

January 17, 2017

The Honorable Richard W. Moyer
Clinton County Prosecuting Attorney
103 East Main Street
Wilmington, Ohio 45177

SYLLABUS:

2017-002

1. A board of county commissioners may donate money for the general health and safety of the community to a nonprofit corporation and serve as an advisor to the nonprofit corporation regarding the charitable disbursement of the moneys donated pursuant to R.C. 307.691, provided the nonprofit corporation is engaged in promoting safety in Ohio.
2. A board of county commissioners' ability to serve as an advisory board to the nonprofit corporation is not affected by the structure of the county's donation under R.C. 307.691 as an endowment.



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OPINION NO. 2017-002

The Honorable Richard W. Moyer
Clinton County Prosecuting Attorney
103 East Main Street
Wilmington, Ohio 45177

Dear Prosecutor Moyer:

You have requested an opinion whether a board of county commissioners may donate moneys for the general health and safety of the community derived from the sale of a county hospital to a private nonprofit corporation to create a donor advised fund. You further ask whether a board of county commissioners may serve as an advisory board that provides direction to the nonprofit corporation regarding charitable disbursements from the fund. Finally, you ask whether the board of county commissioners' ability to serve as an advisory board is affected by structuring the county's donation to the nonprofit corporation as an endowment.

Your letter explains that the board of county commissioners is interested in donating a portion of the proceeds from the sale of the Clinton Memorial Hospital to the Clinton County Foundation, Inc. (the "Foundation"). The Foundation is a nonprofit corporation formed under R.C. Chapter 1702 and is designated a charitable foundation under § 501(c)(3) of the Internal Revenue Code. The Foundation's mission is "[t]o grow, protect, and connect charitable gifts in support of strong Clinton County communities." *See About the Clinton County Foundation*, Clinton County Foundation, <http://www.clintoncountyohiofoundation.org/about> (last visited Jan. 12, 2017). The Foundation "foster[s] a charitable heart in Clinton County by encouraging individuals, families, organizations, businesses to give to the place, people and organizations [they] love." *Id.* Specifically, the Foundation provides

creative charitable giving opportunities for donors. Gifts are invested to provide Clinton County nonprofit organizations with financial support to continue the important work that improves and enhances [Clinton County's] communities. The interest earned from gifts to the Foundation's funds enable these important grant making opportunities.

Id.

According to the Second Amended Articles of Incorporation of the Clinton County Foundation, p. 1, the Foundation was formed, in part, to accept moneys or property made for “charitable, scientific, educational, religious, and public purposes,” and to provide a means by which the donations “may be administered prudently by experienced financial institutions and expended wisely” for such purposes. The “funds and property are to be held, invested, managed, and distributed ... by a Board of Trustees composed of individuals of balanced judgment selected for their knowledge of the Clinton County area, its conditions and needs.” *Id.* The Foundation “prudently invest[s] and reinvest[s] any and all moneys received to produce a reasonable rate of return in such securities including any mutual fund or common trust fund, and property in which it shall be considered proper for Trustees to invest funds held in trust.” *Id.* at p. 2. Further, the Foundation distributes moneys “for such charitable, scientific, educational, religious, and public uses and purposes as will effectively assist, improve the quality of life, and promote the well-being of mankind, primarily of the inhabitants of Clinton County.” *Id.* at p. 1. In light of those functions, it is evident that the Foundation is primarily a grant making entity to further charitable purposes.

The board of county commissioners would like the Foundation to create a donor advised fund with the moneys donated by the county. The Foundation will hold and invest the donated moneys and the board of county commissioners will serve as the advisor to the Foundation, providing recommendations regarding charitable disbursements of the donated principal or any income earned on the invested principal. *See Types of funds*, Clinton County Foundation, <http://www.clintoncountyohiofoundation.org/types-of-funds> (last visited Jan. 12, 2017) (a donor advised fund is one in which the donor works with the professional staff of the Foundation to “identify possible grants that may benefit a variety of causes and organizations that are important” to the donor).

