

OPINION NO. 2011-044

Syllabus:

2011-044

R.C. 307.09 and R.C. 307.10 do not authorize a board of county commissioners to sell a one-half undivided interest in real property that is donated to a board of county hospital trustees under R.C. 339.08.

To: Jessica A. Little, Brown County Prosecuting Attorney, Georgetown, Ohio

By: Michael DeWine, Ohio Attorney General, December 5, 2011

You have requested an opinion concerning the authority of a board of county

commissioners to sell real property donated to a county hospital. As explained in your letter, the Brown County General Hospital, established and operated pursuant to R.C. Chapter 339, recently was sold to a private company. The board of county hospital trustees still exists and is in the process of winding up its affairs. Several of the hospital's assets were not sold to the private company, including a one-half undivided interest in real property that was bequeathed to "the Brown County Hospital" by a private individual. Title to the one-half undivided interest in the property is held in the name of the "Brown County Hospital." It also is our understanding that there is no hospital facility located on the real property; rather, it is farm land.

You now ask whether the board of county commissioners may sell the interest in this property pursuant to R.C. 307.09 and R.C. 307.10 without the approval or consent of the board of county hospital trustees. You also ask, if the board of county commissioners is authorized to sell the interest in this property, what may or must be done with the proceeds of the sale. It is our understanding that the donor did not attach any conditions to the gift that would restrict how the property could be used or that would limit the alienability of the property. We therefore assume, for the purpose of this opinion, that there is no condition connected with the gift of property that requires, prohibits, or limits the sale or other disposition of the one-half undivided interest in the property.

For the following reasons, we conclude that the board of county commissioners has no authority to sell an interest in real property donated to, and held in title by, the county hospital. Because I have answered your first question in the negative, it is not necessary to address your second question.

To resolve your first question, we must understand the respective duties of and the relationship between a board of county commissioners and a board of county hospital trustees. A board of county commissioners and a board of county hospital trustees are creatures of statute that may exercise only those powers explicitly conferred by statute or necessarily implied by those powers that are expressly granted. *State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs 1 and 2) (board of county commissioners); *Roberto v. Brown County Gen. Hosp.*, No. CA87-06-009, 1988 Ohio App. LEXIS 372, at *8 (Brown County Feb. 8, 1988) (board of county hospital trustees); 2010 Ohio Op. Att'y Gen. No. 2010-030, at 2-221 (board of county commissioners); 2010 Op. Att'y Gen. No. 2010-024, at 2-173 (board of county hospital trustees).

Provisions governing the establishment and operation of county hospitals are set forth primarily in R.C. Chapter 339. With regard to the establishment and operation of a county hospital, a board of county commissioners and a board of county hospital trustees have distinct powers and duties. A board of county commissioners has the authority to "purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities thereof." R.C. 339.01(B). Once a board of county commissioners decides to establish a county hospital, a board of county hospital trustees must be created pursuant to R.C. 339.02 if a board is not already in existence. R.C. 339.02(B). The board of county hospital trustees is required to "as-

sume and continue the operation of the hospital'' upon completion of the county hospital. R.C. 339.06(A); *see also* R.C. 339.01(B).

The general powers and duties of a board of county hospital trustees are set forth in R.C. 339.03 and R.C. 339.06. A board of county hospital trustees has authority over ''the entire management and control of the county hospital.'' R.C. 339.06(B). Subject to only a few narrow exceptions, a board of county hospital trustees is not subject to the direction or control of the board of county commissioners. *See, e.g.*, R.C. 339.05 (approval of bidding procedures and purchasing policies of board of county hospital trustees by board of county commissioners); R.C. 339.06(D)(3) (board of county commissioners must review and approve proposed budget of county hospital); R.C. 339.091 (board of county commissioners must approve certain specified initial agreements for acquisition, operation, or lease of a county hospital operated by a board of county hospital trustees).

Several provisions of R.C. Chapter 339 address the powers of a board of county hospital trustees with respect to real property. Pursuant to R.C. 339.03, a board of county hospital trustees ''shall have complete charge of the selection and purchase or lease of a site or sites for a county hospital, taking title or leasehold interest to such site or sites in the name of the county.'' A board of county hospital trustees also ''has control of the property of the county hospital, including management and disposal of surplus property other than real estate or an interest in real estate.'' R.C. 339.06(C). No other provision in R.C. Chapter 339 or elsewhere in the Revised Code addresses the sale or disposal of real property donated to a county hospital by either a board of county hospital trustees or a board of county commissioners.

