

July 25, 2019

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 E. Main St., Suite B
Ottawa, Ohio 45875

SYLLABUS:

2019-024

1. A board of county commissioners or board of township trustees may contribute moneys received from payments in lieu of taxes generated pursuant to R.C. 5727.75(E)(1)(b) or R.C. 5727.75(G) to a community improvement corporation, but only if the respective board first designates the community improvement corporation as its agent for economic development under R.C. 1724.10. (1991 Op. Att’y Gen. No. 91-071, clarified.)
2. A board of county commissioners or board of township trustees may expend moneys received from payments in lieu of taxes under R.C. 5727.75(E)(1)(b) and R.C. 5727.75(G) to construct public improvement projects in the county or township.
3. No statute authorizes a board of county commissioners or board of township trustees to gift moneys generated from payments in lieu of taxes pursuant to R.C. 5727.75(E)(1)(b) or R.C. 5727.75(G), or from any other source, to another political subdivision for the construction of a public improvement project.



DAVE YOST
OHIO ATTORNEY GENERAL

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2019-024

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 E. Main St., Suite B
Ottawa, Ohio 45875

Dear Prosecutor Lammers:

You have requested an opinion regarding the authority of a board of county commissioners or board of township trustees to expend moneys received from payments in lieu of taxes (PILOTs) for various purposes. Specifically, you ask whether PILOTs received under R.C. 5727.75(G) from the owner or lessee of a qualified energy project may be either paid into a private loan fund administered by the Putnam County Community Improvement Corporation (CIC) for any of the functions of the CIC, or expended on public improvement projects within the county or township.¹

You explain that a solar farm project is being contemplated in Palmer and Liberty Townships within Putnam County. You further note that the Putnam County Board of Commissioners has declared the county to be an “alternative energy zone” under R.C. 5727.75, which means the board of county commissioners has given its pre-approval of qualified energy project applications. *See* R.C. 5727.75(E)(1)(c). You write that the Putnam County CIC is a 501(c)(3) non-profit organization and acts as the economic agent for Palmer and Liberty Townships, but does not act as the economic agent for Putnam County. As a result of the proposed solar farm project, and potential PILOT moneys to be generated by the project, the townships and the county are interested in whether they may provide such moneys to a private loan fund created and administered by the Putnam County CIC, or to otherwise contribute such moneys to the CIC to further any of the actions of the CIC authorized under R.C. Chapter 1724.²

¹ A qualified energy project is an energy project certified by the director of development services. R.C. 5727.75(A)(1).

² It is our assumption that the Putnam County CIC is a community improvement corporation organized under R.C. Chapter 1724. Specifically, we assume the CIC is an economic

In the alternative, you ask whether the townships and county may use the PILOT moneys they receive for economic development projects such as the installation of a new sewer system.

A board of county commissioners and board of township trustees are creatures of statute with only those powers expressly provided by law or necessarily implied by law. 2016 Op. Att’y Gen. No. 2016-016, at 2-157; 1994 Op. Att’y Gen. No. 94-003, at 2-10. In financial transactions, county commissioners and township trustees are afforded only limited powers and act on behalf of their respective political subdivisions “only in such transactions as . . . may be expressly authorized . . . by statute.” See *State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916); see also *State ex rel. Clarke v. Cook*, 103 Ohio St. 465, 467, 134 N.E. 655 (1921). “The authority to act in financial transactions must be clear and distinctly granted.” *Locher*, 95 Ohio St. 97, at 99. Public moneys, in other words, may be disbursed “only by clear authority of law.” *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1); see also 2014 Op. Att’y Gen. No. 2014-003, at 2-16; 2006 Op. Att’y Gen. No. 2006-001, at 2-4.

