

OPINION NO. 84-038

Syllabus:

Pursuant to R.C. 307.85(A), a board of county commissioners may contract with an agency or department of the federal government in order to participate in a flood control program established and operated under 33 U.S.C. §701s, provided that such contract does not require a county to perform acts in conflict with state law. (1956 Op. Att'y Gen. No. 6136, p. 11 and 1957 Op. Att'y Gen. No. 1187, p. 609, overruled.)

To: B. Edward Roberts, Marion County Prosecuting Attorney, Marion, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 16, 1984

I have before me your request for my opinion as to whether R.C. 307.85(A) enables the Board of Marion County Commissioners to contract with the U.S. Corps of Engineers to have the Corps clear a thirty mile section of the Upper Scioto River and construct a permanent overflow channel in said river. You have indicated that this project is to be located entirely in Marion County and is to be carried out under the provisions of 33 U.S.C. §701s, which was originally enacted as §205 of the Flood Control Act of 1948.

The policy underlying the enactment of the Flood Control Act, 33 U.S.C. §§701-709a, is expressed in 33 U.S.C. §701a which states:

It is recognized that destructive floods upon the rivers of the United States, upsetting orderly processes and causing loss of life and property, including the erosion of lands, and impairing and obstructing navigation, highways, railroads, and other channels of commerce between the States, constitute a menace to national welfare; that it is the sense of Congress that flood control on navigable waters or their tributaries is a proper activity of the Federal Government in cooperation with States, their political subdivisions, and localities thereof; that investigations and improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare; that the Federal Government should improve or participate in the improvement of navigable waters or their tributaries, including watersheds thereof, for flood-control purposes if the benefits to whomsoever they may accrue are in excess of the estimated costs, and if the lives and social security of people are otherwise adversely affected. (Emphasis added.)

33 U.S.C. §701s states:

The Secretary of the Army is hereby authorized to allot from any appropriations heretofore or hereafter made for flood control, not to exceed \$30,000,000 for any one fiscal year, for the construction of small projects for flood control and related purposes not specifically authorized by Congress, which come within the provisions of section 701a of this title, when in the opinion of the Chief of Engineers such work is advisable. The amount allotted for a project shall be sufficient to complete Federal participation in the project. Not more than \$4,000,000 shall be allotted under this section for a project at any single locality. The provisions of local cooperation specified in section 701c of this title shall apply. The work shall be complete in itself and not commit the United States to any additional improvement to insure its successful operation, except as may result from the normal procedure applying to projects authorized after submission of preliminary examination and survey reports. (Emphasis added.)

33 U.S.C. §701c, which sets forth the provisions of local cooperation, states in part:

After June 22, 1936, no money appropriated under authority of section 701f of this title shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army. . . .

(d) As a condition to the extending of any benefits, in prosecuting measures for run-off and water-flow retardation and soil erosion prevention authorized by Act of Congress pursuant to the policy declared in section 701a of this title, to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of such Acts, require—

(1) The enactment and reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for run-off and water-flow retardation and soil-erosion prevention;

(2) Agreements or covenants as to the permanent use of such lands; and

(3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits.

It is clear that these federal statutes provide for federal and local cooperation with regard to flood control. See 33 U.S.C. §701-l.

It is well established that a board of county commissioners is a creature of statute which may exercise only those powers expressly granted by statute and those necessarily implied therefrom. See State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921); 1982 Op. Att'y Gen. No. 82-011; 1975 Op. Att'y Gen. No. 75-070. R.C. 307.85(A) confers upon a board of county commissioners the power to participate in the establishment and operation of federal programs by providing as follows:

The board of county commissioners of any county may participate in, give financial assistance to, and cooperate with other agencies or organizations, either private or governmental, in establishing and operating any federal program enacted by the congress of the United States, and for such purpose may adopt any procedures and take any action not prohibited by the constitution of Ohio nor in conflict with the laws of this state. (Emphasis added.)

It has been stated previously that R.C. 307.85(A) authorizes a board of county commissioners to perform acts not otherwise statutorily authorized where the performance of such acts is reasonably related to the establishment and operation of a federal program, provided that such acts are not in conflict with the constitutional and statutory laws of this state. See 1979 Op. Att'y Gen. No. 79-055; 1979 Op. Att'y Gen. No. 79-053; 1978 Op. Att'y Gen. No. 78-060. I concur with that conclusion.

In the materials sent with your request there appeared to be some concern that the board of county commissioners could not contract directly with the federal government for flood protection, but that it would be necessary for the board to contract with an entity described in R.C. 307.15 which had the power to participate in federal projects. In 1957 Op. Att'y Gen. No. 1187, p. 609, it was concluded that a board of county commissioners had no authority to enter into a contract with the United States government whereby the federal government would provide a

program for the control of nuisance birds, unless the board had, pursuant to R.C. 307.15, entered into an agreement with a subdivision specified under R.C. 307.15 which itself had the authority to contract with the federal government to effect such a program. Accord 1956 Op. Att'y Gen. No. 6136, p. 11. R.C. 307.15 empowers a board of county commissioners to contract with certain specified public authorities whereby the board "undertakes, and is authorized by the contracting subdivision, to exercise any power, perform any function, or render any service, in behalf of the contracting subdivision or its legislative authority, which such subdivision or legislative authority may exercise, perform, or render." R.C. 307.15 further provides that, upon such an agreement, and within the limits prescribed by the agreement, "the board may exercise the same powers as the contracting subdivision possesses with respect to the performance of any function or the rendering of any service, which, by such agreement, it undertakes to perform or render, and all powers necessary or incidental thereto, as amply as such powers are possessed and exercised by the contracting subdivisions directly."

