OPINION NO. 66-021

Syllabus:

A contract between a board of county commissioners and a private person which would prevent such board from offering mortgage revenue bonds to the trustees, commissioners or other officers who have charge of the sinking fund or bond retirement fund of the subdivision, which would control the discretion of the board to determine which method of financing it would use, by requiring the passage of legislation presented by a private person party to such contract is void and of no effect.

To: Donald D. Simmons, Wood County Pros. Atty., Bowling Green, Ohio
By: William B. Saxbe, Attorney General, January 19, 1966

I have your request for opinion of December 9, 1965, which reads in part:

> "The Board of County Commissioners of Wood County, Ohio, has under consideration the construction and extension of sewer and water lines in the unincorporated area of Wood County. A firm of consulting engineers has been employed and several different proposals are under study.
>
> "* * *   * * *   * * *
>
> "I respectfully request your opinion as to the legality of the enclosed contract and also request your opinion as to whether or not such a contract, if entered into, would be null and void and unenforceable."

Your request requires consideration of the validity of a contract entered into by a board of county commissioners which could require such board of county commissioners to sell all mortgage revenue bonds issued by it during a forty-eight month period to a specified private person, party to such contract. Numbered Paragraphs ten and eleven, page two of the subject contract provides:

> "10. If for any reason these bonds have not been delivered to us within 48 months from the date of this agreement, then either of us shall have the

right upon written notice to the other to withdraw from the agreement. In the absence of written notification this agreement shall continue in full force and effect according to its terms and be applicable to any projects that the County undertakes during that period of time and underwrites on a mortgage revenue bond basis. It is understood that if we withdraw we shall not be reimbursed for any of the expenses we shall have incurred, and in such event, we shall reimburse you for any expenses incurred by you in direct contacts with this office. Should you withdraw it is agreed that you shall compensate us as hereinafter provided in paragraph 11 of this agreement.

"11. If for any reason not presently foreseen by either of us the bonds for these projects shall be issued but not sold or delivered to us as provided in this agreement, or should the County proceed at that time to underwrite the project or projects from the issuance and sale of tax bonds to the exclusion of mortgage revenue bonds, it is mutually agreed by and between us that we shall be reimbursed for all the expenses we have incurred, and in addition thereto shall be compensated by the payment of a sum equal to 1½% of the total face amount of bonds issued."

Insofar as this contract requires the sale of all mortgage revenue bonds issued by the board of county commissioners to be sold to a specified private person it is void and of no legal effect.

Section 133.34, Revised Code, provides in material part:

"Before selling any notes or bonds of a subdivision, the taxing authority shall offer such notes or bonds at par and accrued interest to the trustees, commissioners, or other officers who have charge of the sinking fund or bond retirement fund of the subdivision, and may offer them at par and accrued interest to the officers in charge of the police relief and pension fund, firemen's relief and pension fund, or sanitary police pension fund of the subdivision, or to the officers designated in section 731.57 of the Revised Code, or to a similar treasury investment board provided for or authorized by a municipal charter, and when so offered, such officers shall have the option of purchasing said notes or bonds or rejecting them.* * *"

Section 133.35, Revised Code, provides in material part:

"If the notes or bonds are rejected by the officers mentioned in section 133.34 of the Revised Code, then notes having a maturity of one year or less may be sold at private sale at not less than par and accrued interest, and all bonds and notes having a maturity of more than one year shall be sold to the highest bidder, after being advertised once a week for three consecutive weeks on the same day of the week. * * *"

There is no provision in the proposed contract for offering the bonds to sinking fund or bond retirement fund trustees or officers, and there is no provision for competitive bidding as required under Section 133.35, supra. Recognizing that this proposal may be interpreted merely as a continuing offer to purchase revenue bonds which does not prevent compliance with Sections 133.34 and 133.35, supra, nevertheless the agreement seeks to bind the commissioners to sell at a private sale. Thus it provided in numbered paragraph eleven of the proposal:

> "If for any reason not presently foreseen by either of us the bonds for these projects shall be issued.but not sold or delivered to us as provided in this agreement, or should the county proceed at that time to underwrite the project or projects from the issuance and sale of tax bonds to the exclusion of mortgage revenue bonds, it is mutually agreed by and between us that we shall be reimbursed for all the expenses we have incurred, and in addition thereto shall be compensated by the payment of a sum equal to 1½% of the total face amount of bonds issued."

