

OPINION NO. 2009-024**Syllabus:**

2009-024

1. R.C. 901.22 requires a single ranking system for applications for state-local matching grants to assist sponsoring organizations in purchasing agricultural easements. Having established the Agricultural Easement Purchase Program under 3A Ohio Admin. Code Chapter 901-2, the Ohio Department of Agriculture has no authority to establish an additional program that establishes different criteria for selecting the recipients of state-local matching grants under R.C. 901.22.
2. In addition to the Agricultural Easement Purchase Program established under R.C. 901.22 and 3A Ohio Admin. Code Chapter 901-2, the Ohio Department of Agriculture is authorized under R.C. 901.21 and R.C. 5301.691 to establish a program providing for the use of money from the Agricultural Easement Purchase Fund, the Clean Ohio Agricultural Easement Fund, or public or private grants to purchase agricultural easements in a manner that does not involve state-local matching grants under R.C. 901.22.
3. The permissible uses of federal reimbursement money acquired by the Ohio Department of Agriculture's Office of Farmland Preservation from matching grants of the federal Farm and Ranch Lands Protection Program, *see* 16 U.S.C.A. §§ 3838h-3838i (Supp. 2008); 74 Fed. Reg. 2809 (Jan. 16, 2009) (interim final rule with request for comments, revising 7 C.F.R. Part 1491), must be determined in accordance with applicable state and federal law and provisions of contract and deed, and the money may be expended only in accordance with all applicable restrictions.

To: Robert J. Boggs, Director, Ohio Department of Agriculture, Office of Farmland Preservation, Reynoldsburg, Ohio

By: Richard Cordray, Ohio Attorney General, June 8, 2009

We have received your request for an opinion on the question whether the Ohio Department of Agriculture (ODA) is authorized to create a second easement purchase program to run concurrently with the existing program. You have explained that ODA has been purchasing agricultural easements since 2002 under an arrangement referred to as the Agricultural Easement Purchase Program (Program), which uses state bond money from the Clean Ohio Agricultural Easement Fund (COAEF) to provide state-local matching grants for the purchase of agricultural easements under R.C. 901.22. *See* Ohio Const. art. VIII, § 2o; R.C. 151.01, .09.

The Program is governed by ODA rules appearing in 3A Ohio Admin. Code

June 2009

Chapter 901-2. Under the rules, a landowner applying for a grant under the Program must work through a sponsoring organization that acts as the local holder of the easement and shares responsibility for monitoring and enforcing the easement. The sponsoring organization must provide at least a twenty-five percent local matching contribution in cash or the landowner must agree to accept a minimum of a twenty-five percent reduction of the appraised agricultural easement value. 3A Ohio Admin. Code 901-2-03, 901-2-04, 901-2-11; *see also* R.C. 901.22(D)(1).

The Program has a two-tier application with a possible 100 points in the first tier (focusing on soil types, proximity to protected properties, best management practices, development pressure, and local development and preservation initiatives) and 50 points in the second tier (narrative questions regarding the farm and its unique appeal). 3A Ohio Admin. Code 901-2-05. The highest ranking properties in the tier one evaluation are submitted for tier two evaluation, and the Farmland Preservation Advisory Board recommends to the Director of Agriculture (Director) which of the properties should be awarded state matching grants. R.C. 901.23(B)(2); 3A Ohio Admin. Code 901-2-05.

You state that although the Program has been successful, it fails to address some elements of the current agricultural culture in Ohio, and that the current ranking system makes it impossible for farms located in many counties to qualify for farmland preservation easements. For example, ODA has purchased easements in only 29 of Ohio's 88 counties, and 15 of those counties have only one or two farms funded. The criteria used for accepting, ranking, and choosing farms to receive funding under the Program has resulted in farms in 14 of Ohio's counties receiving 85% of the total funded easements.

