

**Note from the Attorney General's Office:**

1965 Op. Att'y Gen. No. 65-126 was questioned by  
1987 Op. Att'y Gen. No. 87-069.

**OPINION NO. 65-126****Syllabus:**

1. There is no statutory authority for a corporation not for profit to be formed by or on behalf of a county for the purpose of constructing and financing a county office building, and the probability of a conflict of interest is inherent in any plan by which a county official becomes an incorporator or trustee of such corporation.

2. Boards of county commissioners are authorized by Section 307.09, Revised Code, to sell real estate belonging to the county only where such real property is not needed for public use and the interests of the county require such sale and any sale of such real property made pursuant to a resolution adopted by such board must be made in accordance with Section 307.10, Revised Code.

3. A board of county commissioners is authorized by Section 307.02, Revised Code, to enter into a lease agreement with an option to purchase a building for use for county offices and, pursuant to this section, may enter into such lease agreement for a building to be constructed by the use of private funds on land owned by the county.

4. A lease with an option to purchase is a continuing contract within the meaning of Section 5705.41, Revised Code, and the fiscal officer's certification initially required by that section is only for the amount payable under the contract for the fiscal year in which such contract is made.

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**To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio**  
**By: William B. Saxbe, Attorney General, July 13, 1965**

Your request for my opinion reads:

"The Lucas County Board of County Commissioners deem it necessary to provide a county office building in Toledo, Ohio, for the use of the County and have asked me to request your opinion on the legality of the proposed acquisition of such county office building which is as follows:

"1. A non-profit corporation would be formed at the request of the County to act for and on behalf of the County in the acquisition, construction and financing of the desired building. The Articles of Incorporation would provide that non-profit could perform no other functions and, upon retirement of the indebtedness incurred by non-profit to finance such building, non-profit would be dissolved and all of its assets, including the building, would be conveyed to the County.

"2. The County owns land on which the office building would be located. The County Commissioners would declare by resolution that this land, in its existing state, is not needed for a public use. The County proposes to sell this site, in the manner provided by law, to non-profit under Section 307.09 of the Ohio Code.

"3. Non-profit would lease the land to the County for a term of years (probably twenty-five) under Section 307.02 with an option to the County to purchase the land and the building.

"A lease with only an option to purchase (which would exclude a purchase now) appears to be indicated in order that the annual rentals to be paid by the County could be classified as annual obligations of the County under a 'continuing contract' under Section 5705.41. This interpretation would be in conformity with Attorney General Opinion Number 1604 in 1958 at page 22.

"4. The non-profit would then proceed with the issuance of bonds to finance the construction of the office building and would let the construction contract therefor. The bonds would be payable out of rentals received from the County and would be authorized by an indenture which would contain a mortgage.

"5. The annual rentals to be paid by the County for the lease of the building would be sufficient in amount to amortize the bonded indebtedness of non-profit during the term of the lease. The costs of operation and maintenance of the building, renewals and replacements, insurance and amounts equal to any taxes and assessments would be paid by the County as a part of the annual rental. The annual rental, monthly payments plus expenses of operation and maintenance, would not exceed such an amount as is fair and reasonable for a building of the type and location and purposes of the office building to be constructed.

"6. The option to purchase contained in the lease would not be self-executing but would require an overt future act by the County Commissioners. This requirement would be specified in order to show a definite intention of the parties that total purchase price not be considered as a debt obligation of the County initially. The price to be paid in the event of the exercise of the option would be the value of the building after being depreciated at the rate permitted by the Internal Revenue Service.

"7. The annual rentals payable by the

County to non-profit for the use of the office building would be within the overall 10 mill tax levy limitation, including the levy being presently made.

"After all details of the transaction have been worked out and necessary documents prepared to effectuate the acquisition by the County of the office building as above outlined, the documents would be executed and delivered to the parties in interest at the time non-profit receives the proceeds from the sale of its revenue bonds.

"I do not find any decisions interpreting these pertinent sections of the statute. Accordingly, your opinion as to the legality of the acquisition by Lucas County of the office building as outlined above will be greatly appreciated."

