

Note from the Attorney General's Office:

1966 Op. Att'y Gen. No. 66-117 was modified by
1979 Op. Att'y Gen. No. 79-034.

1966 Op. Att'y Gen. No. 66-117 was questioned by
1987 Op. Att'y Gen. No. 87-069.

OPINION NO. 66-117**Syllabus:**

1. Section 307.02, Revised Code, authorizes a board of county commissioners to enter into a contract providing for the construction and lease of a building and related parking facilities for the county welfare department by other than a lease-purchase agreement. This section specifically authorizes the board to "lease" or "lease with option to purchase" such a building.
2. If other than a lease-purchase plan is employed, the requirements of Section 307.02, Revised Code, regarding filing of information, publication of notice, submission of bids, and certification do not apply as the portion of the section including such requirements applies only to a lease-purchase plan.
3. The requirements of Section 5705.41 (D), Revised Code, regarding certification of sufficient funds for a "continuing contract" apply if other than a lease-purchase plan is employed, since a lease for years is a "continuing contract" as used in this section.

To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio
By: William B. Saxbe, Attorney General, July 11, 1966

Your request for my opinion stated the following questions:

"May a Board of County Commissioners, pursuant to Section 307.02 of the Revised Code of Ohio enter into a contract providing for the construction of a building and related parking facilities for a County Department of Welfare and lease thereof from a private individual other than under a lease-purchase plan as provided for in the amendment of said Section 307.02 effective October 13, 1965?"

"If the answer to the above question is in the affirmative:

"(a) Are the filings required by Section 307.02 (A), (B), (C), (D) and (E) necessary?"

"(b) Is the statutory publication of notice, and submission and canvass for bids necessary?"

"(c) What statutory certifications, if any, are required?"

The answers to your questions require a study of Section 307.02, Revised Code, which provides in part:

"The board of county commissioners of any county, in addition to its other powers, may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse, county offices, jail, county home, juvenile court building, detention home, public market houses, county children's home, and other necessary buildings, * * * and related parking facilities, * * *

* * * * *

"The board of county commissioners of any county may lease for a period not to exceed forty years, pursuant to a contract providing for the construction thereof under a lease-purchase plan, those buildings, structures, and other improvements hereinbefore enumerated. Such lease shall provide that at the end of the lease period such buildings, structures, and related improvements together with the land on which they are situated shall become the property of the county without cost.

"Whenever any building, structure or other improvements is to be so leased by a county, the board of county commissioners shall file with the county engineer the following plans, details, bills of materials, and specifications:

"(A) Full and accurate plans, suitable for the use of mechanics and other builders in such construction, improvement, addition, alteration, or installation;

"(B) Details to scale and full sized, so drawn and represented as to be easily understood;

"(C) Accurate bills showing the exact quantity of different kinds of material necessary to the construction;

"(D) Definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needed information;

"(E) A full and accurate estimate of each item of expense and of the aggregate cost thereof.

"The board of county commissioners shall give public notice, in such newspaper and in such form and with such phraseology as the board of county commissioners orders, published once each week for four consecutive weeks, of the time and place, when and where bids will be received for entering into an agreement, to lease to the county a building, structure, or other improvement, * * *

* * * * *

"* * * No such lease agreement shall be entered into until the industrial commission has certified that the corporation, partnership, or person to be awarded the lease agreement has complied with sections 4123.01 to 4123.94, inclusive, of the Revised Code, and until, if the builder submitting the lowest and best bid is a foreign corporation, the secretary of state has certified that such corporation is authorized to do business in this state, * * * and until the agreement is submitted to the county prosecutor and his approval certified thereon. * * *"

(Emphasis added)

From a reading of the entire section, it is apparent that there are three possible leases a board of county commissioners may enter into for buildings for any of several enumerated purposes. These are "lease," "lease with option to purchase," and "lease-purchase" agreement.

Under Section 329.01, Revised Code, each county is to have a department of welfare. Therefore, it would seem that a building which is needed for use by a county department of welfare would fall under the category of "other necessary building," and thus may be acquired by any of the means permitted by Section 307.02, supra.

Consideration should be given to Opinion No. 1062, Opinions of the Attorney General for 1939 at page 1499 where it was said:

"Under the statute above quoted /Section 2433, General Code, now Section 307.02, Revised Code/ it is apparent that the board of county commissioners not only has the power to purchase but to 'lease' or to 'lease with an option to purchase' county offices and 'other necessary building' and sites therefor. * * *

"* * * the statute grants to boards of county commissioners express authority to lease property for an intended purpose * * *"

Thus, under both the statutory provision existing before the enactment of the 1965 amendment and under the present statute, the board of county commissioners may lease or may lease with an option to purchase a building and related parking facilities for any use permitted by the statute.

