

May 24, 2013

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

SYLLABUS:

2013-019

1. Pursuant to R.C. 307.12, R.C. 6103.02, and R.C. 6103.20, a board of county commissioners may sell water to oil and gas drilling companies.
2. A board of county commissioners may not enter into a multi-year contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.



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OPINION NO. 2013-019

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

Dear Prosecutor Hervey:

You have requested an opinion about the authority of a county to use privately-owned and operated water facilities<sup>1</sup> to sell water that is available to the county. An increase in oil and gas drilling operations in Ohio has created a need for large quantities of water to stimulate vertical and horizontal wells.<sup>2</sup> A for-profit company is attempting to obtain water for this purpose through a multi-year contract with the county whereby the company will promote and arrange sales of water by the county to oil and gas drilling companies.<sup>3</sup>

Under the contract, the company will construct, operate, and maintain water facilities to distribute water that is available to the county to oil and gas drilling companies.<sup>4</sup> The company, rather

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<sup>1</sup> According to information provided to us, the water facilities consist of water nodes, valves, pumps, piping, reservoirs, wells, troughs, tanks, mains, trunk and distribution lines, and other equipment and improvements needed to access, store, and distribute water.

<sup>2</sup> The extraction of oil and gas resources from the earth through hydraulic fracturing or fracking requires the use of large amounts of water to stimulate vertical and horizontal wells. See Elizabeth Dotson, Comment, *Drilling a Hole in the Water Supply: Regulation of Injection Wells in Texas*, 10 Tex. Tech. Admin. L.J. 267, 270-71 (2008); Laura LaValle et al., Recent Development, *Washington Update: The EPA Submits 2011 Proposed Budget*, 41 Tex. Env'tl. L.J. 253, 255-56 (2011); Molly Wurzer, Note & Comment, *Taking Unconventional Gas to the International Arena*, 7 Tex. J. Oil Gas & Energy L. 357, 366-67 (2011-2012).

<sup>3</sup> The company will not purchase water from the county for resale; thus, at no time will the water that is being sold under the contract belong to the company.

<sup>4</sup> The contract states that the water facilities will not serve as a source of drinking water for private residences and businesses. The sole purpose of the facilities is to provide water for use in

than the county, is responsible for financing the construction, operation, and maintenance of the facilities on public or private land.<sup>5</sup> Regardless of where the facilities are located, title and ownership of the facilities remain with the company for the duration of the contract.<sup>6</sup>

In addition, the company will serve as the sole and exclusive representative or agent of the county with regard to the sale of water by the county to oil and gas drilling companies. In this role, the company is responsible for marketing the water and negotiating the price, delivery terms, and conditions under which the county will sell water to oil and gas drilling companies. The company will also have the authority to act on behalf of the county and enter into agreements to sell water at the price, delivery terms, and conditions negotiated by the company and oil and gas drilling companies.

For promoting and arranging the water sales, collecting revenue generated under the contract, and operating and maintaining the water facilities, the company is entitled to a certain percentage of the gross revenue derived from the water sales. After deducting from the gross revenue derived from the water sales the amount of money needed to compensate the company for providing its services to the county and pay for water purchased by the county,<sup>7</sup> the company and county share any remaining money as profits.<sup>8</sup>

Given the novelty of the contractual transaction described above, you ask the following questions:

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extracting oil and gas from the earth. The contract also stipulates that the county is required to make available to the company only water that is not needed to supply municipal water systems.

<sup>5</sup> Under certain conditions, revenue derived from the sale of the water will be used to reimburse the company for constructing the water facilities. Also, money derived from the sale of the water is to be used to compensate the company for operating and maintaining the water facilities.

<sup>6</sup> When water facilities are located on land owned by the county, the county retains title and ownership of the land, but not the water facilities. The county must, however, grant the company access to the water facilities through easements, right-of-ways, and leases. The company is not obligated to pay the county a fee for the easements and right-of-ways or rent under the leases.

