

OPINION NO. 74-020

Syllabus:

A joint township district hospital board has implied authority to sell at public auction land not needed for hospital purposes, according to the procedure specified in R.C. 505.10, provided the grant of land was not made subject to a condition which is incompatible with sale.

To: Forrest H. Bacon, Wyandot County Pros. Atty., Upper Sandusky, Ohio
By: William J. Brown, Attorney General, March 6, 1974

I have before me your request for my opinion as to whether a joint township district hospital board established pursuant to R.C. 513.01 may sell recently acquired land at public auction under R.C. 505.10.

Such a board has power to "receive and hold in trust for the benefit of the hospital, any grant or devise of land * * *." R.C. 513.15. There is no mention of power to alienate land, by lease or sale. Nor is such a power mentioned in R.C. 140.03 through 140.05, which are alternative authority for the establishment of such a district board. See R.C. 513.19.

R.C. 505.10, mentioned in your letter, provides express authority for a board of township trustees to sell at public auction, real and personal property not needed for township use. However, under R.C. 513.15, title to land donated to a joint township district hospital board of trustees vests in that board, not in the board of township trustees. Therefore, R.C. 505.10 does not authorize a sale of such donated land. The question then arises, what power does this or any other public agency have to alienate public land not needed by that agency, in the absence of express statutory authority therefor? I assume that the conveyance was not subject to any condition which would be incompatible with sale of the land. If it were, of course the land could not be sold.

At the outset, it is clear that the lack of implied authority to sell the land in question could be detrimental to the public interest. A hospital board may be given or bequeathed land which is of no present or future use to it for hospital purposes. Sale of the land could produce revenue for the operation of the hospital, and consequently benefit the public. But if there is no authority to sell such land, it would remain in the hands of the board, useless for hospital purposes, useless for producing revenue, and unavailable to potential owners who could put it to productive use.

Fortunately, there is ample authority for the proposition that the power to acquire and own land implies the power to dispose of it. The case of Reynolds v. Commissioners of Stark

County, 5 Ohio 204 (1831), upheld the lease of land by a board of county commissioners for 99 years, renewable forever, despite the lack of statutory authority for such conveyance. The Ohio Supreme Court reasoned as follows, at 205-206:

"A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time. Co. Lit. 44, 300, 306; Sid. 162; Com. Dig. title Franchise; 1 Ves. & Beame, 226. Indeed, so necessarily incidental is this power, that it has been holden (10 Rep. 1), that a corporation can not be created possessing the power of holding without the power of disposing; and that a clause in the charter, restricting the alienation of their property without consent of the chancellor, is void. The statutes restraining ecclesiastical and eleemosynary corporations are all the limitations impressed by the laws of England upon the power to sell.

"Admitting that civil corporations incidentally possess the power to transfer a good title by deed, it may still be insisted that a person taking the estate holds it subject to the same trusts as while in the hands of the corporation. Perhaps such a trust may sometimes be raised by the terms of the donation. If the land be made subject to uses expressed on the face of the deed, which can not be enjoyed consistently with the exclusive dominion and enjoyment of the alienee, perhaps the trust might be enforced; as where lands were given to a municipal corporation, to be holden for a common, walk, or public fountain, perhaps the purchaser may take it, subject to the rights of the inhabitants. But the case before cited, from Vesey & Beame, shows that when property held for general corporate purposes is aliened, even for purposes not corporate, such alienation is absolute.

" * * * * * * * * * * * * * * *

"It may be said, that by this construction of their powers the officers of corporations are invested with too large an authority over corporation property, and may waste it or place it beyond the reach of the members, without remedy. We can not avoid this result. We can relieve in case of fraud, and where a specific trust is raised we can enforce it; but the security against improvidence or bad management must be looked for in the interests, wisdom, and justice of the official agents, and in the relations they sustained to those who conferred the authority."

