

September 30, 1996

OPINION NO. 96-048

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

Dear Prosecutor Becker:

You have requested my opinion whether a board of township trustees may grant a lender a security interest in either real property purchased by the board pursuant to R.C. 505.262, or road equipment purchased by the board in accordance with R.C. 5549.02. In your letter you explain that a board of township trustees recently planned to make a purchase of road equipment under R.C. 5549.02 and sought financing for the purchase from the equipment manufacturer's credit subsidiary. The lender was willing to finance the purchase, but sought to retain a security interest in the property as part of the financing package. The board of township trustees was uncertain whether it was authorized to grant the lender the security interest it requested.¹

The authority of a board of township trustees to grant a lender a security interest in property

¹ The term, "[s]ecurity interest," as used in R.C. Chapters 1301-1310, is defined in R.C. 1301.01(KK)(1) as "an interest in personal property or fixtures that secures payment or performance of an obligation." R.C. Chapters 1301-1310 correspond to Articles 1 through 9 of the Uniform Commercial Code (UCC). R.C. Chapter 1309 governs the creation and perfection of security interests in personal property or fixtures, including goods, documents, instruments, general intangibles, chattel paper, or accounts. R.C. 1309.02(A)(1). *But see* R.C. 1309.21(C)(2) (the filing of a financing statement otherwise required by R.C. 1309.01-.50 is not necessary or effective to perfect a security interest in property subject to, *inter alia*, R.C. 4505.13, which addresses a security interest in a motor vehicle and the notation of that security interest upon the motor vehicle's certificate of title).

A security interest in real property is commonly known as a "mortgage." *See* R.C. 5302.12 (mortgage given as security); *Black's Law Dictionary* 1009 (sixth ed. 1990) ("[a] mortgage is an interest in land created by a written instrument providing security for the performance of a duty or the payment of a debt"); *see also* R.C. 1309.01(A)(10) ("[m]ortgage" means "a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like").

the board purchases under R.C. 505.262 or R.C. 5549.02 must either be expressly conferred by statute, or necessarily implicit in some other express statutory power. *Trustees of New London Township v. Miner*, 26 Ohio St. 452, 456 (1875). I am of the view that neither of those two conditions obtains in this instance.² R.C. 505.262(A) authorizes a board of township trustees, by unanimous vote, to adopt a resolution allowing the township to "contract for the purchase of equipment, buildings, and sites, or for the construction of buildings, for any lawful township purpose." R.C. 505.262(A) also instructs a board of township trustees regarding the method of financing any such purchase or construction:

The board may, by resolution adopted by unanimous vote, *issue the notes of the township* to finance purchases and construction made pursuant to this division. The notes shall be signed by the board and attested by the signature of the township clerk and shall be payable over a period not exceeding nine years. The notes shall bear interest not to exceed the rate determined as provided in section 9.95³ of the Revised Code, and shall not be subject to Chapter 133.⁴ of the Revised Code. (Emphasis and footnotes added.)

R.C. 505.262(A) further requires the board's resolution to provide for the levy and collection annually by taxation of amounts sufficient to pay the interest on and principal of the notes; describes the installment payment terms and schedule for that portion of the purchase price secured by the notes; authorizes inclusion in the notes of a clause that permits prepayment at the option of the board; and requires the notes to be offered for sale on the open market or given to the vendor or contractor if no sale is made. *See also* R.C. 505.262(B) (county auditor certification regarding debt service charge required before any purchase or construction is undertaken pursuant to R.C. 505.262(A)).

² One of your assistants has informed a member of my staff that no township within Licking County has adopted the limited self-government form of township government under R.C. Chapter 504. Therefore, I need not consider in this instance whether the board of township trustees is authorized to grant a lender or vendor a security interest in property pursuant to the township's exercise of its powers of local self-government under R.C. 504.04(A).

³ R.C. 9.95 states that securities to which that section applies shall bear interest at not to exceed the maximum or maximum average annual interest rate per annum determined in or pursuant to the proceedings for the securities by the legislative authority, taxing authority, subdivision, governing body, officer, or other issuer, board, authority, commission, district, agency, body, or entity that is the issuer, or governing body or officer of the issuer, of those securities.

⁴ R.C. Chapter 133 is the uniform public securities law, and its provisions govern and regulate the issuance of public securities for financing various state and local governmental activities and operations.

R.C. 5549.02(A) grants boards of county commissioners and boards of township trustees the authority to finance purchases of machinery, tools, trucks, and other equipment for use in constructing, maintaining, and repairing roads,⁵ in accordance with the terms therein specified. R.C. 5549.02(A) is similar to R.C. 505.262(A) in form and content. R.C. 5549.02(A) first provides, in pertinent part, that, "not less than one-fourth of the purchase price shall be paid in cash, and the remainder of the purchase price shall be paid in not more than five equal annual installments." R.C. 5549.02(A) then specifies the method by which a board of county commissioners or board of township trustees may finance those installment payments:

Each installment shall be not less than one-fifth of the balance due and *shall be secured by a note* which may contain a clause permitting prepayment at the option of the board. Such boards may issue the notes of the county or township signed by the board of county commissioners or board of township trustees, attested by the signature of the county auditor or township clerk, and covering such deferred payments and payable at the times above provided. Such notes may bear interest at not to exceed the rate determined as provided in section 9.95 of the Revised Code, and are not subject to section 131.23⁶ or 135.51 to 135.54⁷ or to Chapter 133. of the Revised Code. (Emphasis and footnotes added.)

