

Note from the Attorney General's Office:

1990 Op. Att'y Gen. No. 90-041 was overruled by
1997 Op. Att'y Gen. No. 97-009.

OPINION NO. 90-041**Syllabus:**

A board of county hospital trustees established under R.C. 339.02 is without authority to lease real property of the hospital to a private organization for the purpose of the organization's constructing an office building on such property and leasing office space to physicians.

To: Ronald C. Carey, Clinton County Prosecuting Attorney, Wilmington, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 20, 1990

I have before me your opinion request concerning the authority of a board of county hospital trustees to lease a portion of the hospital property to a private organization. Your request provides the following background information:

Clinton Memorial Hospital (the "Hospital") is a county hospital...and, as such, is subject to the management and control of the Board of County Hospital Trustees of Clinton County (the "Board"). Pursuant to the authority of R.C. 339.03, the Board has taken title, in the name of the County, to the land on which the Hospital is presently situated and to land across the street from the Hospital.

In an effort to attract physicians to the Hospital, the Board desires to lease the County's land situated across the street from the Hospital to a private organization under a long term ground lease. The ground lease would require the private organization to construct a medical office building on the land in accordance with plans and specifications to be approved by the Board, and would contain such covenants and restrictions as were appropriate to assure the Board that the building would serve the purpose of recruiting physicians.

Additional information submitted with your opinion request indicates that the developer, a private organization, "would be responsible for financing, constructing, leasing and managing the building, subject to the covenants and restrictions imposed by the ground lease. During the term of the ground lease, the [d]eveloper would be entitled to the benefits, and subject to the obligations, of ownership of the building....Upon termination of the ground lease, ownership of the building would vest in the county."

Based upon the foregoing, you ask:

May a Board of County Hospital Trustees, in an effort to attract physicians to a county hospital, lease land to a private organization for the purpose of the private organization's constructing a medical office building on the land and leasing office space in the building to physicians?

I begin my discussion by noting that a board of county hospital trustees, appointed under R.C. 339.02, is a creature of statute. As such, the board may perform only those acts which the legislature has, by statute, authorized or directed. 1985 Op. Att'y Gen. No. 85-005. Further, as is true generally of creatures of statute, a board of county hospital trustees has those implied powers which are necessary to carry out its express statutory duties and powers. See 1986 Op. Att'y Gen. No. 86-088.

Provisions governing the establishment and operation of county hospitals are set forth primarily in R.C. Chapter 339. Pursuant to R.C. 339.01, the board of

county commissioners has authority to "purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities thereof."¹ Once a county hospital or hospital facilities have been completed and equipped for occupancy, "any subsequent improvements, enlargements, or rebuilding of any such facility shall be made by the board of county hospital trustees or a hospital commission appointed pursuant to [R.C. 339.14]."² R.C. 339.01. As provided in R.C. 339.02(B), "[u]nless a board of county hospital trustees for the county is in existence in accordance with this section, such board shall be created pursuant to this section after the board of county commissioners first determines by resolution to establish a county hospital." Pursuant to R.C. 339.01, a board of county hospital trustees "may purchase, acquire, lease, appropriate, or construct an outpatient health facility in another county, which may include office space for physicians." Thus, with regard to the establishment of a county hospital, the board of county commissioners and the board of hospital trustees have distinct powers and duties.

The role of the board of county hospital trustees is set forth in R.C. 339.06, in part, as follows:

The board of county hospital trustees *shall*, upon completion of construction or leasing and equipping of the county hospital, *assume and continue the operation of such hospital*. The board shall have the entire management and control of the hospital, and shall establish such rules for its government and the admission of persons as are expedient. (Emphasis added.)

Thus, once a county hospital has been completed, the board of county hospital trustees is under a duty to "assume and continue the operation of such hospital." R.C. 339.06.

The powers of the board of hospital trustees are set out more fully in R.C. 339.03, which states in pertinent part:

The 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...*[and] the determination and erection of all necessary buildings on such site or sites....

¹ R.C. 339.01(A) assigns to the term "hospital facilities," as used in R.C. 339.01-17, the meaning set forth in R.C. 140.01(E), as follows:

buildings, structures and other improvements, additions thereto and extensions thereof, furnishings, equipment, and real estate and interests in real estate, used or to be used for or in connection with one or more hospitals,...diagnostic and treatment and out-patient facilities...and further includes site improvements, utilities, machinery, facilities, furnishings, and any separate or connected buildings, structures, improvements, sites, utilities, facilities, or equipment to be used in, or in connection with the operation or maintenance of, or supplementing or otherwise related to the services or facilities to be provided by, any one or more of such hospital facilities.