A board of county commissioners may declare its county to be an “alternative energy zone” and thereby approve all applications for qualified energy projects for tax exempt status. R.C. 5727.75(A)(3); R.C. 5727.75(E)(1)(c). The director of development services for the State of Ohio shall certify an energy project application if the conditions listed in R.C. 5727.75(E)(2) are satisfied. “Upon certification . . . , the director shall notify the person, owner, or lessee, the tax commissioner, and the county auditor of a county in which the project is located.” R.C. 5727.75(E)(3). A qualified energy project may include a “solar energy project,” which is an “energy project composed of an energy facility using solar panels to generate electricity.” R.C. 5727.75(A)(5). In lieu of taxes, the owner or lessee of a qualified energy project must submit annual service payments to the county treasurer. The statute providing for such PILOTs, R.C. 5727.75(G), states in relevant part as follows:

The owner or a lessee pursuant to a sale and leaseback transaction of a qualified energy project shall make annual service payments in lieu of taxes to the county treasurer on or before the final dates for payments of taxes on public utility personal property on the real and public utility personal property tax list for each tax year for which property of the energy project is exempt from taxation under this section. The county treasurer shall allocate the payment on the basis of the project’s physical location.

development corporation, rather than a county land reutilization corporation. See R.C. 1724.01(A)(2), (B)(1) (defining an “economic development corporation” as “[a] corporation not for profit,” organized for the purpose of, among other things, “[a]dvancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area”).

R.C. 5727.75(G). For a solar energy project, the owner or lessee must remit seven thousand dollars per megawatt of nameplate capacity located in the county for each tax year. R.C. 5727.75(G)(1). Payments received by the county treasurer “are to be distributed to taxing units on the basis of where the property is located.” Ohio Legislative Service Comm’n, Final Bill Analysis, Am. Sub. S.B. 232 (2010). A board of county commissioners may require an additional service payment from the owner or lessee of a solar energy project, not to exceed nine thousand dollars per megawatt of nameplate capacity. R.C. 5727.75(E)(1)(b).

In the situation you have described, the county and the townships in which the solar energy project is located will receive some amount of money disbursed by the county treasurer. You ask whether the county and townships may appropriate such moneys to a private loan fund administered by the Putnam County CIC, or otherwise use the moneys for public improvement projects. Putnam County has not, pursuant to R.C. 1724.10, designated the CIC as its economic agent or instrumentality for the industrial, commercial, distribution, and research development in the county. Palmer and Liberty Townships, on the other hand, have designated the CIC as their economic agent. *See* R.C. 1724.10.

Appropriating R.C. 5727.75(G) PILOT Moneys to a Community Improvement Corporation

A community improvement corporation is a quasi-public entity, “with some private characteristics and some public characteristics.” 2003 Op. Att’y Gen. No. 2003-037, at 2-307. The corporation may be organized for various purposes, including as an economic development corporation to advance, encourage, and promote “the industrial, economic, commercial, and civic development of a community or area.” R.C. 1724.01(B)(1). A political subdivision, including a county or township, may designate a community improvement corporation as its agent “for the industrial, commercial, distribution, and research development in such political subdivision when the legislative authority of [the] subdivision has determined that the policy of the political subdivision is to promote the health, safety, morals, and general welfare of its inhabitants” by designating a CIC as such agency. R.C. 1724.10(A)(1).

The Ohio General Assembly has enacted legislation which affords counties and townships the authority to contribute moneys to community improvement corporations. R.C. 307.78 provides counties such authority, stating:

(A) The board of county commissioners of any county may make contributions of moneys, supplies, equipment, office facilities, and other personal property or services to any community improvement corporation organized pursuant to [R.C. Chapter 1724] to defray the expenses of the corporation. The community improvement corporation may use the board’s contributions for any of its functions under [R.C. Chapter 1724].

(B) Any moneys contributed by the board for such purposes shall be drawn from the general fund of the county not otherwise appropriated.

R.C. 307.78(A)-(B). R.C. 505.701 provides townships similar authority, stating, in part:

The board of trustees of any township, through unanimous vote of its membership, may designate, participate in, and cooperate with any community improvement corporation organized under [R.C. Chapter 1724] and may give financial or other assistance, including any fees generated by the corporation, to that corporation to defray the expenses of the corporation. The corporation may use the board's contributions for any of its functions under [R.C. Chapter 1724] subject to any limitations as may be provided by resolution of the board of trustees. Any moneys contributed by the board to the corporation shall be drawn from the general fund of the township not otherwise appropriated.