<sup>7</sup> If the county purchases water from a third party and the company resells the water, the amount of money needed to pay the third party for the water is deducted from the gross revenue derived from water sales to oil and gas drilling companies.

<sup>8</sup> The contract establishes the method for determining the amount of money the county and company are to receive from the pool of money that remains after compensating the company for providing its services to the county and paying for water purchased by the county.

1. May a board of county commissioners enter into a multi-year contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies?
2. If a county may enter into the type of contract described in question 1, must the contract be competitively bid in accordance with R.C. 307.86-.92?
3. If a county may enter into the type of contract described in question 1, must the county comply with the competitive bidding requirements of R.C. 307.86-.92 when the for-profit company undertakes to construct or improve a road or public improvement needed to access, store, or distribute water sold by the county under the contract?

### **I. Board of County Commissioners' Authority to Sell Water**

As a creature of statute, a “board of county commissioners has only the powers that it is granted by law, either expressly by provision of constitution or statute, or by implication as necessary to carry out a power expressly granted.” 2004 Op. Att’y Gen. No. 2004-016 at 2-133; *accord State ex rel. Shriver v. Bd. of Comm’rs of Belmont Cnty.*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs 1 and 2); 2010 Op. Att’y Gen. No. 2010-030 at 2-221. Moreover, a board of county commissioners may not “dispose of public property without clear statutory authority.” 1999 Op. Att’y Gen. No. 99-016 at 2-122; *accord* 2008 Op. Att’y Gen. No. 2008-023 at 2-248; 2006 Op. Att’y Gen. No. 2006-001 at 2-4; *see State ex rel. Smith v. Maharry*, 97 Ohio St. 272, 119 N.E. 822 (1918) (syllabus, paragraph 1) (“[a]ll public property and public moneys ... constitute a public trust fund.... Said trust fund can be disbursed only by clear authority of law”). Hence, for a board of county commissioners to lawfully enter into a contract to sell water, there must be a clear grant of authority.<sup>9</sup> *See, e.g.*, 2004 Op. Att’y Gen. No. 2004-016; 2002 Op. Att’y Gen. No. 2002-031. *See generally* 2008 Op. Att’y Gen. No. 2008-023 at 2-248 (“whether a board of county commissioners may dispose of county property in [a particular] manner ... depends upon whether [the board] possesses clear statutory authority to do so”).

Various statutes authorize a board of county commissioners to sell water. R.C. 307.12 states that a board of county commissioners may dispose of personal property when the board determines that the property is not needed for public use. Although the term “personal property” is not defined for purposes of R.C. 307.12, its common, ordinary meaning includes “[a]ny movable or intangible thing that is subject to ownership and not classified as real property.” *Black’s Law Dictionary* 1337 (9th ed. 2009). *See generally* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed

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<sup>9</sup> This opinion does not consider the authority of a board of county commissioners to enter into a contract to sell water through a for-profit company when the county has acquired home rule powers, *see* Ohio Const. art. X, § 1; R.C. 9.482; R.C. 307.15, adopted a charter, *see* Ohio Const. art. X, §§ 3 and 4; R.C. 307.94, or adopted an alternative form of county government, *see* Ohio Const. art. X, § 1; R.C. Chapter 302.

according to the rules of grammar and common usage”); 1998 Op. Att’y Gen. No. 98-034 at 2-203 (“[p]roperty’ is a general word that can encompass everything that is owned”).

Water is something that may be owned by a person or entity. *See McNamara v. City of Rittman*, 107 Ohio St. 3d 243, 2005-Ohio-6433, 838 N.E.2d 640 (2005); *Cline v. Am. Aggregates Corp.*, 15 Ohio St. 3d 384, 474 N.E.2d 324 (1984). Water is not classified as real property because it is something that may be taken from the land on which it is found without causing injury to the land. *See Portage Cnty. Bd. of Comm’rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478 (2006); *McNamara v. City of Rittman*. *See generally Black’s Law Dictionary* 1337 (9th ed. 2009) (“real property” is “[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land”). Moreover, the General Assembly classifies water as tangible personal property for sales tax purposes. *See* R.C. 5739.02; R.C. 5739.021. Water is thus personal property for purposes of R.C. 307.12 that a board of county commissioners may decide to sell if it is not needed for public use. *See generally* 2012 Op. Att’y Gen. No. 2012-037 at 2-326 (“[g]iven that the General Assembly has recognized water as tangible personal property for purposes of Ohio’s sales tax law, [see R.C. 5739.02; R.C. 5739.021,] water is personal property for purposes of R.C. 3313.17 that may be sold by a board of education of a local school district”).