To broaden the scope of agricultural easement purchases, it is proposed that a new program be established and structured in a manner that would extend agricultural easement purchases to more counties and help preserve farms in other areas of the state. If the new program is permitted, you propose to fund it exclusively with federal reimbursement money that the Office of Farmland Preservation has acquired from matching grants of the federal Farm and Ranch Lands Protection Program (FRPP).¹

Your question is whether existing Ohio statutes authorize ODA to establish a second program for the purchase of agricultural easements to run concurrently with the existing Program and to have a different set of applicable criteria. If there is

¹ An earlier version of FRPP, known as the Farmland Protection Program (FPP), was enacted in 1996. Existing federal statutes establishing FRPP were enacted in 2002 and amended in 2008. The existing statutes were implemented through regulations adopted in 2003 and revised in 2009. *See* 16 U.S.C.A. §§ 3838h-3838i (Lexis-Nexis Apr. 24, 2009); Farm and Ranch Lands Protection Program, 74 Fed. Reg. 2809 (Jan. 16, 2009) (interim final rule with request for comments, revising 7 C.F.R. Part 1491 and summarizing legislative history); Farm and Ranch Lands Protection Program, 68 Fed. Reg. 26461 (May 16, 2003) (final rule implementing Farm Security and Rural Investment Act of 2002).

statutory authority for a new program, it is necessary to consider whether the federal money you describe may be used for this purpose.

Authority for ODA to Purchase Agricultural Easements or to Provide Matching Grants to Assist Sponsoring Organizations in the Purchase of Agricultural Easements

Several provisions of the Ohio Revised Code authorize the Director to acquire agricultural easements in various ways. Division (B) of R.C. 901.21 authorizes acquisition by gift, devise, or bequest. *See also* R.C. 5301.68. Divisions (E) and (F) authorize the Director to use two different funds—the Agricultural Easement Purchase Fund (AEPF), established under R.C. 901.21(E) and including gifts and grants received from public or private sources; and COAEF, established under R.C. 901.21(F) and containing state bond proceeds—to purchase agricultural easements under R.C. 5301.691 or to provide matching grants under R.C. 901.22 to assist sponsoring organizations in the purchase of agricultural easements.²

Under R.C. 901.22, the Director is authorized to “make matching grants from [AEPF] and [COAEF] to municipal corporations, counties, townships, soil and water conservation districts, and charitable organizations to assist those political subdivisions and charitable organizations in purchasing agricultural easements.” R.C. 901.22(D)(1); *see also* R.C. 901.21(E), (F); R.C. 5301.69, .691. The matching grants to these sponsoring organizations must be made in compliance with the criteria and procedures established in rules adopted under R.C. 901.22(D)(1).

R.C. 5301.67 to R.C. 5301.70 govern conservation and agricultural easements. R.C. 5301.691(A) authorizes the Director to purchase agricultural easements in the name of the state using money credited to AEPF, and R.C. 5301.691(I) authorizes the Director to “receive and expend grants from any public or private source for the purpose of purchasing agricultural easements and supervising and enforcing them.” R.C. 901.21(E) and (F) authorize the use of AEPF and COAEF moneys for these purposes. *See also* R.C. 5301.691(E)(2).

ODA has general authority to adopt reasonable rules to govern its proceedings, R.C. 901.03, and has a mandate to adopt rules that establish procedures and eligibility criteria for making matching grants from AEPF or COAEF to municipal corporations, counties, townships, soil and water conservation districts, and charitable organizations to assist those sponsoring organizations in purchasing agricultural easements, R.C. 901.22(A)(1), (D)(1). *See also* R.C. 901.22(A)(4) (the Director’s rulemaking authority includes the authority to “[e]stablish any other

² Although it was concluded in 1997 Op. Att’y Gen. No. 97-021 that ODA lacked authority to accept agricultural easements or to administer a program or the funding of a program for the purchase of agricultural easements, that lack was remedied by the enactment of R.C. 901.21, R.C. 901.22, and R.C. 5301.691. *See* 1997-1998 Ohio Laws, Part IV, 8791 (Am. Sub. S.B. 223, eff. Apr. 5, 1999) (title) (including among purposes “to authorize only the Director of Agriculture, certain local governments, and charitable organizations to acquire agricultural easements in order to preserve the agricultural use of land”).

requirements that the director considers to be necessary or appropriate to implement or administer a program to make matching grants under this section and monitor those grants”). The state-local matching grants must be made in compliance with the criteria and procedures established in rules adopted under R.C. 901.22, and instruments conveying agricultural easements purchased with matching grant funds provided under R.C. 901.22 must at a minimum include the mandatory provisions set forth in those rules. R.C. 901.22(D)(1).

