

**OPINION NO. 81-092****Syllabus:**

1. A joint vocational school district may, pursuant to R.C. 3313.90, enter into an agreement with a nonprofit corporation whereby students of the district would construct a house on property owned by the corporation with materials and equipment furnished at the expense of the corporation, provided that such an agreement is reasonably necessary to fulfill the requirements of the vocational education curriculum.
2. A board of education of a joint vocational school district may, as part of a vocational education program, purchase land, construct residential dwellings thereon, and thereafter sell such realty. (1976 Op. Att'y Gen. No. 76-065, approved and followed.)

**To: John W. Allen, Richland County Pros. Atty., Mansfield, Ohio**  
**By: William J. Brown, Attorney General, December 21, 1981**

I have before me your request for an opinion regarding the ability of a board of education of a joint vocational school district to operate a program for the construction and sale of residential dwellings. Specifically, you ask:

1. May a joint vocational school participate with a non-profit corporation in acquiring sites and constructing residential dwellings for sale as . . .outlined?
2. May a joint vocational school engage in acquiring sites and constructing residential dwellings for sale as . . .outlined without the participation of a separate non-profit corporation?

You have stated in your letter that the members of the board of education propose organizing a nonprofit corporation. It is my understanding, based on conversations between a member of my staff and your special counsel, that the corporation would have three members who would also serve as trustees, and that the superintendent of schools would fill one of these positions. The corporation would borrow funds sufficient to acquire land and finance the construction of residential dwellings. Those dwellings would be constructed by students of the joint vocational school, and no compensation would be paid for the use of this student labor. The supervision of the construction would be done by instructors of the joint vocational school without compensation from the corporation. The corporation would compensate the school district for any school equipment utilized and would provide funds to the school district for the purchase by the district of equipment and supplies necessary for such construction.

In considering whether a board of education may form a nonprofit corporation, it is necessary to determine whether the board has the statutory authority to do so. It is a longstanding rule of law in Ohio that such bodies as boards of education are creatures of statute and as such have only those powers expressly granted by statute or necessarily implied therefrom. Schwing v. McClure, 120 Ohio St. 335, 166 N.E. 230 (1929); State ex rel. Clarke v. Cook, 103 Ohio St. 465, 134 N.E. 655 (1921).

R.C. 3313.90, which requires each school district to establish a vocational education program, does not expressly authorize boards of education to set up

nonprofit corporations. However, in 1978 Op. Att'y Gen. No. 78-040 at 2-94, I reiterated my opinion that R.C. 3313.90 does grant:

[a] board of education broad discretion to carry out this legislative mandate provided that any specific statutory limitations on the board's power are not exceeded and that the specific elements of any particular program do not go beyond that which is reasonably necessary to fulfill the requirements of the vocational education curriculum. See 1976 Op. Att'y Gen. No. 76-065 (A joint vocational school may construct and sell single family residences on school land.); 1971 Op. Att'y Gen. No. 71-068 (A school may engage and compete in private enterprise, even at a profit, so long as the program is reasonably necessary to the vocational education curriculum); 1971 Op. Att'y Gen. No. 71-026 (Use of school facilities for serving meals and banquets to community organizations is justified as part of the vocational education curriculum).

Since a board of education enjoys broad discretion and a great deal of implied authority, the consideration must now turn to whether this authority is limited either by statute or the Ohio Constitution, such that a board is prevented from forming a nonprofit corporation.

R.C. 1702.04, which authorizes the creation of nonprofit corporations, permits "[a]ny person, singly or jointly with others. . .[to] form a corporation." The question is, thus, whether a board of education is a person for the purposes of R.C. 1702.04. R.C. 1702.01(I) defines "person" for the purpose of R.C. 1702.01 to 1702.58, "unless the context otherwise requires," as including "without limitation, a corporation (whether nonprofit or for profit), a partnership, an unincorporated society or association, and two or more persons having a joint or common interest." R.C. 1.59(E) defines "person," "[a]s used in any statute, unless another definition is provided in such statute or a related statute," to include "an individual, corporation, business trust, estate, trust, partnership, and association."

It has been my opinion that the statutory definitions of "person" set out above do not encompass public bodies or officers. 1979 Op. Att'y Gen. No. 79-055. See 1978 Op. Att'y Gen. No. 78-030; 1962 Op. Att'y Gen. No. 2781, p. 70. Where the General Assembly intends the definition of "person" to include the state, or other governmental bodies, it will specifically name the state, or the body, in the definition.<sup>1</sup> 1981 Op. Att'y Gen. No. 81-055 at 2-220 (public body not "person" absent statutory definition to the contrary). This is clear when one examines, for example, the definition of "person" adopted for the purpose of R.C. Chapter 3719 (controlled substances), and the definition of "person" adopted for the purpose of R.C. Chapter 6111 (water pollution control). Under R.C. Chapter 3719, "person" is defined as "any individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity." R.C. 3719.01(X). For the purpose of R.C. Chapter 6111, "person" is defined as "the state, any municipal corporation, political subdivision of the state, person as defined in Section 1.59 of the Revised Code, interstate body created by compact, or the federal government or any department, agency, or instrumentality thereof." R.C. 6111.01(I).

