

April 15, 1997

OPINION NO. 97-021

Fred L. Dailey, Director  
Ohio Department of Agriculture  
8995 E. Main Street  
Reynoldsburg, Ohio 43068

Dear Director Dailey:

We have received your letter requesting an opinion on the subject of farmland preservation. Your specific questions are these:

1. Does Ohio law authorize the Ohio Department of Agriculture, or any other public entity, to administer a program or the funding of a program for the purchase by the public entity of development rights or conservation easements, or the transfer to the public entity of development rights, of Ohio's farmland?
2. Does statutory authority exist that would otherwise enable the Ohio Department of Agriculture, or any other public entity, to preserve the agricultural use of Ohio's farmland?

Your letter indicates that the opinion request was made on behalf of the Ohio Farmland Preservation Task Force. The Task Force was established pursuant to Executive Order 96-65V, signed by Governor Voinovich in August of 1996. The Task Force consists of representatives of government, business, academia, and agricultural interests. It is staffed by the American Farmland Trust with assistance from the Ohio Department of Agriculture and other public and private entities. The Task Force is charged with examining "historical trends, causes and consequences of the conversion of agricultural land to non-agricultural uses," identifying "voluntary methods and incentives for preserving and maintaining land for agricultural production," and providing "recommendations for enhancing the continued vitality of agricultural activity and protecting private property rights, thereby retaining land in agricultural use." The Executive Order states that "it is a priority to preserve Ohio's productive agricultural land and protect against the unnecessary and irretrievable conversion to nonagricultural uses."

The Task Force is required to complete its work and submit a final report, including recommendations, to the Governor by June 1, 1997. You have indicated that the recommendations of the Task Force may include the development and enactment of legislation or a modification of existing law. To complete its job, the Task Force needs an opinion regarding the scope of existing authority.

Your letter refers to various sections of the Revised Code that relate to agriculture and farmlands. For your information, this opinion addresses each of those sections and also considers other provisions that may impact upon the Task Force's project.

The importance of agriculture to Ohio's economy is clear. *See, e.g.*, R.C. 902.02; 1983 Op. Att'y Gen. No. 83-094. The significance of preserving farmland from conversion to other uses has been discussed by various legal authorities and is not addressed in this opinion. *See, e.g.*, Comment, *Farmland Preservation in Ohio — Good News for Land Speculators?* 12 Cap. U.L. Rev. 229 (1982).

**Tax Valuation of Agricultural and Forest Land**  
**Ohio Const. art II, §36**  
**R.C. 5713.30-.38; R.C. 5731.011; R.C. 5713.22-.26**

Let us begin our review of Ohio law by considering provisions that govern the taxation of agricultural land. One benefit that is available to owners of agricultural land is to have the land taxed at its assessed value for agricultural purposes, commonly known as its current agricultural use value (CAUV), rather than at a higher value that it might be given if other possible uses were considered. This valuation is made pursuant to Ohio Const. art. II, §36, which permits laws to be passed "to encourage forestry and agriculture," and states specifically that "laws may be passed to provide that land devoted exclusively to agricultural use be valued for real property tax purposes at the current value such land has for such agricultural use," notwithstanding the provisions of Ohio Const. art. XII, §2 requiring generally that land "be taxed by uniform rule according to value." *See* 1984 Op. Att'y Gen. No. 84-017; Comment, *Farmland Preservation in Ohio — Good News for Land Speculators?* 12 Cap. U.L. Rev. 229, 236-39 (1982). The statutes authorizing the lower property tax valuation for agricultural land appear in R.C. 5713.30-.38.

To have land valued for real property tax purposes at the current value it has for agricultural use, the owner files an application with the county auditor. The auditor views the land, or causes it to be viewed, and determines whether it is "land devoted exclusively to agricultural use." R.C. 5713.31. If it is land devoted exclusively to agricultural use, the auditor values it accordingly. *See* R.C. 5713.01(B); R.C. 5713.03-.04; R.C. 5713.31; R.C. 5715.01; 16 Ohio Admin. Code Chapter 5705-5. *See generally* 1984 Op. Att'y Gen. No. 84-017; 1977 Op. Att'y Gen. No. 77-020. The application must be renewed each year. R.C. 5713.31; *see also* R.C. 5713.351.