Additional authority for a county to sell water exists when a county establishes a county sewer district. R.C. 6117.01(B)(1) provides:

For the purpose of preserving and promoting the public health and welfare, a board of county commissioners may lay out, establish, consolidate, or otherwise modify the boundaries of, and maintain, one or more sewer districts within the county and outside municipal corporations and may have a registered professional engineer make the surveys necessary for the determination of the proper boundaries of each district, which shall be designated by an appropriate name or number.

After establishing a county sewer district, a board of county commissioners may (1) acquire, construct, maintain, and operate public water supply facilities,<sup>10</sup> (2) enter into a contract for the

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<sup>10</sup> As used in R.C. Chapter 6103, the term “public water supply facilities” means, without limiting the generality of those terms, the following:

water wells and well fields, springs, lakes, rivers, streams, or other sources of water supply, intakes, pumping stations and equipment, treatment, filtration, or purification plants, force and distribution lines or mains, cisterns, reservoirs, storage facilities, necessary equipment for fire protection, other related structures, equipment, and furnishings, and real estate and interests in real estate, necessary or useful in the proper development of a water supply for domestic or other purposes and its proper distribution.

R.C. 6103.01(A).

management, maintenance, operation, and repair of the facilities, and (3) sell water. *See* R.C. 6103.02; R.C. 6103.20. When a county sells water by means of public water supply facilities, a board of county commissioners is required to do the following:

The board shall fix reasonable rates, including penalties for late payments, for water supplied to public agencies and persons when the source of supply or the facilities for its distribution are owned or operated by the county and may change the rates from time to time as it considers advisable. When the source of the water supply to be used by the county is owned by another public agency or person, the schedule of rates to be charged by the public agency or person shall be approved by the board at the time it enters into a contract for the use of water from the public agency or person.

R.C. 6103.02(F).

In addition, R.C. 6103.20(A) authorizes a board of county commissioners to sell water by means of public water supply facilities to properties located outside of the district:

At any time after the formation of any county sewer district, the board of county commissioners, when it considers it appropriate, on application by a person or public agency for the supply of water to properties of that person or public agency located outside of the district, may contract with the person or public agency for supplying water to those properties from water supply facilities acquired or constructed or to be acquired or constructed by the county to serve the district, on terms that the board considers equitable.

The language of R.C. 307.12, R.C. 6103.02, and R.C. 6103.20 thus expressly authorizes a board of county commissioners to sell water.<sup>11</sup> Accordingly, pursuant to R.C. 307.12, R.C. 6103.02, and R.C. 6103.20, a board of county commissioners may sell water to oil and gas drilling companies.

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<sup>11</sup> R.C. 307.11 authorizes a board of county commissioners to enter into contracts to permit the mining of minerals on land owned by the county:

When the county would be benefited, the board of county commissioners may make, execute, and deliver contracts or leases to mine iron ore, stone, coal, petroleum, gas, salt, and other *minerals* upon lands owned by such county, to any person complying with the terms prescribed by the board as to consideration, rights of way, and occupancy of ground for necessary purposes. All other matters of contract shall be such as the board deems most advantageous to the county. (Emphasis added.)

