OPINION NO. 2009-040

Syllabus:

2009-040

A board of county commissioners does not have express or implied statutory authority to construct an employee fitness center for county employees.

To: Dave Yost, Delaware County Prosecuting Attorney, Delaware, Ohio

December 2009

By: Richard Cordray, Ohio Attorney General, October 14, 2009

You have requested an opinion whether a board of county commissioners has statutory authority to construct an employee fitness center. You inform us that, "[a]ccording to public comments, this employee fitness center is a proper public purpose because [it] will promote health, fitness and wellness among the county employees who choose to use it, thereby indirectly saving county [health] care costs and lost productivity due to illness." You direct us to R.C. 307.02 and the canon of statutory construction known as *ejusdem generis*. For the reasons that follow, we conclude that a board of county commissioners is without authority to use county funds to construct an employee fitness center.

Authority of the Board of County Commissioners

We begin with a brief review of the powers of county officers and specifically those persons holding the office of county commissioner, as created in R.C. 305.01. It is well established that a board of county commissioners is a creature of statute that may exercise only those powers conferred upon it expressly by statute or as may be implied by necessity in order to facilitate the exercise of another express power. *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 1986 Op. Att'y Gen. No. 86-083. *See also Elder v. Smith*, 103 Ohio St. 369, 370, 133 N.E. 791 (1921) (a "board of county commissioners has such powers and jurisdiction, and only such, as are conferred by statute"); *Schultz v. Erie County Metro. Park Dist. Bd.*, 26 Ohio Misc. 68, 269 N.E.2d 72 (C.P. Erie County 1971).

The court in *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916), explained the limited authority vested in boards of county commissioners with respect to the expenditure of county funds, as follows:

> The legal principle is settled in this state that county commissioners, in their financial transactions, are invested only with limited powers, and that 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, 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 State ex rel. Smith v. Maharry, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) ("[a]ll public property and public moneys . . . constitute a public trust fund . . . . Said trust fund can be disbursed only by clear authority of law").

Thus, in order for a board of county commissioners to use county funds to construct a fitness center for county employees it must have a clear grant of statutory authority to expend such funds. *See generally, e.g.*, 1988 Op Att'y Gen. No. 88-058 at 2-292 ("[t]he relevant inquiry with respect to each expenditure [by a board of county commissioners] is whether it comes within the statutory grant of authority and serves a public purpose").

Statutory Powers of County Commissioners

We begin by examining R.C. 307.01, which requires a board of county

commissioners to provide "[a] courthouse, jail, public comfort station, offices for county officers, and a county home" "when, in its judgment, any of them are needed." R.C. 307.01(A). The General Assembly has also granted boards of county commissioners authority to provide the following types of county facilities:

> a courthouse, county offices, jail, county home, juvenile court building, detention facility, public market houses, retail store rooms and offices, if located in a building acquired to house county offices, for which store rooms or offices the board of county commissioners may establish and collect rents or enter into leases as provided in [R.C. 307.09], county children's home, community mental health facility, community mental retardation or developmental disability facility, facilities for senior citizens, alcohol treatment and control center, other necessary buildings, public stadiums, public auditorium, exhibition hall, zoological park, public library buildings, golf courses, and off-street parking facilities determined by the board of county commissioners to be so situated as to be useful for any of such purposes or any combination of such purposes.

R.C. 307.02. An employee fitness center is not expressly included as one of the facilities a board of county commissioners may provide under R.C. 307.01 or R.C. 307.02.

Implied Statutory Authority and Application of the Canon *Ejusdem Generis*

We turn now to an examination of whether there exists implied statutory authority for a board of county commissioners to construct an employee fitness center. The facilities listed in R.C. 307.02 include "other necessary buildings," and you suggest the canon of *ejusdem generis* may be applied to interpret the scope of that phrase. *Ejusdem generis* is a "canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." *Black's Law Dictionary* 594 (9th ed. 2009). The principle of *ejusdem generis* is well established and is discussed by the Ohio Supreme Court in *Glidden Co. v. Glander*, 151 Ohio St. 344, 350, 86 N.E.2d 1 (1949) (quoting 37 Ohio Jurisprudence 779, Section 450 (1934)), as follows:

> In accordance with what is commonly known as the rule of *ejusdem generis*, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be construed as restricted by the particular designation and as including only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose. An explanation which has been given for the principle is that if the legislature had meant the general words to be applied without restriction it would have used only one compendious term. In accordance with the rule of *ejusdem generis*, such terms as "other,"

> "other thing," "others," or "any other," when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described.

