.C. 307.07(A)(3),[3] has entered into an agreement with a nonprofit corporation to carry out the functions and duties of a director of economic development set forth in R.C. 307.07(B). The county commissioners question whether they may now "deed" certain county property either to the county's office of economic development or to the nonprofit corporation that has been selected to operate the county's office of economic development. For purposes of discussion, we will refer to either such entity as the transferee of the county property. The county commissioners intend that such transferee sell the property, without competitive bidding or public auction, to a particular nonprofit organization specified by the board of county commissioners at a price already agreed upon by the board and the nonprofit organization. For the reasons that follow, we conclude that a board of county commissioners has no such authority.

In order to answer your question, we must first examine the manner in which title to county property is held. As explained in *Carder v. Board of Comm'rs*, 16 Ohio St. 353, 369 (1865):

> The board of county commissioners is the body -- the *quasi* corporation -- in whom is vested by law the title of all the property of the county. In one sense they are the *agents* of the county, and in another sense they are the *county itself*. It is in this latter sense that they acquire, and hold in perpetuity, the title to its property. In this capacity they not only act *for* the county, but also act *as* the

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> (8) With the approval of the board, design, implement, monitor, oversee, and evaluate economic development plans, programs, strategies, and policies;
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> (9) Perform all acts necessary to fulfill the functions and duties of the office. (Emphasis added.)

[3] R.C. 307.07(A)(3) authorizes a board of county commissioners that has created an office of economic development and has chosen not to hire an executive director to:

> Enter into an agreement with a public or private nonprofit organization to carry out all of the functions and duties of a director of economic development under division (B) of this section. The agreement shall set forth the procedure by which the nonprofit organization shall gain the approval of the board of county commissioners for any actions, functions, and duties under that division. The agreement may continue in effect for a period of one to three years and may be renewed with the consent of all parties. The employment classification of the nonprofit organization's employees shall not be affected by an agreement under this division.

> county. A devise to the county is a devise to the commissioners of the county, and vests the title in them, for the uses of the county.

See State ex rel. Board of County Comm'rs v. Allen, 86 Ohio St. 244, 251, 99 N.E. 312 (1912) (title to all county property is vested in the county's board of commissioners); *Seran v. Biddle*, 86 Ohio App. 1, 89 N.E.2d 669 (Stark County 1949) (syllabus, paragraph one) ("[a] conveyance of real estate by deed to a named county in Ohio is a conveyance to the board of county commissioners of such county and vests title in the commissioners for the use of the county"). Thus, regardless of which county office or entity customarily uses or occupies particular county property, ownership of county property is vested in the county's board of commissioners.[4]

We also note that a board of county commissioners holds county property as a public trust that the board may disburse only by clear authority of law. *Schwing v. McClure*, 120 Ohio St. 335, 342, 166 N.E. 230 (1929) ("[p]ublic officers intrusted with public funds or public property cannot give them away, nor can they pass title to public property except when acting within their strict powers. Property devoted to public use can only be disposed of by express authority"); *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 276, 119 N.E. 822 (1918) ("[f]inally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril; that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation"). *See State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) ("county commissioners, in their financial transactions, are invested only with limited powers, and … they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted").

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[4] An exception to this general rule is prescribed by R.C. 307.10(B), which expressly authorizes a board of county commissioners to transfer the fee simple interest in county property "not needed for public use" to various governmental entities, including a "county board of mental retardation and developmental disabilities, 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. The board shall execute a deed or other proper instrument when such a transfer is approved." *See generally* R.C. 5126.051(A) (stating, in part, "[a] county board [of mental retardation and developmental disabilities] 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 [of mental retardation and developmental disabilities] 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"). We have found no similar statute, however, that authorizes a board of county commissioners to transfer property to a county office of economic development.

Thus, in the disposition of county property, a board of county commissioners has only those powers clearly and distinctly granted to it by the General Assembly.

The authority of a board of county commissioners to dispose of the county's real property is prescribed primarily by R.C. 307.09 and R.C. 307.10.[5] 1999 Op. Att'y Gen. No. 99-016. As provided, in part, by R.C. 307.09(A): "If the interests of the county so require, the board of county commissioners *may sell* any real property belonging to the county and *not needed for public use*, including all or portions of buildings acquired by the board to house county offices, *or may lease or rent* the same." (Emphasis added.) Thus, pursuant to R.C. 307.09(A), a board of county commissioners may sell, lease, or rent county property that is not needed for public use, or, pursuant to R.C. 307.09(B),[6] may grant leases, rights, or easements to the entities

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[5] There are certain statutory exceptions to the provisions of R.C. 307.09 and R.C. 307.10. *See, e.g.*, R.C. 307.084 (authorizing a county to purchase or appropriate property and "donate it to the state, the department of rehabilitation and correction, or the United States bureau of prisons for the construction of a state correctional institution or a federal correctional facility or complex"); R.C. 307.091 (authorizing a board of county commissioners to "sell, lease, or transfer all or any part of the property and assets of a hospital or medical and health care facility or institution owned by the county to a medical school or college established and supported by this state"); R.C. 307.092 (authorizing a board of county commissioners to "sell, lease, or transfer any real property belonging to the county and not needed for public use to a nonprofit senior citizens' organization"); R.C. 307.82 (disposition of vacated park lands or parks at public auction).