The term “mineral” may be construed broadly to include water. *See Merriam-Webster’s Collegiate Dictionary* 790 (11th ed. 2005) (“a solid homogeneous crystalline chemical element or compound that results from the inorganic process of nature; *broadly* : any of various naturally

## II. Authority for a Board of County Commissioners to Engage the Services of a Broker to Sell Water for the County

Let us now turn to your first question, which asks whether a board of county commissioners may enter into a multi-year contract to have a for-profit company broker the sale of water by the

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occurring homogeneous substances (as stone, coal, salt, sulfur, sand, petroleum, water, or natural gas) obtained usu. from the ground”). Under this definition of the term “mineral,” it appears that R.C. 307.11 authorizes a board of county commissioners to enter into a contract to sell water.

However, it is also “a fundamental rule of statutory construction that statutes relating to the same subject matter should be construed together.” *State ex rel. Thurn v. Cuyahoga Cnty. Bd. of Elections*, 72 Ohio St. 3d 289, 294, 649 N.E.2d 1205 (1995). In the context of surface mining, which is the process of extracting minerals from the earth or from the surface of the land, *see* R.C. 1514.01(A), the General Assembly has defined the term “minerals” to mean “sand, gravel, clay, shale, gypsum, halite, limestone, dolomite, sandstone, other stone, metalliferous or nonmetalliferous ore, or other material or substance of commercial value extracted in a *solid state* from natural deposits on or in the earth, but does not include coal or peat.” R.C. 1514.01(B) (emphasis added). Reading R.C. 307.11 in conjunction with the definition of “minerals” set out in R.C. 1514.01(B) indicates that the term “minerals,” as used in R.C. 307.11, does not include water, as it is not in a solid state when extracted from the earth in Ohio, and that R.C. 307.11 does not authorize a board of county commissioners to enter into a contract to sell water. *See generally United States v. Union Oil Co. of California*, 549 F.2d 1271, 1273 n.5 (9th Cir. 1977) (“[n]o one contends that water cannot be classified as [a] mineral.” The question is whether water should be “included in the term ‘minerals’ in this statutory setting. This is basically a question of legislative intent”); *Dyegard Land P’ship v. Hoover*, 39 S.W.3d 300, 310-11, 2001 Tex. App. LEXIS 255 (Ct. App. Tex 2001) (the Texas Supreme Court “noted that it is ‘rare, if ever’ that the term ‘mineral’ is intended in the scientific or technical sense.” The court “further reasoned that, if the scientific definition of minerals was followed, even the caliche dirt composing a large part of the surface could also be considered a mineral. It recognized that ‘the scientific or technical definition of minerals is so broad as to embrace not only metallic minerals, oil, gas, stone, sand, gravel, and many other substances, but even the soil itself’” (citations omitted) (quoting *Heinatz v. Allen*, 147 Tex. 512, 517, 217 S.W.2d 994 (Tex. 1949), *overruled, in part, on other grounds by Friedman v. Texaco*, 691 S.W.2d 586, 1985 Tex. LEXIS 867 (Tex. 1985))).

Your questions do not concern a situation in which the oil and gas drilling companies are seeking the right to conduct mining operations on land owned by the county. Nor do they involve a sale of mineral rights by the county to the for-profit company. *See* note 3, *supra*. For these reasons, it is unnecessary for us to determine whether R.C. 307.11 authorizes a board of county commissioners to sell water.

county to oil and gas drilling companies.<sup>12</sup> As explained above, R.C. 307.12, R.C. 6103.02, and R.C. 6103.20 authorize a board of county commissioners to sell water. These statutes also dictate how a board of county commissioners is to consummate the sale of water.

**A. Procedures for Selling Water under R.C. 307.12, R.C. 6103.02, and R.C. 6103.20**

R.C. 307.12 states that a board of county commissioners may sell water to a private entity by public auction or sealed bid when the board determines that the fair market value of the property exceeds 2,500 dollars; internet auction; or private sale when the board determines that the fair market value of the property is 2,500 dollars or less:

(A) Except as otherwise provided in divisions (D), (E), and (G) of this section,<sup>13</sup> when the board of county commissioners finds, by resolution, that the county has personal property ... that is not needed for public use ... and when the fair market value of the property to be sold ... under this division is, in the opinion of the board, in excess of two thousand five hundred dollars, the board may do either of the following:

(1) Sell the property at public auction or by sealed bid to the highest bidder....