R.C. 505.701.³ On its face, these statutory provisions appear to provide a county or township the authority to make monetary contributions to a community improvement corporation without designating the corporation as the economic agent of the county or township.

The above statutory authority, however, must be considered in light of relevant provisions in the Ohio Constitution. A public entity is generally prohibited from lending public moneys to private enterprise. *See* Ohio Const. art. VIII, § 6; *see also* Ohio Const. art. XII, §§ 6, 11. As noted above, community improvement corporations are quasi-private entities. Despite this general prohibition, an exception was added to the Ohio Constitution that allows political subdivisions to lend aid to private enterprise if the lending of aid results in improving the economic welfare of the people of Ohio. *See* Ohio Const. art. VIII, § 13. The constitutional exception reads, in part, as follows:

³ PILOT moneys received by the county treasurer under R.C. 5727.75(G) are not special assessments like payments in lieu of taxes received under a tax increment financing (TIF) arrangement authorized by R.C. Chapter 5709. *See Sugarcreek Twp. v. City of Centerville*, 133 Ohio St. 3d 467, 2012-Ohio-4649, 979 N.E.2d 261, at ¶ 6 (under tax increment financing procedures, “improvements to real property are exempted from taxation, and the funds that would have been applied toward taxes are instead applied toward public improvements that *benefit the property within the area subject to the TIF*”) (emphasis added); *see also* R.C. 5709.75(B). Rather, the county treasurer receives the moneys and then disburses the moneys to the political subdivisions in which the territory of a qualified energy project is located. *See* R.C. 5727.75(G). These moneys stand in place of the property tax revenues the political subdivisions otherwise would have received but for the tax exemption received by the owner of such qualified energy project. R.C. 5727.75 contains no requirement that the moneys be used exclusively for the benefit of the parcel or parcels of land on which the qualified energy project is located. Therefore, the requirement under R.C. 307.78 and R.C. 505.701 that moneys to a CIC come from the unappropriated general funds of a county or township poses no impediment to contributing moneys to a CIC because R.C. 5727.75(G) PILOT moneys are disbursed into the general funds of a county or township receiving such moneys. *See* R.C. 5727.75(E)(1)(b).

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its *or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities*, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property structures, equipment, and facilities within the State of Ohio for industry commerce, distribution, and research, to make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities.

Ohio Const. art. VIII, § 13 (emphasis added); *see also Cnty. of Stark v. Ferguson*, 2 Ohio App. 3d 72, 77, 440 N.E.2d 816 (Stark County 1981) (“[t]he polestar of ‘proper public purpose’ and ‘public interest’ is the creation or preservation of jobs and employment opportunities”). Laws may be passed to effect the purposes of the constitutional exception to the prohibition against lending public aid to private enterprise. *See* Ohio Const. art. VIII, § 13.

The statute authorizing a political subdivision to designate a community improvement corporation as its economic agent, R.C. 1724.10, was enacted to implement Article VIII, § 13. R.C. 1724.10 “provides the machinery to make such amendment operative,” *State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St. 2d 34, 40, 218 N.E.2d 446 (1966), and empowers a political subdivision to designate a CIC as its agent “for the industrial commercial, distribution, and research development” in the political subdivision. R.C. 1724.10(A)(1). The statute, therefore, “must be read in relation to such amendment and the limitations contained therein. In other words, the constitutional limitation is by implication a part of the statute.” *Burton*, 7 Ohio St. 2d 34, at 40; *see also* 2003 Op. Att’y Gen. No. 2003-037, at 2-307 (“[t]he statutes authorizing the creation and operation of community improvement corporations were enacted to implement Ohio Const. art. VIII, § 13”). The relevant statutory and constitutional provisions, consequently, must be read *in pari materia* to understand the proper scope of a political subdivision’s authority to contribute moneys to a community improvement corporation.