Land is "devoted exclusively to agricultural use" and eligible for valuation under R.C. 5713.30-.38 if it was devoted exclusively to specified uses or qualified under a federal program for the three preceding calendar years, and if it totals at least ten acres or meets gross income

requirements. R.C. 5713.30(A). If land that has been valued at its current agricultural use value is converted to other uses, the land is charged with an amount equal to the tax savings on the land during the three preceding tax years, subject to certain exceptions. R.C. 5713.34; *see also* R.C. 5713.30(B); R.C. 5713.33. *See generally* R.C. 319.202. If the land is acquired by a public entity or by eminent domain and is converted to nonagricultural uses, the entity acquiring the land must pay the tax recoupment charge and may not transfer that charge, directly or indirectly, to the person from whom the land is acquired. Again, there are certain exceptions. R.C. 5713.34(B).

Related provisions governing estate tax permit the valuation of qualified farm property at its value for its actual qualified use, as determined under R.C. 5713.31, with certain exceptions. If the land is used for another purpose or transferred from the family in the prescribed time, a recapture tax is imposed. R.C. 5731.011.

Pursuant to Ohio Const. art. II, §36, "areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation." Existing statutes provide that land devoted exclusively to forestry or timber growing "shall be taxed annually at fifty per cent of the local tax rate." R.C. 5713.23. The Chief of the Division of Forestry of the Department of Natural Resources is responsible for implementing the program. R.C. 5713.22-.26.

### **Agricultural Districts** **R.C. Chapter 929; R.C. 4906.10**

R.C. Chapter 929 provides for the establishment of agricultural districts, which grant certain savings to landowners and impose restrictions on the use of eminent domain and the public funding of nonagricultural development. *See generally* Comment, *Farmland Preservation in Ohio — Good News for Land Speculators?* 12 Cap. U.L. Rev. 229, 239-47 (1982). Land is placed in an agricultural district upon application of the landowner, filed with the county auditor. To be eligible, the land must have been devoted exclusively to agricultural production, *see* R.C. 929.01(A), or in a federal program, for the previous three years and must either consist of at least ten acres or meet gross income requirements. R.C. 929.02(A). If the land is located in a municipal corporation or in an area that is the subject of annexation proceedings, the application must be filed also with the clerk of the legislative body of the municipal corporation, a public hearing must be held, and approval of the legislative body must be obtained. R.C. 929.02(B).

Placement of land in an agricultural district lasts for five years and is subject to renewal. R.C. 929.02(A), (C). A new owner has the option of electing to discontinue inclusion in the agricultural district. R.C. 929.02(C). Land that is converted to use for purposes other than agricultural production is considered to be withdrawn from an agricultural district. R.C. 929.01(B).

While land is in an agricultural district, it is exempt from assessments for sewer, water, or electrical service, except upon the lot surrounding a dwelling or other nonagricultural structure. R.C. 929.03. It may also be eligible for tax savings by being taxed at its value for agricultural purposes under R.C. 5713.30-.38, discussed above.

An owner who withdraws land from an agricultural district must pay a withdrawal penalty based on the amount of tax savings calculated under R.C. 5713.34. R.C. 929.02(D). Further, the owner must pay the amount of uncollected special assessments, with interest, if land is withdrawn from an agricultural district or if the assessed service is used. R.C. 929.03(C). If a portion of the land is appropriated or transferred to a relative, the owner need pay only the uncollected assessment and interest that applies to that portion. *Id.*

Land that is in an agricultural district is subject to limitations on appropriation by any public or private agency. With certain exceptions, the power of eminent domain cannot be used to appropriate more than ten acres or ten percent of an individual property under one ownership and currently used in agricultural production in an agricultural district unless notice is given to the Department of Agriculture and the proposed action is reviewed. The notice must be accompanied by a report that justifies the proposed action and includes an evaluation of alternatives that would not require the action within the agricultural district. R.C. 929.05(A); *see* 1987 Op. Att'y Gen. No. 87-004.

If, upon review, the Director of Agriculture has reason to believe "that the proposed action would have an unreasonably adverse affect on the district or on the policies, plans, objectives, or programs [of other state or local government agencies] that would outweigh the protection, promotion, or enhancement of the public health, safety, peace, or welfare," he informs the Governor, who orders that the action not be taken for sixty days. Then the Director holds a public hearing, makes final findings and recommendations, and distributes them to the agency, entity, or person seeking to appropriate the land, to any public agency with authority to review or approve the appropriation, and to the public. A public agency with authority to review or approve the appropriation must use the findings and recommendations to reach its final determination. R.C. 929.05(B). The Director may institute a civil action to enjoin a prohibited appropriation until the statutory procedure is followed. R.C. 929.05(C).