It will be observed that, if revenue bonds are issued and not sold to private person, party to the contract, the county must reimburse such private person for all of its expenses and, in addition, 1½% of the face amount of the bonds.

It is my opinion this proposal is not a continuing offer to purchase but is a contract to sell and is outside the authority of the Board of County Commissioners. Even if interpreted as a mere continuing offer to purchase, however, it is my opinion that in the operation of this proposal, and particularly paragraph eleven, quoted above, largely destroys the purpose and effectiveness of competitive bid requirements and is void as against public policy.

There is a suggestion in the first paragraph of the subject contract that the provisions thereof are applicable only to mortgage revenue bonds to be issued for the purpose of constructing and extending sewers and sewage disposal systems and water supply systems. If the contract is given this limited interpretation, it is my opinion that it is nevertheless void and of no legal effect as against public policy.

Section 133.06, Revised Code, provides, in part:

> "Any county which acquires, constructs, or extends any sewers, sewage treatment, or disposal works or any public water supply or waterworks system * * * may issue revenue bonds therefor beyond the general limit of bonded indebtedness.
> * * *
>
> "Such bonds * * * shall be signed and sealed as provided in sections 133.01 to 133.48 of the Revised Code, and may be sold as provided in such sections, <u>or at private sale</u> at the option of the county. * * *"
>
> (Emphasis added)

This section removes the requirement that revenue bonds for the enumerated purposes be offered first to sinking fund or bond retirement fund trustees or officers and the requirement of competitive bidding, leaving the manner of the sale of such bonds to the discretion of the board of county commissioners. The provisions of the subject contract would control this discretion and require the board of county commissioners to sell mortgage revenue bonds at private sale to a private person, party to such contract, during a forty-eight month period. In regular course at least one election of a county commissioner would occur during this period. The contract, by its terms, would bind any successor elected and would control the discretion of such a board given by Section 133.06, supra, to determine the manner of sale of certain bonds. Such agreement by the board to control either the discretion of itself or the discretion of any successor members is void as against public policy. The Third District Court of Appeals succinctly expressed this policy in the first paragraph of the syllabus of State ex rel. Hubbard v. Hilty, 31 Ohio Law Abs., 538 (1940):

> "A board of county commissioners is inhibited by law from making any agreement which has the effect of restraining it or its successors in office from exercising any of the discretionary powers vested in it or from performing any of the duties imposed on it by law."

The contract in question would, by the provisions of numbered paragraph eleven, set out supra, also control the discretion of the board to determine whether "tax bonds" or revenue bonds should be issued for the enumerated purposes. In addition to controlling the discretion of the board of county commissioners, numbered paragraph five, pages one and two, of the contract would control the legislative function of the board. That paragraph provides, in part:

> "We agree to retain these bond attorneys at our own expense and to have them prepare insofar as possible, in cooperation with your Attorney, all the required legislation that need be passed for the issuance of these bonds, and you agree to take such steps and adopt such legislation as they furnish for the lawful issuance of the bonds."

This attempt to control the legislative function of the board of county commissioners is clearly void as against the public policy of freedom of decision of a legislative body.

Accordingly, it is my opinion that a contract between a board of county commissioners and a private person which would prevent such board from offering mortgage revenue bonds to the trustees, commissioners or other officers who have charge of the sinking fund or bond retirement fund of the subdivision, which would control the discretion of the board to determine which method of financing it would use, by requiring the passage of legislation presented by a private person party to such contract is void and of no effect.