OPINION NO. 82-070

Syllabus:

A statute that permits the president and trustees of Miami University to convey in fee simple certain university lands, which are currently exempt from state taxation, to the lessees of such land and which would thereafter subject such lands to state taxation does not violate U.S. Const. art. I, §10 or Ohio Const. art. II, §28, where it is clear that the original exemption applied only so long as the lands were held by the university, and the right to alter the power of the university president and trustees to hold land was expressly reserved.

To: Paul E. Gillmor, President, Ohio Senate, Columbus, Ohio
By: William J. Brown, Attorney General, September 28, 1982

I have before me S.R. No. 979 of the 114th General Assembly which requires my opinion concerning the probable constitutionality of S.B. No. 442. The purpose of S.B. 442 is to enact R.C. 3339.06 which would permit the president and trustees of Miami University to convey in fee simple certain university lands which are currently leased subject to the payment of annual rents. You ask whether the bill would, if enacted, be a retroactive law or law impairing the obligation of contracts in violation of the Ohio and United States Constitutions.

U.S. Const. art. I, §10 provides in pertinent part:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Ohio Const. art. II, §28 reflects this prohibition and states:

> The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

"[E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." Weil v. Taxicabs of Cincinnati Inc., 139 Ohio St. 198, 203, 39 N.E.2d 148, 151 (1942), quoting from Society for the Propagation of the Gospel v. Wheeler, 22 Fed. Cases 756, 767 (1814); see also Wheatley v. A.I. Root Co., 147 Ohio St. 127, 69 N.E.2d 187 (1946); City of Cleveland v. Zangerle, 127 Ohio St. 91, 186 N.E. 805 (1933); Miller v. Hixson, 64 Ohio St. 39, 59 N.E. 749 (1901). Retroactive laws and laws impairing the obligation of contracts are often discussed together and it has been said that "[a] retroactive statute not only violates the Constitution of Ohio, but also violates Section 10, Article I of the United States Constitution." Fraternal Order of Police v. Hunter, 36 Ohio Misc. 103, 105, 303 N.E.2d 103, 105 (C.P. Mahoning County 1973). Therefore, if proposed R.C. 3339.06 impairs any vested rights, regardless of the manner in which such rights have been created, it would, if enacted, violate the constitutional provisions set forth above.

The lands which are the subject of the bill were conveyed to Ohio by an act of Congress (Ch. 334 §4, 3 Laws of the U.S. 541, March 3, 1803) and to Miami University by 1809 Ohio Laws 184 (Chapter XLIV, eff. Feb. 17, 1809) (hereinafter cited as Act of 1809). Section 10 of that act provides in part:

> And whereas the said lands have been located and surveyed for the purpose aforesaid: Therefore, be it further enacted, That the said lands so as aforesaid be, and the same are hereby vested in the said corporation, which by this act is created, and their successors forever, for the sole use, benefit and support of the said University, to be holden by the said corporation, in their corporate capacity, with full power and authority to divide, sub-divide and expose the same to sale in tracts of not less than eighty, nor more than one hundred and sixty acres, and for the term of ninety-nine years, renewable forever, subject to a valuation every fifteen years, always considering the land in an unimproved state, for the purpose of valuation, and provided that the land shall be offered at auction for not less than two dollars per acre, and the tenants or lessees shall pay six per cent. per annum on the amount of their purchase, during the continuance of their leases; and the said tenants or lessees shall enjoy and exercise all the rights and privileges which they would be entitled to enjoy, did they hold the said lands in fee simple, any law to the contrary notwithstanding: Provided, That the trustees shall have the power to

> reserve one mile square, for the purpose of laying out a town, which they may lay out, and lease in lotts of such size, as they or a majority of them shall think proper. (Emphasis added.)

Section 13 of the Act exempts the lands from all state taxes, stating:

> Be it further enacted, That the lands appropriated and vested in the corporation, with the buildings which may be erected thereon for the accommodation of the president, professors and other officers, students and servants of the University, and any buildings appertaining thereto; and also the dwelling house and other buildings which may be built and erected on the lands, shall be exempt from all state taxes. (Emphasis added.)

