OPINION NO. 79-053

Syllabus:

The power of eminent domain may be exercised by a board of county commissioners for purposes of soil and water conservation projects, to the extent that the exercise of such power is necessary to enable the board to participate in the establishment and/or operation of a federal program.

To: The Honorable Lee E. Fry, Darke County Prosecuting Attorney, Greenville, Ohio
By: William J. Brown, Attorney General, August 24, 1979

I have before me your request for an opinion concerning the exercise of eminent domain powers in relation to soil and water conservation district projects. Specifically, you ask the following question:

> Where a proposed improvement, initiated through a soil and water conservation district pursuant to Chapter 1515 of the Revised Code, necessitates the use of eminent domain proceedings to obtain easements which will be required for the construction and permanent maintenance of such improvement, who, if anybody, has the power to initiate an eminent domain action for such purpose?

An analysis of this question must begin with a consideration of the statutes governing soil and water conservation districts. The authority of a soil and water conservation district is set forth in R.C. 1515.08. Subsection (C) of that section confers upon the supervisors of a district the following powers:

> (C) To implement, construct, repair, maintain and operate preventive and control measures and other works of improvement for natural resource conservation and development and flood prevention, and the conservation, development, utilization, and disposal of water within the district on lands owned or controlled by this state or any of its agencies and on any other lands within the district, which works may include any facilities authorized under state or federal programs, and to acquire, by purchase or gift, and to hold, encumber, or dispose of, real and personal property or interests therein for such purposes; (Emphasis added.)

R.C. 1515.08(C) does not grant the supervisors of a soil and water conservation district any express power of eminent domain. The supervisors of a district have, however, been given the power to acquire any lands within their district by purchase. The word "purchase" may be defined in two ways, one of which is arguably broad enough to include acquisition by condemnation proceedings. In Shepherd Paint Co. v. Board of Trustees, 88 Ohio App. 319, (Franklin Co., 1950) app. dism'd, 153 Ohio St. 591 (1950), the court discussed this issue as follows:

> [T]he authorities seem to be in agreement that the word "purchase", has two significations, a popular but restricted one and a legal but enlarged one. A "purchase" in the popular acceptance of the term is the transfer of property from one person to another by his voluntary act and agreement founded upon a valuable consideration. The legal or enlarged definition is found in 3 Washburn, Real Property (6th Ed.), 3, Section 1824. "Purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law." (Emphasis added.)

See, e.g., Beight v. Organ, 6 Ohio App. 281 (Mahoning Co., 1917); Bennett v. Hibbert, 88 Iowa 154, 55 N.W. 93 (1893). Compare R.C. 1301.01(FF) with R.C. 5741.01(D).

The word "purchase" may thus be defined in more than one way, and there has been a split among the various state and federal courts in cases which have considered whether the power to acquire real property by purchase includes the power to take property by means of eminent domain. Compare United States v. Hunting Rights of the Swan Lake Hunting Club, 237 F. Supp. 290, 293 (N.D. Miss., 1964); United States v. Beaty, 198 F. 284, 286 (W.D. Va., 1912); United States v. Inlots, 26 Fed. Cas. 482, 486-487 (Cir. Ct. S.D. Ohio, 1873); People v. Superior Court, 10 Cal. 2d 288, 73 P. 2d 1221, 1224 (1937); and Trustees of Schools v. Berryman, 325 Ill. 72, 155 N.E. 850, 852 (1927) with Kohl v. United States, 91 U.S.

367 (1876); Harden v. Superior Court, 44 Cal. 2d 630, 284 P. 2d 9, 17 (1944); Nevins v. City Council of City of Springfield, 227 Mass. 538, 116 N.E. 881, 882 (1917); Paris Mountain Water Co. v. City of Greenville, 105 S.C. 180, 89 S.E. 669, 671 (1916); Griffith v. City of Trenton, 76 N.J.L. 23, 69 A. 29, 30 (1908); and City of Enterprise v. Smith, 62 Kan. 815, 62 P. 324, 326 (1900).

Since the meaning of the word, "purchase," as used in R.C. 1515.08(C) is, therefore, ambiguous, it is necessary to consider pertinent rules of statutory construction to aid in determining legislative intent.

The usual rule of construction in cases involving the power of eminent domain is that the statute will be strictly construed against the grant of the power. McMechan v. Board of Education, 157 Ohio St. 241 (1952). The rationale for this rule is that statutes granting the power of eminent domain are in derogation of the common law. Currier v. Marietta and Cincinnati Railroad Co., 11 Ohio St. 228 (1860). The rule of strict construction requires that the language of a statute should be construed to exclude from the statute's operation all that which does not clearly come within the scope of the language used; it does not, however, require a strained and narrow interpretation which might defeat the object of the statute. Ohio Power Co. v. Deist, 154 Ohio St. 473 (1951).