In view of the fact that a board of education is a body politic and an agent of the state, State ex rel. Ruple Bus Service v. Wickliffe Board of Education, 11 Ohio Misc. 127, 229 N.E.2d 762 (C.P. Lake County 1967), and the fact that such bodies are not expressly included within the definition of "person" in R.C. 1702.01(I), a

<sup>1</sup> A few cases have indicated that where the language, purpose or context of a statute demonstrates that a broad interpretation of the word "person" is intended, a public body will come within the purview of the statute. See, e.g., City of Dayton v. McPherson, 57 Ohio Op. 2d 361, 280 N.E.2d 106 (C.P. Montgomery County 1969). Nevertheless, I find nothing in the context or purpose of R.C. Chapter 1702 from which it could be inferred that it was the legislature's intention to include governmental entities within these provisions.

board of education cannot be considered a "person" for purposes of R.C. 1702.04. Therefore, I am of the opinion that the laws of the state do not permit boards of education, or their members, to form a nonprofit corporation pursuant to R.C. 1702.04. See Op. No. 79-055 (board of county commissioners not "person" for purpose of R.C. 1702.04).

Your first question also concerns the ability of a board of education of a joint vocational school district to participate with a nonprofit corporation once formed. Given the great breadth of implied power a board of education enjoys under R.C. 3313.90, it seems that the board could participate with a nonprofit corporation to the extent reasonably necessary to implement its vocational education program. However, it is necessary to determine that any particular type of participation is not contrary to the provisions of the Revised Code or the constitution.

There appears to be nothing in the Revised Code which would prohibit the board's proposed action. It is, however, necessary to consider whether such action would violate Ohio Const. art. VIII, §4, which states:

The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

It is my understanding that the activity the board desires to engage in would not violate this section of the constitution. The board would not be loaning anything to the nonprofit corporation. Rather, the board would be trading a commodity it possesses—that is, supervised labor—for something it needs—namely, opportunities to provide its students with work experience. Such an exchange does not constitute a lending of credit, and therefore would not violate art. VIII, §4 of the Ohio Constitution. See 1979 Op. Att'y Gen. No. 79-052; 1977 Op. Att'y Gen. No. 77-047.

I am unaware of any provision in the Revised Code, the constitution, or case law, which would prohibit the action contemplated by the board. Therefore, it is my opinion that a board of education of a joint vocational school district may, pursuant to R.C. 3313.90, enter into an agreement with a nonprofit corporation whereby students of the district would construct a house on property owned by the corporation with materials and equipment furnished at the expense of the corporation, provided that such an agreement is reasonably necessary to fulfill the requirements of the vocational education curriculum.

There is one other matter which needs to be considered in connection with your first question. It appears that the superintendent of schools, or any management level member of the school administration, might be prohibited from being a member of the board of trustees of the nonprofit corporation. One individual who simultaneously held both positions, one public and one private, could be subject to a conflict of interest. See Op. No. 79-055. When a public employee holds a private position and, as a result of his public employment and private position, is placed on both sides of a contract, or has two fiduciary duties imposed on him—one to the public and one to the private body, where a potential clash exists between those two groups' aims—his holding of the public employment and the private position creates a conflict of interest. See *Taylor v. Pinney*, 13 Ohio Dec. 210 (1902); Op. No. 79-055; 1974 Op. Att'y Gen. No. 74-039; 1973 Op. Att'y Gen. No. 73-043. Under the common law rule, a conflict of interest also arises where a person in one position is charged with overseeing his own performance in a second position. See *State ex rel. Attorney General v. Gebert*, 12 Ohio C.C. (n.s.) 274 (Cir. Ct. Franklin County 1909).