To implement this authority, ODA has adopted 3A Ohio Admin. Code Chapter 901-2, which applies to both COAEF and AEPF moneys and establishes a single set of criteria under which ODA may provide matching grants. *See* R.C. 901.22(A)(1)(b); 3A Ohio Admin. Code 901-2-01(P) (defining “[f]und” to mean COAEF and AEPF), 901-2-02(B) (“[a]ll applications for matching grants which meet all of the foregoing eligibility requirements shall be ranked in accordance with the criteria established in rule 901-2-05 of the Administrative Code”).³

³ R.C. 901.22(A) requires the Director of Agriculture to adopt rules that meet the criteria listed in divisions (A)(1) through (A)(4). Division (A)(1) states in part: “With respect to agricultural easements that are purchased or proposed to be purchased with such matching grants that consist in whole or in part of moneys from [COAEF] . . . , the rules shall establish all of the following: (a) Procedures [for soliciting and accepting applications, participation by local governments and the public, and notification;] (b) A ranking system for applications for the matching grants [based on soil type, proximity to other agricultural land, farm stewardship, development pressure, and local comprehensive land use plans, and requiring that preferences be given for meeting certain criteria; and] (c) Any other criteria that the director determines are necessary for selecting applications for matching grants.” Rules adopted under division (A)(1) are thus required to apply to grants that consist in whole or in part of moneys from COAEF and, arguably, might be drafted in such a manner as to exclude or distinguish AEPF moneys. The existing rules do not make this distinction, instead applying to both COAEF and AEPF moneys. 3A Ohio Admin. Code 901-2-01(P); *see also* R.C. 901.22(D)(1).

Similarly, a points-based appraisal system is required under R.C. 901.22(D)(2) for the purposes of (D)(1). Division (D)(1) refers to the appraisal system in conjunction with COAEF moneys, and it might be argued that AEPF moneys need not be subject to this system. Again, the existing rules make the system applicable to both COAEF and AEPF moneys.

The statutory provisions requiring rules that establish a ranking system for matching grants and a points-based appraisal system include, in addition to listed criteria and factors, general provisions authorizing the inclusion of any other criteria or factors that the Director determines are necessary. R.C. 901.22(A)(1)(c), (D)(2)(i). You have suggested that this language grants ODA broad authority under which it may create a second agricultural easement program to benefit different counties. We find instead, because of the location of these provisions, that the discretion granted by these provisions serves only to permit the Director to adopt ad-

ODA is given authority under R.C. 901.22(D)(1) to make matching grants to sponsoring organizations only from AEPF and COAEF moneys, and ODA is required under R.C. 901.22(A) to establish a single ranking system that applies to all applicants. *See, e.g.*, R.C. 901.22(A)(1)(b) (rules of ODA “shall require that preference be given to proposed agricultural easements that involve the greatest proportion” of the listed criteria). ODA has exercised this authority in establishing the Program. ODA does not have authority to establish an additional program that establishes different criteria for selecting the recipients of state-local matching grants under R.C. 901.22.

ODA does, however, have authority apart from the Program to purchase agricultural easements without the use of state-local matching grants. Under R.C. 901.21(E) and (F) and R.C. 5301.691(A) and (I), the Director may use AEPF moneys, COAEF moneys, or grants from public or private sources to purchase agricultural easements in the name of the state. The purchase of agricultural easements under R.C. 5301.691 is described by statute as a process separate from the provision of state-local matching grants. R.C. 901.21(E), (F). Thus, in addition to the Program established under R.C. 901.22 and 3A Ohio Admin. Code Chapter 901-2, ODA is authorized under R.C. 901.21 and R.C. 5301.691 to establish a program providing for the use of money from AEPF, COAEF, or public or private grants to purchase agricultural easements in a manner that does not involve state-local matching grants under R.C. 901.22. If additional authority is desired, ODA may pursue statutory changes through appropriate legislation.

It should be noted that an arrangement that is expected to qualify for federal funding will need to comply with appropriate provisions of federal law. In addition, there may be limitations upon the uses for which particular public moneys may be expended.

