OPINION NO. 2008-023

Syllabus:

2008-023

A board of county commissioners has no authority to transfer to the abutting private property owners, without following the competitive bidding procedures prescribed by R.C. 307.10, the county's fee interest in real property no longer needed by the county for highway purposes, regardless of the appraised value of such property.

To: Robert J. Batchelor, Coshocton County Prosecuting Attorney, Coshocton, Ohio
By: Nancy H. Rogers, Attorney General, July 3, 2008

You have requested an opinion of the Attorney General concerning the authority of the county to sell real property that the county no longer needs. You have explained that the property was formerly part of a county road and is owned in fee simple by the county. Once the county straightened the path of this particular road, portions of the former road were no longer needed for highway purposes. You further note that the unneeded property is an irregular tract that crosses property owned by a private landowner. According to an appraisal ordered by the county, the property has an estimated market value of zero.

Given these facts, you question whether the county may simply convey the property to the abutting landowners without consideration and without going through the bidding or public auction process required by R.C. 307.10.[1] For the reasons that follow, we conclude that the county does not have authority to convey this property in the manner you describe.

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[1] The court in *Lawrence Railroad Co. v. Williams*, 35 Ohio St. 168, 171-72 (1878), explained the interests in public roads outside of municipalities, as follows:

> As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. . . . . These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance.

In the situation you describe, however, the county owns the fee to the property over which the road formerly passed. Thus, when the county discontinued using portions of the property for road purposes, ownership of the property did not simply revert, free of the former easement, to the abutting property owners.

Title to County Real Property in Board of County Commissioners

We begin by noting that title to all county property is vested in the county's board of commissioners. *See State ex rel. Bd. of County Comm'rs v. Allen*, 86 Ohio St. 244, 251, 99 N.E. 312 (1912) (title to all county property is vested in the county's board of commissioners); *Carder v. Board of Comm'rs*, 16 Ohio St. 353, 369 (1865) (stating, in part, ''[t]he board of county commissioners is the body—the *quasi* corporation—in whom is vested by law the title of all the property of the county''). As a creature of statute, a board of county commissioners may exercise only those powers granted by statute. *See Geauga County Bd. of Comm'rs v. Munn Road Sand & Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696 (1993) (''[c]ounties . . . may exercise only those powers affirmatively granted by the General Assembly'').

The fundamental duties of boards of county commissioners regarding county property were summarized in 2006 Op. Att'y Gen. No. 2006-001 at 2-4, in part, as follows:

> [A] board of county commissioners holds county property as a public trust that the board may disburse only by clear authority of law. *Schwing v. McClure*, 120 Ohio 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''); *State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 276, 119 N.E. 822 (1918) (''[f]inally we have come to regard all public property and all public moneys as a public trust. The public officers in temporary custody of such public trusts are the trustees for the public, and all persons undertaking to deal with and participate in such public trust do so at their peril; that is, the rights of the public, as beneficiaries, are paramount to those of any private person or corporation''). *See State ex rel. Locher v. Menning*, 95 Ohio St. 97, 99, 115 N.E. 571 (1916) (''county commissioners, in their financial transactions, are invested only with limited powers, and . . . they represent the county only in such transactions as they may be expressly authorized so to do by statute. The authority to act in financial transactions must be clear and distinctly granted''). Thus, in the disposition of county property, a board of county commissioners has only those powers clearly and distinctly granted to it by the General Assembly

Thus, whether a board of county commissioners may dispose of county property in the manner you describe depends upon whether it possesses clear statutory authority to do so.

Disposition of Unneeded County Real Property

The General Assembly has afforded counties several options for the disposition of county real property that is no longer needed for public use. Under R.C. 307.09(A), a board of county commissioners may sell or lease such property as

provided therein. The board may also grant leases, rights, and easements in such property to the United States government, to the state, or to political subdivisions for various purposes. R.C. 307.09(B). In addition, the board may grant such leases, rights, or easements to certain privately-owned utilities or to certain nonprofit corporations for the specific purposes set forth in R.C. 307.09(B). Grants under R.C. 307.09(B) "may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the county." *Id.* As further provided, in part, by R.C. 307.092:

> Notwithstanding section 307.09 of the Revised Code, the board of county commissioners may sell, lease, or transfer any real property belonging to the county and not needed for public use to a nonprofit senior citizens' organization to be used for public purposes involving the provision of housing, health, social services, or recreational activities for the benefit of older persons, upon such terms and conditions as may be agreed upon by the board of county commissioners and the organization.

