

**OPINION NO. 92-060****Syllabus:**

1. The competitive bidding requirements of R.C. 307.86 are not applicable to the purchase of real property by the Greene County Board of County Commissioners for use as a solid waste transfer, disposal, recycling or resource recovery facility of the Greene County Solid Waste Management District.
2. The Board of County Commissioners of Greene County may not accomplish as a single transaction the purchase of real property for a solid waste transfer, disposal, recycling or resource recovery facility and the purchase of operation and maintenance services for the facility the cost of which exceeds \$10,000, since the acquisition of such services is subject to the competitive bidding requirements of R.C. 307.86.
3. R.C. 153.50 requires the Greene County Board of County Commissioners to require separate bids to be made for furnishing materials or doing work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business in the construction of a solid waste transfer, disposal, recycling or resource recovery facility of the Greene County Solid Waste Management District.

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**To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio**  
**By: Lee Fisher, Attorney General, December 29, 1992**

You have requested an opinion regarding the authority of the Board of County Commissioners of Greene County with respect to the Greene County Solid Waste Management District. Your specific questions are as follows:

- A. In order to meet its statutory obligation under ORC 3734.52(F), to afford existing facilities "maximum feasible utilization", and in an effort to avert OEPA's [Ohio Environmental Protection Agency's] predicted solid waste management "crisis" in Greene County, may Greene County, without violating competitive bidding requirements, legitimately negotiate the purchase of a parcel of real property from a private entrepreneur, together with the existing structures on the parcel, with the intent to acquire the improved parcel and continue the use and operation of the existing facility?
- B. Assuming that Greene County may legitimately purchase the existing solid waste facility, and continue its operation in the manner just described, may Greene County also arrange, as part of the negotiated facility purchase, for the operation and maintenance of the facility by the current owner under contract to the County?
- C. If Greene County elects to forgo the opportunity to acquire an existing facility and instead elects to develop its own solid waste transfer/processing operation, may it invite bids which combine all required components of the development of such a new facility, including its design, construction, and operation?

#### **Background**

In 1988, the General Assembly passed Am. Sub. H.B. 592 (1987-1988 Ohio Laws, Part III 4418, eff. June 24, 1988) which provides for the establishment of mandatory solid waste management districts throughout the state. R.C. 343.01(A); R.C. 3734.52(A). R.C. 3734.52(A) requires each board of county commissioners to "either establish and maintain a solid waste management district under Chapter 343. of the Revised Code, or participate in establishing and maintaining a joint solid waste management district with one or more other such boards under that chapter." See also R.C. 3734.52(B). R.C. 343.01(A) mandates that each county shall do one of the following:

- (1) Establish, by resolution, and maintain a county solid waste management district under this chapter that consists of all the incorporated and unincorporated territory within the county except as otherwise provided in [R.C. 343.01(A)];<sup>1</sup>
- (2) With the boards of county commissioners of one or more other counties establish, by agreement, and maintain a joint solid waste management district under this chapter that consists of all the incorporated and unincorporated territory within the counties comprising the joint district except as otherwise provided in [R.C. 343.01(A)]. (Footnote added.)

Thus, the board of county commissioners of each county must establish a solid waste management district, or, in the alternative, establish a joint solid waste management district by agreement with the boards of county commissioners of one or more other counties.

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<sup>1</sup> R.C. 343.01(A) provides that "[i]f a municipal corporation is located in more than one solid waste management district, the entire municipal corporation shall be considered to be included in and shall be under the jurisdiction of the district in which a majority of the population of the municipal corporation resides." In some cases, therefore, a county solid waste management district includes territory outside of the county boundaries.

