OPINION 65-107

Syllabus:

1. A municipality may enter into an agreement whereby vending machines are placed in municipally owned buildings on such terms and for such consideration as is deemed commensurate with the privilege granted, so long as such installation does not interfere with the intended public use of the building involved.

2. A board of county commissioners may, in the exercise of its sound discretion and in good faith, enter into similar agreements pursuant to the provisions of Section 307.01, Revised Code.

3. Proceeds derived from the installation of vending machines in municipally owned buildings, whether such municipality be a charter or non-charter municipality, shall be deposited in the general fund of the particular municipality unless otherwise provided by the legislative body thereof, consistent with the general laws, and such funds shall be disbursed as such body determines.

4. Proceeds derived from the installation of vending machines in county buildings shall be deposited in the general fund of the particular county.

5. Neither municipal nor county officers or employees may, in good faith and consistent with their position, install or receive proceeds received from the operation of vending machines in public buildings.

To: Chester W. Goble, Auditor of State, Columbus, Ohio
By: William B. Saxbe, Attorney General, June 25, 1965

You have requested my opinion on the subject of vending machines being placed in municipal and county buildings. It was stated in your letter of request that often the revenue resulting from the use of vending machines accrues to private individuals or corporations instead of being used for public purposes. Because of the lack of specific laws in this area, you requested my opinion as to the authority for placing vending machines in municipal and county buildings and on the question of what should be done with the revenue resulting from the operation of such machines.

It has long been held that public buildings are impressed with a public trust and cannot be used for private purposes and that a municipality has no proprietary rights

in such public buildings distinct from the trust for the public. Meriwether v. Garrett, 102 U. S. 472 (1880). It has also been held, however, that when the public use of property is not impaired by leasing a portion thereof, or by leasing for a limited period of time only, and such property is not needed for municipal or public purposes, such leasing is included within the powers of local self-government conferred by Article XVIII of the Ohio Constitution. Babin v. Ashland, 160 Ohio St., 328 (1953); Hugger v. City of Ironton, 83 Ohio App., 21 (1947); Minamax Gas Co. v. State, 33 Ohio App., 501 (1929).

And In re Carney v. Ohio Turnpike Commission, 167 Ohio St., 273 (1957), it was held that private corporations may legally rent or lease from the state land to be used for plaza service areas along the Ohio turnpike and derive profit from such operation on the basis that such operation is incidental and does not change the controlling fact that the project is owned by the public and is essentially devoted to an exclusive public use.

While I find no Ohio cases directly in point with your question on vending machines, other jurisdictions have recognized that the maintenance of a vending stand in a publicly owned building from which may be purchased soft drinks, tobacco, candy, and similar items is not an unreasonable use of public property if such stand does not interfere with the intended public purpose of the building and does not divert a material part of the premises otherwise needed for public purposes. Dodson v. Marshall, 118 S.W. 2d., 261 (1938). It should also be noted that Section 5109.11, Revised Code, provides for the operation of vending stands in public buildings for the sale of newspapers, periodicals, confections, tobacco products, and related articles when such stands are operated by the blind.

By its very nature a vending machine does not constitute a vending stand. A vending machine does not require the continued presence of individuals for its functions to be performed and may be most appropriate where a vending stand may require too much space or otherwise be undesirable. A vending machine usually diverts no material part of the premises upon which it is installed, and it would seem that the installation of a vending machine in a public building would be more in the nature of a convenience complementing the intended public use of such public building rather than an additional or separate use for private purposes.

Furthermore, there appears to be nothing in the inherent nature of a vending machine which would make the installation thereof in a public building inappropriate per se.

Prior to the adoption in 1912 of Article XVIII of the Ohio Constitution, commonly referred to as the home rule amendment, municipalities were held strictly to the provisions of Chapter 721, Revised Code, relating to the sale or lease of property owned by the municipality. However, Section 3, Article XVIII, Ohio Constitution,

now provides as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

This provision has been the subject of much controversy and discussion, but it has been generally agreed that by its terms municipalities are free to deal with their local affairs as they deem proper, provided that the"local police, sanitary and other similar regulations" do not conflict with the "general laws" of the state. State ex rel. Arey v. Sherrill, 142 Ohio St., 574 (1944).

It has further been held that the authority to exercise powers of local self-government has application to every city and village regardless of whether or not it has adopted a charter form of government. State ex rel. Arey v. Sherrill, supra. This means that the responsibility of purely local affairs and the authority to deal therewith is vested in the municipalities to the exclusion, when exercised, of the power of the state to legislate on the subject regardless of whether or not a charter has been adopted under Section 7, Article XVIII, Ohio Constitution, and subject to the proviso that "police, sanitary, and similar regulations" are not in conflict with the "general laws." Toledo v. State, 151 Ohio App., 329 (1935).

Your attention is directed to Opinion No. 787, Opinions of the Attorney General for 1957, page 290, where it was stated as follows:

> "A municipality which has not adopted a charter limiting its powers by adopting the provisions of the statutes relative to the sale of its property, has authority under the power of home rule provided by Section 3 of Article XVIII of the Constitution, acting in good faith, to dispose of property belonging to it in such manner and for such consideration as it deems proper, without compliance with any of the provisions of Chapter 721, of the Revised Code."

