

**OPINION NO. 71-070****Syllabus:**

1. A board of county commissioners is authorized, under Section 307.02, Revised Code, to appropriate private property as a site for a mental health or retardation facility upon the recommendation and request of the community mental health and retardation board.

2. Such appropriation must be in accordance with the procedure set forth in Sections 163.01 to 163.22, inclusive, of the Revised Code, which Sections are incorporated by reference in Section 307.08, Revised Code.

3. A board of county commissioners may, under Section 307.09, Revised Code, lease such appropriated property for a period of 40 years to a private non-profit corporation, which will construct and operate a mental health facility thereon, provided such lease is not inconsistent with the need of such land for public use by the county itself.

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To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio  
By: William J. Brown, Attorney General, October 14, 1971

Your request for my opinion poses the following three questions:

"1. Does Section 307.02 of the Revised Code of Ohio authorize the Board of County Commissioners to appropriate private property for a community mental health facility upon the request and recommendation of the Community Mental Health and Retardation Board?

"2. If the answer to question No. 1 is in the affirmative, does the Board of County Commissioners have the power to appropriate the private property in question in accordance with the procedure set forth in Section 307.08 of the Revised Code of Ohio?

"3. If the answers to questions No. 1 and 2 are in the affirmative, may the Board of County Commissioners then after the appropriation of the private property, legally lease the property to

a private non-profit corporation for a period of 40 years who will construct a mental health center thereon?"

Your letter briefly outlines the facts which gave rise to the questions. A Cleveland non-profit corporation desires to construct a community mental health center in Cuyahoga County. Although both the Community Mental Health and Retardation Board of Cuyahoga County and the State Division of Mental Hygiene have approved and recommended the project, and although federal, state and local funds are available for the acquisition of the site and for the construction and operation of the facility, the non-profit corporation has been unable to acquire the necessary property by negotiation with its owners. It has, therefore, requested that the site be appropriated by the board of county commissioners, pursuant to Sections 307.02 and 307.08, Revised Code, with funds which will be donated by the non-profit corporation under Section 9.20, Revised Code. Should appropriation be accomplished, the non-profit corporation proposes to lease the property from the board of county commissioners for a period of 40 years; to construct a community mental health center; and to conduct its operation.

1. Your first question concerns the authority of the board of county commissioners to appropriate private property for a community mental health facility upon the recommendation of the Community Mental Health and Retardation Board.

Chapter 340, Revised Code, provides for the establishment of such community mental health boards and imposes upon them a broad spectrum of duties assigned to foster the care of the retarded and the mentally ill in the community. Section 340.01, Revised Code, provides as follows:

"A community mental health and retardation service program shall be established in any county or combination of counties having a population of at least fifty thousand to provide community services for mentally ill, mentally retarded, and emotionally disturbed persons. \* \* \*

"\* \* \* \* \* \* \* \*"

Section 340.02, Revised Code, provides for the appointment of community mental health boards, and Section 340.03, Revised Code, provides that, among various other duties, the board shall:

"(A) Review and evaluate community mental health and retardation services and facilities and submit to \* \* \* the board or boards of county commissioners, \* \* \* recommendations \* \* \* for the provision of needed additional services and facilities \* \* \*;

"\* \* \* \* \* \* \* \*"

"(E) Enter into contracts with state hospitals other public agencies, and private or voluntary hospitals and other private or voluntary nonprofit agencies for the provision of mental health and mental retardation service and facilities;

\* \* \*                      \* \* \*                      \* \* \*

"(J) In the event a needed service cannot be provided by an existing public or private agency, directly operate a mental health or mental retardation facility until such time as this responsibility can be assumed by another agency.

\* \* \*                      \* \* \*                      \* \* \*"

A community mental health and retardation board should be carefully distinguished from a county board of mental retardation, which is provided for in Sections 5126.01 through 5126.04, Revised Code. The county board's function is limited to supervision of facilities, programs and services in the county for the special training of the mentally retarded, the establishment of which is provided for in Section 5127.01, Revised Code. The community board, on the other hand, has a general planning and coordinating function with respect to all mental health and retardation facilities, programs and services in the community (which may extend over three counties), with the exception of those specifically committed to the jurisdiction of the county board.

It is clear that a community mental health board fulfills a public purpose when it submits a recommendation for additional community mental health facilities, or when it enters into contracts with existing facilities for the provision of mental health services, or when it actually takes over the interim operation of an existing facility. The General Assembly might properly have granted to the community mental health boards the power of eminent domain. Instead, it specifically left this power with the board of county commissioners. Section 307.02, supra, insofar as pertinent at this point, provides as follows:

"The board of county commissioners \* \* \* may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a \* \* \* community mental health facility or community mental retardation facility, \* \* \* and sites therefor, \* \* \*."  
(Emphasis added.)

I conclude, therefore, that the Board of County Commissioners of Cuyahoga County is authorized to appropriate private property as a site for a community mental health facility upon the recommendation of the Community Mental Health and Retardation Board.