The express purpose of each solid waste management district is to "prepare, adopt, and submit to the director of environmental protection for review and approval, and implement a solid waste management plan for the district." R.C. 3734.54(A); *see also* R.C. 3734.53 (format and contents of county and joint solid waste management plans); R.C. 3734.55 (draft plan review and approval procedures; implementation of plan); R.C. 3734.56 (periodic submission of amended plan and certification). *See generally* 1989 Op. Att'y Gen. No. 89-102; 1989 Op. Att'y Gen. No. 89-054; 1989 Op. Att'y Gen. No. 89-020; 1988 Op. Att'y Gen. No. 88-099.

**Management and Acquisition of Property by the Greene County Solid Waste Management District.**

The board of county commissioners of Greene County has established a county solid waste management district pursuant to R.C. 343.01(A)(1). The general management of a county solid waste management district and implementation of the solid waste management plan is vested in the board of county commissioners.<sup>2</sup> R.C. 343.01. R.C. 343.01(C) expressly authorizes the board of county commissioners of a county solid waste management district to "acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate such solid waste collection systems within [the county] and such solid waste transfer, disposal, recycling, or resource recovery facilities within or outside [the county] as are necessary for the protection of the public health." Additionally, "[a] board of county commissioners may acquire within its county real property or any estate, interest, or right therein, by appropriation or any other method, for use by a county...district in connection with [solid waste transfer, disposal, recycling, or resource recovery facilities]," *id.*, and the board may enter into agreements for the acquisition, construction, improvement, enlargement, equipment, maintenance, or operation of solid waste transfer, disposal, recycling, or resource recovery facilities, R.C. 343.04.

R.C. Chapter 343 does not specify any particular method for purchasing real property. However, R.C. 307.86 provides, in relevant part, as follows:

Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser by or on behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code, at a cost in excess of ten thousand dollars, except as otherwise provided in division (D) of section 713.23 and in sections 125.04, 307.022, 307.861, 339.05, 340.03, 340.033, 4115.31 to 4115.35, 5119.16, 5513.01, 5543.19, 5713.01, and 6137.05 of the Revised Code, shall be obtained through competitive bidding.<sup>3</sup> (Footnote added.)

Further exceptions to the requirement of competitive bidding are set forth in divisions (A) through (H) of R.C. 307.86.

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<sup>2</sup> R.C. 343.011 provides for an alternative type of management. Pursuant to this section, a regional solid waste management authority may be formed "for the purpose of executing all the duties and responsibilities imposed on or granted to the [board of county commissioners]." R.C. 343.011(A). However, a member of your staff has indicated that a regional solid waste management authority has not been formed in Greene County.

<sup>3</sup> None of these exceptions are applicable to the purchase of real property by a county solid waste management district.

The provisions of R.C. 307.86 apply to purchases at a cost in excess of ten thousand dollars by or on behalf of the county or a "contracting authority." "Contracting authority" is defined by R.C. 307.92 as "any board, department, commission, authority, trustee, official, administrator, agent, or individual which has authority to contract for or on behalf of the county or any agency, department, authority, commission, office, or board thereof." Clearly, the board of county commissioners has authority to contract for or on behalf of the county and is therefore a "contracting authority" subject to R.C. 307.86 when it does so. Whether the board of county commissioners is a "contracting authority" when it contracts for or on behalf of a solid waste management district depends upon whether that county solid waste management district is an agency, department, authority, or commission of Greene County. *See generally* 1990 Op. Att'y Gen. No. 90-018.

**The Board of County Commissioners of Greene County is Subject to the Competitive Bidding Requirements of R.C. 307.86 When It Transacts the Business of the Greene County Solid Waste Management District**