Although this act has been amended numerous times, the provision regarding the ability of the university to lease land and the exemption from state taxation remain the same.[1]

The proposed language of R.C. 3339.06(A) states that "[t]he president and trustees may grant the change of tenure [conveyance of fee simple] upon any terms that they consider appropriate." R.C. 3339.06(B) provides that "[t]he grant. . .may be accomplished by one or more resolutions of the board of trustees of the Miami university. . . ." R.C. 3339.06(C) states: "Any land or town lot in which the president and trustees of the Miami university grant an absolute estate in fee simple pursuant to division (A) of this section is subject to taxation from the date of such grant in the same manner as other freehold estates in Butler county." Thus, if there is a change of tenure as authorized by R.C. 3339.06, the owners of the leasehold estates would acquire a fee simple in those estates. They would no longer be subject to the land rents. Concomitantly, the university would no longer be obliged to collect such rents. It is my understanding that the university contends that the cost of collecting the rents at the present time greatly surpasses the amounts collected and, therefore, it is no longer in the university's best interests to collect them.

In order to more completely comprehend the proposed changes in Ohio law, I find it prudent to refer to the current legislation concerning the conveyance of Miami University land. Provision for its sale has been made in R.C. 3339.03 as follows:

> The owners of leases of land or town lots from the president and trustees of the Miami university may pay to the treasurer of the university such sum of money as, placed at interest at four per cent, would yield the amount of rent reserved in the original lease, or in the case of a division of the original tract or parcel leased, would equal the proper aliquot part thereof, or the part agreed upon by the several owners. But a person so surrendering and releasing to such university shall pay the necessary expenses incident to such change of tenure, and procure the services of an agent to perform the necessary labor thereof. Upon payment of such sum and of all rents due upon the land, on demand of such owners, the treasurer shall give him a certificate of such payment.
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> The owner shall be entitled to receive a deed of conveyance for such land, to be signed by the president of such university, countersigned by its secretary, and sealed with the corporate seal of the Miami university, conveying the premises in fee simple to him.
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> The deeds shall vest in the grantee an absolute estate in fee simple in the premises, subject to all liens, equities, or rights of third persons in, to, or upon the premises.

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[1]It should, however, be noted that the provision for revaluation was repealed by 1810 Ohio Laws 94 ("An act to amend an act, entitled 'An act to establish the Miami University,' " eff. Feb. 6, 1810).

Thus, R.C. 3339.03 now permits the conveyance of leased land for the above stated consideration upon the initiative of the lessee. R.C. 3339.04 subjects the lands thus sold to taxation "in like manner as other freehold estates in such county." Although the constitutionality of the foregoing provisions pertaining to Miami University has never been before a court, the issue of taxation of exempt property upon sale has been upheld with regard to a similar provision of Ohio law.

R.C. 5709.05 provides generally for the taxation of previously exempt school and ministerial lands upon sale by stating in part: "All tracts of land appropriated by Congress for the support of schools or for ministerial purposes and sold by and under authority of law, and all lands which are sold by the United States shall be subject to taxation, immediately after such sale, as are other lands in this state." The constitutionality of R.C. 5709.05 as originally enacted in 38 Ohio Laws 1 ("An act declaratory of an act passed March 14, 1831," eff. Jan. 15, 1840) was upheld by the court in Armstrong v. Treasurer, 10 Ohio 235 (1840), aff'd 41 U.S. (16 Pet.) 281 (1842). In the first branch of the syllabus of that case the court held:

> Where a statute exempted forever certain lands of the Athens University from taxation, and the same lands were afterward sold by the university, a subsequent statute, authorizing a tax to be levied on the lands, is not a violation of that clause of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

See also Bentley v. Barton, 41 Ohio St. 410 (1884); State ex rel. Johnson v. Purcel, 31 Ohio St. 352 (1877); Martindill v. Sanger, 11 Ohio Dec. 727 (C.P. Vinton County 1901). Based on the foregoing, if a court were asked to rule upon the constitutionality of R.C. 3339.03, Ohio case law would support a finding that the taxation of Miami University lands upon sale to private individuals who once held leasehold interests in such land does not violate the constitutional prohibition against the passage of retroactive laws or laws impairing the obligation of contracts. See 1949 Op. Att'y Gen. No. 1189, p. 812. In this regard, I note that courts have consistently upheld the constitutionality of statutes unless they are unconstitutional beyond a reasonable doubt. See State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955); Williams v. Scudder, 102 Ohio St. 305, 131 N.E. 481 (1921).

Similarly, if a sale of tax exempt lands were to be made pursuant to the authority to be granted to Miami University by R.C. 3339.06, the sale and subsequent taxation of such lands would appear to be within constitutional limitations. The proposed language of R.C. 3339.06, however, purports to grant authority broader than the authority to merely sell the land. R.C. 3339.06 would permit the president and trustees to "grant the change of tenure upon any terms that they consider appropriate" and to effect the change in tenure by mere resolution of the board. The proposed statute, therefore, permits the conveyance of the land for no consideration and without any action on the part of the lessees. A conveyance made under those circumstances presents a contractual impairment question different from that discussed above. In order to address the question of contractual impairment in a situation where there is no voluntary relinquishment of the contract right, it is necessary to investigate further the nature and origin of the exemption of university lands from taxation.

