

March 4, 2003

The Honorable Pat Story
Meigs County Prosecuting Attorney
117 W. Second Street
Pomeroy, Ohio 45769

SYLLABUS:

2003-008

1. A board of county commissioners has the authority pursuant to R.C. 307.41 to lease as well as purchase motor vehicles for the use of the county sheriff and his employees. (1955 Op. Att'y Gen. No. 4806, p. 68, overruled due to statutory change.)
2. A board of county commissioners may not lease, for the use of the county sheriff and his employees, vehicles displaying the designs, decals, and themes of corporate advertisers. (2000 Op. Att'y Gen. No. 2000-042, distinguished.)

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OPINION NO. 2003-008

The Honorable Pat Story
Meigs County Prosecuting Attorney
117 W. Second Street
Pomeroy, Ohio 45769

Dear Prosecutor Story:

You have asked for an opinion concerning whether the county may accept, for the use of the county sheriff, a vehicle that would display corporate advertising in addition to the standard markings required for the vehicles of county sheriffs. You have explained that a private company is offering to enter into an agreement with the county where the company would provide one or more vehicles for use by the sheriff's department for a cost of one dollar each. The vehicles provided would display the designs, decals, and other advertising graphics of corporate sponsors that the county could in no way alter or conceal. After a period of three years, the county would transfer the vehicle back to the company for one dollar. You state in your opinion request that the county's participation in this program would help alleviate the sheriff's budgetary difficulties.

Authority of Board of County Commissioners

We turn first to an examination of the law governing the acquisition and use of motor vehicles by the county, noting that county officers, as creatures of statute, have only those powers conferred by statute, either expressly or by necessary implication. *See State ex rel. Shriver v. Board of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947). R.C. 307.41 authorizes the board of county commissioners to purchase or lease motor vehicles for the use of any elected county official or his employees. The use of such vehicles is subject to the regulation of the board of county commissioners, and all vehicles must be "plainly and conspicuously lettered as the property of the county." R.C. 307.42. *See, e.g.*, 1986 Op. Att'y Gen. No. 86-011 (a board of county commissioners may, pursuant to R.C. 307.42, promulgate a rule requiring county employees to wear a seat belt while operating a county owned vehicle on county business). The sheriff is an elected county official, *see* R.C. 311.01(A), and therefore, the board of county commissioners is expressly authorized to purchase or lease vehicles for the use of the sheriff and his employees,¹ and to regulate the use of such vehicles.

¹ 1955 Op. Att'y Gen. No. 4806, p. 68 concluded that a board of county commissioners has no authority under R.C. 307.41 to lease motor vehicles for the use of the sheriff and his

Nature of Proposed Transaction

We turn next to an analysis of whether the proposed transaction is one under which the board of county commissioners would “purchase” or “lease” a vehicle. You have provided a sample agreement that provides additional details about the program and the nature of the proposed transaction.

Under the sample agreement, the company would “arrange the sale” to the county, and the county would “purchase from a New Car Dealer each Vehicle that will bear a Sponsor Theme for the sum of One Dollar (\$1.00) for exclusive use” by the county. (§ 2) The agreement states that the “sale and transfer of the Vehicle(s) will be effectuated with a standard Vehicle sales contract and transfer of certificate of title, substantially in accordance with the customary transfer of vehicles,” and that “all rights of title to a vehicle shall vest” in the county “except the right to direct, control and alter the Sponsor-Themes, which said rights shall remain exclusively with [the company] as the licensee of its licensors, advertisers and sponsors.” (§ 4.a) Under the agreement, the company “will assure that each Vehicle Delivered” to the county “shall have a Sponsor-Theme for the corporate sponsor, advertiser that it purports to be advertising.” (§ 5.i.ii)

Furthermore, the county would agree to “authorize, (authorization not to be unreasonably withheld) paint, decal and graphics placement based on an illustration and description of the Sponsor themes in advance of production of said Sponsor themes, in an endeavor to preserve the Sponsor themes and locate [the county’s] required decals and equipment in a manner so as to not interfere with the said Sponsor themes.” (§ 6.g) The agreement states, however, that the company “retains the right to make the final determination of placement of Sponsor artwork pursuant to individual licensing agreements with individual sponsors” (§ 5.i.iii), and the county “will not unreasonably withhold its approval of any Vehicle, Sponsor theme or decal.” (§ 5.i.ii) *See generally* note 8, *infra*. The company would be entitled to update sponsor themes and add decals “from time-to-time.” (§ 5.i.ii) The agreement permits the county to add to the vehicle government decals “that do not interfere with the Sponsor-Themes and designs,” and the parties would agree to “work together to label the Vehicles as Government Vehicles in a manner reasonably necessary to clearly advise the Public that the Vehicles are Government Vehicles.” (§ 5.i.iii) The governmental decals may not, however, “cover or interfere with existing Sponsor artwork.” (§ 5.i.iii)