If R.C. 1515.08(C) is subject to strict construction, a finding that the power to purchase includes the power to acquire property by means of eminent domain is precluded. Purchase would then be defined in the more narrow sense of a voluntary transfer for valuable consideration. See Harden v. Superior Court, supra; City of Enterprise v. Smith, supra.

The adoption of a more liberal construction of R.C. 1505.08 is simply not possible in light of several Ohio cases which have construed R.C. 5537.03, the statute which grants the power of eminent domain to the Ohio Turnpike Commission. These cases have held that the traditional rule of strict construction is fully applicable in eminent domain cases. Ellis v. Ohio Turnpike Commission, 162 Ohio St. 86 (1954); Solether v. Ohio Turnpike Commission, 99 Ohio App. 228 (Wood Co., 1954); In re Appropriation by Ohio Turnpike Commission, 98 Ohio App. 151 (Williams Co., 1953).

In the Turnpike Act cases, the Courts held that the rule of strict construction was applicable in spite of R.C. 5537.23, which specifically mandates that the Turnpike Act shall be liberally construed to effect the purposes of the Act. These cases must be taken as implicitly holding that R.C. 1.11, which mandates a liberal construction of "remedial laws," does not alter the common law rule of strict construction relative to the power of eminent domain. In Ellis, the Supreme Court noted the statutory requirement of liberal construction, but quoted the rule of construction with apparent approval.

At this time, based on the recent Turnpike Act cases it must be said that a statute which grants the power of eminent domain must be strictly construed. The word "purchase," therefore, must be strictly construed and may not be read to include a taking by the power of eminent domain. R.C. 1515.08 consequently does not grant the power of eminent domain to the supervisors of a soil and water conservation district.

Since you have asked whether "anybody" has the authority to initiate the subject eminent domain proceedings, other possible sources of the power of eminent domain must be explored. R.C. 1501.01 grants the director of natural resources the power of eminent domain under certain circumstances. That section states, in pertinent part:

> Whenever authorized by the governor to do so, the director may appropriate property for the uses and purposes set forth in an act to create a department of natural resources, 120 Ohio Laws 84, and on behalf of any division within the department. . . .

Consequently, the director of natural resources may exercise the power of eminent domain on behalf of the department of natural resources or any division thereof.

A soil and water conservation district, however, is not a division of the department. A soil and water conservation district is a political subdivision, like a township, which exercises limited powers of local self-government within a limited geographical area. While the definitions of department, division, and political subdivision may vary according to the context in which such terms are used, it is clear that in this context a local, independent political entity is in no way a division of a state executive department. The power of eminent domain may be exercised only for the uses for which the grant of the power was made, and for no other purposes. See, Village of Rockport v. Cleveland, Cinn., Chi., & St. L. Ry. Co., 85 Ohio St. 73 (1911). State ex rel. Heisel v. Board of Cty. Comm. of Cuyahoga Co., 37 Ohio Ops. 58, 61 (C.P. Cuyahoga Co., 1947). As a soil and water conservation district is not a division of the department of natural resources, the director may not exercise the power of eminent domain on behalf of a soil and water conservation district.

The powers of a soil and water conservation district may also be exercised by a board of county commissioners. R.C. 1515.21 states, in pertinent part:

> . . . If the board of county commissioners of each county containing any of the territory included in the project area approves construction of the improvement, the board, or if there is more than one such county, the joint board formed under section 1515.22 of the Revised Code, has in addition to its other powers, the powers of a soil and water conservation district granted by division (C) of section 1515.08 of the Revised Code.

Thus, where a board of county commissioners has approved construction of an improvement, that board may exercise the powers of a soil and water conservation district found in R.C. 1515.08(C).

Pursuant to R.C. 1515.08(C), the board itself may construct such improvement, and acquire real property for that purpose. As a board of county commissioners possesses the power of eminent domain, the question becomes whether the county commissioners may exercise its power of eminent domain for the purpose of constructing an improvement pursuant to R.C. 1515.08(C).

The grant of the power of eminent domain to the boards of county commissioners is set forth in R.C. 307.08:

> 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. (Emphasis added.)

In construing this section, it is necessary to reiterate that statutes granting the power of eminent domain are to be strictly construed against the grant of the power. Ellis v. Ohio Turnpike Commission, supra. The rule of strict construction requires that the language of a statute must be construed to exclude from the statute's operation all that does not clearly come within the scope of the language used.

In R.C. 307.08, the grant of power to condemn generally for any "structure" follows the grant of power to condemn specifically for a "courthouse, jail, or public offices, or for a bridge and the approaches thereto . . ." In this context, the principle of statutory construction known as ejusdem generis is applicable. In State v. Aspell, 10 Ohio St. 2d 1, 4 (1967), the Supreme Court described that principle:

> . . . where in a statute terms are first used which are confined to a particular class of objects having well-known and definite features

> and characteristics, and then afterwards a term is conjoined having perhaps a broader signification, such latter term is, as indicative of legislative intent, to be considered as embracing only things of a similar character as those comprehended by the preceding limited and confined terms.

