

February 4, 2014

The Honorable T. Shawn Hervey  
Harrison County Prosecuting Attorney  
Post Office Box 248  
11 West Warren Street  
Cadiz, Ohio 43907

SYLLABUS:

2014-003

1. A board of county commissioners has no authority to transfer real property belonging to the county to an office of economic development.
2. Pursuant to R.C. 1724.10(B), a board of county commissioners may transfer lands or interests in lands owned by the county to an economic development corporation, provided the economic development corporation has been designated an agency of the county pursuant to R.C. 1724.10 and an agreement between the economic development corporation and the county permits such transfers. A board of county commissioners has no authority, however, to transfer real property other than lands or interests in lands owned by the county to an economic development corporation.



# MIKE DEWINE

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OPINION NO. 2014-003

The Honorable T. Shawn Hervey  
Harrison County Prosecuting Attorney  
Post Office Box 248  
11 West Warren Street  
Cadiz, Ohio 43907

Dear Prosecutor Hervey:

You requested an opinion addressing the power of a board of county commissioners to transfer real property in fee simple to either a county office of economic development or a community improvement corporation without competitive bidding or public auction. “Community improvement corporation” includes two separate and distinct categories of nonprofit corporations: economic development corporations and county land reutilization corporations. R.C. 1724.01(A)(1).<sup>1</sup> Following further discussion, you indicated that your inquiry concerns the power of a board of county commissioners to transfer real property in fee simple to a county office of economic development or an economic development corporation and does not concern a county land reutilization corporation.

To address your question, we must consider the authority of a board of county commissioners to convey county real property. As a creature of statute, a board of county commissioners has only the powers expressly conferred upon the board by statute or as may be implied for the purpose of facilitating the exercise of an express power. 2006 Op. Att’y Gen. No. 2006-001, at 2-1; 1999 Op. Att’y Gen. No. 99-016, at 2-122; *accord Geauga Cnty. Bd. of Comm’rs v. Munn Rd. Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993). Title to all county property is vested in the board of county commissioners. *State ex rel. Bd. of Comm’rs v. Allen*, 86 Ohio St. 244, 251, 99 N.E. 312 (1912); *see also Carder v. Bd. of Comm’rs*, 16 Ohio St. 354, 369 (1865) (“[a] devise to the county is a devise to the commissioners of the county, and vests the title in them, for the uses of the county”). Public money and public lands are held in trust for the public benefit and cannot be expended or disposed of without clear authority of law. *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus) (“[a]ll public property and public moneys ... constitute a public trust fund.... Said trust fund can be disbursed only by clear authority of law”). A board of county commissioners may dispose of county property only with the clear authority of law. *Schwing v. McClure*, 120 Ohio

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<sup>1</sup> Prior to 2009, R.C. Chapter 1724 authorized the formation of community improvement corporations. In 2009, the General Assembly authorized the creation of two separate types of community improvement corporations: economic development corporations and county land reutilization corporations. Sub. S.B. 353, 127th Gen. A. (2008) (eff. Apr. 7, 2009).

St. 335, 342, 166 N.E. 230 (1929) (“[p]ublic officers intrusted with public funds or public property cannot give them away, nor can they pass title to public property except when acting within their strict powers. Property devoted to public use can only be disposed of by express authority”).

A board of county commissioners’ authority to dispose of county real property is found primarily in R.C. 307.09 and R.C. 307.10. 2006 Op. Att’y Gen. No. 2006-001, at 2-4 to 2-5; *see also* 1999 Op. Att’y Gen. No. 99-016, at 2-123. “If the interests of the county so require, the board of county commissioners may sell any real property belonging to the county and not needed for public use, including all or portions of buildings acquired by the board to house county offices.” R.C. 307.09(A).

R.C. 307.10(A) requires competitive bidding or public auction for the sale of county real property pursuant to R.C. 307.09:

No sale of real property ... shall be made unless it is authorized by a resolution adopted by a majority of the board of county commissioners. *When a sale of real property as provided by [R.C. 307.09] is authorized, the board may either deed the property to the highest responsible bidder, after advertisement once a week for four consecutive weeks in a newspaper of general circulation in the county or as provided in [R.C. 7.16], or offer the real property for sale at a public auction, after giving at least thirty days’ notice of the auction by publication in a newspaper of general circulation in the county.* The board may reject any and all bids. The board may, as it considers best, sell real property pursuant to this section as an entire tract or in parcels. The board, by resolution adopted by a majority of the board, may lease real property, in accordance with [R.C. 307.09(A)], without advertising for bids. (Emphasis added.)