The limitations on the power to appropriate land that is in an agricultural district apply to all public and private agencies that seek to exercise the power of eminent domain. *See* R.C. 929.05; R.C. 163.01(A). An exception is provided for "any emergency project immediately necessary for the preservation of the public health, safety, or general welfare." R.C. 929.05(E). Further exceptions apply to a lot that is transferred to a relative for the purpose of constructing a dwelling in which the relative will reside for at least three years. R.C. 929.05(F). In addition, statutory exceptions are provided for lines or other facilities used to transmit or distribute electricity, for gas or oil pipelines or other facilities used for exploration, production, storage, transmission, or distribution of natural gas, synthetic gas, or oil, for telephone lines, and for any activity or facility under the jurisdiction of the Ohio Power Siting Board. R.C. 929.05(D). The Power Siting Board, however, is required to consider the impact upon land in an agricultural district before it grants a certificate for the construction, operation, and maintenance of a major utility facility. R.C. 4906.10(A)(7).

In addition to providing restrictions on eminent domain, R.C. 929.05 also prohibits any person or public entity from advancing a grant, loan, interest subsidy, or other distribution of public funds within an agricultural district for the construction of housing or commercial or industrial

facilities to serve nonagricultural uses of land without giving notice to the Department of Agriculture and having the matter reviewed. The procedure to be followed is the same as that used for requests for appropriation, and the same exceptions apply. R.C. 929.05.

In reviewing proposed takings by eminent domain or distributions of public funds in agricultural districts pursuant to R.C. 929.05, the Department of Agriculture is required to determine the effect of the proposed action on agricultural production in the district and on the policies, plans, objectives, and programs of other state or local government agencies and to consider the need for the proposed action and its necessity to protect, promote, or enhance the public health, safety, peace, or welfare. R.C. 929.05(B). Action taken by the Director of Agriculture in making determinations, holding hearings, and making final findings and recommendations pursuant to R.C. 929.05 may be directed toward preserving the agricultural use of farmland that is within an agricultural district; however, the agency with authority to review or approve the taking by eminent domain or the distribution of public funds has authority to make the final determination regarding the matter.

By statute, a defense to civil nuisance actions is provided for agricultural activities on land in an agricultural district in certain instances. The defense is available only if the plaintiff was not involved in agricultural production and if the agricultural activities were established prior to the plaintiff's activities or interest and either were in compliance with law or were conducted in accordance with generally accepted agricultural practices. R.C. 929.04.

Agricultural districts are created upon the request of landowners. R.C. 929.02. The Director of Agriculture is responsible for prescribing and providing the forms to be used under Chapter 929, *see* R.C. 929.02(F), but has no general authority to create agricultural districts.

### **Nature Preserves R.C. 1517.01-.13**

The Ohio Department of Natural Resources is authorized to acquire a system of nature preserves, *see* R.C. 1517.01-.13, and hold them in trust for the benefit of present and future generations of Ohioans, *see* R.C. 1517.05; R.C. 1517.06. The Chief of the Division of Natural Areas and Preserves has been given responsibility for managing and protecting the nature preserves. R.C. 1517.02; R.C. 1517.06.

A nature preserve is established when a natural area is accepted by the Director of Natural Resources, after consultation with and concurrence by the Ohio Natural Areas Council, and dedicated through the filing of articles of dedication with the county recorder. R.C. 1517.05; *see also* R.C. 317.08(A); R.C. 1517.03-.04; R.C. 1517.08. For this purpose, a "natural area" is "an area of land or water which either retains to some degree or has re-established its natural character, although it need not be completely undisturbed, or has unusual flora, fauna, geological, archeological, scenic, or similar features of scientific or educational interest." R.C. 1517.01(A).

Real property that is dedicated to use as a nature preserve is exempt from property taxation. R.C. 5709.09. It cannot be diverted to another use unless the Department of Natural Resources, with

the approval of the Governor, finds an imperative and unavoidable public necessity for the other use. R.C. 1517.06.