2. The procedure to be followed by a board of county commissioners in the exercise of its power of eminent domain is set forth in Section 307.08, supra. That Section incorporates by reference Sections 163.01 to 163.22, Revised Code, which prescribe the procedure for appropriation of land by the State of Ohio. Section 307.08, supra, provides as follows:

"When, in the opinion of the board of county commissioners, it is necessary to procure real estate \* \* \* for a courthouse, jail, or public offices, or for a bridge and the approaches thereto, or other structure, or pub-

lic market place or market house, proceedings shall be had in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.

It may be argued that Section 307.08, supra, does not specifically mention community mental health and retardation facilities; that Section 307.02, supra, is, therefore, a mere naked power to appropriate real estate for such facilities without the procedural safeguards necessary to protect the owner of the real estate; and that Section 307.02, supra, is, accordingly, unenforceable. See Emanuel v. Twinsburg Twp., 94 Ohio App. 53, 67-70 (1952). I think, however, that the language of Section 307.08, supra, referring as it does to any "other structure", was clearly intended to apply the same procedural safeguards to any of the numerous public purposes for which land can be appropriated under Section 307.02, supra. The contrary construction would render a large part of Section 307.02, supra, nugatory and should be avoided. 50 O. Jur. 2d 205-207. Furthermore, Section 307.08, supra, being a procedural and remedial statute, should be construed liberally in favor of the remedy provided. 50 O. Jur. 2d 24-25, 275-276.

It should be noted that these procedural steps must be strictly followed. Emanuel v. Twinsburg Twp., supra, at 67-68. It will, therefore, be necessary for the board of county commissioners to show that it was impossible to acquire the property in question by negotiation with the owners (Section 163.04, supra), and that the property is sought to be appropriated for a public purpose (Section 163.05, supra).

3. Your final question concerns the authority of the board of county commissioners, after appropriation has been effected, to execute a 40-year lease of the property to the non-profit corporation, which will then construct and operate the proposed mental health center upon the site.

The authority of a board of county commissioners to lease the site for such a community mental health facility is manifest from the language of Section 307.02, supra. Furthermore, the necessity for some type of lease clearly appears from the fact that neither a board of county commissioners nor a community mental health and retardation board has general authority to operate such a facility. The commissioners can provide one, either by construction or by purchase (Section 307.02, supra), and the community board may contract with other agencies for its operation (Section 340.03, supra), but neither has authority to conduct the operation, aside from some interim responsibility in the community board (Section 340.03 (J), supra). Some other public agency or, as here, a non-profit private corporation, must be found to conduct the actual operation of the facility (Section 340.03 (E) and (J), supra). (We are not here concerned, of course, with the county board of mental retardation, which actually operates the special training programs for the mentally retarded.)

Your letter states that the non-profit corporation will request a 40-year lease "pursuant to the provisions of Section 307.09 of the Revised Code of Ohio." That Section provides, in pertinent part, as follows:

"If the interests of the county so require, the board of county commissioners may sell any real estate belonging to the county and not needed for public use, or may lease it, \* \* \*

provided \* \* \* the board may grant leases \* \* \* to municipal corporations \* \* \* for public purposes \* \* \* or to corporations not for profit for hospital, charitable, \* \* \* or recreational purposes \* \* \* on or in lands owned by the county where such lease \* \* \* is not deemed by the board to be inconsistent with the need of such land for public use by the county. Any such lease \* \* \* granted to a municipal corporation \* \* \* or to corporations not for profit for hospital, charitable, \* \* \* or recreational purposes, may be for such length of time \* \* \* as the board deems for the best interests of the public. \* \* \* (Emphasis added.)

It may be argued that it would be inconsistent for a board of county commissioners to appropriate private property on the ground of public necessity and then immediately lease it on the ground that it is not needed for public use. But the Section draws a distinction between "public use" and use for "public purposes". It provides, in effect, that when land is not needed for use in the specific business of the county itself, it may be leased for numerous purposes which are generally beneficial to the public. The concept of "public purpose", as applied to the use of public property, has been given a more liberal interpretation in recent Supreme Court opinions. State ex rel. McClure v. Hagerman, 155 Ohio St. 320 (1951); State ex rel. Ernestle v. Rich, 159 Ohio St. 13, 26-27 (1953). I think it clear from what has been said above in response to your first question, that a community mental health center will fulfill a public purpose.

The length of the lease is, of course, a matter left to the discretion of the board of county commissioners supra under the last sentence of the quoted portion of Section 307.09, supra.

It should be noted that the Syllabus of Opinion No. 69-062, Opinions of the Attorney General for 1969, says:

"Section 340.07, Revised Code, does not authorize a board of county commissioners to lease facilities for a community health and retardation center.

That Opinion, however, did not discuss Section 307.09, supra, and it was concerned with a situation in which the board sought to be lessee of buildings already erected, and not, as here, the lessor of land on which the facility is to be erected.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. A board of county commissioners is authorized, under Section 307.02, Revised Code, to appropriate private property as a site for a mental health or retardation facility upon the recommendation and request of the community mental health and retardation board.
2. Such appropriation must be in accordance with the procedure set forth in Sections 163.01 to 163.22, inclusive, of the Revised Code, which Sections are incorporated by reference in Section 307.08, Revised Code.
3. A board of county commissioners may, under Section 307.09,

Revised Code, lease such appropriated property for a period of 40 years to a private non-profit corporation, which will construct and operate a mental health facility thereon, provided such lease is not inconsistent with the need of such land for public use by the county itself.