The recommendations of the board of county commissioners about the charitable disbursements will be submitted to the Foundation’s governing board for approval and grants will be made in the name of the donor advised fund. *Types of funds*, Clinton County Foundation, <http://www.clintoncountyohiofoundation.org/types-of-funds> (last visited Jan. 12, 2017). You have indicated that generally, as long as the recommendations of the board of county commissioners do not conflict with the Foundation’s governing documents or charitable mission, the Foundation will follow the county’s recommendations. The county’s donation can be structured as an endowment, in which case only the interest income earned from the principal donated will be disbursed, or it may be structured so that the interest and part or all the principal can be disbursed.

As a creature of statute, a board of county commissioners “may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted.” 2011 Op. Att’y Gen. No. 2011-045, at 2-361 (quoting 2010 Op. Att’y Gen. No. 2010-030, at 2-221). With respect to the expenditure of public moneys, governmental entities may only act by clear statutory authority and for a proper public purpose. *Id.* As “[m]oneys of a county are public funds that are held in trust for the benefit of the public,” the use or expenditure of those moneys is carefully guarded. *Id.*; *see generally Kohler v. Powell*, 115 Ohio St. 418, 425, 154 N.E. 340 (1926) (“[p]ublic money may be used only for public purposes and never for private gain”); 2007 Op. Att’y Gen. No. 2007-043, at 2-429 (“[a]ny doubt as to the authority to expend public funds must be

resolved in favor of the public and against the grant of authority to make the expenditure”). Even where statutory authority exists for the expenditure of county moneys, the exercise of that authority must comply with all other provisions of the Revised Code and pertinent restrictions in the Ohio Constitution. 2007 Op. Att’y Gen. No. 2007-036, at 2-373 (“[t]he donation of public money is ... limited by the fact that the use of certain funds is restricted by statute or constitution”). Specifically, when a governmental entity donates money to, or enters into an agreement with, a private entity, care must be taken to ensure there is no violation of Ohio Const. art. VIII, § 4 (the state) and § 6 (a county, city, town, or township), which impose restrictions upon the financial involvement of governmental entities with private enterprises. 2008 Op. Att’y Gen. No. 2008-003, at 2-33.

Therefore, a board of county commissioners may donate moneys to a private nonprofit corporation to create a donor advised fund and serve as an advisory board to the nonprofit corporation regarding charitable disbursements from the fund, provided Ohio law grants the board the authority to do so. If such authority exists, the board of county commissioners also shall ensure that all aspects of the transaction comply with the lending aid and credit proscriptions of Ohio Const. art. VIII, § 6.

Your letter refers to 2011 Op. Att’y Gen. No. 2011-045. In that opinion, the Attorney General considered whether a board of county commissioners may donate moneys derived from the sale of a county hospital to a nonprofit corporation. *Id.* at 2-360 to 2-361. The opinion concluded that R.C. 307.691 authorizes a board of county commissioners to donate county moneys for the general health and safety of the community by donating to a nonprofit corporation that is engaged in promoting safety in Ohio. 2011 Op. Att’y Gen. No. 2011-045 (syllabus). Insofar as you have referred to 2011 Op. Att’y Gen. No. 2011-045, we presume that the board of commissioners intends to donate the moneys to a nonprofit corporation in accordance with R.C. 307.691.

R.C. 307.691 provides, in pertinent part, a board of county commissioners “may *cooperate with, give financial assistance to,* and provide equipment to any nonprofit corporation *engaged in promoting safety in this state.*” (Emphasis added.)¹ The term “give” is synonymous with providing

¹ Under R.C. 307.691, a board of county commissioners may donate county moneys to a nonprofit corporation that is engaged in other activities as well. The first paragraph of R.C. 307.691 provides in full:

The board of county commissioners of any county or the legislative authority of a municipal corporation may cooperate with, give financial assistance to, and provide equipment to any nonprofit corporation engaged in promoting safety in this state, to any nonprofit corporation that provides ambulance service, emergency medical services, or nonemergency patient transport services in this state, to any nonprofit corporation engaged in this state in the development of public interest and understanding of the economic benefits resulting from the building of the Great Lakes-St. Lawrence Seaway, and to any nonprofit ombudsman corporation engaged

a donation. 2011 Op. Att’y Gen. No. 2011-045, at 2-362 n.6 (a donation is consonant with the term “give” used in R.C. 307.691 because “‘give,’ in common usage, means, *inter alia*, ‘to make a present of,’ and ‘to grant or bestow by formal action’” (quoting *Merriam-Webster’s Collegiate Dictionary* 529 (11th ed. 2005))). Thus, R.C. 307.691 authorizes a board of county commissioners to donate public moneys to a nonprofit corporation engaged in promoting safety in the state.