Nature preserves may be acquired for various uses and purposes, as follows:

- (A) *For scientific research in such fields as ecology, taxonomy, genetics, forestry, pharmacology, agriculture, soil science, geology, paleontology, conservation, and similar fields;*
- (B) For the teaching of biology, natural history, ecology, geology, conservation, and other subjects;
- (C) As habitats for plant and animal species and communities and other natural objects;
- (D) As reservoirs of natural materials;
- (E) As places of natural interest and beauty;
- (F) For visitation whereby persons may observe and experience natural biotic and environmental systems of the earth and their processes;
- (G) To promote understanding and appreciation of the aesthetic, cultural, scientific, and spiritual values of such areas by the people of the state;
- (H) *For the preservation and protection of nature preserves against modification or encroachment resulting from occupation, development, or other use which would destroy their natural or aesthetic conditions.*

R.C. 1517.05 (emphasis added). Where possible, the land dedicated as nature preserves must be available for public access. Articles of dedication may provide for the management and custody of land and the rights of the owner or operating agency and the Department. *Id.*

Of the statutory uses permitted for nature preserves, scientific research in agriculture, soil science, and similar fields is related to your questions and may be used to promote agriculture in Ohio. R.C. 1517.05(A). Division (H), providing for preservation and protection against modification or encroachment resulting from development that would destroy natural or aesthetic conditions, might also be proposed as a means for protecting agricultural land.

Lands in a nature preserve, however, are restricted to the purposes listed in R.C. 1517.05. The statutes governing nature preserves contemplate that the lands will either be retained in or returned to their natural state or improved in a manner that does not impair their natural character and makes them available for the named purposes, including scientific research, teaching, and visitation. R.C. 1517.02; R.C. 1517.05. *See generally* Cohen, *Progress and Problems in Preserving Ohio's Natural Heritage Through the Use of Conservation Easements*, 10 Cap. U.L. Rev. 731, 744-45 (1981); Thomas, *Transfers of Land to the State for Conservation Purposes: Methods, Guarantees, and Tax Analysis for Prospective Donors*, 36 Ohio St. L.J. 545 (1975). Existing statutes do not include agricultural production, apart from research, as one of the authorized uses of land that has been accepted and dedicated as a nature preserve.

Pursuant to R.C. 1517.01-13, therefore, the Department of Natural Resources may acquire nature preserves for purposes specified by statute, including scientific research in agriculture and soil science, but not for the purpose of retaining the land in agricultural production. The Department of Agriculture has not been granted any statutory authority with respect to nature preserves.

### **Conservation Easements R.C. 5301.67-.70**

A conservation easement is a type of interest in land that may be granted to limit the use or development of that land. The term "conservation easement" is defined to mean:

*an incorporeal right or interest in land that is held for the public purpose of retaining land, water, or wetland areas predominantly in their natural, scenic, open, or wooded condition, in agricultural, horticultural, silvicultural, or other farming or forest use, or as suitable habitat for fish, plants, or wildlife; that imposes any limitations on the use or development of the areas that are appropriate at the time of creation of the conservation easement to achieve one or more of such purposes; and that includes appropriate provisions for the holder to enter the property subject to the easement at reasonable times to ensure compliance with its provisions.*

R.C. 5301.67 (emphasis added). The purpose of retaining land in agricultural use is thus defined as a public purpose and a proper subject of a conservation easement. The easement may impose appropriate limitations on the use or development of the land and must include appropriate provisions for the holder to enter the property at reasonable times to ensure compliance with its provisions. *Id.*

A landowner may grant a conservation easement in the form of articles of dedication, easement, covenant, restriction, or condition. Conservation easements are executed and recorded in the same manner as other instruments conveying interests in land. R.C. 5301.68; *see also* R.C. 317.08(A). A conservation easement may be assigned to another entity authorized to hold it, and it is not unenforceable for lack of privity of contract or estate or lack of benefit to a particular dominant estate. The holder of a conservation easement may enforce it by injunction or other civil action. R.C. 5301.70.

One reason for granting a conservation easement may be to obtain a tax benefit. When a conservation easement is granted, the landowner receives the benefit of having the property revalued to take into account the diminution in value as the result of the existence of the conservation easement. R.C. 5713.01; R.C. 5713.04; *see generally* Cohen, *Progress and Problems in Preserving Ohio's Natural Heritage Through the Use of Conservation Easements*, 10 Cap. U.L. Rev. 731 (1981).