The proposed agreement further provides that “each Vehicle with a Sponsor theme shall be used for thirty-six (36) months from the date of Delivery.” (§ 6.d) The county would be

employees. At the time the opinion was issued, however, R.C. 307.41 authorized the board of county commissioners only to *purchase* vehicles for the use of the county sheriff. R.C. 307.41 was amended in 1975 to empower the commissioners to lease as well as purchase vehicles. 1975-1976 Ohio Laws, Part I, 1540 (Am. H.B. 84, eff. Aug. 11, 1975). 1955 Op. Att’y Gen. No. 4806, p. 68 is therefore overruled due to statutory change.

required to grant the company “an option to purchase” each vehicle at the end of the thirty-six months, “for the nominal sum of One dollar (\$1.00), for the [company’s] unfettered use.” (§§ 6.d and e) The county would agree to “remove and/or strip, or cause to be removed and/or stripped, all paint and indicia of Sponsor themes from the Vehicle prior to reselling to [the company] for one dollar pursuant to [the] Purchase Option.” (§ 6.d)

Although the agreement characterizes the transaction as a “sale,” whereby the county would purchase and hold title to the vehicle, the details of the arrangement are not entirely consistent with this characterization. *See State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 67, 285 N.E.2d 362 (1972) (“it should be emphasized that this court examines this transaction, not for what it purports to be, but for what, in essence, it is.... this court looks through the form to the substance of the proposed transaction”); *State ex rel. Celebrezze v. Tele-Communications, Inc.*, 62 Ohio Misc. 2d 405, 413, 601 N.E.2d 234 (Ct. Claims 1990) (“[w]hile a document may be denominated a ‘lease,’ and refer to the parties as ‘lessor’ and ‘lessee,’ it may nevertheless be written to accomplish a purpose unrelated to bailment or rental,” and “[c]onsequently, courts and commentators have been required to formulate modes of analyses to uncover the precise nature of the agreement”). Under the proposed agreement, the company would acquire the vehicle from a dealer, negotiate with the sponsors and add the sponsors’ designs, decals, and themes to the vehicle. The company would then convey to the county the possession and use of the vehicle for a term of three years in exchange for one dollar and the county’s promise to display the sponsor’s advertising as specified in the agreement, and, in effect, assist with the promotion of the sponsor’s product or business interests.

One who “purchases” property takes title to, and owns, that property. *See Carder v. Board of Commissioners*, 16 Ohio St. 353, 368 (1865) (the county commissioners are authorized by statute to “purchase” and thus take title of property for the use of the county). *See also* R.C. 1302.01(A)(11) (for purposes of the uniform commercial code, a “‘sale’ consists in the passing of title from the seller to the buyer for a price”). An owner of property has the right to possess, use, and convey the property. *See Black’s Law Dictionary* 1130, 1131 (7th ed. 1999) (defining “own” and “ownership”). An essential component of ownership is the right of complete dominion over the property, specifically the right to use and dispose of the property for any lawful purpose to the exclusion of others. *See City of Mansfield v. Balliett*, 65 Ohio St. 451, 471, 63 N.E. 86 (1902) (“[t]he value of property consists in the owner’s absolute right of dominion, use, and disposition for every lawful purpose,” and “[t]his necessarily excludes the power of others from exercising any dominion, use or disposition over it”); *Antonik v. Chamberlain*, 81 Ohio App. 465, 472, 78 N.E.2d 752 (Summit County 1947) (“[t]he chief characteristic of ownership is the right to complete dominion”). *See also* R.C. 1302.42 (each provision of R.C. Chapter 1302 regarding “the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods except where the provision refers to that title,” but if a situation is not otherwise covered by R.C. Chapter 1302 and title does become

material, any retention by the seller of title in goods delivered to the buyer “is limited in effect to a reservation of a security interest”).²

If the county were to purchase a vehicle, it would have the right to exercise “complete dominion” over the vehicle, to the exclusion of others. The county would be free to use, regulate, convey, or dispose of the vehicle as it deemed appropriate, subject of course to any pertinent statutory provisions. *See, e.g.*, R.C. 307.12. In this instance, the nature of the consideration provided by the county, which includes limitations on the county’s ability to use and dispose of the vehicle, along with the thirty-six month “term of use” and the right of the company to “repurchase” the vehicle for one dollar are indications that the board of county commissioners would not exercise “complete dominion” over the vehicle, and thus would not “purchase” the vehicle for purposes of R.C. 307.41 under the proposed agreement.