Whether a board of county commissioners may, pursuant to R.C. 307.691, donate county moneys to a nonprofit corporation that holds, invests, and makes grants for charitable purposes with the donated moneys depends upon whether those activities constitute “engaging in promoting safety.” As the phrase “engaging in promoting safety” is not defined for the purpose of R.C. 307.691, we look to the ordinary meanings of the terms. *See* R.C. 1.42.

“Engage” means to “occupy or involve oneself; take part; be active,” *Webster’s New World College Dictionary* 481 (5th ed. 2014), or “[t]o employ or involve oneself; to take part in; to embark on[.]” *Black’s Law Dictionary* 549 (7th ed. 1999). “Promote” means to “to help bring about or further the growth or establishment of[.]” *Webster’s New World College Dictionary* 1164, or “[t]o contribute to growth, enlargement, or prosperity of; to forward; to further; to encourage; to advance,” *Black’s Law Dictionary* 1214 (6th ed. 1990). Therefore, to be “engaged in promoting safety,” as understood by R.C. 307.691, a nonprofit corporation shall be involved in or take part in helping to bring about or further safety in the state. It is reasonable for a board of county commissioners to conclude that a nonprofit corporation that grants moneys to organizations or entities that promote safety in Ohio is “engaged in promoting safety.” By granting or distributing moneys to other nonprofit organizations or programs engaged in promoting safety in Ohio, the nonprofit corporation works to ensure that such organizations are provided the financial support they need to engage in activities that promote or advance safety in the state. It is further reasonable to conclude that holding and investing the donated moneys for the purpose of making grants to organizations that promote safety in Ohio are activities that promote safety for the purpose of R.C. 307.691. Investing and managing donated moneys enables the nonprofit corporation to provide continuous grant opportunities and financial support for the recipients of the grants.

As explained in 2011 Op. Att’y Gen. No. 2011-045, at 2-363 n.7, whether a particular nonprofit corporation is “engaged in promoting safety” in accordance with R.C. 307.691 requires an examination of the character of the nonprofit corporation, which may be ascertained from official documents or information published or provided by the nonprofit corporation, such as a nonprofit corporation’s articles of incorporation or public website. Undertaking such a factual determination with respect to a particular nonprofit corporation is beyond the scope of an Attorney General opinion. 2011 Op. Att’y Gen. No. 2011-045, at 2-363 n.7.

in this state in assisting citizens in dealing with governments, including political subdivisions, governmental agencies and instrumentalities, and public officials through the investigation of citizen complaints concerning government services and operations.

We have concluded that a nonprofit corporation that holds and invests moneys for the purpose of making donations to other charitable organizations that promote safety in Ohio constitutes a nonprofit corporation “engaged in promoting safety” for the purpose of R.C. 307.691. We also shall consider whether the donation complies with the restrictions imposed by Ohio Const. art. VIII, § 6. Ohio Const. art. VIII, § 6 prohibits a county from becoming a “stockholder in any joint stock company, corporation, or association whatever; or to raise money for or to loan its credit to, or in aid of, any such company, corporation, or association.”² However, public aid to a private nonprofit organization does not violate Ohio Const. art. VIII, § 6 if “it serves a public purpose.” 2002 Op. Att’y Gen. No. 2002-031, at 2-209; *see also State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 151-154, 128 N.E.2d 59 (1955) (state appropriations to veterans’ groups for veterans’ welfare was permissible under Ohio Const. art VIII, § 4 prohibiting the lending of the state’s credit, because the legislature’s stated purpose of rehabilitation of veterans and promoting patriotism was a public purpose); *State ex rel. Taft v. Campanella*, 51 Ohio App. 2d 237, 249, 368 N.E.2d 76 (Cuyahoga County 1977) (the purchase, refinancing, and lease-back arrangements of a hospital by a board of county commissioners was permissible under Ohio Const. art. VIII, § 6 because the organization to which the credit was lent was a nonprofit corporation operating a public hospital, which is a public purpose). “[E]nactments of the General Assembly are entitled to a presumption of constitutional validity.” 1974 Op. Att’y Gen. No. 74-102, at 2-419. By enacting R.C. 307.691 the General Assembly has determined that donations to nonprofit organizations that are engaged in promoting safety in the state serve a public purpose. 2014 Op. Att’y Gen. No. 2014-030, at 2-262 to 2-263 (“[t]he enactment of a statute authorizing an expenditure of funds is the General Assembly’s recognition that the expenditure serves a public purpose”); 2003 Op. Att’y Gen. No. 2003-019, at 2-151. In addition, the promotion of safety is also a public purpose. *State ex rel., McClure v. Hagerman*, 155 Ohio St. 320, 325, 98 N.E.2d 935, 838 (1951) (“[g]enerally, a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment” (emphasis added)). Therefore, a donation to a nonprofit corporation that comports with R.C. 307.691 serves a public purpose and is permissible under Ohio Const. art. VIII, § 6.³