There is no comprehensive test for determining whether an entity is an agency, board, commission, or authority of the county. However, previous Attorney General Opinions have addressed the issue of whether a particular entity is a county board in the context of determining what was a county board for purposes of R.C. 309.09 (setting forth the duty of the prosecutor to advise certain county entities). 1961 Op. Att'y Gen. No. 2383, p. 366; *see also* 1989 Op. Att'y Gen. No. 89-001; 1984 Op. Att'y Gen. No. 84-099; 1979 Op. Att'y Gen. No. 79-039. This same analysis is applicable in the determination of whether an entity is an agency, board, commission, or authority of the county pursuant to R.C. 307.92, since in both instances, the pivotal question is whether the entity is "essentially a subdivision of the county or a subordinate department of the county." 1961 Op. No. 2383 at 369. *See generally* Op. No. 90-018 (a joint township hospital board is not a contracting authority as defined in R.C. 307.92 as it is neither a county agency nor an administrative subdivision of county government). These opinions examined the following factors to determine whether an entity is essentially a subdivision or subordinate department of the county: (1) whether the territory that comprises the entity is coextensive with the territorial limits of the county; (2) whether the county is responsible for the organization and supervision of the entity; and (3) whether the entity is funded by or through the county.

The fact that the geographic boundaries of an entity are coextensive with the boundaries of the county is not, standing alone, enough to require the conclusion that the entity is a subdivision or subordinate department of the county. However, it weighs in favor of that determination, since an entity that exercises authority over an area that exceeds the territorial limits of the county has been determined not to be a subdivision or subordinate department of the county on that basis. *See, e.g.*, Op. No. 89-102; 1983 Op. Att'y Gen. No. 83-064. In this regard, your letter indicates that the Greene County Solid Waste Management District is coextensive with the territorial limits of Greene County.

Regarding the organization and supervision of the entity, previous Attorney General Opinions have concluded that if an entity is not organized by the county, Op. No. 84-099, or is not supervised by the county, Op. No. 89-001, it is not a county board. Pursuant to R.C. 343.01 and R.C. 3734.52, the board of county commissioners establishes and maintains a county solid waste management district, and thus, a county solid waste management district is both organized and supervised by the county. *See also* R.C. 343.01(F) (authority of the board of county commissioners to make, publish and enforce rules for the operation of a county solid waste management district); R.C. 343.01(G) (authority of the board of county commissioners to enter into contracts for the district).

With respect to funding, Op. No. 79-039 concluded that the board of trustees of a joint ambulance district was not a county board for purposes of R.C. 309.09

because the county had no involvement in the organization, funding or operation of the joint ambulance district. Although the issue of funding is not by itself dispositive of the issue of whether an entity is a county board, the fact that county funds are expended for the entity supports a determination that the entity is a county board. In the case of a county solid waste management district, R.C. 343.07(A) provides that the board of county commissioners "may issue *bonds of the county*...for the purpose of paying a part or the whole cost of the acquisition, construction, enlargement, modification, or repair of any improvement provided for in [R.C. Chapter 343] in connection with a county...solid waste management district." (Emphasis added.)

Based on the above factors, it is clear that the Greene County Solid Waste Management District is a subdivision or subordinate department of the county. Since the Board of County Commissioners of Greene County has the authority to contract for or on behalf of the Greene County Solid Waste Management District, it is a "contracting authority" pursuant to R.C. 307.92. Accordingly, the Board of County Commissioners of Greene County is subject to the competitive bidding requirements of R.C. 307.86 when it transacts the business of the Greene County Solid Waste Management District.

**The Purchase of an Existing Solid Waste Facility for the Greene County Solid Waste Management District by the Board of County Commissioners Is Not Subject to the Competitive Bidding Requirements of R.C. 307.86**

Your first question asks whether the competitive bidding requirements of R.C. 307.86 apply to the purchase of a solid waste facility by the Board of County Commissioners of Greene County. You have provided the information that an individual has developed a solid waste facility<sup>4</sup> and wishes to sell the facility to the Greene County Solid Waste Management District. The purchase of the facility would be in large part a purchase of real property. Thus, the issue to be addressed is whether R.C. 307.86 applies to the purchase of real property by the Board of Commissioners of Greene County for the Greene County Solid Waste Management District.

With respect to the purchase of real estate for certain specified purposes, R.C. 307.08 states as follows:

When, in the opinion of the board of county commissioners, it is necessary to procure real estate, a right-of-way, or an easement for a courthouse, jail, or public offices, or for a bridge and the approaches thereto, or other structure, or public market place or market house, proceedings shall be had in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.

