OPINION NO. 77-047

Syllabus:

1) The subordination of county owned land in conjunction with a lease-purchase plan entered into pursuant to R.C. 307.02 involves a lending of the credit of the county in violation of Ohio Const. Art. VIII, §6.

2) Ohio Const. Art. VIII, §6, does not prohibit a board of county commissioners from leasing county owned lands to a private developer in conjunction with a lease-purchase plan entered into pursuant to R.C. 307.02.

To: John F. Norton, Geauga County Pros. Atty., Chardon, Ohio
By: William J. Brown, Attorney General, August 24, 1977

I have before me your request for an opinion which poses the following question:

> May a Board of County Commissioners lease or otherwise subordinate county owned land to a builder for the purpose of entering into a construction lease-purchase agreement with the builder pursuant to the terms of which the builder would construct and thereafter lease a building to the county for a term of twenty years for a fixed annual sum and at the expiration of the term, title to the land and building would vest in the county without additional cost to the county?

As I understand it, the situation under consideration involves a specific parcel of land that is already owned by the county. The county wishes to lease this property to a private developer for a period of twenty years. Pursuant to the same agreement, said developer will construct a facility on the property and lease the facility to the county to be used for county offices for a period of twenty years. At the end of the twenty year period, title to the building would automatically vest in the county.

In addition to the permissibility of a transaction of this nature, you inquire as to whether the county, as an incident to such a lease-purchase agreement, can in any way subordinate its interest in the land. This subordination would presumably permit the private developer to obtain mortgage loan financing by using the county land as collateral.

The general authority to enter into lease-purchase plans for the construction of various county buildings is conferred upon the board of county commissioners by R.C. 307.02, which provides in pertinent part as follows:

> "The board of county commissioners of any county may lease for a period not

> to exceed forty years, pursuant to a contract providing for the construction thereof under a lease-purchase plan, those buildings, structures and other improvements enumerated in the first paragraph of this section, and in conjunction therewith, may grant leases, easements, or licenses for lands under the control of the county for a period not to exceed forty years. Such lease-purchase plan shall provide that at the end of the lease period such buildings, structures, and related improvements, together with the land on which they are situated, shall become the property of the county without cost."

Although the board of county commissioners possesses the general power to enter into a lease-purchase agreement, such power must be exercised within the limitations set forth in the Ohio Constitution. Of overriding significance to the resolution of the issues you raise is the operation of the Ohio Const., Art. VIII, §6, which provides as follows:

> No laws shall be passed authorizing any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever, or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association, provided that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. Laws may be passed providing for the regulation of all rates charged or to be charged by any insurance company, corporation or association organized under the laws of this state, or doing any insurance business in this state for profit.

The courts have given this provision a rather expansive interpretation. In interpreting the scope of Ohio Const. Art. VIII, §4, which places a limitation upon the state that is almost identical to that imposed upon cities and counties by Art. VIII, §6, supra, the Court in State, ex rel. Saxbe v. Brand, 176 Ohio St. 44 (1964) held as follows:

> 1. The word "credit" as used in Section 4 of Article VIII of the Ohio Constitution includes within its meaning (1) a loan of money and (2) the ability to borrow, i.e., the ability to acquire something tangible in exchange for a promise to pay for it.

Thus, if the borrowing power of a private entity or individual is increased in any way through the use of public property, there has been a prohibited giving or loaning "credit . . . to, or in aid of" that borrower.

In light of the foregoing, it is clear that the subordination of land owned by the county for the purpose of permitting a private developer to obtain a mortgage loan to construct a building, constitutes a giving or loaning of credit in violation of Art. VIII, §6, supra.

Whether the county is able to grant a lease to a private developer in conjunction with such a lease-purchase plan is an issue of greater complexity.

It will be noted at the outset that the long term lease of county owned land to a private developer in conjunction with a lease purchase plan is, unlike the subordination of county owned land under such circumstances, an act expressly authorized by the provisions of R.C. 307.02. Moreover, R.C. 715.011 confers precisely the same power upon a municipal corporation. If a court were to hold such a transaction impermissible, it would, in effect, render invalid two separate acts of the General Assembly. A regularly enacted statute is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. The courts have consistently upheld the constitutionality of enactments of the General Assembly unless they are unconstitutional beyond a reasonable doubt. e.g. State, ex rel. Dickman v. Defenbacher, 164 Ohio St. 142 (1955); Williams v. Scudder, 102 Ohio St. 305 (1921). In advising you, therefore, I shall assume that a court, in passing upon the validity of the agreement you describe, would find such an agreement permissible unless it clearly and unmistakably falls within the purview of activity proscribed by Art. VIII, §6, supra.

In Alter v. City of Cincinnati, 56 Ohio St. 47 (1897) the Court considered the constitutionality of a transaction which involved the construction by a private corporation of enlargements to water works owned by the city. Once the enlargements were constructed, the private corporation was to lease them to the city upon such terms as may be agreed upon. In concluding that the statute authorizing such a transaction was unconstitutional, the Court held in the first and second syllabus of its opinion as follows:

> 1. Under section six of article eight of the constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.
>
> 2. A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations so that when united, both together form one property.