See also State v. Aspell, 10 Ohio St. 2d 1, 4, 225 N.E.2d 226 (1967) (the legal maxim *ejusdem generis* signifies that "where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features and characteristics, and then afterwards a term is conjoined having perhaps a broader signification, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms"). Application of the principle of *ejusdem generis* requires an evaluation of the terms specifically listed to determine their "well-known and definite features and characteristics"; a determination then can be made as to whether some unlisted item is encompassed by the general word or phrase following the list of specifics.

In applying the rule of *ejusdem generis* to R.C. 307.02, we first must consider the specific features and characteristics of those facilities listed in that statute, and then determine whether an employee fitness center reasonably is within the legislative intent that underlies the general phrase "other necessary buildings," R.C. 307.02. The portion of the list preceding the general phrase "other necessary buildings" includes a courthouse, county offices, a jail, a county home, a juvenile court building, a detention facility, public market houses, retail rooms and offices, a county children's home, a community mental health facility, a community mental retardation or developmental disability facility, facilities for senior citizens, and an alcohol treatment and control center. The most obvious characteristic that is common to these several facilities is their devotion to use by the general public. Each facility listed is intended to serve the public or a particular sector of the public in some way. It is apparent, however, that a fitness center specifically constructed for the exclusive use of county employees does not constitute a facility for public use in the same way as a courthouse, jail, or senior citizens center. Consequently, the rule of statutory interpretation, *ejusdem generis*, compels us to conclude that a fitness center for county employees does not fall within the purview of "other necessary buildings," as that term is used in R.C. 307.02. The board of county commissioners may, of course, seek to have R.C. 307.02 amended to include an employee fitness center. *See, e.g.*, 1983-1984 Ohio Laws, Part II, 4373, 4386 (Am. H.B. 660, eff. July 26, 1984) (adding to R.C. 307.02 "facilities for senior citizens"); 1981-1982 Ohio Laws, Part I, 1176, 1199 (Am. Sub. S.B. 550, eff., in pertinent part, Nov. 26, 1982) (adding to R.C. 307.02 "golf courses").

Provision of Fringe Benefits to County Employees

As a final consideration, we look briefly at the law regarding compensation of county employees. Because the proposed fitness center is meant to be used by county employees, we consider whether such fitness center may be provided to county employees as a fringe benefit.

We begin with the fundamental principle that "the authority to provide fringe benefits flows directly from the authority to set compensation." 1981 Op.

Att'y Gen. No. 81-052 at 2-202 (citing to *Ebert v. Stark County Bd. of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980) (per curiam) (the power to employ and compensate includes the power to fix any fringe benefits, absent constricting statutory authority) and *State ex rel. Parsons v. Ferguson*, 46 Ohio St. 2d 389, 348 N.E.2d 692 (1976) (fringe benefits, though not strictly part of salary, are part of compensation)). A board of county commissioners has statutory authority to set compensation for only a limited number of county employees, and thus may provide fringe benefits to only that limited group of county employees. *See generally* 1987 Op. Att'y Gen. No. 87-029 at 2-208 (there is no authority for a board of county commissioners to institute sick leave policies on a countywide basis because the board's authority to set compensation, including the provision of fringe benefits, is limited to those instances in which the board of county commissioners is the appointing authority); 1987 Op. Att'y Gen. No. 87-018 at 2-123 (''it is the appointing authority, pursuant to his power to fix his employees' compensation, who is authorized to determine the fringe benefits, in addition to those prescribed by statute, which his employees will receive'').[1] This means that a board of county commissioners has no authority to construct a fitness center and make that fitness center available to all county employees generally as a fringe benefit of their compensation.

Conclusion

In sum, it is my opinion, and you are hereby advised that a board of county commissioners does not have express or implied statutory authority to construct an employee fitness center for county employees.

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[1] Your letter of request mentions the possibility that construction of the proposed fitness center may serve a proper public purpose and would thereby conform to the limitation that public funds may be expended only for a public purpose. *State ex rel. McClure v. Hagerman*, 155 Ohio St. 320, 98 N.E.2d 835 (1951). The county commissioners' lack of statutory authority to make the expenditure you propose makes it unnecessary, however, to consider whether such an expenditure would serve a public purpose.