Uses of Federal Reimbursement Money Acquired by the Office of Farmland Preservation from Matching Grants Under FRPP

Your request states that the proposed agricultural easement program is to be funded exclusively with federal reimbursement money that ODA’s Office of Farmland Preservation has acquired from FRPP matching grants. *See* R.C. 901.54. Under FRPP, the Secretary of Agriculture, acting through the Natural Resources Conservation Services (NRCS), provides up to fifty percent of the appraised fair market value of agricultural easements. ODA purchases agricultural easements or makes state-local matching grants for the purchase of agricultural easements and receives federal funds to reimburse a portion of its costs. *See* 16 U.S.C.A. §§ 3838h-3838i (Supp. 2008); 74 Fed. Reg. 2809 (Jan. 16, 2009) (interim final rule with request for comments, revising 7 C.F.R. Part 1491). FRPP is implemented through

ditional criteria or factors to be considered in implementing the Program established under R.C. 901.22. *See* 3A Ohio Admin. Code 901-2-05(C)(6), 901-2-09. Division (A)(1)(c) of R.C. 901.22 authorizes the Director to add additional criteria for selecting applications for state-local matching grants, but does not authorize the Director to disregard the single ranking system established under R.C. 901.22(A)(1)(b).

cooperative agreements with recipients of federal matching grants and through the execution of easement deeds. 7 C.F.R. §§ 1491.1-.2, .20-.22 (74 Fed. Reg. 2809, 2818, 2822, eff. Jan. 16, 2009).

The provisions governing FRPP have been amended over the years, and we do not know under which provisions of law or terms of contract or deed the reimbursement amounts at issue were calculated or paid. Therefore, our analysis can be made only in general terms. Specific expenditures must be considered in light of the provisions of statute, regulation, and contract applicable to the particular money to be expended. 7 C.F.R. § 1491.1 (74 Fed. Reg. 2809, 2818, eff. Jan. 16, 2009) (“FRPP cooperative agreements shall be administered under the regulations in effect at the time the cooperative agreement is signed”); *see* note 1, *supra*.

Your representatives have informed us that federal reimbursement money under FRPP is recorded as a separate line item for budget purposes and is kept separate from other state moneys. It appears as “3AB 700-641 Agricultural Easement” under the Federal Special Revenue Fund Group in Am. Sub. H.B. 119, 127th Gen. A. (2007) (eff. June 30, 2007) (sec. 215.10, uncodified). Under FRPP and Ohio law, the money clearly may be expended for purposes of the federal program to which it relates. *See* 16 U.S.C.A. §§ 3838h-3838i (Supp. 2008); R.C. 901.21-.23; *see also* R.C. 131.35; R.C. 901.04. It is not clear to what extent other uses may be permitted.⁴

The federal money in question is described as reimbursement money because of the manner in which the federal program operates, requiring as a general rule that the state acquire an agricultural easement in real property before the federal money is paid. However, intrinsic to this reimbursement is the concept that the money constitutes payment for a use that has been authorized under federal and state law. It is our understanding that recent contracts authorizing ODA to participate in FRPP stated that ODA “shall use funds provided for under this agreement for the acquisition of [agricultural] conservation easements and related title insurance policies for the United States for NRCS approved properties.” Thus, there may be questions regarding the use of FRPP reimbursement money to fund agricultural easements awarded through a system other than that established under FRPP.⁵

⁴ For purposes of this opinion, we assume that the federal reimbursement money in question is properly credited to the appropriate funds or accounts. *See, e.g.*, R.C. 901.21; R.C. Chapters 113 and 131; 2004 Op. Att’y Gen. No. 2004-017, at 2-141; note 5, *infra*.

⁵ The history and terms of FRPP indicate that it cannot be treated as a simple program of unrestricted grants. As enacted in 2002 and implemented by regulations adopted in 2003, FRPP was described as “not a grant program, but rather it is a land procurement program that acquires an actual Federal interest in the Property.” Farm and Ranch Lands Protection Program, 68 Fed. Reg. 26461, 26463 (May 16, 2003) (final rule implementing Farm Security and Rural Investment Act of 2002). The 2008 provisions “[s]hift the program focus from purchasing conservation easements to facilitating the purchase of conservation easements by eligible entities,”

