

OPINION NO. 86-061**Syllabus:**

1. A board of county commissioners which leases county-owned real property pursuant to R.C. 307.09(A), is not required to advertise and bid such lease in accordance with R.C. 307.10(A) if the lease is not for the purpose of airports, landing fields, or air navigational facilities, or parts thereof. (1957 Op. Att'y Gen. No. 1185, p. 599, syllabus, paragraph one limited.)
2. A board of county commissioners which leases county-owned real property pursuant to R.C. 307.09(A) for a purpose other than for airports, landing fields, or air navigational facilities, or parts thereof may, in its discretion, advertise and bid such lease if it so desires, or choose such other method of leasing real property as is reasonable.

To: James S. Rapp, Hardin County Prosecuting Attorney, Kenton, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, August 21, 1986

I have before me your request for my opinion wherein you ask, "[w]hat procedure must be followed in leasing county owned property not needed for public use, when such property is not [to be leased] to a governmental entity or corporation not for profit, nor is the lease to be for the purpose of airports, landing fields, or air navigation facilities or parts thereof?" As examples, you pose situations where excess acreage would be leased to a farmer or where an unused home would be leased to a family. You specifically inquire whether such leases are governed by the advertisement and competitive bidding requirements of R.C. 307.10.

As a general principle of law, a board of county commissioners has only those powers which are expressly granted by statute, or which may be necessarily implied therefrom. See State ex rel. Shriver v. Board of Commissioners, 148 Ohio St. 277, 74 N.E.2d 248 (1947); 1984 Op. Att'y Gen. No. 84-096.

R.C. 307.09 authorizes a board of county commissioners to sell or lease real property by providing, in part, as follows:

(A) If the interests of the county so require, the board of county commissioners may sell any real property belonging to the county and not needed for public use, including all or portions of buildings acquired by the board to house county offices, or may lease or rent the same, but no such lease shall be for a longer term than five years, unless such lease is part of a lease-purchase agreement, in which case the lease may be for a period not exceeding twenty-five years, or unless the lease is to a commercial tenant who uses the property as a retail store room, office, or restaurant, and the leased property is located in a building initially acquired to house county offices, in which case the lease may be for a period not exceeding twenty years, and may include provision for one or more renewals for lesser periods. In the case of real property used or to be used for the purpose of airports, landing fields, or air navigational facilities, including restaurants, parking lots, motels, gasoline service stations, public recreation facilities, public parks, office buildings, retail stores for merchandising or services, and industrial uses located or to be located thereon, or parts thereof, belonging to the county, the primary term of such lease shall not exceed twenty-five years and the board of county commissioners may renew such leases for one or more periods of years. The total of such renewal periods, when added to the primary term of such lease, shall not exceed forty years.

(B) The board may grant leases, rights, and easements to the United States government, to the state or any department or agency thereof, or to municipal corporations or other governmental subdivisions of the state for public purposes, or to privately owned electric light and power companies, or natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities services, or to corporations not for profit for hospital, charitable, water, sewer, or recreational purposes, including among other such purposes memorial structures, parks, golf courses, and underground structures, poles, piers, towers, wires,

pipe lines, underground cables, and manholes, on or in lands owned by the county where such lease, right, or easement is not deemed by the board to be inconsistent with the need of such land for public use by the county. Any such lease, right, or easement granted to the United States government, to the state or any department or agency thereof or to a municipal corporation or other governmental subdivision of the state, or to privately owned electric light and power companies, or natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities services, or to corporations not for profit for hospital, charitable, water, sewer, or recreational purposes, may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the county.

Thus, the board of county commissioners is authorized by R.C. 307.09(A) to lease real property which belongs to the county but is not needed for public use. With certain exceptions, the term of the lease may be no longer than five years. Pursuant to division (B) of R.C. 307.09, a board of county commissioners may lease property to governmental entities, public utilities, and nonprofit corporations "for such length of time, upon such terms, [and] for such purposes...as the board deems for the best interests of the county."

R.C. 307.10 addresses the procedure which is to be followed by the board of county commissioners in the sale or lease of real property, and in part, reads as follows:

(A) No sale of real property, or lease of real property used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof, as provided by section 307.09 of the Revised Code shall be made unless it is authorized by a resolution adopted by a majority of the board of county commissioners. When such a sale or lease is authorized a deed or lease shall be made by the board to the highest responsible bidder, after advertisement once a week for four consecutive weeks in a newspaper of general circulation within such county. The board may reject any bids and readvertise until all such real property is sold or leased. Renewals of such leases shall not be subject to the advertising and competitive bidding requirements of this section if the board, by resolution adopted by a majority of the board, waives the competitive bidding requirement in return for a contract between the board and the lessee obligating the lessee to reconstruct an improvement on the land, or to make substantial additions, repairs, or extensions to, or substantial alterations in, the improvement prior to expiration of the original lease agreement.

