

**OPINION NO. 85-008****Syllabus:**

1. The County of Summit may enter into a lease/purchase agreement for a full service jail facility.
2. The County of Summit may not enter into an agreement, either as part of a lease/purchase agreement for a full service jail facility or independently of such lease/purchase agreement, providing for the operation and management of such jail facility and all persons confined therein by a private, for-profit entity, either in lieu of, or in conjunction with, the county sheriff, but may otherwise contract for the services of persons to perform ministerial duties in connection with the operation and management of such jail facility, and may contract for the services of experts and consultants in connection with the operation and management of a full service jail facility.

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**To: Lynn C. Slaby, Summit County Prosecuting Attorney, Akron, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, April 9, 1985**

I have before me your request for my opinion regarding the acquisition and management of the county jail. I have rephrased your questions as follows:

1. May the County of Summit enter into a lease/purchase agreement for a full service jail facility?<sup>1</sup>
2. May the County of Summit enter into an agreement, either as part of a lease/purchase agreement for a full service jail facility or independently of such lease/purchase agreement, providing for the operation and management of a full service jail facility and all persons confined therein by a private, for-profit entity, either in lieu of, or in conjunction with, the county sheriff?

Summit County has adopted a charter (hereinafter, referred to as the "County Charter") for the exercise of its county government,<sup>2</sup> and I must first look to the County Charter to determine whether it authorizes the proposals set forth in your questions. While the County Charter does not specifically address the lease/purchase or management of a county jail, County Charter art. III, §3.03(7) does empower the County Council "[t]o provide for the acquisition, construction, maintenance, administration, rental, and leasing of property including buildings and

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<sup>1</sup> See 8 Ohio Admin. Code 5120:1-7-02(A)(1), wherein "full service jail" is defined to mean "[a] local facility that may detain persons for more than one hundred twenty hours."

<sup>2</sup> See Ohio Const. art. X, §3; R.C. 301.22.

other public improvements, as provided by general law."<sup>3</sup> I conclude that pursuant to this provision of the County Charter, the County Council is empowered to enter into a lease/purchase agreement for the acquisition of a county jail facility only to the extent permitted under general law.

R.C. 307.02 provides in part: "The board of county commissioners<sup>4</sup> of any county, in addition to its other powers, may purchase, for cash or by installment payments, enter into lease-purchase agreements, lease with option to purchase,<sup>5</sup> lease, appropriate, construct, . . . equip, and furnish a . . . jail. . . ." (Emphasis and footnotes added.) See R.C. 307.01 (a jail shall be provided by the board of county commissioners, when, in its judgment, a jail is needed; new jails must be designed, "and all existing jails shall be operated in such a manner as to comply substantially with the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction"). R.C. 307.02 specifies that the lease period of a lease/purchase plan for the construction of a county building shall not exceed forty years, that at the end of the lease period, the building and the land on which it is situated shall become the property of the county without cost, and that plans, details, bills of materials, specifications, and estimates of cost shall be filed with the clerk of the board or in the office of the county auditor. Further, R.C. 307.02 requires that a board of county commissioners invite bids for lease/purchase plans pursuant to the competitive bidding requirements of R.C. 307.86-.92. See 1979 Op. Att'y Gen. No. 79-034. Before submitting a bid, a builder must have complied with R.C. 153.50-.52.

Therefore, in response to your first question, I conclude that, pursuant to

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<sup>3</sup> While I believe County Charter art. III, §3.03(7) directly addresses the power of the county to enter into a lease/purchase agreement for a full service jail facility, there are other charter provisions which also may be relevant. See County Charter art. II, §2.03(5) (authorizing the County Executive to "execute contracts, conveyances and evidences of indebtedness on behalf of the County"); County Charter art. III, §3.03(3) (vesting power in the County Council to "establish procedures under which the County Executive may employ experts and consultants in connection with the administration of the affairs of the County"); County Charter art. III, §3.03(4) (vesting power in the County Council to "establish procedures governing the making of County contracts and the purchasing of County supplies and equipment by competitive bidding"); County Charter art. III, §3.03(9) (vesting power in the County Council to "provide for the procedure for making public improvements and levying assessments for such improvements").

<sup>4</sup> The County Charter does not provide for a board of county commissioners. Instead, those powers generally exercised by a board of county commissioners are exercised by the County Executive and County Council pursuant to articles II and III, respectively, of the County Charter.

In order for this opinion to have general applicability throughout the state, I elect to address your question in terms of the statutory provisions governing county operations. Thus, any discussion of the statutory powers and duties of boards of county commissioners should be read in Summit County with reference to the appropriate local official who is responsible under the County Charter for performing the particular function being considered.