R.C. 163.01-.22 control the appropriation of property by the county. In particular, R.C. 163.04 requires a public agency to attempt to agree with the owners of real property before invoking the appropriation process. There is an apparent conflict

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<sup>4</sup> You have referred to the solid waste facility in question variously as a "transfer facility" and a "transfer/processing facility." However, "solid waste transfer facility" is defined, for purposes of R.C. Chapters 343 and 3734 to exclude "any facility where legitimate recycling activities are conducted." R.C. 3734.01(U); *see also* R.C. 343.01(J)(2). Since you have indicated that both transfer and recycling activities would occur at the facility, it is not a "solid waste transfer facility" for purposes of R.C. Chapters 343 and 3743.

between R.C. 307.08 and R.C. 307.86 to the extent that R.C. 307.08 requires the board of county commissioners to proceed according to R.C. 163.01-.22 (and thus according to R.C. 163.04) for the procurement of real estate for a structure while R.C. 307.86 calls for competitive bidding for any purchase in excess of ten thousand dollars (with certain exceptions not relevant here) by or on behalf of the county or a contracting authority. This conflict was addressed in 1979 Op. Att'y Gen. No. 79-034, which concluded that the competitive bidding requirements of R.C. 307.86 do not apply to the purchase of real estate by a board of county commissioners. The conclusion was based in large part on the rule of statutory construction that holds that a more specific statutory provision must prevail over a general statutory provision to the extent that there is any conflict between the two. R.C. 1.51. Since R.C. 307.08 specifically governs the acquisition of real property while R.C. 307.86 applies to "anything to be purchased" at a cost exceeding \$10,000, the provisions of R.C. 307.08 prevail in the purchase of real property by the board of county commissioners. Op. No. 79-034 further reasoned that R.C. 307.08

must be construed as authorizing the purchase of a particular parcel of real property without competitive bidding, since the power of appropriation vested in the commissioners under R.C. 307.08 and R.C. Chapter 163 would be meaningless if that body were not free to determine what particular parcels of land best suit the public purpose and to attempt to purchase such parcels without the invocation of the power of eminent domain.

Op. No. 79-034 at 2-115.<sup>5</sup> Moreover, Op. No. 79-034 noted that "because real estate is unique, the purchase thereof is not really susceptible to a competitive bidding process." *Id.*

R.C. 343.01(C) contains language similar to that of R.C. 307.08:

A board of county commissioners may acquire within its county real property or any estate, interest, or right therein, by appropriation or any other method, for use by a county...district in connection with [solid waste transfer, disposal, recycling, or resource recovery] facilities. Appropriation proceedings shall be conducted in accordance with sections 163.01 to 163.22 of the Revised Code.

The reasoning of Op. No. 79-034 is likewise applicable to R.C. 343.01(C). The authority granted to the board of county commissioners by R.C. 343.01 and R.C. Chapter 163 would be meaningless if the board were unable to determine what particular real property was most suitable for solid waste transfer, disposal, recycling, or resource recovery facilities. Thus, following the same analysis discussed above with respect to R.C. 307.08, R.C. 343.01(C) must be construed as authorizing the purchase of real property without competitive bidding.

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<sup>5</sup> Although 1979 Op. Att'y Gen. No. 79-034 referred variously to "parcels of real property" and to "parcels of land," the term "real estate," as used in R.C. 307.08, clearly includes land and any structure located on the land. Since "real estate" is not defined for purposes of R.C. 307.08, it must be accorded its natural, literal, common or plain meaning. R.C. 1.42; *State v. Dorso*, 4 Ohio St. 3d 60, 446 N.E.2d 449 (1983). The dictionary defines "real estate" as "[l]and and anything permanently affixed to the land, such as buildings, fences, and those things attached to the buildings.... The term is generally synonymous with real property." *Black's Law Dictionary* 1263 (6th ed. 1990).