Thus, for purposes of R.C. 339.01, the building about which you ask appears to qualify as a part of the hospital facilities.

² Since the facts you have submitted for consideration do not involve a hospital commission appointed under R.C. 339.14, I will limit my discussion to the permissible actions of a board of county hospital trustees appointed under R.C. 339.02. Further, since the private organization to which the property is to be leased is not a hospital agency, as that term is defined in R.C. 140.01(A), or a governmental entity, I will not discuss the operation of R.C. Chapter 140, which provides for cooperation among hospital agencies.

A board of county hospital trustees may construct an addition to the county hospital or acquire an existing structure for the purpose of leasing office space to local physicians if the board of hospital trustees determines that such purpose is reasonably related to the proper operation of the county hospital. (Emphasis added.)

Thus, pursuant to this section, while the board of county hospital trustees does have complete charge of the selection and purchase or lease of the site for the hospital, it must take title or leasehold interest thereto in the name of the county. Further, with respect to the provision of office space for physicians, R.C. 339.03 expressly empowers the board of county hospital trustees to "construct an addition to the county hospital or acquire an existing structure" for the stated purpose of "leasing office space to local physicians."

Specifically concerning the powers of a board of county hospital trustees with respect to hospital property, R.C. 339.06 states in part: "*The board has control of the property of the hospital, including management and disposal of surplus property other than real estate or an interest in real estate*, and has control of all funds used in the hospital's operation." (Emphasis added.) Pursuant to this section, the board is given control of the property of the hospital, including disposal of surplus property; expressly excepted from the types of surplus property of which the board may dispose, however, is "real estate or an interest in real estate."³ R.C. 339.06.

Your question concerns whether the board of county hospital trustees may "lease" a portion of real property, acquired by the board in the name of the county, to a private organization. As summarized in the first paragraph of the syllabus of *Bremer v. Spiegle*, 116 Ohio St. 631, 157 N.E. 491 (1927):

A lease of real estate is a conveyance by the owner of an estate in land of a portion of the owner's interest therein to the lessee for a term less than the owner's own, and it passes a present interest in the land. Such a conveyance for a consideration constitutes a sale of an interest in real estate.

Since the granting of a lease is the sale of an interest in real estate, the granting of a lease is one type of transaction in which the board of county hospital trustees may not participate under R.C. 339.06.

A question has been raised, however, concerning the extent to which R.C. 339.06 limits the board's authority to dispose of real estate or any interest therein. The suggestion has been made that the foregoing portion of R.C. 339.06 restricts the board's authority over real estate or any interest therein only to the extent that such property constitutes "surplus" property. In the circumstances you describe, the real estate which the board of hospital trustees would like to lease to the private developer is arguably not surplus property, because the property will be used to provide, among other things, office space for physicians employed by the hospital; since the board of hospital trustees is empowered by R.C. 339.06 to "pay reasonable expenses for recruiting physicians and other appropriate health care practitioners," it is argued that the property will still be used for proper hospital purposes. The problem with this proposed analysis is that the legislature has otherwise expressly provided the means by which a board of hospital trustees may provide such office space.⁴ R.C. 339.03 states in part:

³ The exception concerning real estate was added to R.C. 339.06 in 1983-1984 Ohio Laws, Part I, 2352 (Am. Sub. H.B. 224, eff. Oct. 4, 1984).

⁴ This opinion is limited to addressing the method by which a board of county hospital trustees may provide office space for physicians after the county hospital has been completed and equipped for occupancy. As set forth above, the board of county commissioners has authority under R.C. 339.01 "to purchase, acquire, lease, appropriate, and construct a county hospital or hospital facilities thereof." Once the county hospital or hospital

A board of county hospital trustees may *construct* an addition to the county hospital or *acquire* an existing structure for the purpose of *leasing office space to local physicians* if the board of county hospital trustees determines that such purpose is reasonably related to the proper operation of the county hospital. (Emphasis added.)

This paragraph was added to R.C. 339.03 in 1983-1984 Ohio Laws, Part I, 2352 (Am. Sub. H.B. 224, eff. Oct. 4, 1984). In the same bill, the legislature also addressed the authority of a board of county hospital trustees to provide an outpatient health facility in another county, allowing such board to "purchase, acquire, lease, appropriate, or construct an outpatient health facility in another county, *which may include office space for physicians.*" R.C. 339.01. (Emphasis added.) Because the legislature used such limited terminology in describing the powers of the board of county hospital trustees under R.C. 339.03, as opposed to the language of R.C. 339.01, it is apparent that the legislature intended the board to be limited under R.C. 339.03 to providing needed office space for physicians at the county hospital by the two methods specified, either construction of an addition to the hospital or acquisition of an existing structure. See generally *Robert V. Clapp Co. v. Fox*, 124 Ohio St. 331, 178 N.E. 586 (1931) (where the legislature uses different language in a statute, it is presumed that different meanings were intended); *City of Cincinnati v. Roettinger*, 105 Ohio St. 145, 152, 137 N.E. 6, 8 (1922) (where a statute "in terms limits a thing to be done in a particular form,...it necessarily implies that the thing shall not be done otherwise").