Additionally, R.C. 339.08 confers upon a board of county hospital trustees the power to receive and hold in trust real property and to administer such property and the proceeds thereof. R.C. 339.08 provides, in pertinent part, as follows:

The board of county hospital trustees may receive any gift, bequest, or devise of real or personal property in trust for the erection, improvement, or support of the county hospital, and administer the said property and the proceeds thereof in the manner required by law or the instrument creating such trust.

R.C. 339.08 further provides that the board of county hospital trustees ''shall make a complete report of its administration of all property and funds held in trust to the board of county commissioners with its annual report of operation of the hospital.''

A board of county commissioners, pursuant to its powers set forth in R.C. Chapter 307, has general authority to sell property belonging to the county. R.C. 307.09 authorizes a board of county commissioners to ''sell any real property belonging to the county and not needed for public use'' if ''the interests of the county so require.'' R.C. 307.10 prescribes the procedure by which a county may sell real property. Thus, in order for the provisions of R.C. 307.09 and R.C. 307.10 to apply, the property interest must ''belong to the county.'' *See* 2011 Op. Att'y Gen. No. 2011-042, slip op. at 3 (''[b]y their plain terms, R.C. 307.09 and R.C.

307.10 apply only to the sale of real property belonging to the county”). As explained below, we conclude that a property interest donated to a county hospital does not belong to the county for purposes of R.C. 307.09 and R.C. 307.10.

Although title to county property is generally held by the board of county commissioners, there are exceptions to that rule. *See* 2011 Op. Att’y Gen. No. 2011-042, slip op. at 3-4. “If a particular governmental entity has statutory authority itself to hold and invest donations that it receives, it may do so.” 1994 Op. Att’y Gen. No. 94-073, at 2-368; *see also* 2011 Op. Att’y Gen. No. 2011-042, slip op. at 4. We recently concluded that an alcohol, drug addiction, and mental health services board (ADAMHS board) has authority to hold title to real property independently of a board of county commissioners. 2011 Op. Att’y Gen. No. 2011-042, slip op. at 4. Therefore, the opinion concluded that “property acquired by an ADAMHS board pursuant to R.C. 340.031(B) is not real property belonging to the county for purposes of R.C. 307.09, and the sale of such property is not subject to R.C. 307.09 and R.C. 307.10.” *Id.* As discussed in 2011 Op. Att’y Gen. No. 2011-042, slip op. at 4, a prior Attorney General opinion also recognized that a county board of developmental disabilities may hold title to real property independently of a board of county commissioners. 2006 Op. Att’y Gen. No. 2006-001, at 2-4 n.4.

Similar to an ADAMHS board and to a county board of developmental disabilities, a board of county hospital trustees has express authority to accept donations of real property. R.C. 339.08. The plain language of R.C. 339.08 authorizes donations of real property “for the erection, improvement, or support of the county hospital” to be accepted and administered directly by a board of county hospital trustees, the body with responsibility for the management and operation of the county hospital. *See also* 1986 Op. Att’y Gen. No. 86-067, at 2-367 (trustees of a county hospital are authorized to receive, hold in trust, and administer moneys given to the county hospital). Accordingly, a one-half undivided interest in real property donated directly to a county hospital pursuant to R.C. 339.08 is not real property belonging to the county for purposes of R.C. 307.09. *See* 1953 Op. Att’y Gen. No. 2393, p. 82 (syllabus, paragraph 2) (“[r]eal property given to an agency of a county for the purpose of a charitable trust may not be sold by the county commissioners pursuant to the provisions of [G.C. 2447 and G.C. 2447-1, (nearly identical to the language now contained in R.C. 307.09)], as ‘real estate belonging to the county and not needed for public use’”). Therefore, we conclude that a board of county commissioners may not sell such property pursuant to R.C. 307.09 and R.C. 307.10.