<sup>5</sup> See Am. Sub. S.B. 96, 115th Gen. A. (1984) (eff. April 4, 1985), containing newly enacted R.C. 307.022. R.C. 307.022 empowers a board of county commissioners to enter into a lease, including a lease with an option to purchase, of correctional facilities, for a term not to exceed forty years, without following the competitive bidding requirements of R.C. 307.86. R.C. 307.022(A)(1). For the purposes of R.C. 307.022, "correctional facilities" includes jails. R.C. 307.022(C)(1).

R.C. 307.02, Summit County may enter into a lease/purchase agreement for a full service county jail. Since County Charter art. III, §3.03(7) authorizes such a lease/purchase agreement only "as provided by general law," Summit County must comply with those limitations imposed upon counties under R.C. 307.02 with regard to the power to enter lease/purchase agreements.

I turn now to your second question—whether a lease/purchase or other agreement for a county jail facility may also provide for the operation and management of the jail by a private, for-profit corporation either in lieu of or in conjunction with the county sheriff. I note first that County Charter art. IV, §4.01 states in part: "The . . . Sheriff of the County shall be elected and [his] salary and duties shall continue to be determined in the manner provided by general law. . . ."

Your second question asks in part whether the County may contract for the operation and management of the county jail by a private, for-profit entity in lieu of the sheriff. R.C. 341.01 states: "The sheriff shall have charge of the county jail and all persons confined therein. He shall keep such persons safely, attend to the jail, and govern and regulate the jail according to the minimum standards for jails in Ohio promulgated by the department of rehabilitation and correction." (Emphasis added.) See R.C. 307.01. See also R.C. 5120.10 (Director of Department of Rehabilitation and Correction shall promulgate minimum standards for jails in Ohio); 8 Ohio Admin. Code 5120:1-8-17 (staff of full service jails); 8 Ohio Admin. Code 5120:1-8-18 (training of staff of full service jails); 8 Ohio Admin. Code 5120:1-8-19 (code of ethics for employees of a full service jail). The sheriff must visit the county jail and examine the condition of each prisoner at least once a month. R.C. 341.04. He may appoint an administrator for the jail, R.C. 341.05, and he has

<sup>6</sup> I note that certain factors should be considered before any county enters into a lease/purchase agreement. The first is the possible applicability of Ohio Const. art. VIII, §6, which prohibits a county from lending its credit to, or in aid of, any private entity. In 1977 Op. Att'y Gen. No. 77-047, my predecessor concluded that Ohio Const. art. VIII, §6 does not prohibit a board of county commissioners from leasing county owned lands to a private developer in connection with a lease/purchase plan entered into under R.C. 307.02, but also concluded that the subordination of county owned land for the purpose of permitting a private developer to obtain a mortgage loan for building construction would violate art. VIII, §6. Thus, in implementing a particular lease/purchase plan, care must be taken to make certain that public and private interests are legally separate and to avoid the sort of inextricable union of public and private property that brings the lending credit prohibitions into play. See generally *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959); *Village of Brewster v. Hill*, 128 Ohio St. 343, 190 N.E. 766 (1934); *Alter v. City of Cincinnati*, 56 Ohio St. 47, 46 N.E. 69 (1897); *Hines v. City of Bellefontaine*, 74 Ohio App. 393, 57 N.E.2d 164 (Logan County 1943); 1977 Op. Att'y Gen. No. 77-049.

Another factor to consider in arranging a lease/purchase plan is that the Ohio Supreme Court, in *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972), held that the entire contract price of an installment purchase contract which unconditionally obligated a city to make future payments constituted a present bonded indebtedness of the city for purposes of Ohio Const. art. XII, §11. See 1980 Op. Att'y Gen. No. 89-042. Article XII, §11 provides that, when bonded indebtedness is created, the enabling legislation must provide for a tax levy for the liquidation of the debt. Thus, if the county creates a present indebtedness in entering into a lease/purchase agreement for the county jail, a tax must be levied to retire the debt.

<sup>7</sup> Cf. R.C. 307.021 (with respect to a county jail, construction of which is financed by the proceeds of the sale of revenue bonds sold by the Ohio Building Authority, "[t]he office of the sheriff, due to its responsibilities concerning alleged and convicted offenders against state laws, is designated as the state agency having jurisdiction over such jail. . . . It is hereby determined and declared that such capital facilities are for the purpose of housing such state agencies, their functions, equipment, and personnel").

various other responsibilities with regard to the jail. It is evident in examining the duties of a county sheriff that the sheriff has a great number of responsibilities relating to the jail which require the exercise of his discretion. A public officer may not delegate those duties which require the exercise of discretion unless the power to delegate is expressly granted. See 1980 Op. Att'y Gen. No. 80-060; 1979 Op. Att'y Gen. No. 79-067. I am unaware of any authority expressly authorizing the delegation of the sheriff's duties with respect to the jail. Therefore, I conclude that the County of Summit may not contract for the operation and management of the county jail by a for-profit entity in lieu of the sheriff, in view of the fact that R.C. Chapter 341 vests in the sheriff many duties which require the exercise of the sheriff's discretion.