Any allegation that the current lessees have a vested right to tax exemption must be based on the Act of 1809. At that time charter provisions the terms of which perpetually exempted certain property from taxation were considered to be contractual agreements which could not be altered by subsequent legislation. State ex rel. Morgan v. Moore, 5 Ohio St. 444 (1856); Matheny v. Golden, 5 Ohio St. 361 (1856); Knoup v. Piqua Branch of the State Bank of Ohio, 1 Ohio St. 603 (1853), rev'd 57 U.S. (16 How.) 369 (1853). It is necessary, therefore, to look to the terms of the Act of 1809 to determine whether the lessees making contracts pursuant thereto obtained a vested right to perpetual exemption from taxation. As set forth above, Section 10 of that act states in part: "[T]he said lands. . .are hereby vested in the said corporation, which by this act is created, and their successors forever, for the sole use, benefit and support of the said University." Section 13 reads in part: "[T]he lands appropriated and vested in the corporation. . .shall be exempt from all state taxes." Section 15 of the Act provides:

> Be it further enacted, That the legislature of this state may grant any further and greater powers to, or alter, limit or restrain in any of the powers by this act, vested in the said corporation, as shall be necessary to promote the best interest of the said University, with all necessary powers and authority for the better aid, preservation and government thereof.

This section of the Act of 1809 specifically reserves to the legislature the power to enlarge or restrict the powers granted where it is in the best interests of the university to do so. Thus, the legislature reserved the right to enlarge the powers of the trustees and president of the university with regard to land. Once lands are no longer vested in the university the exemption granted in Section 13 of the Act would by its very language no longer apply. Therefore, the contract created by the Act of 1809 did not grant an absolute perpetual exemption from taxation upon which the original lessees could rely; rather, it granted an exemption for lands vested in the university with the caveat that at some future time if it were in the best interest of the university the legislature might divest the university of such lands or authorize the university to effect such divesture.

In making this interpretation of the Act of 1809 I am not unmindful of a different conclusion reached by the court in Matheny.[2] The syllabus of that case at 361 reads in part:

> Where the state, by an act incorporating the Ohio University, vested in that institution two townships of land for the support of the university and instruction of youth, and in the same act authorized the university to lease said lands for ninety-nine years, renewable forever, and provided that lands thus to be leased, should forever thereafter be exempt from all state taxes: Held, that the acceptance of such leases at a fixed rent or rate of purchase by the lessees, constitutes a binding contract between the state and the lessees.
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> A subsequent act of the legislature, levying a state tax on such lands, is a "law impairing the obligation of contracts," within the purview of the 10th section of the 1st article of the constitution of the United States, and is therefore, pro tanto, null and void. (Emphasis added.)

It should be noted that the court was considering a situation in which the tax was to be levied while the land was still vested in the university.[3] That is not the same as the current proposal. Moreover, although the court reached the foregoing conclusion with regard to the act incorporating Ohio University it recognized that "[c]ontracts stipulating for exemptions of this kind are not favored in law, and will

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[2]The court in Matheny discussed the first version of what was reenacted in 1859 Ohio Laws 175 ("An act for the assessment and taxation of all property in this State. . .", eff. April 5, 1859) and is now R.C. 5709.06. That provision currently states that, "[w]henever lands belonging to the state. . .are held under a lease for a term of years renewable forever and not subject to revaluation, such lands shall be considered for taxation purposes as the property of the lessees and shall be assessed in their names." The statute before the court in Matheny was found to be an unconstitutional impairment of the perpetual lease contracts made by Ohio University. G.C. 5330 (the immediate predecessor of R.C. 5709.06) was found to be constitutional on other grounds, however, in cases where the court was not faced with contractual rights. State ex rel. Upper Scioto Drainage & Conservancy District v. Tracy, 125 Ohio St. 399, 181 N.E. 811 (1932).