A conservation easement may be granted to the Department of Natural Resources, a park district created under R.C. Chapter 1545, a township park district created under R.C. 511.18, a conservancy district created under R.C. Chapter 6101, a soil and water conservation district created

under R.C. Chapter 1515, a county, a township, a municipal corporation, or a charitable organization that is authorized by R.C. 5301.69(B)<sup>1</sup> to hold conservation easements. R.C. 5301.68. Specified officials of those public entities are authorized to:

acquire conservation easements in the name of the state, the district, or the county, township, or municipal corporation in the same manner as other interests in land may be acquired under section 307.02 [county facilities], 307.18 [transfer of property between governmental entities], 505.10 [township property], 505.261 [township park]; 511.23 [township park district]; 717.01 [municipal corporation]; 1501.01 [Director of Natural Resources]; 1515.08 [soil and water conservation district], 1545.11 [board of park commissioners], or 6101.15 [conservancy district] of the Revised Code, and each officer, board, or authority acquiring a conservation easement shall name an appropriate administrative officer, department, or division to supervise and enforce the easement.

R.C. 5301.69(A).

The various named governmental entities are thus authorized to acquire conservation easements in the manner in which they acquire other interests in land. On the state level, the entity with authority to acquire and enforce conservation easements is the Department of Natural Resources. The statutes do not grant that authority to the Department of Agriculture.

The fact that the definition of "conservation easement" includes land held "for the public purpose of retaining land...in agricultural...or other farming...use" might suggest that each of the governmental entities that is authorized to acquire conservation easements may acquire conservation easements for the purpose of retaining land in agricultural use. R.C. 5301.67. It is not appropriate, however, to read that definition as a grant of substantive authority to carry out the various activities listed in the definition. Rather, it appears that the conservation easement provisions define a conservation easement as a type of interest in land that the named governmental entities may acquire for those purposes for which the entities are otherwise authorized to acquire real property.

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<sup>1</sup> R.C. 5301.69(B) states:

A charitable organization may acquire and hold conservation easements if it is exempt from federal taxation under subsection 501(a) and is described in subsection 501(c) of the "Internal Revenue Code of 1954," 68A Stat. 3, 26 U.S.C. 1, as amended, and organized for any of the following purposes: the preservation of land areas for public outdoor recreation or education, or scenic enjoyment; the preservation of historically important land areas or structures; or the protection of natural environmental systems.

R.C. 5301.69 authorizes the named governmental entities to acquire conservation easements "in the same manner as other interests in land may be acquired" under specified statutes and to name "an appropriate administrative officer, department, or division to supervise and enforce the easement." The implication is that the governmental entity will be acquiring conservation easements for purposes that come within the general functions and duties of its officers, department, or divisions. Thus, for example, a board of park commissioners that has statutory authority to acquire land for park purposes may acquire a conservation easement that serves that purpose by retaining land in its natural condition. Conversely, a governmental entity listed in R.C. 5301.69 cannot accept a conservation easement to retain land in agricultural use unless it has authority to hold land for that purpose.

An examination of statutory authority granted to the Department of Natural Resources discloses that the Department has authority to acquire land for a variety of purposes relating to parks and to the conservation and preservation of natural resources. *See* R.C. 1501.01; *see also, e.g.*, R.C. 1517.01-.13 (nature preserves); R.C. 5723.08 (authority to take and hold forfeited lands for "reforestation, public recreation, wildlife habitat, water impoundment, or other uses incident to the conservation of natural resources"). The Department of Natural Resources, however, has no general authority to acquire land for the purpose of retaining that land in agricultural production. Therefore, the Department's authority to acquire conservation easements does not extend to easements for the purpose of preserving land in agricultural use.

The same analysis must be applied to the various other governmental entities listed in R.C. 5301.68-.69. To the extent that they have authority to acquire property to carry out the functions described in R.C. 5301.67, they may acquire conservation easements to carry out those functions. Those entities have powers relating to the acquisition of property for various purposes, including parks, conservation, preservation of natural resources, and governmental functions. *See, e.g.*, R.C. 307.02; R.C. 505.26; R.C. 511.23; R.C. 717.01; R.C. 1515.08; R.C. 1545.11; R.C. 6101.15. It does not appear, however, that they have been given a clear grant of authority to acquire farmland for the purpose of preserving it in agricultural use. As a result, they do not have authority to accept conservation easements for the purpose of preserving land in agricultural use.