Your second question also asks whether the County of Summit may contract with a private, for-profit entity to manage the jail in conjunction with the county sheriff. Pursuant to R.C. 341.05, the sheriff may appoint an administrator for the county jail, and such administrator need not be a law enforcement officer. As a general matter, a public body has the implied authority to contract with an independent contractor to perform those duties imposed by law upon the public body. See State ex rel. Sigall v. Aetna Cleaning Contractors of Cleveland, Inc., 45 Ohio St. 2d 308, 345 N.E.2d 61 (1976); 1984 Op. Att'y Gen. No. 84-030. This ability is limited in instances where it is apparent that the public body must perform those duties itself or through its employees. See Op. No. 84-030. See also Council v. Douglas, 163 Ohio St. 292, 126 N.E.2d 597 (1955) (an employer retains control of, or the right to control, the mode and manner in which an employee performs his work; an employer does not retain control of, or the right to control, the mode and manner in which an independent contractor performs his work, but is interested only in the ultimate result to be accomplished by an independent contractor). If the county contracted with a private, for-profit organization to be the administrator of the jail, the county would, in effect, contract away the power of the sheriff to control the manner in which the jail is managed and operated. By delegating the administration of the county jail to a private, for-profit entity acting as an independent contractor, the sheriff would retain interest only in the results accomplished by the contractor as administrator, and could not control the method and manner of the operation of the jail. On the other hand, when the jail administrator is an employee of the sheriff, the sheriff retains control of the method and manner of the administration of the jail. Again, I believe that the duties imposed upon a sheriff which require the exercise of his discretion as to the control and management of the county jail prevent the county from contracting with a private corporation to be the jail administrator. I conclude, therefore, that the County of Summit may not contract with a private, for-profit entity to operate and manage the county jail in conjunction with the county sheriff. Cf. 1981 Op. Att'y Gen. No. 81-002 (a board of education may not contract with a private, non-profit organization for the instruction of secondary school age pupils who have dropped out of the public schools); Op. No. 79-067 (county welfare departments may not delegate the duty of investigating cases of child abuse or neglect to private entities).

I note, however, that a governmental agency or entity has the implied authority to delegate a purely ministerial statutory duty, that is, a duty that requires a mere physical act, or which does not require judgment and discretion in its performance. See State ex rel. Sigall v. Aetna Cleaning Contractors of Cleveland, Inc. (a state university is not precluded by statute or the Ohio Constitution from contracting out custodial services); 1984 Op. Att'y Gen. No. 84-066 (board of county commissioners may contract with an entity to perform administrative services relative to health insurance program for county employees and officers); Op. No. 84-030 (board of education may contract with a person or organization to process claims and perform administrative services in connection with employee health insurance program); Op. No. 79-067. See also R.C. 9.35(B) (authorizing a public official to contract for mechanical, clerical, or recordkeeping

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<sup>8</sup> Cf. former R.C. 341.05 (providing that, "[t]he sheriff may appoint one of his deputies to be the keeper of the county jail"). See Am. Sub. S.B. 23, 114th Gen. A. (1982) (eff. July 6, 1982).

services necessary in the performance of his duties); R.C. 9.35(E) (stating that, "[n]othing contained in this section relieves such public official from the primary responsibility for the maintenance of the records and performance of the duties of his office"). Therefore, the County of Summit may contract for the performance of any ministerial duties imposed upon the county sheriff under R.C. Chapter 341. But see Op. No. 84-066 (summarizing the restrictions imposed upon a public body's authority to contract with an independent contractor).

Further, pursuant to County Charter art. III, §3.03(3), the County Council is empowered, "[t]o establish procedures under which the County Executive may employ experts and consultants in connection with the administration of the affairs of the County." See R.C. 9.36 (board of county commissioners may contract for services of fiscal and management consultants); R.C. 325.17 (the sheriff, an officer mentioned in R.C. 325.27, may contract for the services of fiscal and management consultants). Therefore, the County Executive or the sheriff may employ or contract for the services of consultants in connection with the operation and management of the county jail.

With respect to the employment of persons for the performance of ministerial duties or the employment of consultants in relation to the operation and management of a county jail, I know of no statute or other authority which would prohibit provisions for such employment from being contained within a lease/purchase agreement for a full service county jail.

Therefore, it is my opinion, and you are advised, that:

1. The County of Summit may enter into a lease/purchase agreement for a full service jail facility.
2. The County of Summit may not enter into an agreement, either as part of a lease/purchase agreement for a full service jail facility or independently of such lease/purchase agreement, providing for the operation and management of such jail facility and all persons confined therein by a private, for-profit entity, either in lieu of, or in conjunction with, the county sheriff, but may otherwise contract for the services of persons to perform ministerial duties in connection with the operation and management of such jail facility, and may contract for the services of experts and consultants in connection with the operation and management of a full service jail facility.