As noted in your opinion request, prior to the amendment of R.C. 339.03 in Am. Sub. H.B. 224, in which the board was expressly authorized to construct or acquire office space for local physicians, my predecessor concluded that a board of county hospital trustees, pursuant to its power to improve and manage the hospital, had the implied power to provide office space for local physicians, if the board found such activity to be reasonably related to the proper operation of the hospital. 1979 Op. Att'y Gen. No. 79-052 at 2-163 clearly qualified this conclusion, however, by finding such implied power to exist "[i]n the absence of an express limitation to the contrary." Since the above-mentioned amendment of R.C. 339.03 in Am. Sub. H.B. 224, empowering the board to provide such office space either by construction or acquisition, however, I am constrained to conclude that the board is limited to only those two methods of providing office space for physicians after completion of the county hospital facility, except at a county hospital branch as governed by R.C. 339.01. See 1980 Op. Att'y Gen. No. 80-028 at 2-116 ("absent statutes delineating and/or limiting the power, public bodies have the implied power to alienate land not needed for public purposes"); 1974 Op. Att'y Gen. No. 74-020 (concluding that where the legislature has not provided for the alienation of property by a public agency, the power to alienate may be implied; where the legislature has provided for alienation of property by specific methods, it may be inferred that other methods were not contemplated).

As noted in your opinion request, various Attorney General opinions, issued before the amendment of R.C. 339.03 in Am. Sub. H.B. 224, address situations similar to that about which you ask, and find implied authority to take the action contemplated. See, e.g., Op. No. 79-052 (syllabus) ("[a] board of county hospital trustees, with the approval of the board of county commissioners, may construct an addition to the county hospital or acquire an existing structure for the purpose of leasing office space to local physicians, if the board of county hospital trustees determines that such purpose is reasonably related to the proper operation of a county hospital"); 1970 Op. Att'y Gen. No. 70-018 (syllabus) ("[a] board of county hospital trustees may contract for the construction of intern and resident housing under a lease-purchase agreement"). In light of the above-mentioned amendment of R.C. 339.03, these opinions can no longer support the proposition that the board of

facilities have been fully completed and sufficiently equipped for occupancy, however, it is the board of county hospital trustees which makes "any subsequent improvements, enlargements, or rebuilding of such facility." R.C. 339.01. See also R.C. 339.03.

county hospital trustees has implied authority to lease real property, other than as expressly provided, *see, e.g.*, R.C. 339.09.

Support for this conclusion may be found in 1966 Op. Att'y Gen. No. 66-127, where one of my predecessors considered whether a board of county hospital trustees could enter into a lease agreement for property to be used as an out-patient facility by the county hospital. Although in that situation the board of trustees sought to lease property from, rather than to, another party, the following discussion concerning the authority of the board with regard to the leasing of property is useful:

[T]he legislature must have considered the possibility of leases and lease agreements when it enacted Chapter 339 of the Revised Code, since it did provide for the leasing of completed hospital facilities to charitable Ohio corporations, for use as general hospital facilities [see R.C. 339.09], and it did specifically provide that the board of county commissioners might lease general hospital facilities owned by a municipality, [see R.C. 339.12]. Furthermore, it is to be noted that in giving the boards of county commissioners powers under Section 307.02, Revised Code, the General Assembly specifically provided that such body could enter into lease-purchase agreements, lease with option to purchase, and lease. In view of these numerous instances upon which the power to enter into a lease agreement was specifically granted to county boards and commissions by the General Assembly, I am of the opinion that their failure expressly to grant such a broad power to a board of county hospital trustees is tantamount to a denial of such power to that body of the county government, notwithstanding the recognized principle that where powers are conferred upon a board to operate and manage an institution intended for the public welfare, a large amount of discretion must be invested in such trustees, and the statute can not undertake to enumerate in detail every movement that they may make.

Op. No. 66-127 at 2-249. See Op. No. 74-020.

