

December 29, 2000

OPINION NO. 2000-042

The Honorable Dean Holman
Medina County Prosecuting Attorney
60 Public Square
Bank One Building
Medina, Ohio 44256

Dear Prosecutor Holman:

You have requested an opinion concerning the display of advertisements on the property of a county transit system. In your letter you state that the board of county commissioners operates a county transit system in accordance with the terms of R.C. 306.01-.13. In order to defray the costs of operating the transit system, the board wishes to let advertising space on property that the transit system uses in the course of its operation. We are informed, by way of example, that the board proposes to let advertising space on the transit system's benches, shelters, and buses. Accordingly, you ask whether a board of county commissioners that operates a county transit system pursuant to R.C. 306.01-.13 is authorized to let advertising space on the transit system's property.¹

As a creature of statute, a board of county commissioners may exercise only such power as is expressly conferred upon it by statute, or as may be inferred from those powers that are expressly granted. *State ex rel. Shriver v. Board of County Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947); *Board of County Comm'rs v. Gates*, 83 Ohio St. 19, 30, 93 N.E. 255, 259 (1910). Pursuant to R.C. 306.01(A), if a board of county commissioners operates a county

¹ In your letter you ask about the authority of a board of county commissioners to sell advertising space on county transit system property. Because making advertising space available for a fee is commonly known as leasing or letting the space, or selling the right to use the space, we will address the board's authority to let advertising space on county transit system property. See generally *Webster's New World Dictionary* 810 (2d college ed. 1986) (the term "let" means "to give the use of (a house, room, etc.) to a tenant in return for rent; rent; hire out").

transit system,² the board assumes “all the powers and duties assigned to a board of county commissioners in [R.C. 306.04, R.C. 306.06, R.C. 306.08-10, R.C. 306.12, and R.C. 306.13.]”

The basic powers of a board of county commissioners to operate a county transit system are set forth in R.C. 306.04. Among those powers is the authority to acquire, maintain, lease as lessee or lessor, manage, control, and operate the county transit system, “consisting of all real estate and interests therein, personal property, and a combination thereof, for or related to the movement of persons.” R.C. 306.04(C)(2). The authority to lease, manage, control, and operate the county transit system’s property appears to include the authority first to determine that the letting of advertising space is an appropriate use of the property, and then to take action to carry out that use. *See generally* R.C. 306.04(C)(14) (a board of county commissioners may “[e]stablish rules for the use and operation of the county transit system including the real estate or interests therein, personal property or a combination of the foregoing used by or in connection with such system”).

Additional authority to let property of the transit system is found in language authorizing the board of county commissioners to “[s]ell, lease, release, or otherwise dispose of real estate or interests therein or personal property owned by it and grant such easements across its real estate and interests therein as will not interfere with its use by the county transit system.” R.C. 306.04(C)(13). This provision, as well, provides authority for a board of county commissioners that operates a county transit system to let transit system property.

It is axiomatic that the authority of a board of county commissioners to let property includes the incidental authority to determine the specific terms of any lease. For example, the board may determine the duration of a lease, the amount paid by a lessee, the exact space to be let, the conditions of a lease, and the leasehold estate granted. *See generally* 1994 Op. Att’y Gen. No. 94-076 at 2-385 (“when legislation confers the authority or duty to perform a task, but does not specify the manner of performance, the responsible public officer has the ‘implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded’” (quoting *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff’d sub nom. State ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916))). However, a board of county commissioners may not set forth terms in a lease that are contrary to other provisions of law. *See generally* R.C. 307.09(A); 1947 Op. Att’y Gen. No. 1879, p. 244; 1935 Op. Att’y Gen. No. 4576, vol. II, p. 1090.

Although no provision in R.C. 306.04 or elsewhere in the Revised Code expressly limits the authority of a board of county commissioners to let the property of a county transit system, the board is required to exercise its discretion in a reasonable manner when making decisions concerning the transit system’s operation. *See State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918). With respect to letting transit system property for advertising, it is

² R.C. 306.01(A) states that a county transit system may be operated by a county transit board or board of county commissioners.

generally recognized that it is reasonable for a transit system to let, as an incidental use of property needed for its operation, advertising space on that property. *See generally Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) (“a city transit authority has discretion to develop and make reasonable choices concerning the type of advertising that may be displayed in its vehicles”); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg’l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998) (granting preliminary injunctive relief requiring a regional transit authority that lets advertising space on its buses and bus shelters to accept a proposed wrap-around bus advertisement that the transit authority determined to be aesthetically unpleasant and controversial). Accordingly, a board of county commissioners, in the reasonable exercise of its discretion, may choose to let advertising space on a county transit system’s property, including its vehicles, benches, and shelters.