1956 Op. No. 6136 and 1957 Op. No. 1187 were rendered prior to the enactment of R.C. 307.85(A) in 1965. See 1965 Ohio Laws 206, 1649 (Am. Sub. H.B.33, eff. August 23, 1965). Since the enactment of R.C. 307.85(A), boards of county commissioners have had the authority to perform those acts not otherwise authorized in order to participate in federal programs, as long as such actions are not prohibited under state law. Reliance on a contract under R.C. 307.15 with another political subdivision with the power to contract with the federal government is no longer necessary. 1956 Op. No. 6136 and 1957 Op. No. 1187 are accordingly overruled.

Under the federal Flood Control Act, the United States government is willing to clear a section of the Upper Scioto River and construct a permanent overflow channel in the river in order to prevent flooding as long as the county will contract to perform those duties specified in 33 U.S.C. §701c, set forth above. Pursuant to R.C. 307.85(A) a county may do what is necessary in order to participate in a federal flood control program, as long as the actions the county must take in order to so participate are not in conflict with state law. Cf. 1982 Op. Att'y Gen. No. 82-005 (a board of county commissioners may expend federal funds to construct a drainage improvement pursuant to R.C. Chapter 6131). I am unaware of any constitutional or statutory provisions which would prohibit a board of county commissioners and a federal agency or department from contracting in order to establish and operate a project under 33 U.S.C. §701s, or which would prohibit a county from fulfilling its obligations under 33 U.S.C. §701c. See, e.g., Op. No. 79-053 (the power of eminent domain may be exercised by a board of county commissioners for purposes of soil and water conservation projects, if the exercise of such power is necessary to enable the board to participate in a federal program). With regard to the requirement of 33 U.S.C. §701c(b) that the county agree to "hold and save the United States free from damages due to the construction works," I note that the county should provide in some manner for the eventuality that it may have to indemnify the United States. For example, a county may wish to purchase a policy of insurance, such purchase being authorized under R.C. 307.85(A). See Ohio Const. art. XII, §11; State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972). It should also be pointed out that 33 U.S.C. §701c(c) requires a political subdivision to provide assurances that it will "maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army." Your request does not indicate the nature of any such regulations which may have been promulgated by the Secretary of the Army. In general it may be said, however, that so long as federal regulations do not require a county to pursue a course of action which conflicts with state law, a board of county commissioners may contract with the federal government in order to participate in a federal flood control program established and operated under 33 U.S.C. §701s.

Although you have expressly asked about the authority of the county to enter into the proposed contract under R.C. 307.85(A), I note that cooperation between a county and federal authorities with respect to water and soil conservation and flood control is also addressed under other statutory provisions. See e.g., R.C. Chapter 1515. R.C. 6131.03 provides in pertinent part:

Boards of county commissioners in their respective counties. . .or in co-operation with. . .the proper authorities of the United States, may formulate, create, and construct a complete or co-ordinating system of water conservation and flood control, subject to the approval of the proper authority of the state, with full power to maintain and carry the same forward. Said boards, severally and jointly and in co-operation. . .with the United States, may provide their respective shares of necessary funds in accordance with law for the cost and expense of the formulation, creation, construction, and maintenance of such water conservation or flood control system, which costs and expense shall include the cost and expense of all preliminary surveys necessary to the construction and maintenance of such water conservation or flood control system.

The materials accompanying your request do not indicate whether the proposed project constitutes "a complete or co-ordinating system of water conservation and flood control," and is thus to be undertaken pursuant to R.C. 6131.03. Assuming that R.C. 6131.03 is not applicable, R.C. 307.85(A), as discussed above, authorizes a board of county commissioners to contract with federal authorities to participate in a flood control program. To the extent that R.C. 6131.03 is applicable to a particular project, all pertinent provisions of R.C. Chapter 6131 must be observed by the county. I note that, R.C. 6131.12 provides in part:

If the board [of county commissioners] finds for the improvement, and if the improvement is being undertaken through the joint efforts and cooperation of the board and any federal or state agency, and if the federal regulations, state agency rules, or other procedures of the cooperating agency are in conflict with Chapter 6131. of the Revised Code with respect to the procedures for the preparing of contracts, the issuing of bids, the making of awards, and generally the administering of the contracts, the board may adopt the federal regulations, state agency rules, or procedures in those areas where conflict exists and proceed with the improvement in accordance with the requirements of the federal regulations, state agency rules, or procedures.

Thus, if a flood control improvement project is undertaken in cooperation with a federal agency pursuant to R.C. 6131.03, the board of county commissioners is expressly authorized to adopt federal regulations or procedures concerning the preparation of contracts, issuance of bids, making of awards and administration of contracts for such project. See R.C. 1515.21. While a board of county commissioners may not act contrary to state law while proceeding under R.C. 307.85(A), the board may adopt those federal regulations or procedures specified in R.C. 6131.12 if it is acting pursuant to R.C. 6131.03, even though such regulations conflict with R.C. Chapter 6131. Thus, for example, a board could adopt the federal regulations and procedures specified in R.C. 6131.12 in order to comply with the requirement imposed under 33 U.S.C. §701c(e) that the project be "maintain[ed] and operate[d]. . .after completion in accordance with regulations prescribed by the Secretary of the Army."

In conclusion, it is my opinion, and you are so advised, that, pursuant to R.C. 307.85(A), a board of county commissioners may contract with an agency or department of the federal government in order to participate in a flood control program established and operated under 33 U.S.C. §701s, provided that such contract does not require a county to perform acts in conflict with state law. (1956 Op. Att'y Gen. No. 6136, p. 11 and 1957 Op. Att'y Gen. No. 1187, p. 609, overruled.)