OPINION NO. 2010-004

Syllabus:

2010-004

1. R.C. 9.07(C)(1) authorizes a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. (1928 Op. Att'y Gen. No. 3079, vol. IV, p. 2947, questioned.)
2. While neither R.C. 9.07 nor R.C. 341.21 imposes a limitation upon the type of out-of-state prisoner that may be housed in a county correctional facility, R.C. 9.07(C)(1) and the minimum standards for jails in Ohio require a board of county commissioners to determine the types of out-of-state prisoners that may be housed in the facility and notify the Department of Rehabilitation and Correction of its determination for review and comment.

To: Robin N. Piper, Butler County Prosecuting Attorney, Hamilton, Ohio
By: Richard Cordray, Ohio Attorney General, February 9, 2010

You have requested an opinion whether R.C. 9.07 authorizes a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility.[1] You also ask whether R.C. 341.21 imposes any limitations upon the types of out-of-state prisoners that may be housed in a county correctional facility pursuant to R.C. 9.07.

R.C. 9.07 provides, in relevant part:

> (B) Subject to division (I) of this section,[2] *the only entities other than this state that are authorized to operate a correctional facility to house out-of-state prisoners in this state are a local public entity that*

[1] This opinion does not consider the authority of a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility when the county operates under a charter adopted pursuant to Article X, §§ 3 and 4 of the Ohio Constitution or the alternative form of county government prescribed in R.C. Chapter 302.

In addition, insofar as your letter indicates that you are concerned with the housing of out-of-state prisoners in the county jail, this opinion will not consider whether R.C. 9.07 authorizes a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a municipal-county or multicounty jail. *See* note 7, *infra*.

[2] The exception set forth in R.C. 9.07(I) pertains to the housing of out-of-state prisoners in a correctional facility operated by a private contractor. This exception has no bearing upon the issues you have presented to us.

> *operates a correctional facility pursuant to this section* or a private contractor that operates a correctional facility pursuant to this section under a contract with a local public entity.
>
> . . . .
>
> (C)(1) Except as provided in this division, on and after March 17, 1998, a local public entity shall not enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state. *On and after March 17, 1998, a local public entity may enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state* only if the local public entity and the out-of-state jurisdiction with which the local public entity intends to contract jointly submit to the department of rehabilitation and correction a statement that certifies the correctional facility's intended use, intended prisoner population, and custody level, and the department reviews and comments upon the plans for the design or renovation of the correctional facility regarding their suitability for the intended prisoner population specified in the submitted statement. (Emphasis and footnote added.)

For purposes of R.C. 9.07, a county is a ''local public entity.'' R.C. 9.07(A)(3) (as used in R.C. 9.07, a ''local public entity'' is ''a county, a municipal corporation, a combination of counties, a combination of municipal corporations, or a combination of one or more counties and one or more municipal corporations''). Thus, pursuant to R.C. 9.07(C)(1), a county is authorized to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility.[3]

No provision in R.C. 9.07, however, states that a board of county commissioners is authorized to act on behalf of the county when the county intends to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. Nevertheless, it is a well-established principle that ''[t]he power to make contracts on behalf of the county is vested in the board of county commissioners and no other officer can bind the county by contract, unless by reason of some express provision of law.'' 1981 Op. Att'y Gen. No. 81-042 at 2-167; *accord Burkholder v. Lauber,* 6 Ohio Misc. 152, 154, 216 N.E.2d 909 (C.P.

[3] R.C. 9.07(A) states that the phrases ''out-of-state jurisdiction'' and ''out-of-state prisoner'' mean the following for purposes of R.C. 9.07:

> (5) ''Out-of-state jurisdiction'' means the United States, any state other than this state, and any political subdivision or other jurisdiction located in a state other than this state.
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> (6) ''Out-of-state prisoner'' means a person who is convicted of a crime in another state or under the laws of the United States or who is found under the laws of another state or of the United States to be a delinquent child or the substantially equivalent designation.

Fulton County 1965); 2004 Op. Att'y Gen. No. 2004-031 at 2-275. Accordingly, unless a statute provides otherwise, a board of county commissioners is authorized to act on behalf of the county when the county intends to exercise its authority under R.C. 9.07(C)(1) to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility.