This conclusion finds further support in R.C. 306.04(C)(5), which authorizes a board of county commissioners operating a county transit system to “[f]ix, alter, and charge rates and other charges for the use of its real estate and interests therein, personal property, and combinations thereof.” (Emphasis added.) Pursuant to R.C. 306.04(C)(5), a board of county commissioners that operates a county transit system has discretion, in operating the system, to make reasonable decisions regarding the charging of fees for the use of the transit system’s property. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. at 19, 122 N.E. at 40. Because R.C. 306.04 does not limit the authority of a board of county commissioners with respect to the types of charges the board may assess for the use of a county transit system’s property, it follows that a board may charge advertisers for the use of the transit system’s property to display advertisements. Therefore, pursuant to R.C. 306.04, a board of county commissioners that operates a county transit system under R.C. 306.01-.13 has discretion to let advertising space on transit system property.

As a final matter, a member of your staff is concerned that the case of *Campbell v. Jackson Twp. Bd. of Zoning Appeals*, Case No. 1995CA00223, 1996 Ohio App. LEXIS 669 (Stark County Feb. 20, 1996), may compel the conclusion that a board of county commissioners is not permitted to let advertising space on county transit system property.³ For the following reasons we do not believe that the court’s opinion in this case compels that conclusion.

In *Campbell v. Jackson Twp. Bd. of Zoning Appeals* the court considered the propriety of applying a township zoning resolution concerning advertising to advertisements placed on benches located at a regional transit authority’s bus stops. The court upheld a decision that the placement of public benches bearing advertising at bus stops of a regional transit authority

³ The opinion of the Fifth District Court of Appeals of Ohio in *Campbell v. Jackson Twp. Bd. of Zoning Appeals*, Case No. 1995CA00223, 1996 Ohio App. LEXIS 669 (Stark County Feb. 20, 1996), was subsequently adopted and incorporated by that court as its opinion in *Campbell v. Plain Twp. Bd. of Zoning Appeals*, Case No. 95 CA 0352, 1996 Ohio App. LEXIS 3715 (Stark County July 1, 1996).

violated township zoning provisions. The *Campbell* case is not directly applicable to your question because it concerned a regional transit authority rather than a county transit authority and, although their powers are similar, they are not identical. Compare R.C. 306.01-.13 (providing for the creation and operation of a county transit authority) with R.C. 306.30-.54 (providing for the creation and operation of a regional transit authority).

Of greater significance, however, is the fact that the *Campbell* case involved a zoning question. The court concluded that the provisions of R.C. 519.211(A) that exempt from township zoning the use of land by any public utility for the operation of its business do not apply to a situation in which a company acting under contract with a regional transit authority places benches bearing advertising at the transit authority's bus stops.⁴ The court of appeals determined that the township's zoning power prevailed over the transit authority's actions on the facts presented, stating that the application of the zoning resolution in that case "merely affects the proprietary business use of the property." *Campbell v. Jackson Township Bd. of Zoning Appeals*, 1996 Ohio App. LEXIS 669, at *5. The court in *Campbell* thus acknowledged that a transit authority may have a proprietary business interest in allowing its property to be used for advertising purposes, but concluded, on the facts presented, that such an interest was subordinate to the township's zoning power.

Nevertheless, the *Campbell* court did state that "[a]dvertising is not a part of the operation of a transit business[.]" and that the lease authorizing the placement of benches containing advertising at the regional transit authority's bus stops "is not a rental for use of a transit facility as contemplated by statute." *Id.* at *4-5. We are not persuaded, however, that these statements preclude the conclusion that, in appropriate circumstances, a county transit system may be permitted to let advertising space on its property, where such action is found to constitute a reasonable exercise of the discretion granted a board of county commissioners to operate the transit system. See generally *Lehman v. City of Shaker Heights; United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.* The *Campbell* case, therefore, does not compel the conclusion that a county transit system is prohibited from letting advertising space on its property. Accordingly, the *Campbell* case is not dispositive of your specific question.

⁴ R.C. 519.211(A) provides as follows:

Except as otherwise provided in division (B) or (C) of this section, [R.C. 519.02-.25] confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or *the use of land by any public utility or railroad, for the operation of its business.* (Emphasis added.)

The Honorable Dean Holman

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In conclusion, it is my opinion, and you are hereby advised that, pursuant to R.C. 306.04, a board of county commissioners that operates a county transit system under R.C. 306.01-.13 may let advertising space on the transit system's property.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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SYLLABUS:

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Pursuant to R.C. 306.04, a board of county commissioners that operates a county transit system under R.C. 306.01-.13 may let advertising space on the transit system's property.