Ohio law thus provides a statutory means for certain public entities to acquire, supervise, and enforce conservation easements. Pursuant to R.C. 5301.67-.70, the Director of Natural Resources, the board of park commissioners of a park district created under R.C. Chapter 1545, the board of park commissioners of a township park district created under R.C. 511.18, the board of directors of a conservancy district created under R.C. Chapter 6101, the board of supervisors of a soil and water conservation district created under R.C. Chapter 1515, the board of county commissioners of a county, the board of township trustees of a township, and the legislative authority of a municipal corporation have authority to acquire, supervise, and enforce conservation easements, as defined by statute, for purposes for which those entities are authorized to acquire real property. Because existing provisions of law do not grant clear authority for the governmental entities named in R.C. 5301.68-.69 to acquire land for the purpose of retaining the land in agricultural use, however, those entities are not authorized by R.C. 5301.67-.70 to accept conservation easements for that purpose.

Certain private entities are also authorized to acquire conservation easements. *See* note 1, *supra*. Accordingly, there may be private entities that undertake the function of acquiring conservation easements for the purpose of retaining land in agricultural use.

**Receipt of Donations of Property**  
**R.C. 9.20; R.C. 901.04**

R.C. 9.20 provides general authority for the state and various other governmental entities to "receive by gift, devise, or bequest moneys, lands, or other properties for their benefit or the benefit of any of those under their charge and...hold and apply the moneys, lands, or properties according to the terms of the gift, devise, or bequest." The gifts or devises of real estate may be subject to reasonable reservations. R.C. 9.20. This statute permits public entities to accept and hold land for public purposes. It would permit the acceptance of interests in agricultural land where the receipt of those interests serves a proper purpose of the accepting public entity.

The receipt of a gift under R.C. 9.20 does not, however, expand the statutory authority of the governmental entity that receives the gift. *See, e.g.*, 1993 Op. Att'y Gen. No. 93-056, at 2-266; 1982 Op. Att'y Gen. No. 82-086; 1957 Op. Att'y Gen. No. 1150, p. 545, at 550 (an entity may accept property pursuant to R.C. 9.20 and administer it according to the terms of the gift only if the entity has statutory power to acquire such property otherwise than by gift and to administer or operate it in harmony with the gift). As discussed above, there is no clear authority under Ohio law for public entities to hold interests in real estate for the purpose of preserving the agricultural use of the real estate. Therefore, there is no general authority for public entities to accept gifts of farmland for the purpose of preserving its agricultural use.

The Department of Agriculture is authorized to accept grants, gifts, devises, or bequests for the use of the Department or for promoting any part of the public welfare that is under the supervision and control of the Department. R.C. 901.04. Gifts of money must be deposited in the state treasury to the credit of the Agro Ohio Fund. Other property may be held in kind, and the Department may contract for and carry out the terms and conditions of any devise, grant, gift, or donation. *Id.*

The Department of Agriculture has a variety of powers and duties relating to the regulation and promotion of agricultural activities. *See* R.C. Title 9. The Department, however, is not expressly granted the power to hold real estate for the purpose of retaining its use as farmland. Because there is no clear authority for the Department of Agriculture to hold interests in real estate for the purpose of preserving the agricultural use of the land, there is no general authority for the Department to accept gifts for that purpose pursuant to R.C. 9.20 or R.C. 901.04.

**County Rural Zoning; Township Zoning; Nuisances**  
**R.C. 303.21; R.C. 519.21; R.C. 3767.13; R.C. 929.04**

With certain exceptions, county rural zoning powers and township zoning powers do not include the power "to prohibit the use of any land for agricultural purposes or the construction or use

of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located," or to require a zoning certificate for any such building or structure. R.C. 303.21(A); R.C. 519.21(A); *see also* R.C. 303.01; R.C. 519.01. County rural zoning authorities and township zoning authorities have limited authority to regulate agriculture or related buildings on lots of specified sizes no greater than five acres and to regulate farm markets. R.C. 303.21(B)-(C); R.C. 519.21(B)-(C).