....

(2) Donate any motor vehicle that does not exceed four thousand five hundred dollars in value to a nonprofit organization exempt from federal income taxation pursuant to 26 U.S.C. 501(a) and (c)(3) for [certain specific uses].

(B) When the board of county commissioners finds, by resolution, that the county has personal property ... that is not needed for public use ... and when the fair market value of the property to be sold ... under this division is, in the opinion of the

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<sup>12</sup> Under the contract, the for-profit company will be the sole and exclusive agent or representative of the county as to the sale of water by the county. The for-profit company will also serve as an intermediary to facilitate contracts for the sale of water between the county and oil and gas drilling companies. In other words, the for-profit company is a broker-agent. *See generally Black's Law Dictionary* 219 (9th ed. 2009) (a "broker-agent" is "[a] person who acts as an intermediary between parties to a transaction, and as a representative of one of them"). Thus, when the for-profit company brokers the sale of water between the county and oil and gas drilling companies, the company arranges the sales and negotiates the terms of the sales for the county.

<sup>13</sup> R.C. 307.12(D) authorizes a board of county commissioners to donate county personal property to the federal government, the state, political subdivisions of this state, and county land reutilization corporations. R.C. 307.12(G) states that a board of county commissioners may sell vehicles, equipment, or machinery to a person or firm from which the board proposes to purchase other vehicles, equipment, or machinery and "have the selling price credited to the person or firm against the purchase price of other vehicles, equipment, or machinery." Neither of these divisions of R.C. 307.12 applies to the situation you have presented to us.



board, two thousand five hundred dollars or less, the board may do either of the following:

(1) Sell the property by private sale, without advertisement or public notification;

(2) Donate the property to an eligible nonprofit organization that is located in this state and is exempt from federal income taxation pursuant to 26 U.S.C. 501(a) and (c)(3)....

....

(E) Notwithstanding anything to the contrary in division (A), (B), or (G) of this section and regardless of the property's value, the board of county commissioners may sell personal property ... that is not needed for public use ... by internet auction. (Footnote added.)

R.C. 307.12 thus authorizes a board of county commissioners to sell water to oil and gas drilling companies by public auction, sealed bid, internet auction, or private sale. None of these methods, however, entails a board of county commissioners using a for-profit company as a broker to sell water for the county. *See generally Black's Law Dictionary* 149 (9th ed. 2009) (an "auction" is "[a] public sale of property to the highest bidder"); *Black's Law Dictionary* 183 (9th ed. 2009) (a "sealed bid" is "[a] bid that is not disclosed until all submitted bids are opened and considered simultaneously"); *Black's Law Dictionary* 1455 (9th ed. 2009) (a "private sale" is "[a]n unadvertised sale negotiated and concluded directly between the buyer and seller, not through an agent"). R.C. 307.12 therefore does not authorize a board of county commissioners to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.

In addition, neither R.C. 6103.02 nor R.C. 6103.20 provides such authority. When a board of county commissioners establishes a county sewer district under R.C. Chapter 6117, the board may acquire or construct public water supply facilities to supply water to real property located within or outside of the district. *See* R.C. 6103.02; R.C. 6103.05; R.C. 6103.081; R.C. 6103.10; R.C. 6103.20-.21; R.C. 6103.25-.26. Pursuant to this grant of authority, a board of county commissioners may acquire or construct public water supply facilities to supply water to real property used by an oil and gas drilling company to conduct its operations.