R.C. 307.10(B) permits a board of county commissioners to transfer real property, without competitive bidding or public auction, only in limited circumstances:

The board, by resolution, may transfer real property in fee simple belonging to the county and not needed for public use to the United States government, to the state or any department or agency thereof, to municipal corporations or other political subdivisions of the state, to the county board of developmental disabilities, or to a county land reutilization corporation organized under [R.C. Chapter 1724] for public purposes upon the terms and in the manner that it may determine to be in the best interests of the county, without advertising for bids. The board shall execute a deed or other proper instrument when such a transfer is approved.

*See also* 2006 Op. Att’y Gen. No. 2006-001, at 2-6 (“any conveyance of real property by the board of county commissioners under R.C. 307.09 must comply with the procedural requirements set forth in R.C. 307.10”) (quoting 2004 Op. Att’y Gen. No. 2004-012, at 2-92)).

Your question asks whether a board of county commissioners may transfer real property without competitive bidding or sale at public auction to either a county office of economic development or an economic development corporation. An office of economic development is an

entity distinct from an economic development corporation and created under separate provisions of the Revised Code. *See* R.C. 307.07 (office of economic development); R.C. 1724.01(A)(2) (economic development corporation). While both might fulfill similar functions in practice, each has different rights and obligations under law and therefore will be addressed separately by this opinion.

### **Transfer of County Real Property to an Office of Economic Development**

A board of county commissioners does not have the authority to transfer real property belonging to the county to an office of economic development without competitive bidding or public auction. An office of economic development is an entity established by a board of county commissioners under R.C. 307.07 “to develop and promote plans and programs designed to assure that county resources are efficiently used, economic growth is properly balanced, and that county economic development is coordinated with that of the state and other local governments.” R.C. 307.07(A). A board of county commissioners may hire a director of economic development to perform the duties prescribed under R.C. 307.07(B). R.C. 307.07(A). Instead of hiring a director, a board of county commissioners may enter into an agreement with a county or regional planning commission, the Ohio State University extension, or a public or private nonprofit organization to carry out the functions and duties of the director set forth in R.C. 307.07(B). R.C. 307.07(A)(1)-(3).

The question of whether a board of county commissioners may transfer county property to an office of economic development in fee simple without competitive bidding or public auction is similar to the question addressed in 2006 Op. Att’y Gen. No. 2006-001. The 2006 opinion considered whether a board of county commissioners could “deed” county property under R.C. 307.07 to its office of economic development or to the nonprofit corporation selected to operate the office of economic development without competitive bidding or public auction. 2006 Op. Att’y Gen. No. 2006-001, at 2-6 to 2-8. The board of county commissioners intended that either transferee (the office of economic development or the nonprofit management corporation) sell the property, without competitive bidding or public auction, to a particular organization at a price already agreed upon by the board of county commissioners and the purchaser. *Id.* at 2-7.

The opinion first addressed whether the board of county commissioners had “the authority to simply transfer fee simple title to certain county property to the county’s office of economic development.” 2006 Op. Att’y Gen. No. 2006-001, at 2-7. Noting that a board of county commissioners must possess statutory authority to make such a transfer, the opinion “found no statute ... that authorizes a board of county commissioners to transfer fee simple title to county property to the county’s office of economic development.” *Id.* The opinion explained:

Although the General Assembly has also authorized a board of county commissioners to transfer fee simple title to county real property that is not needed for public use to certain specified entities, it has not authorized the transfer of the fee simple title to county property to the county’s office of economic development or to a nonprofit organization that operates the county’s office of economic development. We must assume, therefore, that the General Assembly does not intend that a board of county commissioners have authority to transfer county property to the county office

of economic development or to a nonprofit corporation that operates the county office of economic development.

*Id.* at 2-8 (footnote omitted).

