

**OPINION NO. 81-106****Syllabus:**

A county children services board may directly sell surplus real property, which it owns and for which it has no use, if the board reasonably determines that such sale is in the public interest. A county children services board may conduct the sale in such manner as it determines to be appropriate.

**To: Michael G. Spahr, Washington County Pros. Atty., Marietta, Ohio**  
**By: William J. Brown, Attorney General, December 23, 1981**

I have before me your request for my opinion on two questions concerning the Washington County Children Services Board. First, does the Washington County Children Services Board have authority to sell real estate, which it acquired by devise and which it does not need for public purposes, or must the county commissioners make the sale? Second, if the board may sell such property, is it required to do so in some specific manner, such as auction, competitive bidding, or direct private sale?

County children services boards are provided for in R.C. Chapter 5153. Your letter states that the board in your county is operated separately from the county welfare department. Such a board is vested with all the powers and duties set out in R.C. 5153.01 to 5153.42. R.C. 5153.03, .04, .07.

It is long settled that a board created pursuant to statute, such as a county children services board, has only those powers expressly granted, or necessarily incident to the performance of its duties. State ex rel. A. Bentley & Sons Co. v. Pierce, 96 Ohio St. 44, 117 N.E. 6 (1917). R.C. 5153.30 provides that a board may accept bequests, donations, and gifts of property as follows:

The county children services board or county department of welfare may accept and receive bequests, donations, and gifts of funds or property, real or personal, for child care and services. The facilities or services to be established or maintained through any such gift shall be subject to the approval of the department of public welfare. (Emphasis added.)

It is my understanding that, pursuant to this section, the Washington County Board accepted and received a bequest of a fee simple interest, not encumbered by an express trust or other condition, in certain real property in that county. Thereafter, the Board determined that the property was not needed for its purposes, and that it was in the public interest that it be sold. The question remains as to who has the authority to sell or otherwise alienate the property.

I have found no provision of R.C. 5153.01 to 5153.42 which expressly confers this authority upon a children services board. Nor am I aware of any other section of the Revised Code which directly addresses your questions. There remains, however, the possibility that such authority might be implied as necessarily incident to some express power of the board.

The concept of an implied power to alienate real property being vested in a subdivision of the state has been addressed by the courts. In Reynolds v. Commissioners of Stark County, 5 Ohio 204 (1831), the court adopted the concept that the power to hold an interest in land includes, and implies, a power to alienate that interest. The court upheld a lease of land owned by a board of county commissioners, as a body corporate, to a private party through a corporate-capacity-to-contract analysis:

A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time. Co. Lit. 44, 300, 306; Sid. 162; Com. Dig., title Franchise; 1 Ves. & Beame, 226. Indeed, so necessarily incidental is this power, that it has been holden (10 Rep. 1), that a corporation can not be created possessing the power of holding without the power of disposing. . . .

Id. at 205-06 (emphasis added). The General Assembly confirmed this authority as to counties thereafter in 54 Ohio Laws 32 (eff. May 1, 1857). The modern expression of this power is at R.C. 307.09.

The Reynolds reasoning has been extended by cases like Minimax Gas Co. v. State ex rel. McCurdy, 33 Ohio App. 501, 170 N.E. 33 (Scioto County 1929), to include situations where the "public's best interest" will trigger a governmental unit's implied power to alienate land. In 1980 Op. Att'y Gen. No. 80-028 at 2-116, I wrote:

Both Reynolds and Minimax make it clear that the power to take title to and hold land implies the power to alienate such land if in the public's best interest, and if the land is not currently needed for public uses. As my predecessor stated in 1924 Op. Att'y Gen. No. 1250, p. 110, 112, it would be "inconsistent with the holding of land for public benefit if it were permitted to lie idle when proper business management would require the same to produce an income for the public use." In accordance with the foregoing, opinions of the Attorney General have concluded that, absent statutes delineating and/or limiting the power, public bodies have the implied power to alienate land not needed for public purposes. See 1974 Op. Att'y Gen. No. 74-020 (joint township district hospital board has implied authority to sell land); . . . . (Emphasis added; footnote omitted.)