ODA's goal of establishing a separate program for the purchase of agricultural easements to expand the class of recipients of funding for agricultural easements may be affected by FRPP's provision of a single system for ranking eligibility. Federal law sets forth definitions for farmland of "statewide" or "local" importance, "[p]rime farmland," or "[u]nique farmland," and these definitions must be considered in implementing a federal program or using funds obtained pursuant to a federal contract. 7 C.F.R. §§ 1491.1-.3 (74 Fed. Reg. 2809, 2818, eff. Jan. 16, 2009); *see* R.C. 901.22(A)(1)(b)(i). Federal rules provide for the State Conservationist (an NRCS employee) to score and rank parcels for funding, using national and state criteria. 7 C.F.R. §§ 1491.3, .6(b) (74 Fed. Reg. 2809, 2820, 2821, eff. Jan. 16, 2009). The ranking is described as a single system: "All parcels will be ranked together in accordance with the national and state ranking criteria before parcels are selected for funding." 7 C.F.R. § 1491.6(d) (74 Fed. Reg. 2809, 2821, eff. Jan. 16, 2009); *see also* 7 C.F.R. § 1491.3 (74 Fed. Reg. 2809, 2819, eff. Jan. 16, 2009) (the Land Evaluation and Site Assessment System is the system approved by the NRCS State Conservationist and used to rank land for FRPP purposes).

Thus, although state law would allow the establishment of an additional program that establishes separate criteria for the purchase of agricultural easements apart from state-local matching grants under R.C. 901.22, there are questions concerning the ability to use FRPP reimbursement money for this purpose.⁶ It is not clear to what extent federal reimbursement money would be available to fund a program for the purchase of agricultural easements in accordance with a ranking system other than that set forth in the existing Program.

but retain the requirement that the Secretary of Agriculture "hold a right of enforcement in FRPP funded conservation easements," which is included in the easement deeds. Farm and Ranch Lands Protection Program, 74 Fed. Reg. 2809, 2811-12 (Jan. 16, 2009) (interim final rule with request for comments, revising 7 C.F.R. Part 1491); 74 Fed. Reg. 2809, 2813; 7 C.F.R. §§ 1491.4(a), .22 (74 Fed. Reg. 2809, 2820, 2822, eff. Jan. 16, 2009); note 1, *supra*.

⁶ More generally, reimbursement money is not ordinarily treated by the recipient as additional unrestricted money but, instead, is identified as money that reimburses the fund from which the reimbursed expenditure was drawn, in this case, COAEF. Thus, even if federal reimbursement money is not restricted to uses prescribed by federal law, reimbursement money received for expenditures made from COAEF would be paid into COAEF or, if kept in another fund, would be limited to expenditures for which COAEF money may be used. Any other arrangement would provide unauthorized expansion of the permissible uses of ODA funds, with restricted state money advanced for easement purchases and the reimbursement money subsequently received from the government under FRPP treated as unrestricted money. *See generally* 2008 Op. Att'y Gen. No. 2008-025; 1984 Op. Att'y Gen. No. 84-080.

Conclusions

For the reasons discussed above, it is my opinion and you are advised as follows:

1. R.C. 901.22 requires a single ranking system for applications for state-local matching grants to assist sponsoring organizations in purchasing agricultural easements. Having established the Agricultural Easement Purchase Program under 3A Ohio Admin. Code Chapter 901-2, the Ohio Department of Agriculture has no authority to establish an additional program that establishes different criteria for selecting the recipients of state-local matching grants under R.C. 901.22.
2. In addition to the Agricultural Easement Purchase Program established under R.C. 901.22 and 3A Ohio Admin. Code Chapter 901-2, the Ohio Department of Agriculture is authorized under R.C. 901.21 and R.C. 5301.691 to establish a program providing for the use of money from the Agricultural Easement Purchase Fund, the Clean Ohio Agricultural Easement Fund, or public or private grants to purchase agricultural easements in a manner that does not involve state-local matching grants under R.C. 901.22.
3. The permissible uses of federal reimbursement money acquired by the Ohio Department of Agriculture's Office of Farmland Preservation from matching grants of the federal Farm and Ranch Lands Protection Program, *see* 16 U.S.C.A. §§ 3838h-3838i (Supp. 2008); 74 Fed. Reg. 2809 (Jan. 16, 2009) (interim final rule with request for comments, revising 7 C.F.R. Part 1491), must be determined in accordance with applicable state and federal law and provisions of contract and deed, and the money may be expended only in accordance with all applicable restrictions.