The board's authority does not, however, include the power to have a for-profit company broker the sale of water by the county to oil and gas drilling companies. Instead, the board's authority is limited to acquiring existing public water supply facilities from a for-profit company or to contract to have a for-profit company construct public water supply facilities for the county. *See* R.C. 6103.02; R.C. 6103.05; R.C. 6103.081; R.C. 6103.10. The board's authority also includes the power to have a for-profit company operate county-owned public water supply facilities and sell water at the rates established by the board of county commissioners. *See* R.C. 6103.02. Accordingly, the provisions of R.C. Chapter 6103 authorizing a board of county commissioners to sell water, *i.e.* R.C. 6103.02 and

R.C. 6103.20, do not empower a board to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.<sup>14</sup>

Other than R.C. 307.12, R.C. 6103.02, and R.C. 6103.20, no other statute or constitutional provision authorizes a board of county commissioners to sell water. Additionally, no language in R.C. 307.12, R.C. 6103.02, R.C. 6103.20, or any other provision of law authorizes a board of county commissioners to have a for-profit company broker the sale of water for the county.<sup>15</sup> This means that a board of county commissioners does not have express authority to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.

**B. No Implied Authority for a Board of County Commissioners to Engage the Services of a Broker to Sell Water for the County**

By setting forth in R.C. 307.12, R.C. 6103.02, and R.C. 6103.20 the specific procedures a board of county commissioners must follow when selling water, the General Assembly has provided the means by which a board of county commissioners may exercise its power to sell water and limited the manner in which a board may sell water. *See* 1935 Op. Att’y Gen. No. 4198, vol. I, p. 487 (syllabus, paragraph 1) (“where authority is extended by statute to public officers or boards to sell and dispose of public property, and the statute fixes the manner of consummating the sale, the terms of the authorization must be strictly complied with”); *see also* 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]”). *See generally* *Akron Transp. Co. v. Glander*, 155 Ohio St. 471, 480, 99 N.E.2d 493 (1951) (it is a well-recognized legal principle that when a statute directs a thing may be done by a specified means or in a particular manner it may not be done by other means or in a different manner); 2009 Op. Att’y Gen. No. 2009-055 at 2-411 (same as the previous parenthetical); 1948 Op. Att’y Gen. No. 4038, p. 543 (syllabus) (“[c]ounty commissioners who avail themselves of the terms of [G.C. 2447-2 (now R.C. 307.12)], which section permits the sale of personal property at public auction for cash to the highest bidder, must comply with its terms as to the method of sale, and such commissioners have no power to ‘trade-in’ items of personal property”). A board of county commissioners thus does not have implied authority to enter into a contract to have a for-profit company broker the sale of water by the county to oil and gas

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<sup>14</sup> In the situation you have presented to us, the board of county commissioners is not acquiring public water supply facilities from the for-profit company or contracting to have the company construct and operate county-owned public water supply facilities for the county. As explained at the beginning of this opinion, the for-profit company retains title and ownership of the public water supply facilities. Hence, the board of county commissioners is not entering into the contract in question to acquire, construct, or operate county-owned public water supply facilities.

<sup>15</sup> In certain circumstances, R.C. 307.12(B)(2) authorizes a board of county commissioners to use a representative to donate personal property to nonprofit corporations. This authority does not apply to your specific inquiry since the board is not donating personal property to nonprofit corporations.

drilling companies. *See generally* 1980 Op. Att’y Gen. No. 80-028 at 2-117 (the implied power to alienate property, “as has been done in the case of counties, [may] be limited or controlled by enactments of the General Assembly”).

As a board of county commissioners has neither express nor implied authority to enter into a contract to have a for-profit company broker the sale of water for the county, a board does not have a clear grant of authority to enter into a multi-year contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies. Consequently, a board of county commissioners may not enter into such a contract.

**C. No Authority for a Board of County Commissioners to Delegate Its Authority to Sell Water to a For-Profit Company**

The foregoing conclusion is supported further by the common-law rule governing the delegation of duties by public officers. This rule provides as follows:

Where the proper execution of a public office requires that the officer exercise his own judgment or discretion, the presumption is that the particular officer was chosen because he was deemed fit and competent to exercise that judgment or discretion. In such cases, the officer cannot delegate his duties to another, unless the power to so substitute another in his place has been expressly or impliedly granted to the officer.