It is my opinion that the above may be extended to the leasing of space for the operation of a vending machine.

Of course, if a charter municipality, by a charter provision, specifically adopts Chapter 721, Revised Code, such municipality is then bound by the provisions of that

chapter. A non-charter municipality need follow the provisions of Chapter 721, Revised Code, only if it has not made its own specific provisions by ordinance.

There is no reason to believe that a vending machine would be any less appropriate in a county building than in a municipal building simply because different governmental units are involved. Bearing in mind that county officers and boards of county commissioners have only such powers as are expressly granted by law and such implied powers as may be necessary to carry into operation the powers which are expressly granted, the question here becomes one of statutory interpretation.

Section 307.01, Revised Code, provides in pertinent part as follows:

> "* * *The board [of county commissioners] shall also provide equipment, stationary, and postage, as it deems necessary for the proper and convenient conduct of county offices, and such facilities as will result in expeditious and economical administration of such offices. * * *"

In In re Common Pleas Court of Marion County v. County of Marion, 162 Ohio St., 345, (1954) it was held that it is within the discretion of the board of county commissioners to provide facilities which it deems necessary and which will result in the expeditious and economical administration of county offices.

The above discussion concerning the appropriateness of vending machines in municipally owned buildings applies equally well to the case where county owned buildings are involved, and decisions regarding installations lie within the sound discretion of the board of county commissioners.

With regard to the revenue resulting from the operation of vending machines in municipal buildings, your attention is directed to Section 731.47, Revised Code, which provides as follows:

> "The legislative authority shall have the management and control of the finances and property of the municipal corporation except as otherwise provided."

This section permits municipal corporations to manage their own financial affairs subject to the provisions of Section 13, Article XVIII, Ohio Constitution, which authorizes the General Assembly to restrict and limit, by the enactment of general laws, the power of municipal corporations to incur indebtedness.

Section 733.46, Revised Code, provides as follows:

> "The treasurer of a municipal corporation shall receive and disburse all funds of the municipal corporation and such other funds as arise in or belong to any department or part of the municipal corporation."

Reading Sections 731.47 and 733.46, supra, together it seems clear that the municipal legislative body has authority to provide what shall be done with such revenues and profits as may arise from vending machines. Furthermore, the treasurer of the municipal corporation shall be responsible for receiving such funds and the subsequent dispursal of them as determined by the local legislative body.

County treasurers are charged with the collection of the public moneys belonging to their respective counties and with the disbursement of such funds as prescribed by law. State v. Meyers, 56 Ohio St., 347 (1897); State v. Ellet, 47 Ohio St., 90 (1890).

There appears to be no reason why the proceeds or the profits realized from the operation of such machines should not be considered to be public moneys. It has been determined that moneys received from any source whatsoever by a library clerk of a municipal library district are public funds or moneys within the meaning of the Uniform Depository Act. Opinion No. 995, Opinions of the Attorney General for 1937. I am of the opinion that proceeds or the profits realized from the operation of such machines are public moneys.

Opinion No. 1285, Opinions of the Attorney General for 1964, mentioned in your letter of request, concerned the proceeds derived from the operation of vending machines installed by a board of education under authority of Section 3313.811, Revised Code. That section provides for a specific fund into which such proceeds are to be deposited. I find no statutory authority for such similar fund in this case. Accordingly, the most appropriate place for the proceeds here involved is the county general fund.

Section 741.09, Revised Code, sets forth the sources from which moneys are to be derived for deposit in the Firemen's Relief and Pension Fund and Section 741.40, Revised Code, sets forth similar provisions for the Police Relief and Pension Fund. Inasmuch as those sections specifically provide from what source those funds are to be created, and inasmuch as the proceeds from vending machines is not one of the sources included therein, it would not be appropriate to deposit such proceeds in the relief and pension funds

It has been long established that those who occupy

public office, whether they be elected or appointed, or municipal, county, or state officials, hold a position of public trust and are not permitted to derive any personal or pecuniary advantage or interest by virtue of such position. Accordingly, it has been held that it is contrary to good morals and public policy to permit a municipal officer to enter into contractual relations with the municipality. Halliday v. Norfolk & W. R. Co., 44 Ohio Law Abs., 208 (1945) It follows, therefore, that it would not be appropriate for an officer or an employee of a municipality or a county to enter into a lease agreement or other arrangement with the municipality or county with respect to the installation of vending machines

I am of the opinion that a municipality may enter into an agreement whereby vending machines are placed in municipally owned buildings on such terms and for such consideration as is deemed commensurate with the privilege granted, so long as such installation does not interfere with the intended public use of the building involved.

It is also my opinion that a board of county commissioners may, in the exercise of its sound discretion and in good faith, enter into similar agreements pursuant to the provisions of Section 307.01, Revised Code.

The proceeds derived from the installation of vending machines in municipally owned buildings, whether such municipality be a charter or non-charter municipality, shall be deposited in the general fund of the particular municipality unless otherwise provided by the legislative body thereof, consistent with the general laws, and such funds shall be disbursed as such body determines.

The proceeds derived from the installation of vending machines in county buildings shall be deposited in the general fund of the particular county.

Furthermore, I am of the opinion that neither municipal nor county officers or employees may, in good faith and consistent with their position, install or receive proceeds received from the operation of vending machines in public buildings.