OPINION NO. 80-028

Syllabus:

1. A board of township trustees has the implied power to alienate, by lease, real property owned by the township and determined by the trustees not to be needed for current public use. (1958 Op. Att'y Gen. No. 2363, p. 432 overruled.)

2. Such a lease may not be for a term of unreasonable length and must contain a clause reserving to the township the power to revoke the same should the public interest so require.

3. A board of township trustees is not required to follow competitive bidding procedures leasing real property owned by the township since there is no statutory enactment imposing such a requirement.

To: Arthur M. Elk, Ashland County Pros. Atty., Ashland, Ohio
By: William J. Brown, Attorney General, May 13, 1980

I have before me your request for my opinion wherein you ask the following questions:

1. May a board of township trustees lease real property that it owns as long as it is determined that the real property is not necessary for township purposes and as long as the trustees reserve the power to terminate the lease as the real property becomes needed for a township purpose?

2. If the township trustees have the power to lease real property, may they use their discretion in the term of the lease?

3. If the trustees may lease real property, are there any requirements for competitive bidding in the awarding of said lease?

As a general principle of law, a township, through its trustees, has only such powers as are expressly granted by statute or necessarily implied therefrom. E.g., 1979 Op. Att'y Gen. No. 79-025. The only statutes of which I am aware granting township trustees the power to alienate property are R.C. 505.11 (lease of mineral lands), R.C. 511.03 (lease of town halls), R.C. 517.22 (sale of cemeteries), and R.C. 505.10, which permits a board of township trustees to "sell and convey" property it

does not need for township purposes. No specific statutory authorization exists which generally permits townships to convey a lesser interest than a fee in township property. The Ohio Supreme Court has, however, recognized the power of a governmental subdivision[1] to alienate property implied from the power to take title to, and hold, the same.

The syllabus of Reynolds v. Commissioners of Stark County, 5 Ohio 204 (1831), provides that "[w]here real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could." The case presented the question of the validity of a lease of county property made by the commissioners, the court stating as follows:

> A corporation is an artificial person, and by the terms of its creation it possesses the same capacity, to purchase or to sell, that an individual has who possesses the capacity to contract. This doctrine has been long settled, and repeatedly recognized, from a very early period to the present time. [Citations omitted.] Indeed, so necessarily incidental is this power, that it has been holden (10 Rep. 1), that a corporation can not be created possessing the power of holding without the power of disposing. . . .

5 Ohio at 206-07.

The Reynolds case has been cited with approval in Louisville & Nashville R. R. Co. v. City of Cincinnati, 76 Ohio St. 481, 81 N.E. 983 (1907); First German Reformed Church v. Commissioners of Summit County, 3 Ohio C.C. (n.s.) 303 (Cir. Ct. Summit County 1902); and Nearing v. Toledo Electric Street Ry. Co., 9 Ohio C.C. 596 (Cir. Ct. Lucas County 1893).

A lease of real property by a county was also upheld in Minamax Gas Co. v. State ex rel. McCurdy, 33 Ohio App. 501, 170 N.E. 33 (Scioto County 1929), decided after the enactment of G.C. 2447, which prescribed the method by which county commissioners could sell real estate not needed for county purposes. The court concluded that G.C. 2447 would not alter the county's power to lease property, further stating:

> [I] t appears a forced interpretation to say that the General Assembly, in regulating the sale of county real estate for which the county has no use, intended to inhibit the leasing of property which the county could not sell. This appears to us not only a strained construction, but one not necessary to fully protect the public interests. Until the commissioners find that county real estate is "not needed for public use" all such property must be deemed of some potential use to the county. So long as it has such potential use, the interests of the county do not require its sale, nor does Section 2447 permit its sale. In the absence of a finding that would enable the commissioners to sell, title must be retained by the county, but, under the doctrine of the Reynolds case, supra, there is no reason why it should not be temporarily leased, subject to repossession whenever the public needs so require. The commissioners could not, however, lease for a definite term and thereby embarrass either themselves or their successors in using the property for public purposes. (Emphasis added.)

33 Ohio App. at 507-08, 170 N.E. at 35-36.

The court in Minamax saw G.C. 2447 as a limitation on the Reynolds case—that is, a limitation on the power of a county to alienate property by sale. As G.C. 2447 applied only to sales, however, the court held that Reynolds was still authority for the implied power to dispose of a lesser interest in real property, without the necessity of competitive bidding as required in the case of a sale.

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[1]Each township is a body politic and corporate, with power to "receive and hold real estate by devise or deed. . . ." R.C. 503.01.

Both Reynolds and Minamax make it clear that the power to take title to and hold land implies the power to alienate such land if in the public's best interest, and if the land is not currently needed for public uses. As my predecessor stated in 1924 Op. Att'y Gen. No. 1250, p. 110, 112, it would be "inconsistent with the holding of land for public benefit if it were permitted to lie idle when proper business management would require the same to produce an income for the public use."[2] In accordance with the foregoing, opinions of the Attorney General have concluded that, absent statutes delineating and/or limiting the power, public bodies have the implied power to alienate land not needed for public purposes. See 1974 Op. Att'y Gen. No. 74-020 (joint township district hospital board has implied authority to sell land); 1941 Op. Att'y Gen. No. 3802, p. 393 (township may lease land; however, a lease for 99 years is unquestionably unreasonable); 1935 Op. Att'y Gen. No. 4576, p. 1090 (county's power to lease land); 1935 Op. Att'y Gen. No. 4312, p. 650 (township may grant easements or right-of-way over township land, and need not conduct auction therefor); 1932 Op. Att'y Gen. No. 4588, p. 1006 (board of education may permit temporary use of property it cannot advantageously dispose of by sale); 1931 Op. Att'y Gen. No. 3410, p. 948 (county may lease with reservation to terminate if and when public interests so require); 1924 Op. Att'y Gen. No. 1250, p. 110 (county may lease unused lands).