1977 Op. Att’y Gen. No. 77-064 at 2-232; *accord CB Transp., Inc. v. Butler Cnty. Bd. of Mental Retardation*, 60 Ohio Misc. 71, 82, 397 N.E.2d 781 (C.P. Butler County 1979); *Burkholder v. Lauber*, 6 Ohio Misc. 152, 154, 216 N.E.2d 909 (C.P. Fulton County 1965); 2008 Op. Att’y Gen. No. 2008-038 at 2-388; 2000 Op. Att’y Gen. No. 2000-024 at 2-164 and 2-165; 1984 Op. Att’y Gen. No. 84-074 at 2-240 and 2-241. *See generally* 1979 Op. Att’y Gen. No. 79-067 at 2-223 (“[i]f a duty imposed by statute is purely ministerial, i.e., a ‘mere physical act,’ it may be delegated; the duty is not delegable, however, if it requires judgment and discretion in its performance”). A board of county commissioners thus may not delegate a duty that involves the exercise of judgment or discretion to another entity unless the board has express or implied authority to do so.

Entering into a contract to sell water to an oil and gas drilling company requires the exercise of discretion or judgment by a board of county commissioners. *See Burkholder v. Lauber*, 6 Ohio Misc. at 154-55 (a board of county commissioners exercises discretion and judgment when disposing of county personal property). *See generally A.F.S.C.M.E., Local 1045 v. Polta*, 59 Ohio App. 2d 283, 284-85, 394 N.E.2d 310 (Erie County 1977) (“[i]t is the province of the board of county commissioners to make contracts for the county, and no other officer can bind the county by contract, unless by reason of some express provision of law”); 1981 Op. Att’y Gen. No. 81-042 at 2-167 (same as the previous parenthetical). In performing this act, a board of county commissioners must initially determine whether it is in the best interest of the county to sell the water. *See generally Seran v. Biddle*, 86 Ohio App. 1, 89 N.E.2d 669 (Stark County 1949) (syllabus, paragraph 3) (“[a] sale, by a board of county commissioners, of a portion of a county-home farm will not be held by a court to be an abuse of discretion, although the county home has not been closed, where the land was sold at public sale in accordance with applicable statutory provisions, its value had outgrown farm values,

and no fraud or irregularities are shown in the record”); 1987 Op. Att’y Gen. No. 87-035 at 2-243 (“[w]hen the board [of county commissioners], in its discretion, determines that the county nursing home is not needed for public use, it may sell the real property pursuant to [R.C. 307.09]” (citation omitted)); 1965 Op. Att’y Gen. No. 65-126 at 2-286 (“it is clear that if the board of county commissioners determines in the exercise of its sound discretion that the described land is not needed for public use and is to be sold, there could be no assurance that that sale could legally be made to the corporation to which you have referred”). The board also must obtain (1) the best price for the water and (2) favorable delivery terms and conditions under the contract. *See generally State ex rel. Hecht v. Zangerle*, 148 Ohio St. 9, 72 N.E.2d 453 (1947) (syllabus, paragraph 2) (“[t]he county auditor, as liquidator of forfeited lands to satisfy delinquent taxes, must strictly follow statutory requirements as to the conduct of such sales, but he may exercise a sound discretion, not inconsistent with the statutes, to accept at such sales only bids as are reasonably adequate and bear a reasonable relation to the value of the property sold”).

Because we have found no authority for a board of county commissioners to delegate to a private entity its authority to enter into a contract to sell water, a board may not delegate to a for-profit company the power to negotiate the price, delivery terms, and conditions under which a county will sell water to oil and gas drilling companies. *See Burkholder v. Lauber*, 6 Ohio Misc. at 154-55 (the authority of a board of county commissioners to dispose of county personal property may not be delegated). *See generally* 1979 Op. Att’y Gen. No. 79-067 at 2-223 (“[i]t would contravene the legislative intent of [R.C. 2151.421] to allow a judgmental and discretionary act to be delegated to an entity other than the entity originally entrusted with the duty by statute”). Accordingly, a board of county commissioners may not enter into a multi-year contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.