A review of the statutes governing the housing of out-of-state prisoners in county correctional facilities discloses no authority on the part of a county official or entity other than the board of county commissioners to act on behalf of the county when the county intends to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility.[4] Instead, these statutes indicate that a board of county commissioners, rather than another county official or entity, is responsible for entering into such contracts on the county's behalf.

[4] R.C. 311.07(A) provides that "[i]n the execution of official duties of the sheriff, the sheriff may call to the sheriff's aid such persons or power of the county as is necessary." R.C. 311.08(A) states further that a county sheriff is required to "exercise the powers conferred and perform the duties enjoined upon him by statute and by the common law." Under these statutes, a county sheriff "has the general duty to preserve the public peace and may call to his aid such power of the county as is necessary to carry out his duty to preserve the public peace." 1986 Op. Att'y Gen. No. 86-023 at 2-120. R.C. 311.07(A) and R.C. 311.08(A) thus could be interpreted as authorizing a county sheriff to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. *See generally* 2007 Op. Att'y Gen. No. 2007-029 (syllabus, paragraph 1) ("[f]or the purpose of carrying out his duties under R.C. 311.07 and R.C. 311.08, a county sheriff may enter into a written agreement with the United States Immigration and Customs Enforcement Office or the United States Department of Homeland Security under 8 U.S.C. § 1357(g) whereby deputy sheriffs are empowered to perform a function of an immigration officer in relation to the enforcement of the criminal provisions of federal immigration law").

However, as discussed more fully later in this opinion, the General Assembly has specifically provided in R.C. 341.21(A) and R.C. 9.07(C) a means whereby a county may enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. The existence of such legislation makes it unlikely that the General Assembly intended that the general language of R.C. 311.07(A) and R.C. 311.08(A) authorizing a county sheriff to call to his aid the power of the county as is necessary to carry out his duty to preserve the public peace be interpreted as authorizing a county sheriff to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. *See generally City of Cincinnati v. Roettinger,* 105 Ohio St. 145, 152, 137 N.E. 6 (1922) ("[f]or the purpose of determining the legislative intent the maxim *expressio unius est exclusio alterius* has direct application. That maxim has peculiar application to any statute which in terms limits a thing to be done in a particular form, and in such case it necessarily implies that the thing shall not be done otherwise").

R.C. 341.21(A) provides, in part:

> The *board of county commissioners* may direct the sheriff to receive into custody prisoners charged with or convicted of crime by the United States, and to keep those prisoners until discharged.
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> The *board of the county* in which prisoners charged with or convicted of crime by the United States may be so committed *may negotiate and conclude any contracts with the United States for the use of the jail* as provided by this section and as the board sees fit. (Emphasis added.)

In addition, R.C. 9.07(C)(1) states that, "[e]*xcept as provided in this division*, on and after March 17, 1998, a local public entity *shall not enter into a contract* with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state." (Emphasis added.) R.C. 9.07(C)(1) thus requires a county, as a local public entity, *see* R.C. 9.07(A)(3), to comply with the provisions of R.C. 9.07(C)(1) when entering into a contract with an out-of-state jurisdiction, which includes the United States, *see* note 3, *supra,* for the housing of prisoners who have been convicted of a crime under the laws of the United States in a county correctional facility.

Reading the provisions of R.C. 341.21(A) and R.C. 9.07(C)(1) together, as we are required to do, reveals that a board of county commissioners must comply with R.C. 9.07(C)(1) when the county intends to exercise its authority under R.C. 341.21(A) to enter into a contract with the United States to house prisoners who have been convicted of a crime under the laws of the United States in a county jail.[5] *See generally State ex rel. Herman v. Klopfleisch*, 72 Ohio St. 3d 581, 585, 651 N.E.2d 995 (1995) ("[a]ll statutes relating to the same general subject matter must