**A Contract Pursuant to R.C. 343.01(G) for the Operation and Maintenance of a Solid Waste Facility for the Greene County Solid Waste Management District Must Be Competitively Bid Pursuant to R.C. 307.86**

Your second question asks whether the purchase of the real property constituting a solid waste facility by the board of county commissioners and the purchase of services to operate and maintain the facility can be accomplished as a single transaction.

R.C. 343.04 was recently amended in order "to revise the procedures by which a solid waste management district may acquire, construct, improve, enlarge, equip, maintain, and operate solid waste facilities included in the district's solid waste management plan." Am. Sub. H.B. 149, 119th Gen. A. (1992) (eff. Mar. 24, 1992) (preamble). This amendment expanded the authority of the board of county commissioners by providing that, after the board has approved a general facilities plan, it

may enter into agreements determined by the board to be necessary for the acquisition, construction, improvement, enlargement, equipment, maintenance, or operation of, any solid waste transfer, disposal, recycling, or resource recovery facilities included in the general facilities plan. Such agreements may include provisions concerning at least the ownership and control of the facilities by the district or by any other party to the agreement as designated in the agreement; the operation, leasing, or subleasing of the facilities by the district or by any other such party; and the final sale or other disposition of the facilities to the district or to any other such party.

Accordingly, an agreement entered into by the board for the acquisition of any solid waste transfer, disposal, recycling, or resource recovery facility pursuant to R.C. 343.04 may provide for the operation of the facility by the seller, or any other party to the agreement.<sup>6</sup>

In exercising its authority pursuant to R.C. 343.04, however, the board of county commissioners must comply with any other statutes that control the purchase of property or services by the board. Although the board is not constrained to employ competitive bidding in the purchase of real property, R.C. 307.86 requires the board to accept bids for the purchase of services at a cost in excess of \$10,000. See generally *Sentinel Security Systems v. Medkeff*, 36 Ohio App. 3d 86, 521 N.E.2d 7 (Summit County 1987).<sup>7</sup> Thus, although R.C. 343.04 permits an agreement for the acquisition of real property to include provisions for the operation

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<sup>6</sup> R.C. 343.04 permits the board of county commissioners to include a provision for the *operation* of a solid waste facility in an agreement for the purchase of such facility. "Operation" is not defined for purposes of the statute, and therefore it must be accorded its ordinary meaning. *State v. Dorso*. The dictionary defines "operation" to include "the act, process, or method of operating[;]...the condition of being in action or at work." *Webster's New World Dictionary* 997 (2d ed. 1978). The "process or method of operating" a solid waste facility reasonably includes the maintenance of such facility. Whether a contractual provision for the operation of a solid waste facility includes maintenance, however, is a question of fact to be determined in each individual case.

<sup>7</sup> Your letter requesting my opinion suggested that the exceptions to competitive bidding listed in divisions (A) and (B) of R.C. 307.86 might apply to the present case. However, neither R.C. 307.86(A) nor (B) is applicable.

of the facility, the board of county commissioners must obtain any operation and maintenance services the cost of which exceeds \$10,000 pursuant to competitive bidding. Accordingly, the board may not arrange, as a part of the negotiations for the purchase of the real property, for the operation and maintenance of the facility by the seller of the real property. In the event that the seller of the real property is also the successful bidder for the supply of operation and maintenance services, however, the agreement for the purchase of the real property may include provisions concerning the operation of the solid waste facility pursuant to R.C. 343.04.