You have said that the proposed corporation not for profit would be formed to act for and on behalf of the County, but you have not given specific information concerning this proposed plan. I can, therefore, make no complete analysis of this phase of the plan. I must mention, however, that I know of no statutory authority for a county to perform its legal duties by the intervention of such a corporation. Also, any county official who may plan to act as an incorporator or trustee of this corporation should give careful thought to a possible conflict of interest between the dual duties which he would be assuming. In addition, the corporate purposes should necessarily be those which would be proper for a non-profit corporation and not be such that the corporation would be usurping powers vested only in county officials.

Boards of county commissioners are authorized by Section 307.09, Revised Code, to sell certain real estate. That section reads in part:

"If the interests of the county so require, the board of county commissioners may sell any real estate belonging to the county and not needed for public use.\* \* \*"

(Emphasis added)

There is no authority, express or implied, for such board to find that real property is not needed "in its existing state." Neither is there authority to sell real property which is in fact needed for county purposes and to enter into an agreement whereby such real property will first be sold and then repurchased.

The decision that real property is not needed for public use and that the interests of the county require that it be sold is a question of fact to be determined by the board of county commissioners in the exercise of its sound discretion, and is not a question upon which I could rule as a matter of law. Whether such a board in fact abuses its discretion is a matter which can be determined only by a court where a proper action is filed.

You have said in your request that the board of county commissioners plans to sell the real property in question to the corporation which is to be formed. In the event that the board adopts a resolution to sell such property, Section 307.10, Revised Code, would govern the method of sale. That section reads in part:

"No sale of real estate, or lease of real estate used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof, as provided by section 307.09 of the Revised Code shall be made unless it is authorized by a resolution adopted by a majority of the board of county commissioners. When such a sale or lease is authorized a deed or lease shall be made by the board to the highest responsible bidder, after advertisement once a week for four consecutive weeks in a newspaper of general circulation within such county. The board may reject any bids and readvertise until all such real estate is sold or leased."

This section has been amended since I issued Opinion No. 318, Opinions of the Attorney General for 1957, page 91, at which time Section 307.10, Revised Code, controlled only the sale of property, but I do not find that these amendments in any way change the conclusion I then reached. The first paragraph of the syllabus reads:

"1. A board of county commissioners selling county owned land under the provisions of Section 307.09, Revised Code, must proceed in compliance with Section 307.10, Revised Code, and such sale cannot be for nominal consideration if there is any higher bid."

Opinion No. 1185, Opinions of the Attorney General for 1957, page 599, was issued after Section 307.10, Revised Code, had been amended, and I there said, as shown by the syllabus:

"1. A board of county commissioners selling or leasing county owned real property under the provisions of Section 307.09, Revised Code, must proceed in compliance with Section 307.10, Revised Code, and such sale or lease must be by acceptance of the written bid of the highest responsible bidder."

Thus, it is clear that if the board of county commissioners determines in the exercise of its sound discretion that the described land is not needed for public use and is to be sold, there could be no assurance that the sale could legally be made to the corporation to which you have referred. It is possible that such corporation would not be the highest responsible bidder.

Boards of county commissioners have express statutory authority to enter into a lease with an option to purchase such as you have described. Section 307.02, Revised Code, reads in part:

"The board of county commissioners of any county, in addition to its other powers, may

purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse, county offices, jail, county home, juvenile court building, detention home, public market houses, county children's home, and other necessary buildings, public stadiums, public auditorium, exhibition hall, zoological park, and related parking facilities, and sites therefor, such real estate adjoining an existing site as is necessary for any of such purposes, including real estate necessary to afford light, air, protection from fire, suitable surroundings, ingress, and egress; such copies of any public records of such county, made or reproduced by miniature photography or microfilm, as are necessary for the protection and preservation of public records of such county."