Thus, the General Assembly has granted boards of county commissioners various options for the disposition of unneeded county real property.[2]

The General Assembly has also prescribed the methods by which a board of county commissioners may exercise the options available to it under R.C. 307.09. According to R.C. 307.10(A):

> No sale of real property, or lease of real property used or to be used for the purpose of airports, landing fields, or air navigational facilities, or parts thereof, as provided by section 307.09 of the Revised Code 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 section 307.09 of the Revised Code 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 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 division (A) of section 307.09 of the Revised Code, *without advertising for bids.* (Emphasis added.)

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[2] *See generally, e.g.*, R.C. 307.091 (authorizing a board of county commissioners to "sell, lease, or transfer all or any part of the property and assets of a hospital or medical and health care facility or institution owned by the county to a medical school or college established and supported by this state, upon such terms and conditions as may be agreed by the board of county commissioners and the board of trustees governing such medical school or college and subject to the approval of the Ohio board of regents").

Thus, in the sale of real property under R.C. 307.09, R.C. 307.10(A) authorizes a board of county commissioners to advertise for bids and accept the highest responsible bidder, to advertise and conduct a public auction for the sale of the property, or, in either case, to reject any and all bids. [3] Except as authorized by R.C. 307.10(B), a board of county commissioners has no authority under R.C. 307.10 simply to transfer the county's fee interest in real property to a private party without advertising for bids or conducting a public auction in accordance with R.C. 307.10(A).[4]

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[3] Although not applicable to the situation you describe, R.C. 307.10 also authorizes a board of county commissioners to engage in the specific transactions described therein without advertising for bids, as follows:

(B) 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, or to the *county board of mental retardation and developmental disabilities*, 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.

(C) The board, by resolution adopted by a majority of the board, may grant *leases, rights, or easements* to the *United States* government, to the *state* or any department or agency thereof, or to *municipal corporations and other political subdivisions* of the state, or to *privately owned electric light and power companies, natural gas companies, or telephone or telegraph companies for purposes of rendering their several public utilities services*, in accordance with division (B) of section 307.09 of the Revised Code, *without advertising for bids*. When such grant of lease, right, or easement is authorized, a deed or other proper instrument therefor shall be executed by the board. (Emphasis added.)

[4] *See generally, e.g.*, 2006 Op. Att'y Gen. No. 2006-001 (syllabus) (''[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, to a buyer previously selected by the county commissioners at a price agreed upon by the buyer and the county commissioners, even if the transferee remits to the county commissioners the purchase price paid by the buyer''); 1999 Op. Att'y Gen. No. 99-016 (syllabus) (''1. If a board of county commissioners wishes to convey to a private nonprofit county historical society the title to real property consisting of an old jail facility, the board must sell the property in accordance with R.C. 307.09 and R.C. 307.10. 2. To sell real property pursuant to R.C. 307.09, the board of county commissioners must determine that the property is not needed for public use and that the interests of the county require its sale. 3. To sell real property pursuant to R.C. 307.10, a majority of the board of county commissioners must adopt a resolution authorizing the sale. The sale must be made either at

Disposition of Unneeded County Real Property Used for Highway Purposes

The General Assembly has specifically provided for the disposition of a county's fee interest in real property that is owned by a county for highway purposes and that is no longer needed for such purposes. R.C. 5547.05 states, in pertinent part:

