

OPINION NO. 79-055**Syllabus:**

1. R.C. 307.85 does not authorize a board of county commissioners or the members thereof acting in an official capacity to cause the incorporation under R.C. Chapter 1702 of a non-profit corporation to act as a conduit for federal Community Development Block Grant funds.
2. R.C. 307.85 authorizes a board of county commissioners to be members of a non-profit corporation and, as such, to vote for trustees and carry out other activities of members where such membership and activities are reasonably related to the operation of a federal program, such as the Community Development Block Grant program.
3. County officers or employees may not act as trustees of a non-profit corporation which administers a county-operated housing rehabilitation grant and loan program for the county pursuant to contract when the official duties of such officers and employees are in any way a check upon, or subordinate to, the functions performed pursuant to contract by the non-profit corporation.
4. A board of county commissioners which has selected the board of trustees of a non-profit corporation is not prohibited from contracting with that non-profit corporation for the administration of a housing rehabilitation loan and grant program, provided that the county officers and corporate trustees involved adhere to the duties of loyalty and good faith inherent in their respective offices.
5. A board of county commissioners which has selected the board of trustees of a non-profit corporation and which then contracts with the non-profit corporation for administration of a county housing rehabilitation loan and grant program may not participate in the management or control of the affairs of such non-profit corporation.
6. The provisions of Ohio Const. art. VIII, §6 do not prevent a board of county commissioners from operating a homeowner rehabilitation loan and grant program which is administered, pursuant to contract, by a non-profit corporation, and in which the funds advanced to the non-profit corporation for distribution to individual homeowners are at all times exclusively federal funds given to the county for the express purpose of operating such a program under federal law.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: William J. Brown, Attorney General, September 12, 1979

I have before me your request for my opinion on several questions concerning R.C. 307.85 and the authority of a board of county commissioners to participate in the establishment of a non-profit corporation entrusted with the administration of Community Development Block Grant (hereinafter C.D.B.G.) funds.

Your letter of request indicates that the Montgomery County Board of County Commissioners is considering the establishment of a non-profit corporation to act as a conduit for federal C.D.B.G. funds. You have indicated that the federal funds would be received by the Board of County Commissioners upon the application of the Board. The plan outlined in your letter would then involve the channeling of the funds to a non-profit corporation for administration of a county-wide housing rehabilitation grant and loan program.

Your specific questions may be summarized as follows:

1. Does the language of R.C. 307.85 grant to a board of county commissioners the authority to cause the incorporation of a non-profit corporation officially and through its own office, and can said board then create such non-profit corporate entity pursuant to R.C. Chapter 1702?
2. If a board of county commissioners may not form a non-profit corporation pursuant to R.C. 307.85 and R.C. Chapter 1702, then is a board of county commissioners statutorily empowered to appoint private citizens, or county employees, as trustees (directors) of a private, non-profit corporation, which non-profit corporation has been previously created by private citizens, pursuant to R.C. Chapter 1702, assuming that the articles of incorporation and regulations of the said private, non-profit corporation permit such appointments by the Board of County Commissioners of Montgomery County, Ohio?
3. If the answer to question one is in the affirmative, can a board of county commissioners enter into a contract with a non-profit corporation which it created, staffed, and funded without running afoul of statutory prohibitions such as R.C. 305.27?
4. If the answer to question two is in the affirmative, can a board of county commissioners, after making such appointments to a private, non-profit corporation, enter into a contractual relationship with the non-profit corporation, by virtue of which the board of county commissioners may channel federal C.D.B.G. monies to said non-profit corporation for purposes of loans to private homeowners?
5. If a board of county commissioners may, in fact, appoint trustees to a non-profit corporation, then to what extent may a board of county commissioners further participate in the conduct of the business of such non-profit corporation?
6. Is the operation of a rehabilitation loan or grant program by a board of county commissioners, through contract with a non-profit corporation created by a board of county commissioners, violative of Ohio Const. art. VIII, §4 or 6 as a lending of the credit of the county to a private corporation or as an illegal participation in the structure of a private corporation? It should be understood that the source of funds is totally federal; however, these federal C.D.B.G. funds will be deposited by the board of county commissioners in the county treasury, along with county funds, or in public depositories qualifying under R.C. Chapter 135, again along with county funds.
7. If the answer to question six is in the affirmative, would the answer be otherwise if the federal funds were not commingled in any manner with county funds?