R.C. 5549.02(A) further requires the boards to make provision for levying and collecting annually, by taxation, an amount sufficient to pay the interest upon such notes and to provide a sinking fund for the final redemption of the notes at maturity.

The language of R.C. 505.262(A) and R.C. 5549.02(A) is thus plain and direct regarding the method of financing the categories of property described in each of those sections. R.C. 505.262(A) authorizes a board of township trustees to "issue the notes of the township to finance" installment payment purchases of equipment, buildings, and sites for any lawful township purpose. There is no further statement in R.C. 505.262(A) that a board of township trustees may grant a lender or vendor a security interest in the equipment, buildings, or sites thus purchased and upon which the board of township trustees issues the notes of the township. Instead, R.C. 505.262(A) imposes an explicit

⁵ R.C. 5549.01 and R.C. 5549.21 authorize boards of county commissioners and boards of township trustees to make those types of purchases.

⁶ R.C. 131.23 authorizes the various political subdivisions of Ohio to issue bonds solely for the purpose of paying their unsecured indebtedness and providing funds for disability assistance. R.C. 131.23(I). The provisions of that section specify the conditions that control the issuance of such bonds.

⁷ R.C. 135.51-.54 address the retention and disposition of securities, held by local governmental entities as security for the deposit of public funds in a public depository, in the event of a default by the public depository.

obligation upon a board of township trustees to provide for the annual levy and collection of taxes in amounts sufficient to pay the interest on and principal of the notes it issues under that section. Moreover, nothing appears elsewhere within the provisions of R.C. 505.262 from which one may necessarily infer that a board of township trustees is authorized to grant a lender or vendor a security interest in the specific property thus financed.

R.C. 5549.02(A) similarly authorizes a board of township trustees to pay the balance due upon the purchase of machinery, tools, trucks, and other equipment in not more than five equal annual installments. The statute then directs that each installment "shall be secured by a note" of the township, issued and signed by the board of township trustees, and attested by the signature of the township clerk. As in the case of R.C. 505.262(A), R.C. 5549.02(A) requires a board of township trustees to provide for the annual levy and collection of taxes in amounts sufficient to pay the interest on those notes and provide a sinking fund for their final redemption at maturity. There is no further statement in R.C. 5549.02(A) that a board of township trustees may grant a lender or vendor a security interest in the specific property that is the subject of those installment payments for which the board issues notes of the township. To the contrary, the express language of R.C. 5549.02(A) indicates that the notes issued by the board are the only security that the board may grant to a lender or vendor by way of financing those installment payments. I also discern nothing in the remaining language of R.C. 5549.02 to indicate that a board of township trustees possesses by necessary implication the authority to grant a lender or vendor a separate security interest in property financed under that section.

The provisions of R.C. 505.262(A) and R.C. 5549.02(A) thus indicate that the General Assembly has carefully limited the authority of a board of township trustees to act in the transactions you have asked about. Those provisions also reflect the more general proposition that a board of township trustees, being a creature of statute and an agency of government, *see* Ohio Const. art. X, § 2; R.C. Chapter 505, does not possess, either inherently or in equal measure, all the rights and powers that might otherwise be exercised by private sector parties engaged in similar kinds of purchasing transactions. Unless a power has been unambiguously conferred upon a board of township trustees by the General Assembly, one must conclude that the board does not possess and may not exercise that power.

In summary, therefore, installment payments upon property purchased by a board of township trustees pursuant to R.C.505.262(A) may be financed by notes of the township issued in accordance with the terms of that section. A board of township trustees is not authorized to grant a lender or vendor a security interest in the property thus purchased. Installment payments upon property purchased by a board of township trustees that is financed pursuant to R.C. 5549.02(A) shall be secured by notes of the township issued in accordance with the terms of that section. A board of township trustees is not authorized to grant a lender or vendor a security interest in the property thus purchased.

Based upon the foregoing, therefore, it is my opinion, and you are advised that:

- 1.A board of township trustees is not authorized to grant a lender or vendor a security interest in property purchased and financed by the board in accordance with the terms of R.C. 505.262(A).
- 2.A board of township trustees is not authorized to grant a lender or vendor a security interest in property purchased by the board that is financed in accordance with the terms of R.C. 5549.02(A).

Respectfully,

BETTY D. MONTGOMERY
Attorney General

The Honorable Robert L. Becker

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September 30, 1996

The Honorable Robert L. Becker
Licking County Prosecuting Attorney
20 South Second Street
Newark, Ohio 43055

SYLLABUS:

96-048

- 1.A board of township trustees is not authorized to grant a lender or vendor a security interest in property purchased and financed by the board in accordance with the terms of R.C. 505.262(A).
- 2.A board of township trustees is not authorized to grant a lender or vendor a security interest in property purchased by the board that is financed in accordance with the terms of R.C. 5549.02(A).