The transaction would, however, appear to constitute a “lease” of the vehicle to the county. A lease of property grants to the lessee the possession and use of property, usually for an established term, in return for consideration. *See Black’s Law Dictionary* 900 (7th ed. 1999); R.C. 1310.01(A)(10) (defining “lease,” for purposes of the uniform commercial code as “a transfer of the right to possession and use of goods for a term in return for consideration”). *See also Advanced Dirt Works, Inc. v. C.L. Bridges Equipment Co.*, Case No. 97-CA-11, 1998 Ohio App. LEXIS 1376 at *8 (Champaign County April 3, 1998) (“a true lease [is] not a ‘transaction

² The agreement’s provision for the transfer of the certificate of title to the county is not necessarily determinative of whether the transaction is a “purchase” for purposes of determining whether the board of county commissioners is authorized by R.C. 307.41 to enter into the agreement in the first instance. *See Smith v. Nationwide Mutual Insurance Co.*, 37 Ohio St. 3d 150, 153, 524 N.E.2d 507 (1988) (“R.C. 4505.04 [the certificate of title act] is irrelevant to all issues of ownership except those regarding the importation of vehicles, rights as between lienholders, rights of bona-fide purchasers, and instruments evidencing title and ownership,” and “[o]therwise, motor vehicle ownership rights will be determined by the Uniform Commercial Code”); *Fuqua Homes, Inc. v. Evanston Building and Loan Company*, 52 Ohio App. 2d 399, 403, 370 N.E.2d 780 (Hamilton County 1977) (“R.C. Chapter 4505 states how ownership and interest in motor vehicles are evidenced, recognized, recorded, and normally transferred, but it does not set forth the only provisions whereby title is acquired in the first instance to the exclusion of all other law.... [t]he acquisition of ownership of a motor vehicle is governed by R.C. Chapter 1302 of the Ohio Uniform Commercial Code”). *See also* R.C. 1302.42 (each provision of R.C. Chapter 1302 regarding “the rights, obligations, and remedies of the seller, the buyer, purchasers, or other third parties applies irrespective of title to the goods except where the provision refers to that title”). Possession of the certificate of title could become relevant in a dispute as to ownership between the county and the company, or, if the county conveyed the vehicle to a third party, between the company and that third party. *Id.* *See also Advanced Dirt Works, Inc. v. C.L. Bridges Equipment Co.*, Case No. 97-CA-11, 1998 Ohio App. LEXIS 1376 (Champaign County April 3, 1998).

of purchase,’ so the lessee’s subsequent sale of the motor vehicle ... conveyed only void title” (citations omitted)). In this instance, the county would be entitled to possess and use the vehicle for a term of three years in return for consideration provided. Therefore, the board of county commissioners arguably has the authority, implied from its authority to lease and regulate the use of vehicles for the use of the county sheriff, to enter into the agreement in question. *See generally State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 112 N.E. 138 (1915) (syllabus, paragraph four) (“[w]here an officer is directed by the constitution or a statute of the state to do a particular thing, in the absence of specific directions covering in detail the manner and method of doing it, the command carries with it the implied power and authority necessary to the performance of the duty imposed”).

We must next determine, however, whether there are other statutory provisions that limit or constrict this implied authority. It is a well-established principle of statutory construction that, although the ability of a county board or officer to carry out a certain activity may be implied from one of the powers expressly granted to it, the exercise of that implied power is subject to any limiting or constricting statutory language or scheme that would curtail, inhibit, or extinguish it. *See Ebert v. Stark County Board of Mental Retardation*, 63 Ohio St. 2d 31, 406 N.E.2d 1098 (1980); 1986 Op. Att’y Gen. No. 86-011; 1984 Op. Att’y Gen. No. 84-054 at 2-179 (although a county board of mental retardation and developmental disabilities may have the implied authority to dispose of unneeded property, “it is not unrestricted in the exercise of that power,” and the “exercise of such power is subject to any statutory provision which may constrict or circumscribe the implied power”).

Typically, the enactment of a thorough and inclusive statutory scheme governing or regulating the manner in which an agency is to implement its express duties in a particular area will be deemed to constrict any implied authority the agency would otherwise have to carry out those express duties, and to limit the agency to operating only within the parameters of that statutory scheme. For example, in *Perkins v. Bright*, 109 Ohio St. 14, 141 N.E. 689 (1923), the court, in considering whether a board of education had properly bid work for the construction of a schoolhouse, noted:

The minute directions set forth in Section 7623, General Code [now R.C. 3313.46], and the great care with which the section was originally drawn, and with which it has been retained ... lead us to the conclusion that the phraseology therein employed was placed there advisedly, and to serve as a check and limitation upon the exercise of a wide discretion in building and repairing schoolhouses, except under circumstances and to the degree in the specific language pointed out.