[5] The use of the word "may" in the provision of R.C. 341.21(A) authorizing a board of county commissioners to "negotiate and conclude any contracts with the United States for the use" of a county jail suggests that a board of county commissioners has discretion whether to require a contract when the county intends to house prisoners who have been convicted of a crime under the laws of the United States in a county jail. *See generally Dennison v. Dennison,* 165 Ohio St. 146, 149, 134 N.E.2d 574 (1956) ("[o]rdinarily, the word, 'shall,' is a mandatory one, whereas 'may' denotes the granting of discretion"). However, insofar as the language of R.C. 9.07(C)(1) unequivocally requires a contract between the county and the United States whenever a county houses prisoners who have been convicted of a crime under the laws of the United States in a county correctional facility, the word "may," as used in the foregoing provision of R.C. 341.21(A), must be construed as imposing a mandatory duty upon a board of county commissioners to enter into a contract with the United States when the county intends to house prisoners who have been convicted of a crime under the laws of the United States in a county jail. *See generally Dorrian v. Scioto Conservancy Dist.,* 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph 1) ("[i]n statutory construction, the word 'may' shall be construed as permissive . . . unless there appears a clear and

be read *in pari materia*, and in construing these statutes *in pari materia*, this court must give them a reasonable construction so as to give proper force and effect to each and all of the statutes''); *State ex rel. Thurn v. Cuyahoga Cty. Bd. of Elections,* 72 Ohio St. 3d 289, 294, 649 N.E.2d 1205 (1995) (''[i]t is a fundamental rule of statutory construction that statutes relating to the same subject matter should be construed together'' and ''[i]n construing such statutes *in pari materia*, they should be harmonized so as to give full application to the statutes''). Such a reading also discloses that a board of county commissioners, rather than another county official or entity, is responsible for acting on behalf of the county when the county intends to exercise its authority under R.C. 9.07(C)(1) to enter into a contract with the United States to house prisoners who have been convicted of a crime under the laws of the United States in a county correctional facility.[6]

Further evidence that a board of county commissioners, rather than another county official or entity, acts on behalf of the county when the county intends to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility may be gleaned from language used by the General Assembly in R.C. 9.07(C)(3). This provision of law states as follows:

> If a local public entity and an out-of-state jurisdiction intend to enter into a contract to house out-of-state prisoners in a correctional facility in this state as authorized under [R.C. 9.07(C)(1)], . . . prior to entering into the contract the local public entity and the out-of-state jurisdiction . . . shall conduct a public hearing in accordance with this division, and, prior to entering into the contract, *the governing authority of the local public entity* in which the facility is or will be located shall authorize the location and operation of the facility. (Emphasis added.)

Pursuant to R.C. 9.07(A)(2), the phrase ''governing authority of a local public entity,'' as used in R.C. 9.07, includes, ''[f]or a county, the board of county commissioners of the county.'' R.C. 9.07(C)(3) thus requires the board of county commissioners of a county that intends to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility to ''authorize the location and operation of the facility.''

Because no other provision of R.C. 9.07 indicates the county official or

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unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage'').

[6] 1928 Op. Att'y Gen. No. 3079, vol. IV, p. 2947, at 2952 stated that, ''under the present state of the law, a sheriff is not precluded from contracting with the Federal Government for the subsistence of Federal prisoners in his custody, on the basis of a flat rate per day, or on any basis satisfactory to the Federal Government.'' In light of the fact that R.C. 341.21(A) and R.C. 9.07(C)(1) require a board of county commissioners, rather than another county official or entity, to enter into a contract with the United States to house prisoners who have been convicted of a crime under the laws of the United States in a county correctional facility, we question 1928 Op. Att'y Gen. No. 3079, vol. IV, p. 2947 to the extent that it states otherwise.

entity that is responsible for entering into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility, it seems reasonable to conclude that the authority conferred on a board of county commissioners to ''authorize the location and operation of the facility'' evidences a legislative intent that a board of county commissioners is empowered by R.C. 9.07(C)(1) to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. Therefore, on the basis of the general language used by the General Assembly in R.C. 9.07(C) and R.C. 341.21(A) and the absence of an express provision of law authorizing a particular county official or entity to enter into a binding contract under R.C. 9.07(C)(1), we find that R.C. 9.07(C)(1) authorizes a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility.

Your second question asks whether R.C. 341.21 imposes any limitations upon the types of out-of-state prisoners that may be housed in a county correctional facility pursuant to R.C. 9.07.[7] R.C. 341.21(A) authorizes a county to house prisoners ''charged with or convicted of crime by the United States.'' No provision in R.C. 341.21 or elsewhere in the Revised Code, however, sets forth the conditions under which a county may house out-of-state prisoners or establishes certain qualifications or requirements that must be satisfied with respect to an out-of-state prisoner before the prisoner may be housed in a county correctional facility.