[3]Compare Jetton v. University of the South, 208 U.S. 489 (1907) (syllabus, paragraph two) where the U.S. Supreme Court found that, "the contract exemption from taxation granted to the university of the South by its charter. . .to continue as long as the land so exempted belongs to that institution, is not impaired by taxing. . .the interests of the lessees of such land under leases from the university for a term of years. . . ."

never be presumed." Matheny at 375, citing Ohio Life Ins. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416 (1853) and Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837). See also Morris Canal & Banking Co. v. Baird, 239 U.S. 126 (1915). Even with that principle in mind the court was compelled to reach its conclusion upon finding "a contract perfect in all its requisites. . .the language and conduct of the parties is unequivocal, admits of but one interpretation, and leaves no room for presumptions." Since the court in Matheny did not have before it a provision similar to Section 15 of the Act of 1809 its interpretation of the act incorporating Ohio University is not controlling with regard to Miami University's charter. 1803-04 Ohio Laws 193 ("An act, establishing an University in the town of Athens," eff. Feb. 18, 1804).

Having determined that the lessees of land presently vested in Miami University are not entitled to an exemption from state taxes once such lands are no longer vested in the university and, therefore, concluding that no impairment of their contracts in violation of U.S. Const. art. I, §10 or Ohio Const. art. II, §28 would be caused by such change, I must consider possible limitations on the exercise of discretion by the president and board of trustees in determining the terms upon which the land will be conveyed.

One possible limitation arises from the prohibition in Ohio Const. art. VIII, §4 against lending credit of the state.[4] This prohibition has consistently been applied to outright grants of funds.[5] State ex rel. Dickman; State ex rel. Pugh v. Sayre, 90 Ohio St. 215, 107 N.E. 512 (1914); Op. No. 77-049; Op. No. 71-044. It has also been determined that in addition to any company, association or corporation, the credit of the state may not be loaned to an individual. Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N.E. 28 (1898); Walker v. City of Cincinnati, 21 Ohio St. 14 (1871); Op. No. 77-049. Therefore, the proposed language of R.C. 3339.06 could not be construed so as to permit the conveyance of fee simple titles where such conveyance would amount to an outright grant. Whether the particular circumstances under which a conveyance is made, such as a conveyance for no consideration, but one which nevertheless results in a net gain to the state, would amount to an outright grant is a question properly decided by a court.

Another possible limitation on the exercise of discretion by the president and trustees arises from the fact that the lands of Miami University were granted to the State of Ohio in trust for purposes of a university. DuBois v. Baker, 52 Ohio App. 148, 3 N.E.2d 552 (1935); Wendel v. Hughes, 69 Ohio App. 554, 42 N.E.2d 929 (Butler County 1942); 1949 Op. No. 1189; see also Armstrong. Clearly, if the lands are sold, the proceeds from such sale become the trust res and must be used in accordance with the trust purposes. See Bentley; R.C. 3339.05. Generally speaking, the duty of a trustee with regard to trust property is to "protect. . .the trust estate with the utmost fidelity in the interest of the beneficiary." In re Estate of Fiorelli, 74 Ohio Law Abs. 38, 43, 134 N.E.2d 576, 580 (Ct. App. Cuyahoga County 1956). The president and trustees, therefore, could not grant a change in tenure in a manner inconsistent with that duty. Whether any particular terms of

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[4]In discussing the potential conflict with Ohio Const. art. VIII, §4 it should be noted that it is to be construed in the same manner as Ohio Const. art. VIII, §6 which contains a similar provision for cities, counties, towns or townships. State ex rel. Eichenberger v. Neff, 42 Ohio App. 2d 69, 330 N.E.2d 454 (1974); 1977 Op. Att'y Gen. No. 77-049. Therefore, cases concerning either of the two provisions may be used to analyze the limitations on the discretion which may be exercised pursuant to R.C. 3339.06.

[5]I note that certain exceptions to Ohio Const. art. VIII, §4 have been provided. See, e.g., Ohio Const. art. VIII, §13 (industrial development); Ohio Const. art. VI, §5 (student loans). Additionally, the Ohio Supreme Court has held that Ohio Const. art. VIII, §4 does not prohibit a gift or loan to a private nonprofit organization to be expended for a public purpose. State ex rel. Dickman v. Defenbacher, 164 Ohio St. 142, 128 N.E.2d 59 (1955); State ex rel. Leaverton v. Kerns, 104 Ohio St. 550, 136 N.E. 217 (1922). There is, however, no exception which would apply in this fact situation.

conveyance would amount to a breach of the trust is, however, again a question for judicial consideration.

Based on the foregoing, it is my opinion, and you are advised, that a statute that permits the president and trustees of Miami University to convey in fee simple certain university lands, which are currently exempt from state taxation, to the lessees of such land and which would thereafter subject such lands to state taxation does not violate U.S. Const. art. I, §10 or Ohio Const. art. II, §28, where it is clear that the original exemption applied only so long as the lands were held by the university, and the right to alter the power of the university president and trustees to hold land was expressly reserved.