If the property interest had been purchased by a board of county commissioners, the property interest would belong to the county for purposes of R.C. 307.09 and R.C. 307.10. *See* 1953 Op. Att’y Gen. No. 2393, p. 82, at 87. Similarly, the property interest would belong to the county for purposes of R.C. 307.09 and R.C. 307.10 if it had been acquired by a board of county hospital trustees pursuant to R.C. 339.03, which authorizes a board of county hospital trustees to purchase or lease a site for a county hospital. *See id.* Here, however, the property interest was not purchased, either by a board of county commissioners or a board of county hospital trustees. Rather, the property interest was donated directly to the board of

county hospital trustees pursuant to R.C. 339.08. Therefore, the provisions of R.C. 339.03 that require a board of county hospital trustees to take title or a leasehold interest in the name of the county do not apply.

Further, R.C. 339.08 does not make the acceptance of a gift or donation subject to R.C. 339.03. Nor does R.C. 339.08 include language that requires a board of county hospital trustees to take title in the name of the county, as the board is required to do when it purchases or leases a site for the county hospital pursuant to R.C. 339.03. If the General Assembly had intended to impose such a requirement upon a board of county hospital trustees, it could have used express language similar to that used in R.C. 339.03. *See Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the legislature intended a particular meaning, "it would not have been difficult to find language which would express that purpose," having used that language in other matters); *State ex rel. Enos v. Stone*, 92 Ohio St. 63, 67, 110 N.E. 627 (1915) (had the General Assembly intended a particular result, it could have employed language used elsewhere that plainly and clearly compelled that result). In the absence of such language, it appears that the General Assembly did not intend for a board of county hospital trustees to take title to real property or an interest in real property donated to the county hospital "in the name of the county."

Because the interest in the property is not held in the name of the county, we conclude that a board of county commissioners has no authority to sell the property interest pursuant to R.C. 307.09 and R.C. 307.10. Those provisions explicitly and clearly apply only to property "belonging to the county." R.C. 307.09.

The question remains whether a board of county hospital trustees has the authority to sell or otherwise alienate the property interest. No provision in R.C. Chapter 339 expressly confers this authority upon a board of county hospital trustees. Ohio courts and prior Attorney General opinions have consistently recognized that the power to take title to and hold real property implies the power to alienate such land if it is in the public's best interest and if the land is not currently needed for public uses. *E.g., Reynolds v. Comm'rs of Stark County*, 5 Ohio 204 (1831); *Minamax Gas Co. v. State ex rel. McCurdy*, 33 Ohio App. 501, 507-08, 170 N.E. 33 (Scioto County 1929); 1981 Op. Att'y Gen. No. 81-106; 1980 Op. Att'y Gen. No. 80-028. In other words, "the right to sell follows necessarily as an incident to ownership." 1935 Op. Att'y Gen. No. 4198, p. 487, at 488; *see also* 1980 Op. Att'y Gen. No. 80-028, at 2-116 ("the power to dispose of property is implied from ownership thereof").

The rationale for this rule was explained in this way:

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 value 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 [joint township district hospital board], useless for hospital purposes, useless for producing revenue, and unavailable to potential owners who could put it to productive use.

1974 Op. Att’y Gen. No. 74-020, at 2-89; *see also* 1924 Op. Att’y Gen. No. 1250, p. 110, at 112 (reasoning that “[i]t would be inconsistent with the holding of land for public benefit if it were permitted to lie idle when proper business management would require the same to produce an income for the public use”). In the 1974 opinion, the Attorney General concluded that, because a joint township district hospital board had authority to receive and hold in trust for the hospital any grant or devise of land, the board had implied authority to sell land not needed for hospital purposes. 1974 Op. Att’y Gen. No. 74-020, at 2-89 and 2-92.

Thus, “absent statutes delineating and/or limiting the power, public bodies have the implied power to alienate land not needed for public purposes.” 1980 Op. Att’y Gen. No. 80-028, at 2-116. No statute prohibits a board of county hospital trustees from selling an interest in real property that was donated to the board pursuant to R.C. 339.08. Accordingly, based on its authority to receive a donation of real property pursuant to R.C. 339.08, a board of county hospital trustees has the authority to sell a one-half undivided interest in property donated to the county hospital.

Based on the foregoing, it is my opinion, and you are hereby advised that R.C. 307.09 and R.C. 307.10 do not authorize a board of county commissioners to sell a one-half undivided interest in real property that is donated to a board of county hospital trustees under R.C. 339.08.