Having determined that a board of county commissioners has no authority to transfer title to county property to the county office of economic development, the opinion then addressed such a transfer of county property without competitive bidding or public auction. The 2006 opinion concluded that “[a] board of county commissioners has no authority to transfer title to county property to its office of economic development or to a nonprofit corporation operating that office for the purpose of the transferee’s selling the property, without competitive bidding or public auction.” 2006 Op. Att’y Gen. No. 2006-001 (syllabus).

We discern no reason to depart from the analysis set forth in 2006 Op. Att’y Gen. No. 2006-001. No Ohio court has reached a conclusion contrary to the 2006 opinion. Further, no statute provides a board of county commissioners authority to transfer county property to the county office of economic development, regardless of whether the county applies competitive bidding or public auction to the transfer. *But cf.* R.C. 307.10(B) (authorizes board of county commissioners to transfer real property without advertising for bids to specific government entities). We conclude that a board of county commissioners has no authority to transfer real property belonging to the county to an office of economic development.

### **Transfer of County Real Property to Economic Development Corporation**

An economic development corporation is one type of community improvement corporation that may be formed under R.C. Chapter 1724. An economic development corporation is organized for the purpose of “[a]dvancing, encouraging, and promoting the industrial, economic, commercial, and civic development of a community or area.” R.C. 1724.01(B)(1); *see also* R.C. 1724.01(A)(2).

An economic development corporation is a nonprofit corporation organized under the provisions of R.C. Chapter 1724 that is subject to the general nonprofit corporation provisions of R.C. Chapter 1702, to the extent that they are not inconsistent with R.C. Chapter 1724. R.C. 1724.01(A)(1)-(2); R.C. 1724.08. The articles of incorporation of an economic development corporation must be approved by the Attorney General as being in accordance with R.C. Chapter 1724 before they are filed and recorded by the Secretary of State. R.C. 1724.04. An economic development corporation also must submit an annual financial report to the Auditor of State and is subject to audit by the Auditor of State. R.C. 1724.05. An economic development corporation enjoys basic corporate powers to, *inter alia*, “purchase, receive, hold, manage, lease, lease-purchase, or otherwise acquire and to sell, convey, transfer, lease, sublease, or otherwise dispose of real and personal property.” R.C. 1724.02(C); *see also* R.C. 1724.08.

Pursuant to R.C. 1724.10, “a county, one or more townships, one or more municipal corporations, two or more adjoining counties, or any combination of the foregoing,” may designate an economic development corporation “as the agency of each such political subdivision for the industrial, commercial, distribution, and research development in such political subdivision” when the legislative

authority has determined that it is the policy of the political subdivision “to promote the health, safety, morals, and general welfare of its inhabitants” through the designation of the economic development corporation. R.C. 1724.10(A)(1). A county also may designate an economic development corporation “as the agency for the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in the county.” R.C. 1724.10(A)(2).<sup>2</sup>

Following a designation as described in R.C. 1724.10(A), a political subdivision may enter into an agreement with the economic development corporation to provide the economic development corporation one or more of the following types of authority: (1) authority to prepare a plan for the political subdivision and participate as the agency of the political subdivision in carrying out the plan, R.C. 1724.10(B)(1); (2) authority to sell or lease lands or interests in lands owned by the political subdivision and not needed for purposes of the subdivision, R.C. 1724.10(B)(2); and (3) authority to acquire lands or interests in lands from the political subdivision or others for specified uses, R.C. 1724.10(B)(3). An agreement under R.C. 1724.10(B)(3) may authorize an economic development corporation to accept lands and interests in lands conveyed to it by a political subdivision, for the consideration and upon the terms established in the agreement, if the land or interests are “not to be required by the political subdivision for its purposes,” and the conveyance will promote the welfare of the people of the political subdivision, stabilize the economy, provide employment, assist in the development to the benefit of the people of the political subdivision, or will promote the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property in the subdivision. R.C. 1724.10(B)(3).