Following this line of reasoning, we conclude that a political subdivision may make monetary contributions to a CIC, but only if the subdivision first designates the community improvement corporation as its economic agent under R.C. 1724.10. Contributions by a subdivision to a CIC without this designation run afoul of the prohibitions against lending public money to private enterprise under Ohio Const. art. VIII, § 6 and Ohio Const. art. XII, §§ 6, 11. *See* 2014 Op. Att’y Gen. No. 2014-003, at 2-21 (“pursuant to R.C. 1724.10(B), a board of county commissioners may transfer lands or interests in lands owned by the county to an economic development corporation without public advertising and receipt of bids, *provided the economic development corporation has been designated an agency of the county pursuant to R.C. 1724.10 and an agreement between the corporation and the county permits such transfers*”) (emphasis

added). Therefore, it is our opinion that contributions of R.C. 5727.75(G) PILOT moneys to a CIC, whether to a private loan fund administered by the CIC or to a general operating fund of the CIC, are permitted, but only if the county or township making such contributions has first designated the CIC as its economic agent under R.C. 1724.10.⁴

Appropriating R.C. 5727.75(G) PILOT Moneys for Public Improvement Projects

As noted above, R.C. 5727.75(G) PILOT moneys are disbursed by the county treasurer and deposited into the general funds of the political subdivisions receiving the moneys. *See supra*, note 3; R.C. 5705.05; R.C. 5705.09. For counties, “[m]oneys in the county’s general fund may be used for any proper county purpose, unless the law requires them to be used for a specific purpose.” 2013 Op. Att’y Gen. No. 2013-035, at 2-354 to 2-355. “And, when the moneys are not required to be used for a particular purpose, the appropriation of such moneys is largely discretionary with the board of county commissioners.” *Id.* at 2-355. For townships, similarly, any moneys deposited into the township’s general fund “may be used for any proper township purpose, which includes, among other things, general expenses of the township.” 2011 Op. Att’y Gen. No. 2011-026, at 2-217. A township may expend moneys in a township’s general fund if the board of township trustees “is authorized to make the expenditure.” 1998 Op. Att’y Gen. No. 98-023, at 2-127. In other words, as long as constructing public improvement projects constitutes a public purpose, then a county or township may expend moneys received under R.C. 5727.75(G) on those projects.

Counties and townships generally may contract for the construction of public improvements. *See* R.C. 1311.25-.38; *see also City of Cincinnati v. Scheer & Scheer Dev.*, 169 Ohio App. 3d 101, 2006-Ohio-1221, 862 N.E.2d 122, at ¶¶ 15-20, 26 (Hamilton County). “Public improvement” is defined as “any construction, reconstruction, improvement, enlargement, alteration, demolition, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and any other structure or work of any nature by a public authority.” R.C. 1311.25(A). Counties and townships are “public authorities” that are authorized to engage in construction of a public improvement. R.C. 1311.25(B). “A public improvement project usually involves a contract between the public authority and a principal contractor.” *Miller-Yount Paving, Inc. v. Freeman Cargo Carrier, Inc.*, No. 98 C.A. 226, 2000 Ohio App. LEXIS 1467, at *15 (Mahoning County March 30, 2000). Public improvement projects, therefore, are among the matters on which counties and townships may expend general fund moneys. *See* R.C. 307.77 (authorizing a

⁴ In 1991 Op. Att’y Gen. No. 91-071, we advised that R.C. 307.78 and R.C. 505.701 authorized a county and township, respectively, to contribute moneys to a CIC. 1991 Op. Att’y Gen. No. 91-071, at 2-337. We note that certain language in the 1991 opinion could be interpreted as suggesting a county or township need not first designate a CIC as its agent for economic development under R.C. 1724.10 before contributing moneys to the CIC. In light of our conclusion in this opinion, we hereby clarify 1991 Op. Att’y Gen. No. 91-071 to reflect the constitutional requirement that a county or township must first designate a CIC as its economic agent before contributing moneys to the CIC.

board of county commissioners to appropriate money or issue bonds for a public improvement whenever certain statutory conditions are satisfied).