> *The board of county commissioners of any county may convey the fee simple estate* or any lesser estate or interest in, or permit the use of, for such period as it shall determine, *any lands owned by such county and acquired or used for highways,* bridges, or culverts, *or owned by such county in connection with highways or as incidental to the acquisition of land for highways, provided that* said board shall determine and enter its determination on its journal, that the property or interest so to be conveyed or made subject to a permit to use, is *not needed by the county for highway purposes.* Such conveyance or permit to use may be to the grantee or permittee and his or its successors and assigns and shall be of such portion of such lands as said board shall determine, which shall be described in the deed or other instrument of conveyance and in any permit to use, and may include or be limited to, areas or space on, above, or below the surface, and may include the grant of easements or other interests in any such lands not so conveyed or made subject to a permit to use, for use by the grantee for buildings or structures or other uses and purposes, and for the support of buildings or structures constructed or to be constructed in or on the lands, areas, or space conveyed or made subject to a permit to use.
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> *All such conveyances or grants or permits to use shall be made with competitive bidding as required by section 307.10* of the Revised Code, except that competitive bidding shall not be required if such conveyance, grant, or permit to use is to be made to the United States of America or this state, or any political subdivision, taxing district, department, commission, board, institution, authority, or other agency of either. (Emphasis added.)

R.C. 5547.05 thus authorizes a board of county commissioners that owns a fee interest in real property used for highway purposes, upon determining that such property is no longer needed by the county for highway purposes, to dispose of the

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public auction or pursuant to competitive bidding, after appropriate public notice''); 1965 Op. Att'y Gen. No. 65-126 (syllabus, paragraph 2) (''[b]oards of county commissioners are authorized by [R.C. 307.09] to sell real estate belonging to the county only where such real property is not needed for public use and the interests of the county require such sale and any sale of such real property made pursuant to a resolution adopted by such board must be made in accordance with [R.C. 307.10]''), *questioned, on other grounds, in* 1987 Op. Att'y Gen. No. 87-069.

county's fee or any lesser interest in that property. R.C. 5547.05, however, also mandates, with exceptions not here applicable, that any such conveyance or grant "be made with competitive bidding," as required by R.C. 307.10. Again, the General Assembly has not authorized a board of county commissioners simply to transfer to abutting private property owners, without using the competitive bidding process described in R.C. 307.10, the county's fee interest in real property the county no longer needs for highway purposes.

You have indicated that the value of the real property that the county no longer needs for highway purposes has been appraised at a market value of zero. You question whether the county commissioners may dispense with the competitive bidding process in the disposition of this property because of its appraised market value.

In addressing this concern, we first note that R.C. 307.10 contains no express exception from the competitive bidding process of R.C. 307.10 for the sale of parcels of real property with an appraised market value that is less than a specific sum. R.C. 307.12(B), on the other hand, authorizes a board of county commissioners to dispose of unneeded county personal property, valued at $2,500 or less, in specified ways, including certain methods that do not entail competitive bidding. Because the General Assembly expressly exempted from competitive bidding the disposition of county personal property below a fixed value, but did not provide a similar exemption for county real property of a certain value, we must conclude that the General Assembly intended no such exemption. *See generally Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (the General Assembly, "[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended"). We conclude, therefore, that a board of county commissioners has no authority to transfer to the abutting property owners without consideration the county's fee interest in real property that is no longer needed for highway purposes, even if the property has been appraised as having no market value, but may convey such real estate only by using the competitive bidding process prescribed by R.C. 307.10. *See* 1957 Op. Att'y Gen. No. 318, p. 91 (syllabus, paragraph 1) ("[a] board of county commissioners selling county owned land under the provisions of [R.C. 307.09] must proceed in compliance with [R.C. 307.10], and such sale cannot be for nominal consideration if there is any higher bid"); 1935 Op. Att'y Gen. No. 4198, p. 487 (syllabus, paragraph 2) ([a] board of county commissioners is without authority to sell real estate belonging to the county to a board of education within the county or to anyone else, without complying with the terms of [G.C. 2447 (current version at R.C. 307.09) and G.C. 2447-1 (current version at R.C. 307.10)] with respect to the passage of the proper resolution and the advertising for bids as fixed by the statute, regardless of the value of said property").

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that a board of county commissioners has no authority to transfer to the abutting private property owners, without following the competitive bidding procedures prescribed

by R.C. 307.10, the county's fee interest in real property no longer needed by the county for highway purposes, regardless of the appraised value of such property.