R.C. 1724.10(B)(3) not only permits an economic development corporation to acquire lands from a political subdivision, it also authorizes a political subdivision to transfer lands and interests in lands owned by the political subdivision to the economic development corporation. Importantly, the agreement between the county and an economic development corporation may authorize the board of county commissioners to convey lands or interests in lands to the economic development corporation without advertising and receipt of bids. *Id.* “Any conveyance or lease by the political subdivision to the community improvement corporation shall be made without advertising and receipt of bids.” *Id.*

To determine whether a board of county commissioners may transfer real property in fee simple to an economic development corporation without competitive bidding or public auction, we must consider R.C. 1724.10 as well as R.C. 307.09 and R.C. 307.10. R.C. 1724.10 permits a county to convey only “lands and interests in lands” owned by the county to an economic development corporation. It does not permit a county to convey any buildings, equipment, or improvements on that land. 1973 Op. Att’y Gen. No. 73-060, at 2-230 (“R.C. 1724.10(C) speaks only to the sale of ‘land.’” Hence, the board of county commissioners may sell only the land, not the buildings and equipment, to

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<sup>2</sup> Additionally, a political subdivision may designate an economic development corporation “as the agency for the reclamation, rehabilitation, and reutilization of vacant, abandoned, tax-foreclosed, or other real property within the political subdivision” if the political subdivision enters into an agreement with an economic development corporation that has been designated as the agency of a county under R.C. 1724.10(A)(2). R.C. 1724.10(A)(3).

a community improvement corporation, pursuant to R.C. 1724.10(C)"). R.C. 307.09 and R.C. 307.10, on the other hand, address the transfer of "real property" belonging to a county. "Real property" includes land as well as any buildings, equipment, or improvements on the land. *See Random House Webster's Unabridged Dictionary* 1607 (Deluxe ed. 2001) ("real property" means "an estate or property consisting of lands and of all appurtenances to lands, as buildings, crops, or mineral rights"); *Black's Law Dictionary* 1337 (9th ed. 2009) (defining "real property" as "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land"). Thus, R.C. 307.09 and R.C. 307.10 are broader in scope than R.C. 1724.10(B) and permit the county to convey more than what the county may convey under R.C. 1724.10(B).

The provisions of R.C. 307.10 and R.C. 1724.10 are in conflict insofar as they impose different requirements for the disposition of lands belonging to the county. As you note in your letter, R.C. 307.10(A) requires competitive bidding or public auction for the sale of real property, which includes lands, belonging to the county. R.C. 1724.10(B)(3) authorizes a county to convey lands to an economic development corporation in certain circumstances without advertising and receipt of bids. A well-established rule of statutory construction is that when two statutory provisions conflict, the special provision, enacted later in time, prevails over a more general, preexisting provision. *See* R.C. 1.51; R.C. 1.52; *Davis v. State Pers. Bd. of Review*, 64 Ohio St. 2d 102, 105, 413 N.E.2d 816 (1980). R.C. 307.09 and R.C. 307.10 address the sale of county real property in general. R.C. 1724.10, on the other hand, addresses the specific transfer of county land between a political subdivision, including a county, and an economic development corporation when an agreement between the two entities gives the economic development corporation authority to acquire the land. R.C. 1724.10(B)(3). Further, R.C. 1724.10(B) was enacted in 1965, *see* 1931 Ohio Laws 572 (Am. H.B. 941, eff. Nov. 1, 1965), whereas R.C. 307.10 was carried over from the General Code, *see* 1914-1915 Ohio Laws 399 (H.B. 202 approved May 27, 1915) (enacting G.C. 2447-1, now R.C. 307.10). The specific and more recently enacted requirements of R.C. 1724.10(B)(3) prevail over the general provisions of R.C. 307.09 and R.C. 307.10 with regards to conveyance of lands and interests in lands belonging to the county to an economic development corporation. Therefore, pursuant to R.C. 1724.10(B), a board of county commissioners may transfer lands or interests in lands owned by the county to an economic development corporation without public advertising and receipt of bids, provided the economic development corporation has been designated an agency of the county pursuant to R.C. 1724.10 and an agreement between the corporation and the county permits such transfers.<sup>3</sup>