Activities related to agriculture, as defined for purposes of township zoning, are also granted exemptions from nuisance and noise provisions, when the activities are conducted outside a municipal corporation, in accordance with generally accepted agricultural practices, and in a manner that does not have a substantial, adverse effect on the public health, safety, or welfare. R.C. 3767.13. In addition, emissions from agricultural production activities, as defined for purposes of agricultural districts, are exempt from statutory air contaminant provisions if the activities are consistent with generally accepted agricultural practices, were established prior to adjacent nonagricultural activities, have no substantial adverse effect on the public health, safety, or welfare, do not result from negligent or improper operations, and would not require an operating permit under the Federal Clean Air Act. R.C. 3704.01(B), (S). As discussed above, agricultural activities conducted in an agricultural district are provided with a defense to a civil nuisance action in certain circumstances if the activities were in compliance with law and in accordance with generally accepted agricultural practices. R.C. 929.04.

**Public Moneys for Agricultural Purposes**  
**Ohio Const. art. VIII, §13**

**R.C. Chapter 902; R.C. 901.61-.64; R.C. Chapter 165; R.C. Chapter 166**

Ohio Const. art. VIII, §13 permits the making of loans, issuance of bonds, lending of aid and credit, and other use of public moneys for the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment, and facilities within the State of Ohio "for industry, commerce, distribution, and research," where the purpose is to "create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste." The purposes are to be accomplished through programs established by statute, and no moneys raised by taxation may be obligated or pledged for the payment of bonds or guarantees.

This constitutional provision has been read to include farming as a form of industry or commerce. *See State ex rel. Bd. of County Comm'rs v. Mong*, 12 Ohio St. 3d 66, 465 N.E.2d 428 (1984); 1983 Op. Att'y Gen. No. 83-094. Therefore, when an agricultural use serves the purposes set forth in Ohio Const. art. VIII, §13, it may be funded by the means authorized by that provision. Hence, the General Assembly, through appropriate legislation, may establish programs that provide moneys for the acquisition, construction, enlargement, improvement, or equipment of property, structures, equipment, or facilities used for agricultural purposes. *See* 1983 Op. Att'y Gen. No. 83-094.

Existing programs that permit the use of public moneys for agricultural purposes in accordance with Ohio Const. art. VIII, §13 appear in various sections of the Revised Code. R.C. Chapter 902 is designed expressly to provide agricultural financing in accordance with Ohio Const. art. VIII, §13. *See* R.C. 902.02-.03. It permits the state, through the Agricultural Financing Commission, *see* R.C. 901.61-.64, or a county or municipal corporation to acquire by gift or purchase and hold and mortgage real or personal property to be used as projects, to purchase, construct, reconstruct, enlarge, improve, furnish, equip, lease, sell, exchange and otherwise dispose of projects, and to issue bonds or make loans for acquiring, constructing, reconstructing, enlarging, improving, furnishing, or equipping projects. R.C. 902.01(E)-(F); R.C. 902.02-.03. "Projects" consist of real or personal property that is within the boundaries of the issuing entity and is used or to be used by a borrower for agricultural purposes. R.C. 902.01(K). The state, county, or municipal corporation is the "issuer," *see* R.C. 902.01(E), and it has authority to acquire, hold, lease, mortgage, improve, or sell property to carry out its functions. R.C. 902.03. The goal of R.C. Chapter 902 is to provide agricultural credit and loan financing at affordable interest rates. R.C. 902.02. Bonds issued pursuant to R.C. Chapter 902 are not debts of the state or a political subdivision and they may not be paid from tax moneys. R.C. 902.04(C).

R.C. Chapter 165, which authorizes the issuance of industrial development revenue bonds to finance certain projects, has been construed to permit an industrial development loan for the purpose of financing agricultural operations. *State ex rel. Bd. of County Comm'rs v. Mong*. Like R.C. Chapter 902, R.C. Chapter 165 was enacted to implement Ohio Const. art. VIII, §13. R.C. 165.02. It authorizes the issuance of bonds and making of loans by the state, through the Director of Development, or by a county or municipal corporation that has designated a community improvement corporation (CIC), *see* R.C. Chapter 1724, as its agency for industrial, commercial, distribution, and research development and has confirmed a plan prepared by the CIC. R.C. 165.01(D)-(E).