Your questions raise three primary issues: first, the authority of a board of county commissioners to participate in the establishment or operation of a non-profit corporation; second, the limitations necessary to avoid a conflict of interest if a board does so participate; third, the constitutional limitations upon the operation of a housing rehabilitation grant and loan program.

It is, of course, virtually axiomatic as a matter of Ohio law that boards of county commissioners are creatures of statute which exercise only those powers expressly conferred by statute or necessarily implied from those expressly granted. See, e.g., State ex rel. Clark v. Cook, 103 Ohio St. 465 (1921); State ex rel. Locher v. Menning, 95 Ohio St. 97 (1916); Gorman v. Heuck, 41 Ohio App. 453 (Hamilton County 1931); 1974 Op. Att'y Gen. No. 74-065; 1974 Op. Att'y Gen. No. 74-024; 1973 Op. Att'y Gen. No. 73-103; 1973 Op. Att'y Gen. No. 73-090. I am unaware of any

statutory provisions which could be said to expressly empower a board of county commissioners to participate in the establishment or operation of a non-profit corporation of the sort you describe. Initially, then, your first and second questions require an analysis of whether the terms of R.C. 307.85, which authorize a board of county commissioners to participate in the establishment and operation of federal programs, provide authority for such a board to take the actions outlined in your questions.

R.C. 307.85(A) specifies:

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.

I have had occasion to consider the authority of boards of county commissioners to take various actions related to the operation of federal programs in a number of opinions, most recently 1979 Op. Att'y Gen. No. 79-053. See also 1978 Op. Att'y Gen. No. 78-060, 1974 Op. Att'y Gen. No. 74-065; 1973 Op. Att'y Gen. No. 73-102; 1971 Op. Att'y Gen. No. 71-092. As stated in those opinions, it is my conclusion that R.C. 307.85 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 program created by federal law.

While the grant of authority to a board of county commissioners under R.C. 307.85 is quite broad, it is not unlimited. The statutory provision authorizes such a board to take any action reasonably related to the establishment and operation of a federal program; such action must, however, be neither prohibited by the Constitution of Ohio nor in conflict with the laws of this state. Consequently, with respect to your first question, further examination is necessary to determine whether the creation by a board of county commissioners of a non-profit corporation is in any way in conflict with the laws of this state.

R.C. Chapter 1702 provides for the formation of non-profit corporations. R.C. 1702.04 specifies that any person, singly or jointly with others, may form such a corporation. R.C. 1702.01(i), however, defines "person" as follows:

"Person" includes, without limitation, a corporation (whether non-profit or for profit), a partnership, an unincorporated society or association, and two or more persons having a joint or common interest.

Moreover, R.C. 1.59, in pertinent part, provides:

As used in any statute, unless another definition is provided in such statute or a related statute:

....

(C) "Person" includes an individual, corporation, business trust, estate, trust, partnership, and association.

These definitions of "person" do not encompass public bodies or officers. See 1978 Op. Att'y Gen. No. 78-030; 1962 Op. Att'y Gen. No. 2781, p. 70.

You have asked whether a board of county commissioners, officially and through its own office, can create a non-profit corporation pursuant to R.C. Chapter 1702. Because neither the board in its official capacity nor the board members in their official capacities come within the applicable definition of

"person," I am of the opinion that the laws of this state do not permit formation of a non-profit corporation by a board of county commissioners or the members thereof acting in an official capacity. Consequently, such an incorporation would conflict with the provisions of R.C. Chapter 1702. I am constrained to conclude, as a result, that the provisions of R.C. 307.85 do not authorize a board of county commissioners or the members thereof acting in an official capacity to create a non-profit corporation pursuant to R.C. 1702, even where the creation of such a corporation may be reasonably related to the operation of a federal program.

Because you have not inquired as to the authority of the commissioners to act in their individual capacities, I have not addressed that possibility. It is clear, however, that individuals are "persons" who may establish non-profit corporations pursuant to R.C. Chapter 1702.