It should be noted that originally, the statutory section in question did not specifically permit a "lease-purchase" agreement. In 1957 (127 Ohio Laws 392, 393) such language was added to the first paragraph to permit a "lease-purchase" which is in essence a purchase on an installment plan, thus authorizing the county to acquire necessary buildings without the necessity of the usual bond issue to raise the needed funds, and without requiring entering into a contract for the construction of such buildings. Opinion No. 451, Opinions of the Attorney General for 1959, at page 225.

The 1959 Opinion, supra, states that Section 307.02, as it

existed in that year, included no "specifications or restrictions as guides for procedure" concerning the "lease-purchase" agreement (Opinion No. 451, *supra*, page 224.) Any procedural requirements were apparently intended by the Legislature to be "left to the sound discretion of the county commissioners to make such stipulations in the contract as will secure the desired result and protect the interests of the county" (Opinion No. 451, *supra*, page 224.) It seems that the same statements might have been made concerning the other two types of leases permitted by Section 307.02, *supra*, that there were (1959) no specific requirements concerning the procedure to be followed in entering such lease, at least as far as advertisement and bidding were concerned.

The 1965 amendment to Section 307.02, however, has added ten paragraphs concerning procedural matters to the existing statute (131 v. H 492, Section 1). These paragraphs, I believe, refer specifically only to the acquisition of a building pursuant to a contract providing for the construction or the building under a "lease-purchase plan". After explaining the nature of a lease-purchase agreement, the new language directs 1) that certain information be filed with the county engineer, 2) that notice be published concerning bidding, 3) that bids be submitted, and 4) that the successful bidder be certified by the Industrial Commission, the Secretary of State, and the county prosecutor.

The terms "lease-purchase arrangement," "lease-purchase plan," "lease agreement," and "agreement to lease," as used throughout the new language, appear to have been used interchangeably. Nowhere within the last ten paragraphs is any mention made of a "lease" or a "lease with option to purchase." It seems logical that the Legislature intended to provide procedural requirements for the lease-purchase agreement, a purchase on an installment plan, similar to those procedures required for an outright purchase or the erection of a building. Such procedures are not necessarily important when the lease is for a period of years only, or even with a possibility of later purchase at the county's option. It would seem that if the Legislature intended these ten paragraphs to apply to other than a lease-purchase plan, it would have so indicated somewhere within these paragraphs.

Thus the requirements in Section 307.02, *supra*, concerning filing of information (paragraphs (A)-(E)), advertising, bidding, and certification, therefore apply only when a lease-purchase plan is employed. You have asked, however, in part (c) of your question, if any certifications are required when other than a lease-purchase plan is employed.

Your attention is directed to Subsection (D) of Section 5705.41, Revised Code, which provides in part:

"No subdivision or taxing unit shall:

"* * * * *

"(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing con-

tract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * *

(Emphasis added)

Opinion No. 1604, Opinions of the Attorney General for 1958, at page 27, states that a lease for years is "obviously" a "continuing contract" as provided for in Section 5705.41, supra, whereas a lease agreement coupled with a firm contract to purchase would not be. Thus this certification would be required for a lease for years by the county.

It should be noted that the certification requirements of Section 153.44, Revised Code, apply only to contracts falling within the scope of Chapter 153, supra, which deals with the construction, alteration, addition, or repair of a building by the county. Opinion No. 3743, Opinions of the Attorney General for 1954, page 212.

Therefore, in answer to your specific questions, it is my opinion that Section 307.02, Revised Code, authorizes a board of county commissioners to enter into a contract providing for the construction and lease of a building and related parking facilities for the county department of welfare by other than a "lease-purchase agreement." Section 307.02, supra, specifically authorizes the board to "lease" or "lease with option to purchase" such a building.

Thus if other than a lease-purchase plan is employed: (a) the requirements of Section 307.02, paragraphs (A)-(E), supra, regarding filings, do not apply; (b) the requirements of Section 307.02, supra, regarding publication of notice and submission of bids, do not apply; and (c) while the requirements of Section 307.02, supra, and Chapter 153, supra, regarding certifications do not apply, the requirements of Section 5705.41, supra, regarding certification of the existence of sufficient funds for a "continuing contract" do apply and must be complied with before such lease will be considered valid.