The contemplated arrangement might violate the common law conflict of interest rule, outlined above, which is the law in Ohio. If the superintendent were in the position of having to ensure that the nonprofit corporation, on which board of trustees he sat, completely and satisfactorily performed a contract, he would in essence be supervising himself. Such an arrangement would be a clear violation of the conflict of interest rule. A conflict of interest would exist if any person with the duty of overseeing contract performance for the board of education also sat on the board of trustees of an organization which had contracted with the board of education. It is impossible to simultaneously owe primary loyalty to two separate

entites which are parties to one contract, since "no man can faithfully serve two masters." Op. No. 73-043 at 2-169. As a trustee of the nonprofit corporation, a school superintendent's private consideration of his duty of loyalty to that corporation could detract from his service to the public interest in his role as school superintendent. Thus, a school superintendent who sat on the board of directors of a nonprofit corporation which had a contract with the school board would be violating the common law conflict of interest rule if he had the responsibility, as superintendent, of supervising performance of the contract.

The proposed arrangement might also violate R.C. 102.03(A), which states:

No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendations, the rendering of advice, investigation, or other substantial exercise of administrative discretion. As used in this division, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. (Emphasis added.)

This statute would foreclose anyone who was in any way involved in negotiating the contract on behalf of the school board from "representing" the board of trustees of the nonprofit corporation before the board of education on the matter of the contract.

Additionally, the proposed situation might violate R.C. 102.03(D), which states:

No public official or employee shall use or attempt to use his official position to secure anything of value<sup>2</sup> for himself that would

<sup>2</sup>Pursuant to R.C. 102.01, "anything of value," as used in R.C. Chapter 102, has the meaning set forth in R.C. 1.03. R.C. 1.03 states:

As used in any section of the Revised Code for the violation of which there is provided a penalty or forfeiture, unless the context otherwise requires, "anything of value" includes:

- (A) Money, bank bills or notes, United States treasury notes, and other bills, bonds, or notes issued by lawful authority and intended to pass and circulate as money;
- (B) Goods and chattels;
- (C) Promissory notes, bills of exchange, orders, drafts, warrants, checks, or bonds given for the payment of money;
- (D) Receipts given for the payment of money or other property;
- (E) Rights in action;
- (F) Things which savor of the realty and are, at the time they are taken, a part of the freehold, whether they are of the substance or produce thereof or affixed thereto, although there may be no interval between the severing and taking away;
- (G) Any interest in realty, including fee simple and partial interests, present and future, contingent or vested interests, beneficial interests, leasehold interests, and any other interest in realty;
- (H) Any promise of future employment;
- (I) Every other thing of value.

"Bond" for the purpose of this statute is defined as "includ[ing] an undertaking." R.C. 1.02(D).

not ordinarily accrue to him in the performance of his official duties, which thing is of such character as to manifest a substantial and improper influence upon him with respect to his duties. (Footnote added.)

See R.C. 102.04(C) (governmental official or employee prohibited from accepting compensation from any source other than from the governmental entity which employs him, or of which he is an officer, for performance of any service rendered in any matter before such entity); R.C. 2921.43(A)(1) (prohibits public servant from receiving compensation to perform his duties other than as allowed by law).

The proposed arrangement also arguably violates R.C. 2921.42(A)(4), which prohibits a public official from knowingly having "an interest in the profits or benefits of a public contract entered into by or for the use of the political subdivision or governmental agency or instrumentality with which he is connected." To understand why the proposed scheme violates this statute, it is necessary to consider what constitutes "having an interest in the profits or benefits" of the contract.

According to the committee comments to R.C. 2921.42, the intent of the statute is to prohibit "those dealings in which there is a risk that private considerations may detract from serving the public interests." OLSC Summary of Am. Sub. H.B. 511,<sup>3</sup> cited in Ohio Legal Center Institute Criminal Code Publications No. 87-1973 at 21-47 (1973). The Ohio Ethics Commission has concluded that R.C. 2921.42(A)(4) prohibits a public official from having a fiduciary interest in an agency which contracts with his governmental entity, regardless of whether he was involved in negotiating the contract. Ohio Ethics Commission, Advisory Opinion No. 81-003. Further, it seems that R.C. 2921.42(A)(4) acts as an absolute prohibition to a public official from serving on the board of a nonprofit corporation that contracts with the official's public body. See Ohio Ethics Commission, Advisory Opinion No. 81-008. Thus, it appears that the proposed arrangement would arguably violate R.C. 2921.42(A)(4).

Another potential problem with the proposed arrangement involves R.C. 2921.42(A)(1), which prohibits a public official from knowingly "[a]uthoriz[ing], or employ[ing] the authority or influence of his office to secure authorization of any public contract in which he, a member of his family, or any of his business associates has an interest." For the reasons outlined above, this provision would prohibit the superintendent or another management level member of the school administration from taking any action to influence the board of education with regard to any contract with a nonprofit corporation if he were a member of the nonprofit corporation's board of trustees.