Your second question pertains to the issue of whether R.C. 307.85 provides authority for a board of county commissioners to appoint members to the board of trustees of a non-profit corporation established under R.C. Chapter 1702. The answer to your question depends in large measure on the capacity and manner in which the commissioners act in selecting trustees. R.C. 1702.04 specifies that the initial trustees must be designated in the articles of incorporation and R.C. 1702.26 provides that successor trustees are elected by the members of the corporation. Hence, any proviso in the articles which would purport to grant the commissioners qua commissioners any appointive power relative to trustees would be in conflict with Ohio statutory law for purposes of R.C. 307.85. However, I find no statutory prohibition against the commissioners becoming the members of the corporation who would then, qua members, elect successor trustees pursuant to R.C. 1702.26. This assumes, of course, that the commissioners become members of the corporation pursuant to the procedures mandated in R.C. Chapter 1702 and the articles of the corporation.

R.C. 1702.01 defines "member" as "one having membership rights and privileges in a corporation in accordance with its articles or regulations." R.C. 1704.02 and R.C. 1702.13 permit persons, including corporations and partnerships, to be members, if permitted by the articles or regulations, and set no limits on what other types of entities might be members. I conclude, therefore, that the laws of Ohio do not prohibit a board of county commissioners or the members thereof, acting in an official capacity, from becoming members of a non-profit corporation who could elect the corporation's trustees.

I conclude, also, that mere membership by the county commissioners in a non-profit corporation organized under R.C. Chapter 1702 does not violate that portion of Ohio Const. art. VIII, §6, which states that "[n]o laws shall be passed authorizing any county. . .to become a stockholder in any joint stock company, corporation, or association whatever. . . ." By definition, a "non-profit corporation" means ". . .a corporation which is not formed for the pecuniary gain or profit of, and whose net earnings or any part thereof is not distributable to its members, trustees, officers or other private persons. . . ." R.C. 1702.01(C). In addition, R.C. 1702.13 expressly prohibits the corporation from issuing certificates for shares to its members. Thus, a member of a non-profit corporation lacks the most essential attribute of a stockholder. Burt v. Rattle, 31 Ohio St. 116 (1876). Moreover, the mischief which Ohio Const. art. VIII, §6 was intended to prevent was a "union of public and private capital" in a business enterprise. Walker v. Cincinnati, 21 Ohio St. 14, 54 (1871). Such is hardly the case here.

For the reasons outlined above, it is my opinion that the membership of a board of county commissioners or its members, acting in an official capacity, in a non-profit corporation established under R.C. Chapter 1702 is not prohibited by the Constitution of Ohio or in conflict with the laws of the state. Therefore, such membership is authorized by R.C. 307.85 where it is reasonably related to the establishment and operation of a program created by federal law, such as the Community Development Block Grant program. As members of a non-profit corporation established under R.C. 1702, the commissioners could participate, in accordance with the articles and regulations of the corporation, in the election of trustees pursuant to R.C. 1702.16 and 1702.26.

In addition to possible participation as members of a non-profit corporation, county commissioners, acting in an official capacity, might be called upon to make appointments to fill vacancies for unexpired terms. R.C. Chapter 1702 provides that the articles of incorporation or regulations may establish procedures for filling vacancies. R.C. 1702.28 and R.C. 1702.29. I am aware of no provision of Ohio law which would prohibit a board of county commissioners from appointing trustees to fill vacancies for unexpired terms if the articles of incorporation or regulations of a non-profit corporation lawfully provided for such appointment. Accordingly, such appointment would not conflict with the laws of the state. Therefore, I conclude that the terms of R.C. 307.85 authorize a board of county commissioners to appoint trustees to the board of a non-profit corporation where such appointment is reasonably related to the operation of a federal program, such as the Community Development Block Grant program, and where such appointment is lawfully permitted by the articles and regulations of the corporation.

A portion of your second question asks whether county employees other than commissioners may be selected to serve as trustees of a non-profit corporation. I am aware of no general principle of law which would limit to certain classes the persons whom the members might properly elect, assuming that the articles of incorporation and regulations set no requirements. R.C. 1702.27 specifically provides that the articles or regulations may name persons occupying certain positions, such as public offices, as ex officio trustees and may permit them to vote.

While I am of the opinion that selection of a county employee as trustee would not be improper by operation of law, many public employees are included among the class of public who have a duty to avoid private activity which is inconsistent with their official duties. See, e.g., R.C. 102.03; R.C. 102.04; R.C. 2921.42. For this reason, a county employee or official whose public duties would be in any way a check upon, or subordinate to, the functions performed by the non-profit corporation could not properly act as a trustee. Similarly, conflicts may result if the county commissioners select as trustee a person who is under their control as a county employee, and care should be taken to avoid any possible impropriety of this nature.