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<sup>3</sup> This conclusion is supported by 1973 Op. Att'y Gen. No. 73-060, which addressed a transfer of county land that formerly constituted a county experimental farm to a community improvement corporation formed under R.C. Chapter 1724. A board of county commissioners wanted to sell or lease the farm to the community improvement corporation pursuant to R.C. 1724.10(B) or (C) without public advertisement or bidding. 1973 Op. Att'y Gen. No. 73-060, at 2-228. R.C. 903.21, however, provided for the disposal of unused county experimental farms by public auction to the highest bidder. 1973 Op. Att'y Gen. No. 73-060, at 2-228. The opinion reasoned that R.C. 1724.10 prevailed over R.C. 903.21. 1973 Op. Att'y Gen. No. 73-060, at 2-229 to 2-230. R.C. 1724.10 was a special

There is no authority, however, for a board of county commissioners to transfer real property other than lands or interests in lands owned by the county to an economic development corporation. Nothing in R.C. 1724.10, R.C. 307.09, or R.C. 307.10 authorizes a board of county commissioners to make such a transfer to an economic development corporation. *But see* R.C. 307.78 (authorizing board of county commissioners to make contributions to a community improvement corporation, including moneys, supplies, equipment, office facilities, and “other personal property or services”). *But cf.* R.C. 307.10(B) (authorizing board of county commissioners to transfer real property in fee simple to a county land reutilization corporation). Therefore, a board of county commissioners has no authority to transfer real property other than lands or interests in lands owned by the county as permitted by R.C. 1724.10(B).

**2006 Op. Att’y Gen. No. 2006-001 and 2003 Op. Att’y Gen. No. 2003-037**

You also have asked whether 2006 Op. Att’y Gen. No. 2006-001 and 2003 Op. Att’y Gen. No. 2003-037 conflict and, if so, which opinion is determinative with regard to your question. The two opinions do not conflict, but instead address two separate types of economic development entities. As detailed above, 2006 Op. Att’y Gen. No. 2006-001 examines the authority of a board of county commissioners to transfer real property, without competitive bidding or public auction, to an office of economic development established under R.C. 307.07. This opinion, therefore, is directly relevant to answering the first part of your question. The 2006 opinion concludes that a board of county commissioners does not have statutory authority to transfer real property without competitive bidding or public auction to its office of economic development. 2006 Op. Att’y Gen. No. 2006-001 (syllabus).

2003 Op. Att’y Gen. No. 2003-037 examines the authority of a community improvement corporation, established under R.C. Chapter 1724, to dispose of real property without competitive bidding or public auction. This opinion concludes that a community improvement corporation is not bound by the competitive bidding requirements in R.C. Chapter 307 and may dispose of real property it holds without competitive bidding or public auction pursuant to R.C. Chapter 1724, absent an agreement to the contrary under R.C. 1724.10. 2003 Op. Att’y Gen. No. 2003-037, at 2-312 to 2-315. Although the 2003 opinion discusses a community improvement corporation, it does not address the question you have posed. You have asked about the authority of a board of county commissioners to transfer real property to a specific type of community improvement corporation, *i.e.*, an economic development corporation, or to an office of economic development established under R.C. 307.07. Therefore, 2003 Op. Att’y Gen. No. 2003-037 is not determinative of your question.

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provision of law, as opposed to one of general application, and it was the more recently enacted statute. 1973 Op. Att’y Gen. No. 73-060, at 2-229 to 2-230. Therefore, the opinion concluded that a board of county commissioners had authority to convey the land to a community improvement corporation without public advertising and receipt of bids under R.C. 1724.10. 1973 Op. Att’y Gen. No. 73-060 (syllabus).



**Conclusions**

For the foregoing reasons, it is my opinion, and you are hereby advised that:

1. A board of county commissioners has no authority to transfer real property belonging to the county to an office of economic development.
2. Pursuant to R.C. 1724.10(B), a board of county commissioners may transfer lands or interests in lands owned by the county to an economic development corporation, provided the economic development corporation has been designated an agency of the county pursuant to R.C. 1724.10 and an agreement between the economic development corporation and the county permits such transfers. A board of county commissioners has no authority, however, to transfer real property other than lands or interests in lands owned by the county to an economic development corporation.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is fluid and cursive, with the first name "Michael" being more prominent than the last name "Dewine".

MICHAEL DEWINE  
Ohio Attorney General