...
(C) The board, by resolution adopted by a majority of the board, may grant leases, rights, or easements to the United States government, to the state or any department or agency thereof, or to municipal corporations and other governmental subdivisions of the state, or to privately owned electric light and power companies, natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities services, in accordance with division (B) of section 307.09 of the Revised Code, without advertising for

bids. When such grant of lease, right, or easement is authorized, a deed or other proper instrument therefor shall be executed by the board. (Emphasis added.)

You have inquired as to the necessary procedure the board of county commissioners must follow when the county leases real property to one other than a governmental entity, public utility, or nonprofit organization, or for a purpose other than for airports, landing fields, or air navigational facilities. As you note, R.C. 307.10(A) establishes the procedure to be followed when county property "used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof" is leased. See generally 1963 Op. Att'y Gen. No. 363, p. 411. Division (C) of R.C. 307.10 states that property may be leased to a governmental entity or public utility, as provided in R.C. 307.09(B) "without advertising for bids." See generally Op. No. 84-096 (a board of county commissioners may lease county property for a nominal sum, to a nonprofit corporation for the purpose of establishing a park); 1957 Op. Att'y Gen. No. 318, p. 91. No specific statute exists, however, which addresses the procedure to be followed when real property belonging to the county is leased under the circumstances you describe.

In Minamax Gas Co. v. State ex rel. McCurdy, 33 Ohio App. 501, 170 N.E. 33 (Scioto County 1929), the court upheld the lease of real property by the county, even though G.C. 2447 (now R.C. 309.09) did not, at that time, authorize the county to lease real property. The court stated:

In other jurisdictions counties have no power to alien property unless express legislative authority exists therefor....In Ohio, however, there was early recognition of the fact that, while counties have no power to acquire property not needed for county purposes, the county might find itself actually possessed of property for which there was no public need. In such case, said the Supreme Court in Reynolds v. Commissioners of Stark County, 5 Ohio, 204, if the property is not held in trust, and not dedicated to public use, it may be aliened, because the right to alien follows necessarily as an incident to ownership. Later the General Assembly enacted what is now Section 2447 et seq., General Code, prescribing the method by which county commissioners may sell real estate which is not needed for county purposes.

It is claimed in this case, that, as a lease is in law a sale of an interest in real estate (Brenner v. Spiegle, 116 Ohio St. 631, 157 N.E., 491), a valid lease may be made by the commissioners only by complying with the terms of the statute referred to, and, as the terms of that statute require competitive bids after due advertisement, the lease in question is invalid because it was effected without such competition or advertisement. Other counties have found it convenient and profitable to temporarily lease property for which there was no immediate need, and we hesitate to unequivocally condemn a practice that properly carried out results in even a slight public advantage. Moreover, it appears a forced interpretation to say that the General Assembly, in regulating the sale of county real estate for which the county has no use, intended to inhibit the leasing of property which the county could not sell. This appears to us not only a strained construction, but one not necessary to fully protect the public interests. Until the commissioners find that county real estate is "not needed for public use" all such

property must be deemed of some potential use to the county. So long as it has such potential use, the interests of the county do not require its sale, nor does Section 2447 permit its sale. In the absence of a finding that would enable the commissioners to sell, title must be retained by the county, but, under the doctrine of the Reynolds case, supra, there is no reason why it should not be temporarily leased, subject to repossession whenever the public needs so require. The commissioners could not, however, lease for a definite term and thereby embarrass either themselves or their successors in using the property for public purposes.

33 Ohio App. at 506-508, 170 N.E. at 35-36.

Subsequent to the issuance of Minamax Gas Co. v. State ex rel. McCurdy, R.C. 307.09 was amended to permit counties to lease real property not needed for public use or to lease property "in any event" to governmental subdivisions for any length of time and upon such terms and for such purposes as the board deemed to be in the best interest of the county. 1935-1936 Ohio Laws, Part 2, 149 (Am. S.B. 395, eff. Feb. 4, 1936). Applying the principles of Minamax, one of my predecessors in 1947 Op. Att'y Gen. No. 1879, p. 244 stated:

[I]f implied power to lease without competitive bidding after advertisement is derived from express power to sell only after such competitive bidding and advertisement, power to lease without competitive bidding after advertisement would a fortiori exist where the statute, as it does in its present form, expressly grants such power to lease without specifically requiring advertisement and competitive bidding.