Your third, fourth, and fifth questions illustrate a number of the issues inherent in a situation in which a board of county commissioners is involved in a relationship with a non-profit corporation of the sort you describe. As you have observed, R.C. 305.27 expressly provides that no county commissioner shall be concerned, directly or indirectly, in any contract for work done for the county. Moreover, R.C. 2921.42 prohibits each public official from having an interest in the benefits of a public contract entered into by the governmental entity with which he is connected.

It is obvious, then, that a board of county commissioners, or a member thereof, could not properly be in a position to control the services delivered to the county by a corporation pursuant to a contract while at the same time passing in an official capacity upon the adequacy of the services delivered. It is for this reason that it would be improper for a member of a board of county commissioners to be involved in the management of a non-profit corporation which contracts with the board of county commissioners for the delivery of services. Management of the operations of a non-profit corporation, however, are generally carried out by the trustees and officers, rather than the members. See R.C. 1702.30 and R.C. 1702.34. Unless the activities of the members become such as to constitute control over operations of the corporation, there would apparently be no prohibited activity. Attention should be given, however, to the authority of the members, pursuant to R.C. 1702.11, to adopt or amend the regulations, which govern such matters as the compensation and removal of trustees and officers, the duties of officers, and the limitations on the exercise of authority of the trustees and officers, for it is possible that, pursuant to such authority, the members might stray into an excessive involvement in management decisions. Care should also be taken to ascertain that the members will reap no financial gain, whether direct or indirect, from a contract with the board of county commissioners. As I concluded in 1973

Op. Att'y Gen. No. 73-043, in construing a provision prohibiting an elected official of a city from being interested in any contract with the city, the interest of an agent or employee who has no management authority in promoting the success of his principal or employer may be sufficient to prevent his assuming a public office in which he would be in a position to perpetuate contracts between the political subdivision and his employer.

Your fourth question centers upon the issue of whether there would be any conflict of interest arising from a contract between a board of county commissioners and a non-profit organization if, pursuant to R.C. 307.85 and the articles of incorporation, the county commissioners, as members of the corporation, elected the board of trustees of such organization. It is an established principle of corporate law that the trustees of a non-profit corporation are charged with faithfully executing the trust which the law and the articles and regulations of the corporation impose upon them. State v. Standard Life Ass'n, 38 Ohio St. 281 (1882). This duty of loyalty imposed upon the trustees of a non-profit corporation would, of course, operate to prohibit any person appointed to the board thereof from making decisions in the management and control of the corporation that are influenced by considerations outside the scope of the corporate purpose. I must assume that the members of a board of trustees appointed pursuant to the corporate articles and regulations by a board of county commissioners will observe the duties of loyalty and fiduciary care required by corporate office. I must also assume that the members of a board of county commissioners will adhere to their duties as public officers and that they will hold paramount the interests of the county in any dealings the board may have with a non-profit corporation. Subject to these assumptions, I am aware of no statutory provision or general principle of law which would operate to prohibit a board of county commissioners which has selected trustees to the board of trustees of a non-profit corporation pursuant to their status as members of such corporation, from contracting for services with that corporation. For the reasons set forth above, however, a board of county commissioners may not in any way participate in the management or control of the business of a non-profit corporation with which it contracts.

Your sixth and seventh questions center upon the effect of Ohio Const. art. VIII, §§4 and 6 upon the operation of county housing rehabilitation grant and loan program. Art. VIII, §4 prohibits the state from giving or lending its credit in aid of any individual association or corporation and prohibits the state from becoming a joint owner or stockholder in a company or association. Similar prohibitions pertaining to counties are set forth in art. VIII, §6. It is the latter provision which is relevant to your questions. The prohibition against becoming a stockholder is discussed above in connection with the question of membership of the board of county commissioners in a non-profit corporation. It is the issue of lending credit to which your sixth and seventh questions are addressed.