² Article VIII, § 4, imposes restrictions on the state and § 6 imposes restrictions on counties, cities, towns and townships. We are concerned specifically with § 6’s restrictions on counties; however, the analysis utilized in cases brought under § 4 has been applied in cases challenging involvement by local entities brought under § 6 and *vice versa*. *See Grendell v. Ohio Environmental Protection Agency*, 146 Ohio App. 3d 1, 7-8, 764 N.E.2d 1067 (Summit County 2001); *see also State ex rel. Tominos v. Brown*, 47 Ohio St. 3d 119, 121-122, 549 N.E.2d 505 (1989). Therefore, we look to cases and opinions interpreting both sections to guide our analysis.

³ For the purpose of this opinion, we presume that none of the donated county moneys will be used for the “purpose of assisting private, for-profit corporations.” 1998 Op. Att’y Gen. No. 98-034, at 2-199 (grants made to “nonprofit corporations for the purpose of assisting private, for-profit corporations [are] prohibited by Ohio Const. art. VIII, §4”). The board of county commissioners

We now consider whether a board of county commissioners may serve as an advisory board to the nonprofit corporation that receives a donation of county moneys pursuant to R.C. 307.691.⁴ In addition to authorizing a board of county commissioners to make a donation to a nonprofit corporation engaged in promoting safety, R.C. 307.691 authorizes a board of county commissioners to “cooperate with” a nonprofit corporation engaged in promoting safety. R.C. 307.691 declares that a board of county commissioners may “cooperate with, give financial assistance to, *and* provide equipment to” a nonprofit corporation that is engaged in promoting safety in the state. (Emphasis added.) The use of the word “and” rather than “or” suggests the General Assembly intended for a board of county commissioners to have the power to cooperate with, donate to, and provide equipment to the same nonprofit corporation engaged in promoting safety. Therefore, a board of county commissioners may make a donation and “cooperate with” the same nonprofit corporation.

The term “cooperate” is not defined in R.C. 307.691. Thus, in accordance with R.C. 1.42, the term is to be “read in context and construed according to the rules of grammar and common usage.” *See also* 1989 Op. Att’y Gen. No. 89-080, at 2-375 (“any term left undefined by statute is to be accorded its common, everyday meaning” (quoting *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449, 451(1983))). “Cooperate” in common usage means, *inter alia*, “to act or work together with another or others for a common purpose.” *Webster’s New World College Dictionary* 327; *see also Black’s Law Dictionary* 334 (6th ed. 1990) (defining “cooperate” as “[t]o act jointly or concurrently toward a common end”). It is evident that “cooperate” includes many possible activities or efforts, but denotes effort or work by both parties. One party does not control or perform all the effort or work.

Advising a nonprofit corporation regarding charitable disbursements of the county’s donated moneys may reasonably be considered an act of working with the corporation for the common

may want to consider placing qualifiers upon the use of county moneys that it donates to a nonprofit corporation to ensure the public moneys are used to promote safety in accordance with R.C. 307.691. 1971 Op. Att’y Gen. No. 71-044 (syllabus) (“[a] municipality may not make an outright, unrestricted gift of funds to a nongovernmental organization, regardless of whether or not such organization may be generally engaged in performing a beneficial, public purpose”). Protection against the improper use of the donated county moneys is provided in the second paragraph of R.C. 307.691 which states that the nonprofit corporation shall be required to:

make an audited account at least once every year of any funds received, and a report of the use and disposition of any equipment received, from the board of county commissioners ... to the board of county commissioners ... from which the funds or equipment is received.