Instead, the General Assembly has authorized boards of county commissioners to ''negotiate and conclude any contracts with the United States for the use'' of a county jail. R.C. 341.21(A). In exercising this authority, a board of county commissioners has discretion to agree upon any contractual terms, including the types of prisoners that may be housed in the county jail pursuant to R.C. 341.21(A). *See* 1999 Op. Att'y Gen. No. 99-049 at 2-303; 1996 Op. Att'y Gen. No. 96-060 at 2-236.

In addition, as explained above, a board of county commissioners must comply with R.C. 9.07(C)(1) when the county exercises its authority under R.C. 341.21(A) to enter into a contract with the United States to house prisoners who have been convicted of a crime under the laws of the United States in a county jail. R.C. 9.07(C)(1) provides, in part:

[7] The term ''correctional facility'' is not defined for purposes of R.C. 9.07. A review of the statutes and regulations governing the housing of persons who are convicted of an offense under the laws of Ohio in county facilities indicates that this term generally includes a county jail, municipal-county jail, multicounty jail, minimum security jail, workhouse, or other residential facility used for the confinement of persons convicted of an offense under the laws of Ohio. These statutes and regulations also indicate that the term ''correctional facility'' does not include community-based correctional facilities unless the term is expressly defined to include such facilities. *See* R.C. 307.022(C); R.C. 341.35; R.C. 2301.51-.58; R.C. 2929.01(D); R.C. 2929.01(R); R.C. 2929.16(A); R.C. 2949.08; R.C. 2949.12; 15 Ohio Admin. Code Chapters 5120:1-7 to 5120:1-14. *See generally* R.C. 1.42 (''[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly'').

> On and after March 17, 1998, a local public entity may enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a correctional facility in this state *only if the local public entity and the out-of-state jurisdiction* with which the local public entity intends to contract *jointly submit to the department of rehabilitation and correction a statement that certifies the correctional facility's intended use, intended prisoner population, and custody level*, and the department reviews and comments upon the plans for the design or renovation of the correctional facility regarding their suitability for the intended prisoner population specified in the submitted statement. (Emphasis added.)

Thus, pursuant to R.C. 9.07(C)(1) and R.C. 341.21(A), a board of county commissioners and out-of-state jurisdiction that enter into a contract for the housing of out-of-state prisoners in a county correctional facility have a statutorily imposed duty to consider a county correctional facility's use, prisoner population, and custody level as a part of the contract process. When considering a county correctional facility's use and custody level, a board of county commissioners must take into account the statutes and regulations that govern the correctional facility and the classification of prisoners to be housed in the facility.

Under R.C. 5120.10, the Department of Rehabilitation and Correction (DRC) is required to promulgate minimum standards for jails in Ohio. In accordance with this mandate, DRC has adopted and promulgated Ohio Admin. Code Chapters 5120:1-7 to 5120:1-12.

Every county correctional facility that houses out-of-state prisoners pursuant to R.C. 9.07 must comply with the minimum standards for jails in Ohio unless a variance has been granted. *See* R.C. 341.09; R.C. 341.34(C)(4); R.C. 5120.10; 15 Ohio Admin. Code 5120:1-7-01; 15 Ohio Admin. Code 5120:1-7-02(A); 15 Ohio Admin. Code 5120:1-7-03(B). For purposes of the standards, a county correctional facility is classified as a full service jail, twelve day facility, twelve-hour facility, or a minimum security jail, which are defined as follows:

> (1) "Full service jail": A local confinement facility used primarily to detain adults for more than two hundred eighty-eight hours . . . .
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> (2) "Twelve day facility": A local confinement facility used primarily to detain adults for a maximum of two hundred eighty-eight hours . . . .
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> (3) "Twelve-hour facility": A local confinement facility used primarily to detain adults for a maximum of twelve hours . . . .
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> (4) "Minimum security jail": A local confinement facility used to detain sentenced adults for more than one hundred twenty hours for a misdemeanor or a felony of the fourth or fifth degree, provided the person has been classified as a minimum security risk by the jail administrator or designee.

Rule 5120:1-7-02(A).