It has been suggested that the board of county hospital trustees may engage the services of the private developer pursuant to the board's power to hire consultants, set forth in R.C. 339.06, as follows: "The board [of county hospital trustees] may hire, by contract or as salaried employees, such *management consultants*,...and other professional advisors as it determines are necessary and desirable to assist in the management of the programs and operation of the county hospital." As defined in *Webster's New World Dictionary* 305 (2d college ed. 1978), a "consultant" is "an expert who is called on for professional or technical advice or opinions." As I stated in 1984 Op. Att'y Gen. No. 84-030 at 2-88: "A consultant may be called upon to render his expert advice or opinion on a certain responsibility or task, but, in the process of consulting, *he does not actually perform the duty or task himself.*" (Emphasis added.) In the material accompanying your opinion request, the duties of the lessee private developer are described as follows: "The Developer would be responsible for financing, constructing, leasing and managing the building, subject to the covenants and restrictions imposed by the ground lease. During the term of the ground lease, the Developer would be entitled to the benefits, and subject to the obligations, of ownership of the building." From your description of the developer's responsibilities, it appears that he will be acting beyond the scope of merely rendering advice, and will actually own and manage the building. Under such circumstances, the developer does not qualify as a management consultant for purposes of R.C. 339.06.

As a final matter, I note that even if the leasing of hospital property to a private organization were within the board's authority, certain questions arise in the situation you describe as to the propriety of the board of county hospital trustees' delegation of its duty under R.C. 339.06 to manage and control the county hospital. Pursuant to R.C. 339.01(B), the county hospital includes "all of the county hospital's branches and hospital facilities, wherever located." As discussed in note 1, *supra*, the proposed office building, as a hospital facility, will constitute a part of the county hospital. Under the contemplated plan, however, the control and management of the office building appears to lie with the private organization, subject to any restrictions contained in the ground lease to the private organization.

The general rule concerning delegation of authority by a public agency was aptly expressed in 1979 Op. Att'y Gen. No. 79-067 at 2-223, as follows:

When power or authority is granted to a governmental agency, such agency may exercise only that authority which is expressly conferred on it by statute. New Bremen v. Public Utilities Commission, 103 Ohio St. 23 (1921). It follows that the power to delegate authority, if not expressly conferred, is excluded.

There are, however, exceptions to the general rule which allow implication of authority to delegate statutory duties. Whether such authority may be implied is controlled by the nature of the duty. Kelley v. City of Cincinnati, 7 Ohio N.P. 360 (C.P. Hamilton County 1900). See also Bell v. Board of Trustees, 34 Ohio St. 2d 70 (1973). If a duty imposed by statute is purely ministerial, i.e., a "mere physical act," it may be delegated; the duty is not delegable, however, if it requires judgment and discretion in its performance. 1973 Op. Att'y Gen. No. 73-126 (overruled, in part, for other reasons, by 1977 Op. Att'y Gen. No. 77-064). The presumption exists that the Legislature has delegated duties to an agency named in a statute because the agency is deemed competent to exercise the judgment and discretion necessary for performance of the duties. Cf. 1977 Op. Att'y Gen. No. 77-064 (concluded that certain public officers may not designate alternates to serve in their capacity). It would contravene the legislative intent of such a statute, therefore, to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute.

Since the board of county hospital trustees exercises a wide discretion in the operation and management of the county hospital, see 1952 Op. Att'y Gen. No. 1126, p. 97, it appears doubtful that outside of the instances where the board is expressly authorized to delegate such duty to another entity, see, e.g., R.C. 140.05, such authority may be implied. Of course, it is a factual matter as to whether the ground lease could be so restricted as to retain in the lessor board of county hospital trustees all decision making with regard to discretionary matters, in order to avoid an unlawful delegation of power by the board. Such matters cannot, however, be resolved by means of an opinion of the Attorney General. 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three).

Although your opinion request sets forth various reasons as to why it would be in the interest of the board of county hospital trustees to proceed with the contemplated transaction, the provision of the requisite authority is a matter within the province of the General Assembly. See generally Pohl v. State, 102 Ohio St. 474, 475, 132 N.E. 20, 21 (1921), *rev'd on other grounds*, 262 U.S. 404 (1923) ("the policy, the advisability, and the wisdom of all legislation, subject to the veto of the governor and the referendum of the people, are subjects for legislative determination exclusively"); 1953 Op. Att'y Gen. No. 3063, p. 462.

Based on the foregoing, it is my opinion, and you are hereby advised, that a board of county hospital trustees established under R.C. 339.02 is without authority to lease real property of the hospital to a private organization for the purpose of the organization's constructing an office building on such property and leasing office space to physicians.