[6] R.C. 307.09(B) provides options by which entities other than county entities may use county property, as follows:

> (B) *The board may grant leases, rights, and easements* to the United States government, to the state or any department or agency thereof, or to municipal corporations or other governmental subdivisions of the state for public purposes, or to privately owned electric light and power companies, or natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities services, or to *corporations not for profit for* hospital, charitable, water, sewer, or recreational purposes, including among other such purposes memorial structures, parks, golf courses, and underground structures, poles, piers, towers, wires, pipelines, underground cables, and manholes, *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. *Any such lease, right, or easement* granted to the United States government, to the state or any department or agency thereof, or to a municipal corporation or other governmental subdivision of the state, or to privately owned electric light and power companies, or natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities

specified therein, so long as such grants are not "inconsistent with the need of such land for public use by the county."

In carrying out its authority under R.C. 307.09, a board of county commissioners must comply with the requirements and limitations prescribed by R.C. 307.10, which states, in pertinent part:

> (A) *No sale of real property*, or lease of real property used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof, as provided by [R.C. 307.09] *shall be made unless it is authorized by a resolution adopted by a majority of the board of county commissioners*. When a *sale* of real property as provided by [R.C. 307.09] is authorized, the *board 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. The board may reject any and all bids. The board may, as it considers best, sell real property pursuant to this section as an entire tract or in parcels. The board, by resolution adopted by a majority of the board, may *lease* real property, in accordance with [R.C. 307.09(A)], *without advertising for bids*. (Emphasis added.)[7]

> services, or to corporations not for profit for hospital, charitable, water, sewer, or recreational purposes, *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*. (Emphasis added.)

The options described in R.C. 307.09(B) do not, however, include the sale of county property.

[7] R.C. 307.10(B) states:

> The board, by resolution, may transfer real property in fee simple belonging to the county and not needed for public use to the United States government, to the state or any department or agency thereof, to municipal corporations or other political subdivisions of the state, or to the *county board of mental retardation and developmental disabilities*, 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. The board shall execute a deed or other proper instrument when such a transfer is approved. (Emphasis added.)

See generally 1999 Op. Att'y Gen. No. 99-016 at 2-123 ("[t]he authority to transfer real property without competitive bidding under [R.C. 307.10(B)] does not extend to transfers to private entities, whether those entities are nonprofit or profit-seeking entities"). In addition, pursuant to

See 2004 Op. Att'y Gen. No. 2004-012 at 2-92 ("[a]ny 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").

You have stated that the board of county commissioners proposes to "deed" certain county property to its economic development office or to the nonprofit organization that operates that office, with the understanding that the transferee will then sell the property to a buyer previously selected by the board of county commissioners at a price that has been agreed to by the board of county commissioners and the buyer, *i.e.*, without competitive bidding or public auction, and then pay the proceeds of the sale to the board of county commissioners. We assume that your use of the term "deed" refers to the county commissioners' placing title to the county property in the name of either transferee. The county commissioners have not specified, however, the manner in which they propose transferring the title of the subject county property to either such transferee.

Let us first consider whether the county commissioners have the authority to simply transfer fee simple title to certain county property to the county's office of economic development. As stated above, absent a statutory exception, title to all county property is vested in the county's board of commissioners. In order for a board of county commissioners to transfer title to county property to a specific office of county government, the board must possess statutory authority to make such transfer. *See, e.g.*, R.C. 307.10(B) (in part, authorizing a board of county commissioners to transfer fee simple title in county property not needed for public use to, among others, "the county board of mental retardation and developmental disabilities"). We have found no statute, however, that authorizes a board of county commissioners to transfer fee simple title to county property to the county's office of economic development.[8] *Cf.* R.C.

R.C. 307.10(C), a board of county commissioners may grant leases, rights, or easements, without advertising for bids, to certain governmental entities or to certain privately owned utility companies "for purposes of rendering their several public utilities services."

[8] As mentioned in your opinion request, R.C. 307.07(B)(6) authorizes a county office of economic development, with the approval of the board of county commissioners, to "receive and accept grants, gifts, and contributions of money, property, labor, and other things of value, to be held, used, and applied only for the purpose for which they are made, from individuals, private and public corporations, the United States government or any agency thereof, from the state or any agency thereof, or from any political subdivision or any agency thereof, and may agree to repay any contribution of money or return any property contributed or the value thereof in amounts, and on terms and conditions, excluding the payment of interest, as the director determines, and may evidence the obligations by written evidence." Thus, included within the authority of a county office of economic development is the power to receive and accept a gift or contribution of property from a political subdivision, including a county. There is, however, no corresponding statutory authority that empowers a board of county commissioners to give property to its office of economic development.