You have indicated that under the proposed plan the board of county commissioners would enter into a lease with an option to purchase. Although the factual situation presented in Opinion No. 1604, Opinions of the Attorney General for 1958, page 22, was different from that now being considered, the following language in the second paragraph of the syllabus is pertinent here:

"2.\* \* \*Such agreement may also include either an option or a firm contract to purchase such property, the former being a 'continuing contract' as provided in Section 5705.41, Revised Code.\* \* \*"

Section 5705.41, Revised Code, reads in part:

"No subdivision or taxing unit shall:

\* \* \* \* \* \* \* \*

"(D) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon.\* \* \*"

The following language in Opinion No. 1604, Opinions of the Attorney General for 1958, supra, at page 27, is applicable here:

"Since a lease for a period of years is

obviously a 'continuing contract' as provided for in Section 5705.41, Revised Code, I find no reason why a board of education may not enter into such lease agreement, provided, of course, said board complies in all other respects with Section 5705.41 (D), supra, to wit: that a certificate be obtained stating that the amount necessary to meet such agreement in the year in which made has been appropriated and is in the treasury or in the process of collection.\* \* \*"

Section 5705.44, Revised Code, directs as follows as to subsequent payments becoming due on such lease:

"When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge."

Your attention is invited to the following language which appears in the syllabus of Opinion No. 1524, Opinions of the Attorney General for 1964, page 2-428:

"2. An agreement to purchase real estate which provides for payment of the purchase price in installments extending beyond the termination of the fiscal year in which made is subject to Section 5705.44, Revised Code.

"3. The amount of the obligation under a contract by a board of county commissioners to purchase real estate remaining unfulfilled at the end of a fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge."

At page 2-431, I said this:

"Accordingly, in the case of contracts running beyond the termination of the fiscal year in which they were made, the fiscal officer is authorized to make his certificate for only the amount needed for the fiscal year in which the contract was made. The amount of the obligation under such contract remaining unfulfilled at the end of any subsequent fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge."

Boards of county commissioners have statutory authority to

construct a county office building; this power is specifically granted by Section 307.02, Revised Code. Your attention is invited to Opinion No. 451, Opinions of the Attorney General for 1959, page 220. The plan proposed at that time was somewhat similar to that you have described, and my predecessor in office said this, at page 225:

"Since it appears clear that the plan contemplated by the Company involves the erection of the building in question on land owned by the county, I can see no place in the scheme for either a conveyance or lease by the county of its land on which the building is to be erected, now occupied by the jail, nor do I consider that Section 307.02, *supra*, in referring to a lease-purchase plan contemplates that the county should either convey or lease its land to the Company. The building is to be built with the consent and agreement by the county, on county land. The Company in turn will execute the purchase-lease of the building to the county."

The syllabus reads in part:

"1. Under the provision of Section 307.02, Revised Code, the county commissioners of any county may enter into a lease-purchase contract with an individual or corporation for the construction by such contractor of a jail and office building, on land owned by the county, to be paid for by the county in stipulated installments running over not more than twenty-five years, such building, on completion of such payments, to become the property of the county.

"2. The county commissioners are not required to advertise for bids before entering into a lease-purchase contract, as authorized by Section 307.02, Revised Code."

In Opinion No. 451, Opinions of the Attorney General, *supra*, reference was made to the requirements of Section 153.36, Revised Code, but as that section refers to the construction, repair or improvement of a courthouse or jail, it is my conclusion that it has no application in this instance. Your attention is invited to the applicable sections of Chapter 153, Revised Code, which would control in the event that the board of county commissioners construct the proposed county office building, using public funds for such construction.

It is, therefore, my opinion and you are advised:

1. There is no statutory authority for a corporation not for profit to be formed by or on behalf of a county for the purpose of constructing and financing a county office building, and the probability of a conflict of interest is inherent in any plan by which a county official becomes an incorporator or trustee of such corporation.



2. Boards of county commissioners are authorized by Section 307.09, Revised Code, to sell real estate belonging to the county only where such real property is not needed for public use and the interests of the county require such sale and any sale of such real property made pursuant to a resolution adopted by such board must be made in accordance with Section 307.10, Revised Code.

3. A board of county commissioners is authorized by Section 307.02, Revised Code, to enter into a lease agreement with an option to purchase a building for use for county offices and, pursuant to this section, may enter into such lease agreement for a building to be constructed by the use of private funds on land owned by the county.

4. A lease with an option to purchase is a continuing contract within the meaning of Section 5705.41, Revised Code, and the fiscal officer's certification initially required by that section is only for the amount payable under the contract for the fiscal year in which such contract is made.