Accordingly, we are of the opinion that a county or township receiving R.C. 5727.75(G) PILOT moneys may expend those moneys on public improvement projects within the county or township.⁵ This conclusion also applies to any discretionary service payments that may be required under R.C. 5727.75(E)(1)(b).

Further discussion with your office has also revealed your interest in knowing whether a political subdivision receiving R.C. 5727.75(G) PILOT moneys may “gift” those moneys to another political subdivision for the purpose of that political subdivision’s construction a public improvement project. Specifically, you ask whether a county or township may provide PILOT moneys to a municipal corporation so that the municipal corporation may construct a public improvement project. Boards of county commissioners and township trustees are creatures of statute and may only act in accordance with express statutory authority, or authority that is necessarily implied by law, particularly with respect to financial transactions. *See* 2016 Op. Att’y Gen. No. 2016-016, at 2-157; 1994 Op. Att’y Gen. No. 94-003, at 2-10; *see also Locher v. Menning*, 95 Ohio St. 97, at 99.

Under R.C. 715.02, political subdivisions may jointly construct public improvement projects. The statute reads, in part:

Two or more municipal corporations, one or more municipal corporations and one or more other political subdivisions, or two or more political subdivisions other than municipal corporations may enter into an agreement for the joint construction or management, or construction and management, of any public work, utility, or improvement, benefiting each municipal corporation or other political subdivision or for the joint exercise of any power conferred on municipal corporations or other political subdivisions by the constitution or laws of this state, in which each of the municipal corporations or other political subdivisions is interested.

R.C. 715.02(A). Under a joint construction/management agreement, the political subdivisions constructing a public improvement project must apportion among themselves “any expense of jointly constructing” the project. R.C. 715.02(B)(3).

We find no other statutory provision, however, which may be construed to empower a board of county commissioners or board of township trustees to contribute or gift moneys to any other political subdivision. It is our opinion, therefore, that a board of county commissioners and board of

⁵ This opinion does not consider the ability of a county or township to contribute R.C. 5727.75(G) PILOT moneys to public improvement projects under R.C. Chapter 1710 (special improvement districts) or R.C. Chapter 5709 (tax increment financing), as those chapters contain specific procedures for the funding of such projects.

township trustees may not contribute or gift funds derived from R.C. 5727.75(G) PILOT moneys, or otherwise, to another political subdivision, except as noted herein.⁶

Conclusions

Based on the foregoing, it is our opinion, and you are hereby advised as follows:

1. A board of county commissioners or board of township trustees may contribute moneys received from payments in lieu of taxes generated pursuant to R.C. 5727.75(E)(1)(b) or R.C. 5727.75(G) to a community improvement corporation, but only if the respective board first designates the community improvement corporation as its agent for economic development under R.C. 1724.10. (1991 Op. Att’y Gen. No. 91-071, clarified.)
2. A board of county commissioners or board of township trustees may expend moneys received from payments in lieu of taxes under R.C. 5727.75(E)(1)(b) and R.C. 5727.75(G) to construct public improvement projects in the county or township.
3. No statute authorizes a board of county commissioners or board of township trustees to gift moneys generated from payments in lieu of taxes pursuant to R.C. 5727.75(E)(1)(b) or R.C. 5727.75(G), or from any other source, to another political subdivision for the construction of a public improvement project.

Respectfully,



DAVE YOST
Ohio Attorney General

⁶ We note that R.C. 307.15 provides a board of county commissioners, for example, the authority to contract with a township or municipal corporation to authorize the board to exercise any power of the municipality or township. R.C. 307.15, therefore, may authorize a board of county commissioners to provide something of value to the municipality or township, such as construction of a public improvement project, in exchange for compensation from the municipality or township. We do not consider the various possible arrangements under the statute. Rather, we highlight the statute as a possible avenue for consideration.