Boards of county commissioners were subsequently granted express power to convey land. However, the reasoning in Reynolds v. Commissioners of Stark County, supra, has been followed and cited in many instances. See, for example, Railroad

Company v. City of Cincinnati, 76 Ohio St. 481 (1907), Minimax Gas Co. v. State, ex rel. McCurdy, 33 Ohio App. 506-507 (1927), and Opinion No. 4198, Opinions of the Attorney General for 1935. A similar rule applies to municipal corporations under the constitutional home rule power. Babin v. City of Ashland, 160 Ohio St. 328 (1953).

However, this line of cases has been sharply criticized in an Opinion of one of my predecessors, which holds that a board of township trustees which owns property used for park purposes has no authority to lease such property. Opinion No. 2363, Opinions of the Attorney General for 1958, states as follows at 434-435:

"* * * Boards of township trustees, like boards of county commissioners possessing only limited authority granted by statute, cannot be held to have such broad authority as that stated in the following terms in Reynolds v. Commissioners, supra:

"Believing that the commissioners possess the powers of individuals, we enforce contracts against them in the same manner. The execution of this agreement is not an official duty created by law, and therefore properly the subject of a mandamus; but the right springs from contract, to enforce which an appeal may be properly made to our general chancery powers."

"I believe it unnecessary to allude to subsequent authority which by implication has modified this broad expression of authority. For such reason, I cannot accept it and apply such a rule in the situation which you present.

"In Opinion No. 1232, Opinions of the Attorney General for 1957, p. 638, in which I had occasion to consider the authority of a board of township trustees to acquire property by lease, I held that since the authority to acquire by lease had not been specifically granted by statute and since other sections of the statutes relating to boards of township trustees and boards of county commissioners provided expressly for the modes of acquiring property, that such authority to acquire by lease was not included within the authority to purchase.

"Parity of reasoning would impel me to the same conclusion. Once acquired, property is held by public boards for the use of the public; therefore, when public property is disposed of, the statutory authority must be found for such disposal as was required to be found when such purchase was made. This principle must be applied in the absence of statutory authority to the contrary."

This Opinion can readily be distinguished from the instant case. In it, the question was whether the express authority to sell property implied the authority to lease it. The Opinion on which my predecessor relied, Opinion No. 1232,

Opinions of the Attorney General for 1957, dealt with the analogous question of whether the power to acquire by purchase includes the power to acquire by lease. Such cases are appropriate for the application of the principle expressio unius est exclusio alterius, the mention of one thing implies the exclusion of all others. The Legislature having chosen to specify one method of disposing of property (e.g. by sale), one may assume that no other method was contemplated. But where the General Assembly has not expressly authorized any method of alienation, it can hardly be inferred that none was intended, because of the possible wasteful consequences discussed previously. Statutes are to be construed, where possible, to produce a just and reasonable result. R.C. 1.47(C). Therefore, in spite of some of the language in Opinion No. 2363, supra, I find nothing in that opinion which contradicts the implied power to alienate.

The statutes enacted since Reynolds v. Commissioners of Stark County, supra, have greatly restricted the application of that case's reasoning, by providing express authority for the alienation of land by specified methods. Those statutes, I believe, are the basis of the "subsequent authority" to which my predecessor referred in Opinion No. 2363, supra. However, where the General Assembly has not spoken to the alienation of land by a public agency, the power to alienate may still be implied.

Your letter specifically asks whether the land can be sold at public auction. Without going into the various possible methods of conveying all or part interest in the land, I can assume that this method is authorized. It provides an open, public sale, which helps to assure the best possible price. A specific procedure can be derived by analogy to R.C. 505.10, mentioned in your letter, which governs sale of unneeded real estate by a board of township trustees, after publication of notice under specified conditions.

In specific answer to your question, it is my opinion and you are so advised that a joint township district hospital board has implied authority to sell at public auction land not needed for hospital purposes, according to the procedure specified in R.C. 505.10, provided the grant of land was not made subject to a condition which is incompatible with sale.