In 1958 Op. Att'y Gen. No. 2363, p. 432, however, my predecessor opined that "[b]oards of township trustees owning property used for park purposes are without authority to lease such property." For the following reasons, I cannot concur in this conclusion.

Op. No. 2363 first notes that it has been held that the power to sell includes the lesser power to lease, citing for such proposition the Reynolds and Minamax cases, and 1935 Op. No. 4312, 1931 Op. No. 3410, and 1924 Op. No. 1250. Although these opinions of the Attorney General do make the statement that the power to lease may be implied from the power to sell, it is clear that each such statement is based upon a misconception of the rationale underlying the case law. Inasmuch as Reynolds does not even mention any statutory authority for the sale of property by a county, a power derived from the power to sell could not have been the basis for the court's result. And in Minamax, the court states that Reynolds stands for the proposition that "the right to alien follows necessarily as an incident to ownership." 33 Ohio App. at 507, 170 N.E. at 35. Hence, the power to lease (or grant lesser estates in property) is not derivative of an express power to sell; rather, the power to dispose of property is implied from ownership thereof.

Furthermore, my predecessor in Op. No. 2363 stated that the language in Reynolds upon which the Minamax court relied had been changed by statutory and case law, stating that he believed it to be "unnecessary to allude to" such subsequent authority. Id. at 434. Since my predecessor failed to provide citations of authority for this statement, I cannot say with certainty to what he was referring. I assumed in Op. No. 74-020, supra, that statutes enacted providing express authority for the alienation of lands by specified methods constituted the "subsequent authority" to which he alluded. Certainly, with respect to counties, the General Assembly has greatly restricted Reynolds by enacting statutes specifically delineating the interests in land which may be conveyed and the manner by which disposal shall be conducted. See, e.g., R.C. 307.09-.12; R.C. 307.86. However, the General Assembly has not seen fit to similarly restrict this power with respect to townships. Accordingly, I must conclude that, absent some expression of a contrary intent by the legislature, Reynolds and Minamax define the scope of the power of townships to dispose of real property other than by sale.

It also appears that my predeccesor in Op. No. 2363 declined to follow Reynolds because the court stated therein that county commissioners possess the

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[2]Op. No. 1250 was modified by 1935 Op. Att'y Gen. No. 4576, p. 1090, wherein the then-Attorney General agreed that a county had implied power to lease, but further opined that Minamax had altered the conclusion in Op. No. 1250 that competitive bidding would be required.

powers of individuals. I believe, therefore, that the "subsequent authority" to which he referred also included cases stating that commissioners have only such powers as are conferred by statute. This position fails to recognize that the Minamax court expressly stated that county commissioners may exercise only such authority as is granted by the General Assembly, but nonetheless held that counties have the power to alienate property derivative of their power to own the same. My predecessor, moreover, seems to have equivocated in the conclusion reached in Op. No. 2363 by stating at pp. 435-36 that if the "Minimax case would appear to apply to your situation, the lease must be subject to revocation by the board of township trustees," and this right might be exercised at a time when the use of the property by the lessee, board of education, might be adversely affected. I do not believe that the fact that such a lease could be problematical is sufficient justification for the disregarding of case law. In any event, it is my opinion that, absent contrary legislation, Reynolds and Minamax control, and, therefore, township trustees may lease or grant interests in township property not needed for current public use, if such lease or instrument contains a clause reserving the power to revoke the same should the public interest so require. (1958 Op. Att'y Gen. No. 2363, p. 432 overruled.)

Your second question asks whether the township trustees may use their discretion in the term of the lease. I am aware of no limitation upon a township's discretion in determining the length of time property may be leased other than the requirement that the power to revoke be reserved, and that the length of the term not be unreasonable. 1941 Op. No. 3802 (99 years manifestly unreasonable, and, in effect, an attempt to sell the property). Within these limitations then, the trustees may use their discretion.

Your third question inquires whether competitive bidding is required in awarding such a lease. As noted earlier herein, the Supreme Court in Reynolds established the principle of an implied power to alienate property. This power may, as has been done in the case of counties, be limited or controlled by enactments of the General Assembly. The General Assembly has controlled a township's power to sell through R.C. 505.10, but has not so controlled the power to convey lesser interests in realty. Accordingly, the township trustees are not bound to offer the property for lease only after competitive bidding. See Minimax Gas Co., supra (county may lease, subject to repossession when the public needs so require, without competitive bidding); 1935 Op. No. 4576. Of course, the township trustees, in their discretion, may choose to lease by means of competitive bidding if they so desire.

Therefore, it is my opinion, and you are advised, that:

1. A board of township trustees has the implied power to alienate, by lease, real property owned by the township and determined by the trustees not to be needed for current public use. (1958 Op. Att'y Gen. No. 2363, p. 432 overruled.)

2. Such a lease may not be for a term of unreasonable length and must contain a clause reserving to the township the power to revoke the same should the public interest so require.

3. A board of township trustees is not required to follow competitive bidding procedures leasing real property owned by the township since there is no statutory enactment imposing such a requirement.