**The Construction of a Solid Waste Facility for the Greene County Solid Waste Management District Is Subject to R.C. 153.50**

Your third question asks whether, if the Board of County Commissioners of Greene County chooses to develop a solid waste facility rather than to purchase an existing facility, the Board may invite bids that combine all required components of the development of a new facility, including design, construction, and operation. R.C. 307.86, which, as noted above, applies to the Board of County Commissioners of Greene County when transacting the business of the Greene County Solid Waste Management District, requires that any construction to be purchased at a cost in excess of ten thousand dollars (with certain exceptions not relevant here) shall be obtained through competitive bidding. R.C. 307.86 does not address the issue of combining the components of the development of a new facility into a single bid. However, R.C. 153.50 provides as follows:

An officer, board, or other authority of the state, a county, township, municipal corporation, or school district, or of any public institution belonging thereto, authorized to contract for the erection, repair, alteration, or rebuilding of a public building, institution, bridge, culvert, or improvement and required by law to advertise and receive proposals for furnishing of materials and doing the work necessary for the erection thereof, shall require separate and distinct proposals to be made for furnishing such materials or doing such work, or both, in their discretion, *for each separate and distinct trade or kind of mechanical*

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R.C. 307.86 permits relief from the requirement of competitive bidding under certain circumstances where the board of county commissioners makes a determination that a "real and present emergency exists." A "real and present emergency" is not defined for purposes of R.C. 307.86. However, "emergency" is generally understood to mean "a sudden, generally unexpected occurrence or set of circumstances demanding immediate action." *Webster's New World Dictionary* 457 (2d ed. 1978). The present situation cannot be reasonably characterized as an emergency. Although the operation and maintenance of a solid waste facility is doubtless of a serious nature, the necessity for these services is not unexpected. To the contrary, the need for these services has been projected by the board of county commissioners. Likewise, the exception set forth in R.C. 307.86(B) is not applicable. R.C. 307.86(B) excepts from competitive bidding a purchase that "consists of supplies or a replacement or supplemental part or parts for a product or equipment owned or leased by the county and the only source of supply for such supplies, part or parts is limited to a single supplier." The language of the statute does not include "services" in this exception, and there is no evidence to indicate that the General Assembly intended to create such an exception.



*labor, employment, or business entering into the improvement.*<sup>8</sup>  
(Emphasis and footnote added.)

It is clear that a bid invitation that combines all of the components of the development of a solid waste facility will violate the requirement of R.C. 153.50 that separate proposals be received for "furnishing such materials or doing such work, or both...for each separate and distinct trade or kind of mechanical labor, employment, or business entering into the improvement." Since the requirements set forth in R.C. 153.50 are mandatory, a contract made in violation of this section is void. See *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966); *State ex rel. Shaefer v. Board of County Commr's*, 11 Ohio App. 2d 132, 229 N.E.2d 88 (Montgomery County 1967). The development of a solid waste facility, from design through construction, involves a number of distinct trades or kinds of mechanical labor, employment, or business. Therefore, the Board of County Commissioners of Greene County, pursuant to R.C. 153.50, may not invite bids that combine all aspects of the design, construction and operation of a solid waste facility.

### Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised, that:

1. The competitive bidding requirements of R.C. 307.86 are not applicable to the purchase of real property by the Greene County Board of County Commissioners for use as a solid waste transfer, disposal, recycling or resource recovery facility of the Greene County Solid Waste Management District.
2. The Board of County Commissioners of Greene County may not accomplish as a single transaction the purchase of real property for a solid waste transfer, disposal, recycling or resource recovery facility and the purchase of operation and maintenance services for the facility the cost of which exceeds \$10,000, since the acquisition of such services is subject to the competitive bidding requirements of R.C. 307.86.
3. R.C. 153.50 requires the Greene County Board of County Commissioners to require separate bids to be made for furnishing materials or doing work, or both, in their discretion, for each separate and distinct trade or kind of mechanical labor, employment, or business in the construction of a solid waste transfer, disposal, recycling or resource recovery facility of the Greene County Solid Waste Management District.

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<sup>8</sup> Additionally, R.C. 153.51 provides that

[w]hen one or more trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

See also R.C. 153.52 (contracts awarded separately for each trade or kind of mechanical labor to the lowest and best bidder).