Id. at 248. 1947 Op. No. 1879 concludes that "[c]ounty owned real estate, not needed for public use, may, under the terms of [R.C. 307.09 and 307.10], be leased to anyone other than municipalities or other governmental subdivisions...without advertising and competitive bidding" (syllabus, paragraph one).

In 1956-1957 Ohio Laws 61 (Am. Sub. S.B. 104, eff. Aug. 15, 1957), R.C. 307.09 was amended to include reference to the leasing of real property used for purposes of airports, landing fields, and air navigational facilities and R.C. 307.10 was amended to require that such leases be advertised and bid. I believe, however, that 1947 Op. No. 1879 correctly stands for the proposition that all other leases of county-owned real property not needed for public use are not required to be advertised or competitively bid. Indeed, the conclusion of 1947 Op. No. 1879 is supported by the passage of Am. Sub. S.B. 104. Where the General Assembly has intended that county leases of real property be advertised and bid, it has specifically so stated. See generally 1984 Op. Att'y Gen. No. 84-093; 1984 Op. Att'y Gen. No. 84-060. By failing to expressly require that leases other than those for the purpose of airports, landing fields, or air navigational facilities be advertised and bid, the General Assembly has evidenced a clear intent that no such requirements apply. See Dougherty v. Torrence, 2 Ohio St. 3d 69, 442 N.E.2d 1295 (1982) (in construing a statute, words not used may not be inserted).

I note that, subsequent to the enactment of Am. Sub. S.B. 104, one of my predecessors opined that, "[a] board of county commissioners selling or leasing county owned real property under the provisions of Section 307.09, Revised Code, must

proceed in compliance with Section 307.10, Revised Code, and such sale or lease must be by acceptance of the written bid of the highest responsible bidder." 1957 Op. Att'y Gen. No. 1185, p. 599 (syllabus, paragraph one). I cannot, however, fully concur in the conclusion of 1957 Op. No. 1185 as reflected in the syllabus.

The question presented in 1957 Op. No. 1185 was whether the county could sell real estate at a public auction. My predecessor considered that the amendments of Am. Sub. S.B. 104 prohibited the use of a public auction, reasoning as follows:

A further study of the recently enacted statute, Section 307.10, Revised Code, shows that the sale "shall be made by the board to the highest responsible bidder." This requires the board of county commissioners to study the bids and apply judgment and discretion thereto in determining which bid is the highest responsible bidder. Such could not be accomplished in the conduct of a public auction.

If the procedure of sale by auction were to be read into or interpolated into the amended statute, could it be said to apply to leasing of lands for airports, landing fields or air navigational facilities? I do not believe this to be so. The present amended Section 307.10, Revised Code, injects the elements of leasing into the same procedural requirements as those required for a sale. (Emphasis in original).

1957 Op. No. 1185 at 601. Thus, although my predecessor recognized that the language of R.C. 307.10 was restricted to leases of property "used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof," the syllabus of 1957 Op. No. 1185 was drafted to indicate that a county must comply with R.C. 307.10 in the "selling or leasing of county owned real property" and did not limit the applicability of R.C. 307.10 to leases of property in connection with airport facilities. For the reasons stated above, I disagree with the broad statement found in the first paragraph of the syllabus of 1957 Op. No. 1185, and I limit this conclusion to the extent that a board of county commissioners is required to advertise and bid only those leases that are for the purpose of airports, landing fields, or air navigational facilities.

In sum, I conclude that a board of county commissioners is not required to advertise and bid a lease of county-owned real property in accordance with R.C. 307.10, if such lease is not for the purpose of airports, landing fields, or air navigational facilities, or parts thereof. A board may, however, in its discretion advertise and bid leases of real property not for airport facilities if it so desires, or choose such other method of leasing real property as is reasonable. See 1980 Op. Att'y Gen. No. 80-028. See also 1981 Op. Att'y Gen. No. 81-106; 1974 Op. Att'y Gen. No. 74-020.

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

1. A board of county commissioners which leases county-owned real property pursuant to R.C. 307.09(A), is not required to advertise and bid such lease in accordance with R.C. 307.10(A) if the lease is not for the purpose of airports, landing fields, or air navigational facilities, or parts thereof. (1957 Op. Att'y Gen. No. 1185, p. 599, syllabus, paragraph one limited.)

2. A board of county commissioners which leases county-owned real property pursuant to R.C. 307.09(A) for a purpose other than for airports, landing fields, or air navigational facilities, or parts thereof may, in its discretion, advertise and bid such lease if it so desires, or choose such other method of leasing real property as is reasonable.