**D. Article VIII, § 13 of the Ohio Constitution Does Not Authorize a Board of County Commissioners to Retain the Services of a Broker to Sell Water**

It has been suggested that Article VIII, § 13 of the Ohio Constitution may provide express authority for a county to have a for-profit company broker the sale of water by the county to oil and gas drilling companies. This constitutional provision declares:

To create or preserve jobs and employment opportunities [or] to improve the economic welfare of the people of the state, ... it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, ... to sell ... or otherwise dispose of property ... within the State of Ohio for industry, commerce, distribution, and research[.]

A board of county commissioners may not use the powers granted to it under Article VIII, § 13 of the Ohio Constitution unless the General Assembly has enacted corresponding enabling legislation. Specifically, Article VIII, § 13 of the Ohio Constitution states that “[l]aws may be passed to carry into effect [the] purposes” delineated in this constitutional provision. As the General

Assembly has not enacted legislation authorizing a board of county commissioners to enter into a contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies, a board may not invoke Article VIII, § 13 of the Ohio Constitution as authority to do so. *See generally State ex rel. Burton v. Greater Portsmouth Growth Corp.*, 7 Ohio St. 2d 34, 40, 218 N.E.2d 446 (1966) (R.C. 1724.10 “was enacted pursuant to and as a result of [Article VIII, § 13 of the Ohio Constitution]. It provides the machinery to make such amendment operative”); 2004 Op. Att’y Gen. No. 2004-016 at 2-134 (“Ohio Const. art. VIII, § 13 permits an arrangement under which a board of county commissioners lends grant moneys to a private for-profit business enterprise for purposes of economic development, provided that there is statutory authority for such an arrangement”); 2004 Op. Att’y Gen. No. 2004-005 at 2-46 (R.C. Chapter 165 “was enacted to implement Ohio Const. art. VIII, § 13”); 1985 Op. Att’y Gen. No. 85-011 (syllabus) (“Ohio Const. art. VIII, § 13 and appropriate legislation empowering the Department of Economic and Community Development (currently the Department of Development) to expend money for the purpose of attracting the development of business and industry in the state authorize the Department to make industrial inducement grants to, and for the benefit of, private, for-profit corporations if such grants are for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment and facilities within the state for industry, commerce, distribution, and research”); 1983 Op. Att’y Gen. No. 83-094 (syllabus) (“Ohio Const. art. VIII, § 13 permits the state to issue, under appropriate enabling statutes, bonds or other obligations to provide moneys for the acquisition, construction, enlargement, improvement or equipment of property, structures, equipment or facilities used in farming”). *See generally also Taylor v. Comm’rs of Ross Cnty.*, 23 Ohio St. 22, 78 (1872) (the Ohio Constitution “does not forbid the employment of corporations, or individuals, associate or otherwise, as agents to perform public services; nor does it prescribe the mode of their compensation. And if it should be deemed wise and economical to authorize municipalities, who own water-works, or gas-works, to lease them as a means of supplying the public needs, we know of no constitutional impediment”); 1984 Op. Att’y Gen. No. 84-032 at 2-92 (“[n]umerous laws exist to implement the provisions of Ohio Const. art. VIII, § 13”).

### **III. Applicability of R.C. 307.86-92 when a Board of County Commissioners Sells Water**

Your second and third questions concern the application of the competitive bidding requirements set forth in R.C. 307.86-92 when a board of county commissioners enters into a multi-year contract with a for-profit company to have the company sell water for the county to oil and gas drilling companies. As we have determined that a board of county commissioners does not have the authority to enter into a contract to sell water through a for-profit company, it is unnecessary for us to answer your second and third questions.

### **IV. Conclusions**

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 307.12, R.C. 6103.02, and R.C. 6103.20, a board of county commissioners may sell water to oil and gas drilling companies.

2. A board of county commissioners may not enter into a multi-year contract to have a for-profit company broker the sale of water by the county to oil and gas drilling companies.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE  
Ohio Attorney General