

OPINION NO. 81-095**Syllabus:**

A board of county commissioners may issue bonds under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165 for the purpose of acquiring, constructing, enlarging, improving or equipping a nursing home.

To: Gregory W. Happ, Medina County Pros. Atty., Medina, Ohio
By: William J. Brown, Attorney General, December 21, 1981

I have before me your request for my opinion as to whether a board of county commissioners may issue bonds for a nursing home under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165.

I shall assume for the purposes of this opinion that you intend the term "nursing home" to be given its common meaning. The common meaning of the term "nursing home" is a facility used for the care of persons who by reason of illness or physical or mental impairment require skilled nursing care and related medical

services or personal assistance. See, e.g., R.C. 3721.01(F); Ganim v. Village of New York Mills, 75 Misc. 2d 653, 347 N.Y.S.2d 372 (1973).

Ohio Const. art. VIII, §13 authorizes the state and its political subdivisions to issue bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement or equipment of facilities "for industry, commerce, distribution and research." R.C. Chapter 165 uses the same terms in describing the purpose for which such bonds may be issued and clarifies that a board of county commissioners is a proper "issuing authority" for such bonds, provided, of course, that all procedural prerequisites are satisfied. See R.C. 165.01(E); R.C. 165.01(H). Considering the purposes for which such bonds may be issued, I find the term "commerce" to be the broadest of those purposes enumerated and the only one relevant to your inquiry. The dispositive issue is, therefore, whether the operation of a nursing home falls within the meaning of the term "commerce."

There is little Ohio case law interpreting the meaning of this term for the purposes of Ohio Const. art. VIII, §13. The Ohio Supreme Court has considered this issue once only. In State ex rel. Brown v. Beard, 48 Ohio St.2d 290, 358 N.E.2d 569 (1976), the Ohio Supreme Court held that moderate and low cost housing is not related to industry and commerce to such an extent as to fall within either of those constitutionally designated categories. Nursing homes are, however, distinguishable from housing, since they by definition provide something in addition to mere shelter. In order to constitute a "nursing home," a facility must provide skilled nursing care and related medical services or personal assistance. Accordingly, the Beard decision is not controlling in this instance. Moreover, since the court in Beard did not offer any guidelines on how to interpret the term "commerce" for the purposes of Ohio Const. art. VIII, §13 and R.C. Chapter 165, I must look beyond Beard for such guidance.

Over the years there has been considerable evolution in how the courts have interpreted the term "commerce." Early on the courts defined the term quite narrowly, limiting it to activities involving the production or movement of tangible goods and commodities and expressly excluding activities involving the delivery of personal services. See, e.g., State ex rel. Schneider v. Dunkle, 2 Ohio Op. 217 (C.P. Hamilton County 1935) (a barber shop is not engaged in commerce as that term is intended in the Ohio Recovery Act). More recently courts have recognized that "commerce" encompasses much more than the production or movement of tangible goods and includes the delivery of personal or professional services. See, e.g., Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975), rehearing denied, 453 U.S. 866 (1976) ("[w]hatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' in the most common usage of that word").

This recognition of the expanded meaning of the term "commerce" was, admittedly, not fully evolved at the time Ohio Const. art. VIII, §13 was enacted. Constitutional provisions are not, however, static in nature.

Constitutions are not lifeless or static instruments, whose interpretation is confined to the conditions and outlook which prevailed at the time of their adoption. Nor are they circumscribed by legislation previously adopted under them. They should be given a flexible interpretation such as will meet new conditions and circumstances as they arise, and which necessity may demand without doing violence to plain language employed or transgressing the clear bounds of reason.

State ex rel. City of Columbus v. Ketterer, 127 Ohio St. 483, 494, 189 N.E. 252, 256 (1934). It is proper to rely upon subsequent judicial interpretations to give new meaning to words used in a constitutional provision. Moreover, at least one Ohio court has already recognized that the term "commerce" as used in Ohio Const. art. VIII, §13 and R.C. Chapter 165 encompasses the delivery of professional or personal

services as well as goods. In County of Stark v. Ferguson, No. CA-5519 (Ct. App. Stark County June 3, 1981), the court upheld the validation of the county's authority to issue bonds under Ohio Const. art. VIII, §13 and R.C. Chapter 165 for the purpose of financing the construction of a medical office building. I concur in the court's reasoning and it is, accordingly, my opinion that the term "commerce" as used in Ohio Const. art. VIII, §13 and R.C. Chapter 165 encompasses the delivery of professional and personal services as well as the production or movement of tangible goods. Thus, a nursing home, which by definition provides skilled medical services or personal assistance, would come within the term "commerce" as that word has been interpreted by the courts in recent years.

In specific response to your question, it is, therefore, my opinion, and you are advised, that a board of county commissioners may issue bonds under the authority provided in Ohio Const. art. VIII, §13 and R.C. Chapter 165 for the purpose of acquiring, constructing, enlarging, improving or equipping a nursing home.