In conclusion, an attempt by any management level personnel of the school board to be a member of the board of trustees of a nonprofit corporation with which the school board seeks to contract might result in a conflict of interest. It would possibly violate the common law conflict of interest rule set out above. Further, such actions may violate various provisions of R.C. Chapter 102 and R.C. 2921.42(A)(1) and (4).<sup>4</sup>

Your second question asks whether a board of education of a joint vocational school is permitted to acquire land and construct residential dwellings thereon which are to be offered for sale. R.C. 3313.17 sets forth the general corporate powers of boards of education, including "acquiring, holding, possessing, and

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<sup>3</sup>Am. Sub. H.B. 511, 109th Gen. A. (1971) (eff. Jan. 1, 1974), enacted R.C. 2921.42.

<sup>4</sup>I note that the Ohio Ethics Commission has the power to issue advisory opinions concerning R.C. 2921.42, as well as R.C. Chapter 102. See R.C. 102.08.

disposing of real and personal property." The ability of a board of education of a joint vocational school district to acquire land is limited by R.C. 3313.37(B)(2), which provides as follows:

Boards of education may acquire land by gift or devise, by purchase, or by appropriation. Lands purchased may be purchased for cash, by installment payments, with or without a mortgage, by entering into lease-purchase agreements, or by lease with an option to purchase, provided that if the purchase price is to be paid over a period of time, such payments shall not extend for a period of more than five years, and a special tax levy shall be authorized by the voters of the school district in accordance with section 5705.21 of the Revised Code to provide a special fund to meet the future time payments.

Aside from the methods of financing which are set forth in R.C. 3313.37(B)(2), I am unaware of any restrictions placed upon a board's power to acquire land. In particular, this power does not appear to be limited so as to prohibit the purchase of land where such land is to be used in connection with a vocational training program. As I stated above, boards of education may exercise only those powers expressly granted by statute or those which are necessarily implied therefrom. Where power is granted to administrative boards with respect to any matter, the manner of carrying out such power and the extent thereof, if not fixed or limited by statute, are within the discretion of the board, which discretion will not be interfered with by the courts. State ex rel. Great Lakes College v. Medical Bd., 29 Ohio St. 2d 198, 280 N.E.2d 900 (1972); Brannon v. Board of Education, 99 Ohio St. 369, 124 N.E. 235 (1919); 1962 Op. Att'y Gen. No. 3238, p. 662; 1940 Op. Att'y Gen. No. 1698, vol. 1, p. 39. I am unaware of any statute which limits the purposes for which a board of education may purchase land; the board, however, may not exceed its statutory duties and purchase land in a situation when the purchase is not necessary to the execution of such duties.

To analogize, I note that R.C. 3313.39 empowers a board of education to appropriate land and delineates the purposes for which such an action may be deemed necessary. The board, however, is limited to carrying out its statutory duties, and cannot appropriate property for other than school purposes. Pifer v. Board of Education, 25 Ohio App. 469, 159 N.E. 99 (Lorain County 1927). For the board to procure land when unnecessary to the performance of its statutory functions would be an abuse of the board's authority. R.C. 3313.39 provides that "[w]hen it is necessary, in the opinion of the board of education, to procure or enlarge: (A) any site for a building to be used for public school purposes whether as classrooms, auditorium, or for technical training, administrative, storage or other education purposes; . . . [the board may file for such parcel of land]" (emphasis added). It appears that, in most situations, vocational training would be deemed a valid purpose for appropriation and within the limits of the board's power in performing its defined statutory duties.

I have on several occasions in the past considered the scope of a school district's authority pursuant to R.C. 3313.90 to establish a vocational education program. See Op. No. 76-065; Op. No. 71-068; Op. No. 71-026. In Op. No. 76-065 at 2-219, I concluded:

Because of the clear mandate of the General Assembly in R.C. 3313.90 that vocational education programs be developed and made available, I conclude that a joint vocational school may, as part of a vocational education program, construct and sell single family residences on land owned by the joint vocational school district.

Concomitantly, if the district does not own land on which students of the vocational education program can build houses, land may be purchased in accordance with R.C. 3313.37. As I also noted in Op. No. 76-065, R.C. 3313.41

provides guidelines which must be followed for the sale of realty owned by the school district once construction of the house is completed.

Based on the foregoing, it is my opinion, and you are advised, that:

1. A joint vocational school district may, pursuant to R.C. 3313.90, enter into an agreement with a nonprofit corporation whereby students of the district would construct a house on property owned by the corporation with materials and equipment furnished at the expense of the corporation, provided that such an agreement is reasonably necessary to fulfill the requirements of the vocational education curriculum.
2. A board of education of a joint vocational school district may, as part of a vocational education program, purchase land, construct residential dwellings thereon, and thereafter sell such realty. (1976 Op. Att'y Gen. No. 76-065, approved and followed.)