When a county correctional facility is used to house out-of-state prisoners, as defined in R.C. 9.07(A)(6), the facility is required to be in compliance with the standards that are applicable to a full service jail, twelve day facility, or a minimum security jail. *See* R.C. 341.09; R.C. 341.34(C)(4); R.C. 5120.10; rule 5120:1-7-01; rule 5120:1-7-02(A); rule 5120:1-7-03(B). In order to comply with the applicable set of standards, the county correctional facility must have "a written prisoner *classification* system that specifies the criteria and procedures for determining and changing the classification of prisoners to determine the level of custody required, special needs, housing assignment and participation in programming." 15 Ohio Admin. Code 5120:1-8-02(A) (emphasis added); 15 Ohio Admin. Code 5120:1-10-02(A) (emphasis added); *see also* rule 5120:1-7-02(A)(4) ("[t]he standards set forth in rules 5120:1-8-01 to 5120:1-8-19 of the Administrative Code apply to minimum security jails"). As used in Ohio Admin. Code Chapters 5120:1-8 and 5120:1-10, the term "classification" means "[a] system or process for determining the needs and requirements of prisoners and for assigning them to housing units and programs. Elements of this determination include the following: security level; work assignments; special treatment services; allowance or denial of certain privileges; and other assignments as may be available." Rule 5120:1-7-02(B)(7).

Implicit in the classification of prisoners by a county correctional facility is the duty to provide for the protection and safety of the prisoners while housed in the facility. This duty includes, *inter alia,* separating prisoners who have committed violent offenses from prisoners who have committed nonviolent offenses and limiting contact between persons convicted of misdemeanors and persons convicted of felonies. *See* R.C. 341.21(B); R.C. 341.34(B); R.C. 2929.16; R.C. 5120.161; rule 5120:1-7-02(A)(4); rule 5120:1-8-02; rule 5120:1-10-02(B).

Accordingly, when a board of county commissioners enters into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility, the board must determine the types of out-of-state prisoners that may be housed in the facility under the minimum standards for jails in Ohio and notify DRC of its determination for review and comment. R.C. 9.07(C)(1). When making its determination, a board of county commissioners must, at a minimum, establish the qualifications or requirements that must be satisfied for each out-of-state prisoner before the prisoner may be housed in a county correctional facility. Moreover, insofar as the board has a specific duty to limit contact between persons convicted of misdemeanors and persons convicted of felonies, the board must place appropriate limits on the types of out-of-state prisoners who have been convicted of a felony that may be housed in a county correctional facility pursuant to R.C. 9.07.[8]

Whether it is appropriate to house a certain type of out-of-state prisoner in a

[8] R.C. 5120.10 authorizes DRC to enforce compliance with the minimum standards for jails in Ohio. *See* rule 5120:1-7-01; rule 5120:1-7-02(A); rule 5120:1-7-03(B). Therefore, in order to ensure compliance with the minimum standards for jails in Ohio, a board of county commissioners should consult with DRC when determining the types of out-of-state prisoners that may be housed in a county correctional facility pursuant to R.C. 9.07.

county correctional facility is a question of fact that must be determined by the board of county commissioners and DRC. *See generally* 1983 Op. Att'y Gen. No. 83-057 at 2-232 (the Attorney General does not serve as a fact-finding body). Therefore, while neither R.C. 9.07 nor R.C. 341.21 imposes a limitation upon the type of out-of-state prisoner that may be housed in a county correctional facility, R.C. 9.07(C)(1) and the minimum standards for jails in Ohio require a board of county commissioners to determine the types of out-of-state prisoners that may be housed in the facility and notify DRC of its determination for review and comment.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. R.C. 9.07(C)(1) authorizes a board of county commissioners to enter into a contract with an out-of-state jurisdiction to house out-of-state prisoners in a county correctional facility. (1928 Op. Att'y Gen. No. 3079, vol. IV, p. 2947, questioned.)

2. While neither R.C. 9.07 nor R.C. 341.21 imposes a limitation upon the type of out-of-state prisoner that may be housed in a county correctional facility, R.C. 9.07(C)(1) and the minimum standards for jails in Ohio require a board of county commissioners to determine the types of out-of-state prisoners that may be housed in the facility and notify the Department of Rehabilitation and Correction of its determination for review and comment.