⁴ For the purpose of this opinion we are addressing the ability of the board of county commissioners to serve as an advisor to a nonprofit corporation under R.C. 307.691. This opinion does not address the ability of the county commissioners to act as advisors in their individual capacities.

purpose of distributing the moneys of the fund to other charitable organizations. By advising the nonprofit corporation regarding charitable disbursements, a board of county commissioners is providing its opinion and assisting in the nonprofit corporation's decision making regarding where or to whom it should allocate its money. In this regard, a board of county commissioners is acting with the nonprofit corporation in making decisions regarding the recipients of charitable disbursements. Thus, R.C. 307.691 authorizes a board of county commissioners to serve as an advisory board to the nonprofit corporation that receives a donation of county moneys pursuant to R.C. 307.691.⁵

We now consider whether the board of county commissioners' ability to serve as an advisory board to the nonprofit corporation is affected by the structure of the donation as an endowment. "An endowment is generally understood to be a gift or bequest of money that is restricted by the donor's condition that the principal be kept primarily or wholly intact, while the income generated from the principal is expended for a specific purpose set forth by the donor in the gift instrument." 2013 Op. Att'y Gen. No. 2013-031, at 2-316; *see also Black's Law Dictionary* 448 (7th ed. 1999) (defining "endowment" as, *inter alia*, "[a] gift of money or property to an institution (such as a university) for a specific purpose, esp. one in which the principal is kept intact indefinitely and only the interest income from that principal is used"). Thus, structuring the county's donation as an

⁵ It is important to note that if a board of county commissioners retains so much control over the nonprofit corporation's actions or its use of the donated moneys that the nonprofit corporation is essentially acting as the agent or "alter ego" of the board of county commissioners, the board of county commissioners may be doing more than "cooperating" with the nonprofit corporation as authorized by R.C. 307.691. In addition, if the nonprofit corporation is essentially acting as the agent or "alter ego" of the board of county commissioners the requirements and prohibitions of Ohio Const. art. VIII, § 6, R.C. Chapter 135 (Uniform Depository Act), and any other laws that limit a board of county commissioners use or expenditure of public funds may be applicable to the nonprofit corporation. 2008 Op. Att'y Gen. No. 2008-003, at 2-32 ("if the nonprofit corporation is so dominated and controlled by the Foundation that it has no separate mind, will, or existence of its own, the corporate form of the nonprofit may be disregarded" and "could be subject to the same constitutional and statutory limitations" imposed on the Foundation); 1998 Op. Att'y Gen. No. 98-034, at 2-201 (the board of county commissioners "cannot do indirectly what it cannot do directly"). A nonprofit corporation will be found to be the alter ego or agent of the county if the nonprofit corporation lacks independence from the county or control over the use the moneys. 2008 Op. Att'y Gen. No. 2008-003, at 2-35; 1998 Op. Att'y Gen. No. 98-034, at 2-201.

In the circumstances you have described, it does not appear that the nonprofit corporation will act as the alter ego of the board of county commissioners. While the board of county commissioners will advise the nonprofit corporation regarding the charitable disbursements of the moneys, the corporation must approve the recommendations. Thus, the nonprofit corporation has retained independent control regarding the charitable disbursements of the funds. In addition, the nonprofit corporation, independent of the board of county commissioners, will hold, manage, and invest the donated moneys.

endowment allows only investment income from the moneys to be disbursed to charities rather than the principal.

As discussed above, under R.C. 307.691, so long as the nonprofit corporation is engaged in promoting safety, the board of county commissioners may donate and advise the nonprofit corporation. The statute provides no limitations regarding the form of the donation. Therefore, whether the donation is an endowment does not alter the board's ability to serve as an advisory board.

Conclusions

It is our opinion, therefore, and you are hereby advised that:

1. A board of county commissioners may donate money for the general health and safety of the community to a nonprofit corporation and serve as an advisor to the nonprofit corporation regarding the charitable disbursement of the moneys donated pursuant to R.C. 307.691, provided that the nonprofit corporation is engaged in promoting safety in Ohio.
2. A board of county commissioners' ability to serve as an advisory board is not affected by the structure of the county's donation under R.C. 307.691 as an endowment.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General