Applying this principle, it appears that the word "structure" should be limited to substantial, permanent, erected facilities, such as a jail, a hospital, or a bridge. See Cardinal Fence Co. v. Comm. of Bureau of Revenue, 84 N.M. 314, 502 P.2d 1004, 1008 (Ct. App., 1972). Such a restrictive interpretation is at least reasonably debatable, and, therefore, applying the rule of strict construction, the definition of the word "structure" must be so restricted.

The power to condemn property for a "structure," as narrowly as that term must be defined, would be of limited utility for soil and water conservation purposes. A dam would be a structure, and land could conceivably be condemned for that purpose; however, the land flooded by a dam is not a "structure," and such land could not be condemned. In addition, reservoirs, lakes, canals, and drainage ditches are clearly not structures, and land could not be condemned for such purposes. In short, in light of the nature of soil and water conservation projects, the power to condemn property for "structures" is of limited usefulness.

It is also worth noting that the most recent amendment to R.C. 307.08 became effective February 21, 1967, and the use of the word "structure" in the statute itself or its predecessors dates back to the General Code. The statute granting county commissioners the authority to exercise the powers of a soil and water conservation district, (R.C. 1515.21), on the other hand, is a recent statute which first became effective November 6, 1969. Consequently, it is impossible that the Legislature had contemplated that the power of eminent domain would be exercised for the purposes set forth in R.C. 1515.08(C). It is true that a statute written in general terms will apply to subjects coming into existence after the passage of the statute, but this is true only where the language of the statute fairly includes those subjects. See City of Cleveland v. Curluter, 163 Ohio St. 269 (1955).

The above discussion leads to the conclusion that R.C. 307.08 cannot be read to grant to county commissioners the power of eminent domain for soil and water conservation purposes. To the extent that this conclusion may be debatable, the rule of strict construction mandates that all doubts be resolved against the grant of the power of eminent domain. Consequently, a board of county commissioners may not exercise the power of eminent domain granted by R.C. 307.08 for the purposes of soil and water conservation.

Another section which confers power on a board of county commissioners must be considered in analyzing the issue presented. R.C. 307.85 confers upon a board of county commissioners all the power necessary to enable the board to participate in the establishment and operation of federal programs. That section states, in pertinent part:

> 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. (Emphasis added.)

In construing this provision in 1978 Op. Att'y Gen. No. 78-060, I stated:

> This section . . . authorizes a board of county commissioners to perform acts not otherwise statutorily authorized where the performance of the act is reasonably related to the establishment and operation of a program created by federal law.

The Watershed Protection and Flood Prevention Act, 16 U.S.C. 1001 et seq., establishes a program through which states and their political subdivisions and local public agencies may obtain funding for projects relative to watershed protection and flood prevention. I have been advised that 97.8% of the cost of the soil and water conservation project being considered in this case will be funded by federal grants. However, in order to participate in this program, an appropriate local governmental agency must possess the power to undertake and complete the project. 16 U.S.C. § 1004. In this context, any inability to exercise the power of eminent domain for soil and water conservation projects would effectively block participation in the federal program because the project could not be undertaken and completed.

Hence, the instant situation would seem to be a classic example of the situation to which R.C. 307.85 was intended to apply. The board of county commissioners lacks the express power to condemn property for soil and water conservation purposes, and such power is necessary to enable the board to participate in the operation of a federal program. R.C. 307.85 grants a board of county commissioners the power it needs to enable it to participate in the establishment and operation of federal programs. Consequently, pursuant to R.C. 307.85, a board of county commissioners would appear to possess the power to condemn property for soil and water conservation purposes, to the extent necessary to enable it to participate in the operation of the federal funding program.

This interpretation is underscored by an examination of the possible alternative result, viewed in light of the legislative intent in enacting R.C. 307.85. The clear purpose of R.C. 307.85 was to enable the county commissioners to exercise whatever power was necessary to participate in the operation of a federal program. It is not uncommon for a state or local agency to lack such power and this situation can result in the loss of federal funds and/or hasty efforts by the Legislature to grant the agency the necessary power. It is this very situation which the Legislature clearly intended to remedy by granting the board of county commissioners the authority to "take any action," not prohibited by the constitution or in conflict with law, which is necessary to enable the board to participate in the operation of a federal program. To hold that the authority granted by R.C. 307.85 does not include, where necessary, the power of eminent domain would fly directly in the face of the clear legislative intent.

It would be difficult to explain to the Legislature what broader language could have been used to overcome any doubt as to the Legislature's intent. Hence, I must conclude that the language of the statute means exactly what it says, and that the grant of power to "take any action" includes, if necessary, the power of eminent domain.

Accordingly, as the exercise of the power of eminent domain by a board of county commissioners is neither prohibited by the constitution of Ohio nor in conflict with the laws of the state, it is my opinion, and you are advised, that the power of eminent domain may be exercised by a board of county commissioners for purposes of soil and water conservation projects, to the extent that the exercise of such power is necessary to enable the board to participate in the establishment and/or operation of a federal program.