Other statutes providing for the implementation of Ohio Const. art. VII, §13 include R.C. Chapter 166, which authorizes economic development programs. One of the factors to be considered in determining the projects to be assisted under R.C. Chapter 166 is the "effect of the assistance on the loss of or damage to or destruction of prime farmland, or the removal from agricultural production of prime farmland." R.C. 166.05(A)(1)(i). "Prime farmland" has the definition given by the United States Soil Conservation Service. *Id.*

#### **Promotion and Assistance of Agricultural Uses**

**R.C. 901.18; R.C. 901.30-.34; R.C. 3335.56; R.C. Chapter 122; R.C. 135.71-.76**

Various other statutory provisions make funds or programs available for the assistance of agriculture. For example, the Director of Agriculture is authorized to collect and disseminate "such information relative to agriculture, agricultural labor, waste, and uncultivated land, undeveloped resources, and decrease of rural population as he deems wise for the promotion of agricultural production." R.C. 901.18. Certain rural rehabilitation moneys are available to the Department of Agriculture to provide loans or grants for farming and other programs for rural areas. R.C. 901.30-.34; 3 Ohio Admin. Code Chapter 901-17; 1973 Op. Att'y Gen. No. 73-006. The Ohio Agricultural

Research and Development Center, a part of the Ohio State University, undertakes basic and applied research "in agriculture, natural resources, and related subjects essential to the continued development of the state's agricultural industry and natural resources." R.C. 3335.56; *see also* R.C. 3335.57.

In addition, the Department of Development is authorized under R.C. Chapter 122 to disseminate information concerning the agricultural advantages of Ohio, R.C. 122.07, and to include agriculture and agribusiness as matters that it promotes and assists, R.C. 122.28-.36; R.C. 122.41. The agricultural linked deposit program is designed to provide agricultural credit and loan financing at affordable interest rates. R.C. 135.71-.76.

It is evident from the foregoing discussion that many provisions of Ohio law relate to the promotion and protection of agriculture within the state. Existing law, however, does not provide specific authority for public entities to preserve the agricultural use of Ohio's farmland. It must be concluded, therefore, that no existing statutes authorize the Ohio Department of Agriculture to administer a program or the funding of a program for the purchase by the Department of development rights or conservation easements, or the transfer to the Department of development rights, of Ohio's farmland. *See generally, e.g.,* Comment, *Farmland Preservation in Ohio — Good News for Land Speculators?* 12 Cap. U.L. Rev. 229 (1982).

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. Action taken by the Director of Agriculture in making determinations, holding hearings, and making final findings and recommendations pursuant to R.C. 929.05 may be directed toward preserving the agricultural use of farmland that is within an agricultural district; however, the agency with authority to review or approve the taking by eminent domain or the distribution of public funds has authority to make the final determination regarding the matter.
2. Pursuant to R.C. 1517.01-.13, the Department of Natural Resources may acquire nature preserves for purposes specified by statute, including scientific research in agriculture and soil science, but not for the purpose of retaining the land in agricultural production.
3. Because existing provisions of law do not grant clear authority for the governmental entities named in R.C. 5301.68-.69 to acquire land for the purpose of retaining the land in agricultural use, those entities are not authorized by R.C. 5301.67-.70 to accept conservation easements for that purpose.
4. There is no general authority for public entities to accept gifts of farmland for the purpose of preserving its agricultural use.
5. Because there is no clear authority for the Department of Agriculture to hold interests in real estate for the purpose of preserving the agricultural use of the land, there

is no general authority for the Department to accept gifts for that purpose pursuant to R.C. 9.20 or R.C. 901.04.

6.No existing statutes authorize the Ohio Department of Agriculture to administer a program or the funding of a program for the purchase by the Department of development rights or conservation easements, or the transfer to the Department of development rights, of Ohio's farmland.

Respectfully,

BETTY D. MONTGOMERY  
Attorney General

April 15, 1997

Fred L. Dailey, Director  
Ohio Department of Agriculture  
8995 E. Main Street  
Reynoldsburg, Ohio 43068

SYLLABUS:

97-021

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4. There is no general authority for public entities to accept gifts of farmland for the purpose of preserving its agricultural use.
5. Because there is no clear authority for the Department of Agriculture to hold interests in real estate for the purpose of preserving the agricultural use of the land, there is no general authority for the Department to accept gifts for that purpose pursuant to R.C. 9.20 or R.C. 901.04.
6. No existing statutes authorize the Ohio Department of Agriculture to administer a program or the funding of a program for the purchase by the Department of development rights or conservation easements, or the transfer to the Department of development rights, of Ohio's farmland.