1724.10 (in part, authorizing a board of county commissioners to empower a community improvement corporation to act as an agency of the county "for the industrial, commercial, distribution, and research development" of the county and to sell or lease county property not needed for county purposes for uses that will promote the welfare of the people of the county, stabilize the economy, provide employment, and assist in the development of industrial, commercial, distribution, and research activities to the benefit of the people of the county and that "will provide additional opportunities for their gainful employment" upon such terms as specified by the county commissioners).[9]

Although the General Assembly has also authorized a board of county commissioners to transfer fee simple title to county real property that is not needed for public use to certain specified entities, it has not authorized the transfer of the fee simple title to county property to the county's office of economic development or to a nonprofit organization that operates the county's office of economic development.[10] We must assume, therefore, that the General Assembly does not intend that a board of county commissioners have authority to transfer county property to the county office of economic development or to a nonprofit corporation that operates the county office of economic development. *See* 1935 Op. Att'y Gen. No. 4198, vol. I, p. 487 (syllabus, paragraph one) ("[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 conformed with"). *See generally Akron Transportation Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493 (1951) ("when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner"). Thus, we conclude that a board of county commissioners has no authority to transfer title to county property to the county's office of economic development or to a nonprofit corporation that operates the county office of economic development for the purpose of such transferee's selling the property, without competitive bidding or public auction, to a buyer previously selected by the county commissioners at a price previously agreed upon by the board and the buyer.

In considering a similar question concerning the authority of a board of county commissioners to transfer title to county property to a specific private nonprofit entity, 1999 Op. Att'y Gen. No. 99-016, concluded in the syllabus:

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[9] *See generally* 2003 Op. Att'y Gen. No. 2003-037 (syllabus, paragraph 2) ("[w]hen a county has designated a CIC [community improvement corporation] as its agency pursuant to R.C. 1724.10 and in accordance with Ohio Const. art. VIII, § 13, the CIC must comply with applicable provisions of R.C. Chapters 1702 and 1724 and with the terms of any agreement under R.C. 1724.10. In buying, selling, or leasing real or personal property or services, the CIC is not required to follow competitive bidding requirements or other restrictions that apply to a board of county commissioners but are not expressly made applicable to a CIC by statute or agreement").

[10] *See, e.g.*, note 5, *supra* (R.C. 307.084, R.C. 307.091, R.C. 307.092); R.C. 307.10(B).

> 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.

The 1999 opinion noted that, although the board of county commissioners wished to sell county property to a particular nonprofit county historical society, the requirements of R.C. 307.09 and R.C. 307.10 that call for county property to be sold only at public auction or to the highest responsible bidder could not guarantee that the property would necessarily be sold to the buyer of the county commissioners' choice.

In the alternative, the 1999 opinion suggested that the county commissioners could guarantee a particular use of property through the granting of leases, rights, or easements. Pursuant to R.C. 307.09(C), a board of county commissioners may grant such leases, rights, and easements "without advertising for bids." As explained by 1999 Op. Att'y Gen. No. 99-016 at 2-124 to 2-125:

> 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 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. None of these arrangements, however, would result in the conveyance of real estate to a private nonprofit county historical society, as you have proposed. (Footnotes omitted.)

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. 307.10(C).

As a final matter, 1999 Op. Att'y Gen. No. 99-016 also cautioned that:

> 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.

1999 Op. Att'y Gen. No. 99-016 at 2-125 n.6. *See generally* Ohio Const. art. VIII, § 13 (permitting public aid to private enterprise for purposes of creating or preserving employment opportunities or improving the economic welfare of the people of Ohio).

Thus, although a board of county commissioners is without authority to transfer title to county property, without competitive bidding or public auction, to the county office of economic development or to the nonprofit corporation that operates that office in order that such transferee sell such property to a buyer selected by the county commissioners, the board may wish to consider whether it may achieve the intended use of the property by granting the proposed buyer a lease, easement, or right to use the county property, as described in 1999 Op. Att'y Gen. No. 99-016. *See, e.g.*, 1971 Op. Att'y Gen. No. 71-070 (syllabus, paragraph three) ("[a] board of county commissioners may, under [R.C. 307.09] lease such appropriated property for a period of 40 years to a private non-profit corporation, which will construct and operate a mental health facility thereon, provided such lease is not inconsistent with the need of such land for public use by the county itself").

Based upon the foregoing, it is my opinion, and you are hereby advised that a board of county commissioners has no authority to transfer title to county property to its office of economic development or to a nonprofit corporation operating that office for the purpose of the transferee's selling the property, without competitive bidding or public auction, to a buyer previously selected by the county commissioners at a price agreed upon by the buyer and the county commissioners, even if the transferee remits to the county commissioners the purchase price paid by the buyer.

Respectfully,

JIM PETRO
Attorney General