The proposition first set forth in the foregoing case was restated by a unanimous Court in Village of Brewster v. Shell, 128 Ohio St. 343 (1934). The latter case involved a

situation in which a village, which owned a distribution system for electric current, contracted with a private corporation to supply generating machinery for its system. The city agreed to provide housing for the machinery, to pay the balance in deferred installments. In concluding that such a transaction violated the Constitution, the Court stated in the syllabus as follows:

> The foregoing transaction between the village and the seller of the machinery contemplates the union of the property of the village with that of the seller in a common pool, from which the net earnings of the joint enterprise would be paid to the seller. To the extent that the village devoted the whole of its own property to secure the seller, to that extent did it loan its financial credit to and in aid of the seller in violation of Section 6, Article VIII, of the Ohio Constitution.

The situations considered by the Court in both Alter v. Cincinnati, supra, and Village of Brewster v. Hill, supra, are similar inasmuch as they both involved a union of public and private property that was so inextricable that both properties were wholly dependant upon one another for their worth and usefulness. They both involved entire systems that, although operated as single entities, were owned by two different parties.

The most recent case to advance the proposition first set forth in Alter v. Cincinnati, supra, is State, ex rel. Wilson v. Hance, 169 Ohio St., 457 (1959). The case involved an agreement between a city and the electric company in which the city agreed to convey to the company a parcel of city-owned land adjacent to the present municipal light plant. The company was then to place a mortgage on the land to secure a loan to be granted it by the Rural Electrification Administration for the purpose of constructing an electric generating plant. The corporation was to reconvey such land to the city subject to the mortgage. The city was then to lease such land to the corporation for a period of forty years and a plant was to be built thereon by the corporation and subleased to the city for the purpose of operating it. Under the contract the city would operate the plant as an integral part of its electric system. The Court found that the city would be owning part of a property that was owned in part by another so that the parts owned by both, when taken together, constitute but one property. The Court, therefore, found the agreement violative of Art. VIII, §6, supra.

One of the features of the transaction considered in the Hance case, supra, is identical to the one hereunder consideration. In both situations ownership of an improvement is in a private corporation and ownership of the land on which it stands is in the political subdivision. Although the Court mentioned the arrangement, it is not clear what, if any, impact this particular detail had upon the decision of the Court.

A broad reading of the foregoing cases would seem to indicate that the type of lease-purchase agreement that you have described is prohibited by the terms of Art. VIII, §6, supra. The building will be owned by the developer and the land upon which

it is to stand will be owned by the county. Thus, the county will own part and a corporation will own part of what might, in a very general sense, be described as a single property.

Such a conclusion, however, would fail to adequately recognize the reasons upon which the holding in each of the foregoing cases is based. As those cases indicate, when the state or political subdivision is with a private individual or entity part owner of a single piece of property, the former is, to the extent it has invested in such property, lending its credit to the latter. Publicly owned property was, in each case, used to benefit a private party.

In the transaction under consideration the city is not in any manner lending its credit to the developer. The land and the building do not in the strict and primary sense of the term constitute a single property. Although a building might generally be considered a fixture of the realty to which it is annexed, it need not, in every case, become such. Where an article belonging to one party is attached to the realty of another party, the status of the article as either a fixture or a chattel may be controlled by agreement of the parties. Teaff v. Hewitt, 1 Ohio St. 511 (1953). If the lease purchase agreement effects a union of public and private property, I am of the opinion that the union is legally separable and, therefore, permissible.

In the case at hand the county plans to lease land that it owns to the private developer. The county will be fully compensated for the use of such land. Title to the property will remain exclusively in the county and the county is free to exercise full rights of the lessor in negotiating the terms of the lease. The county will at all times be the sole proprietor of the land. Title to the building, on the other hand, will remain in the developer for the duration of the lease. The developer will at all times be the sole proprietor of the building. This situation is, therefore, significantly different from those transactions considered by the Court in the foregoing cases.

It is significant that a municipal corporation is fully possessed of the power to carry out independently each of the parts of this particular transaction. The power of a city to lease land that it owns to a private party is indisputable. It has never been held that a city by entering into such lease lends its credit to or assumes any interest in a business carried on by the lessee. Similarly, a city may lease property from a private party. It certainly has never been held that a city that occupies the status of a lessee lends its credit to or is in any way involved with the business of the lessor. Thus, each particular aspect of the transaction is permissible. I see no reason to conclude that the mere combination of these features in a single agreement is unconstitutional.

This conclusion comports with the decisions of lower courts that have considered situations similar to the one that you describe. In Hines v. Bellefontaine, 28 Ohio Op. 538 (1943) the Court considered the constitutionality of a city ordinance which authorized the city to enter into a lease, with the privilege of purchase, parking meters that were to be installed on city streets by a private manufacturer. In holding that such a lease did not come within the inhibition of Art. VIII, §6, the Court stated at 546 as follows:

A lease, with the privilege of pur-

> chase, of the character contemplated by the ordinance and advertisement for bids, does not come within this constitutional inhibition, as during the period of the lease the property covered by it remains the sole property of the lessor, and when and if the privilege to purchase is exercised, the property becomes the sole property of the lessee, and there does not exist at any time the combination, in any form of the public funds or credit of the lessee municipality with the lessor corporation.

The court did not find that ownership of the meters by the corporation and ownership by the city of the land upon which they were installed resulted in an arrangement that falls within the purview of activity proscribed by Art. VIII, §6.

In specific answer to your questions, therefore, it is my opinion and you are so advised that:

1) The subordination of county owned land in conjunction with a lease-purchase plan entered into pursuant to R.C. 307.02 involves a lending of the credit of the county in violation of Ohio Const. Art. VIII, §6.

2) Ohio Const. Art. VIII, §6, does not prohibit a board of county commissioners from leasing county owned lands to a private developer in conjunction with a lease-purchase plan entered into pursuant to R.C. 307.02.