Thus, the power in a public entity to obtain and hold real property carries with it an implied power of alienation. The questions which a public entity must affirmatively answer before it disposes of its property are whether the property is not currently needed for public use, and whether it serves the public interest to alienate it.

Your request notes that, in the past, predecessors in this office have concluded that, when a board cannot properly acquire real property, if such property is in fact acquired by it, it must transfer such property to the county commissioners. Of course, once real property is held by the county commissioners, it may then be sold under R.C. 307.09. For example, in 1967 Op. Att'y Gen. No. 67-109, the first syllabus states that "[r]eal property acquired by a county child welfare [now 'children services'] board without authority at law and in contravention to [1946 Op. Att'y Gen.] No. 1168. . . and [1960 Op. Att'y Gen.] No. 1464. . . must be transferred to the board of county commissioners." This opinion noted, however, that real property obtained under authority of R.C. 5153.30 was not being considered. Op. No. 67-109 at 2-173. As the property which is the subject of your request has been lawfully acquired under authority of R.C. 5153.30, there would not be a mandatory requirement to make such a "transfer"; rather the board might choose to do so preliminary to its sale.

I am of the belief that such a procedure, where a board holds real property under authority of express statute and transfers it to a board of county commissioners for subsequent sale under R.C. 307.09, is an unnecessarily convoluted course of action to follow, not required by law. It is assumed in the procedure outlined above that the board has an implied power to transfer the property. I am aware of no basis to limit this power of alienation so as to permit a transfer solely to another governmental entity. Further, I know of no reason to

prefer the county commissioners over, for example, the department of public welfare. R.C. 5153.30 (approval of department of public welfare needed as to "facilities or services to be established or maintained" with property received by the board under this section). Absent an express limitation on the entity to which a board's R.C. 5153.30 property might be alienated, I am aware of no reason to hold that the board could not make an alienation of real property directly to any purchasers, public or private. Accordingly, I conclude that while a county children services board may choose to transfer real property to the board of county commissioners for subsequent sale, there is no requirement to do so.

Other opinions dealing with the authority of a county children services board to acquire or dispose of real property include 1960 Op. Att'y Gen. No. 1464, p. 408 at 410 ("county child welfare boards are not empowered [by R.C. 5153.34] to purchase real property"), 1953 Op. Att'y Gen. No. 2393, p. 82 at 90 (in order to sell real property received by gift but encumbered by an express charitable trust for the benefit of the "county children's home," the "county authorities [here the director of the county welfare department 'with the advice and consent of the county commissioners'] should make application to the court [of equity] for instructions, and act in pursuance of the same"), and 1946 Op. Att'y Gen. No. 1168, p. 628 at 630 (former G.C. 3070-35, now R.C. 5153.34, is "not intended to empower child welfare boards to purchase real estate"). As these opinions do not address the disposition of real property properly acquired under R.C. 5153.30, which property is free of an express charitable trust, I find that they are not relevant to the disposition of your questions and will not consider them further.

In specific answer to your first question, I conclude that real property properly held by a county children services board, if not currently needed for public use, may be alienated under implied authority contained within the express power to accept and hold that property under R.C. 5153.30, if the board reasonably determines that such alienation is in the public interest.

In considering your second question, I find that the response is latent in the analysis of the first. As noted above, there simply is not an express statutory provision conferring upon a county children services board the authority to alienate real property. Rather, I have found that the power is necessarily incident to the power to possess that property conferred by R.C. 5153.30. As there is no express provision for alienation, there is no limitation to a particular method of sale in exercising that power. See 1974 Op. Att'y Gen. No. 74-020 ("joint township district hospital board has implied authority to sell at public auction land not needed for hospital purposes"); 1972 Op. Att'y Gen. No. 72-051 at 2-198 (absent an express limitation upon a county library district board in the disposal of surplus property, the district board "has broad discretion in determining how and when it can sell its real property").

In specific answer to your question, I conclude that a county children services board has broad discretion in determining the manner of sale of surplus real property and is not limited to any particular form of sale.

Therefore, it is my opinion, and you are hereby advised, that a county children services board may directly sell surplus real property, which it owns and for which it has no use, if the board reasonably determines that the sale is in the public interest. A county children services board may conduct such sale in such manner as it determines to be appropriate.