As discussed at length in 1977 Op. Att'y Gen. No. 77-049, I am of the opinion that the provisions of art. VIII, §6 do not prevent a unit of local government subject thereto from operating a homeowner rehabilitation and grant program for the purpose of eliminating and preventing urban blight, assuming that the funds provided to homeowners are at all times exclusively federal funds provided to the unit of local government for the express purpose of operating such a program under federal law. The question under consideration in 1977 Op. Att'y Gen. No. 77-049 involved the operation of such a program by a municipal corporation; however, I believe the conclusions reached therein are fully applicable to a board of county commissioners which directly operates such a program. The situation you describe, however, differs from that considered in Opinion No. 77-049 in that in your situation the board of county commissioners is contemplating a contract under which a non-profit corporation will administer loan and grant funds, while the situation considered in the 1977 Opinion involved grants or loans made directly by the unit of local government.

As observed in 1977 Op. Att'y Gen. No. 77-049, the Supreme Court has recognized a line of exceptions to the prohibition of art. VIII, §6 which focuses upon

the nature of the recipient of public funds and the purpose for which such funds are spent by the recipient. The Court has on two occasions upheld, as valid acts of legislative bodies, the appropriation of public funds to private, non-profit organizations to be expended for public purposes. State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142 (1955)(appropriation bill which included grants to designated veterans' organizations for the express purpose of rehabilitating war veterans held constitutional); State ex rel. Leaverton v. Kerns, 104 Ohio St. 550 (1922)(statute providing county financial support for non-profit agricultural society designed for public instruction held constitutional). On the basis of these decisions, it would be possible to argue that a board of county commissioners involved in a housing rehabilitation grant and loan program such as you describe would be under no duty to segregate federal funds from county funds before transmission to a non-profit agency, since the board could properly grant even county funds to a private non-profit organization for a public purpose. Such an argument would require a detailed examination of whether the grant of funds to a non-profit organization for distribution to homeowners as grants and loans indeed serves a public purpose.

Such an argument is, however, unnecessary to the resolution of the issue you present. You have indicated that the board of county commissioners contemplates applying to the Secretary of Housing and Urban Development for the Community Development Block Grant and then entering into a contract with a non-profit corporation for the administration of the housing rehabilitation loan and grant program. Your question, then, does not involve a situation in which the board of county commissioners would grant the federal funds it received to a non-profit agency. Rather, the board of county commissioners would itself make loans and grants to recipient homeowners through a program administered, pursuant to contract, by the non-profit organization. Therefore, for the reasons set forth in 1977 Op. Atty Gen. No. 77-049, I am of the opinion that the provisions of Ohio Const. art. VIII, §6 do not prevent a board of county commissioners from operating a homeowner rehabilitation loan and grant program which is administered, pursuant to contract, by a non-profit corporation, and in which the funds advanced to the non-profit corporation for distribution to individual homeowners are at all times exclusively federal funds given to the county for the express purpose of operating such a program under federal law.

In summary, then, it is my opinion, and you are advised, that:

1. R.C. 307.85 does not authorize a board of county commissioners or the members thereof acting in an official capacity to cause the incorporation under R.C. Chapter 1702 of a non-profit corporation to act as a conduit for federal Community Development Block Grant funds.
2. R.C. 307.85 authorizes a board of county commissioners to be members of a non-profit corporation and, as such, to vote for trustees and carry out other activities of members where such membership and activities are reasonably related to the operation of a federal program, such as the Community Development Block Grant program.
3. County officers or employees may not act as trustees of a non-profit corporation which administers a county-operated housing rehabilitation grant and loan program for the county pursuant to contract when the official duties of such officers and employees are in any way a check upon, or subordinate to, the functions performed pursuant to contract by the non-profit corporation.
4. A board of county commissioners which has selected the board of trustees of a non-profit corporation is not prohibited from contracting with that non-profit corporation for the administration of a housing rehabilitation loan and grant program, provided that the county officers and corporate trustees involved adhere to the duties of loyalty and good faith inherent in their respective offices.

5. A board of county commissioners which has selected the board of trustees of a non-profit corporation and which then contracts with the non-profit corporation for administration of a county housing rehabilitation loan and grant program may not participate in the management or control of the affairs of such non-profit corporation.

6. The provisions of Ohio Const. art. VIII, §6 do not prevent a board of county commissioners from operating a homeowner rehabilitation loan and grant program which is administered, pursuant to contract, by a non-profit corporation, and in which the funds advanced to the non-profit corporation for distribution to individual homeowners are at all times exclusively federal funds given to the county for the express purpose of operating such a program under federal law.