Id., 109 Ohio St. at 18-19. *See also, e.g.*, 1984 Op. Att’y Gen. No. 84-054 at 2-181 (to “require that all county personal property be disposed of pursuant to R.C. 307.12 seems to be the interpretation most consistent with construing R.C. 307.12 as *an entire, harmonious scheme* for the disposition of county personal property” (emphasis added)).

County Sheriffs' Standard Car-Marking and Uniform Commission

We find that the manner in which the vehicles of county sheriffs are to be marked is indeed heavily regulated by statute and administrative rule adopted pursuant thereto, and that such explicit requirements constrict any implied authority the board of county commissioners would otherwise have to accept a vehicle displaying corporate advertising. R.C. 311.25 provides for the establishment of the county sheriffs' standard car-marking and uniform commission ("commission"), which is responsible, *inter alia*, for prescribing a "standard color and design of car-marking for all motor vehicles used by county sheriffs," R.C. 311.28. *See also* R.C. 311.25 (the commission is composed of three members, all of whom must be "an elected and acting county sheriff"); R.C. 311.26 (organization of commission); R.C. 311.27 (members of the commission receive no compensation for their services). The standard car-markings must "be used on all cars operated by the county sheriffs and their deputies while in the performance of their duties." R.C. 311.28. The standards that have been adopted by the commission may be found at 2 Ohio Admin. Code 311-3-01 (2002-2003 Supplement).

Even the most cursory review of rule 311-3-01 reveals a comprehensive scheme of inter-related specifications for marking vehicles used by county sheriffs. The rule minutely describes the markings that are required to be displayed on a vehicle and the placement of those markings.³

³ For example, division (D) of rule 311-3-01 requires that a vehicle display the great seal of the State of Ohio, and the word, "sheriff." The word, "sheriff," must be displayed as follows:

(1) ... The great seal shall be surrounded by a circular border in which the name of the county is printed in uppercase letters below the great seal and the word "SHERIFF" is printed above the seal. The lettering shall be reflex blue. The name of the sheriff, printed in reflex blue uppercase letters, may be placed in a custom-designed rocker panel above the word "SHERIFF."

(2) The word "SHERIFF," produced on a forty-five inch pre-aligned, pre-spaced panel, shall be placed on the front and rear vehicle doors, parallel to the ground.

(a) The panel shall be positioned so that no letter is split between the doors of the vehicle. On the driver's side, the word "SHERIFF" should begin approximately four inches to the right of the star prescribed in paragraph (D) (1) of this rule. On the passenger's side. The word "sheriff" [sic] should end approximately four inches to the right of the star.

(b) The lettering shall be seven inches high, uppercase, in Isbella bold type, with a ten degree right slant. The word "SHERIFF" will slant toward the rear of the vehicle on the driver's side and toward the front of the vehicle on the passenger's side.

...

It then provides that county sheriffs “may employ the following optional vehicle markings,” specifying that a sheriff may choose to display the assigned vehicle number on the roof, and the name of a political subdivision for which he provides service by contract “on both upper rear quarter panels, parallel to the ground, in Isbella bold lettering one and one-half inches high.” Rule 311-3-01(E).

Division (B) of rule 311-3-01 states that, “[a]ll standard and optional vehicle markings shall conform substantially to the standards for design, color, and placement prescribed by this rule.” This requirement mandating conformity to the prescribed standards, together with the degree of detail with which the permissible markings are described, lead us to conclude that the markings set forth in rule 311-3-01 are intended to be exclusive.⁴ Therefore, R.C. 311.28 and the administrative rule adopted pursuant thereto constitute a complete regulatory scheme that limits the implied authority the board of county commissioners might otherwise have to agree to display corporate advertising on the vehicles used by the county sheriff.

Purpose of Standard Car-Marking Requirements

An examination of the purpose of car-marking requirements for law enforcement vehicles supports our conclusion that the county lacks authority to agree to the display of corporate advertising on vehicles used by the county sheriff. Although we are unaware of any case law interpreting R.C. 311.28 and related provisions, there are a number of cases explaining the import of R.C. 4549.13, which requires that any motor vehicle used by a peace officer in the enforcement of the motor vehicle or traffic laws “be marked in some distinctive manner or

(6) The word “SHERIFF,” produced on a twenty-seven inch pre-aligned, pre-spaced panel, shall be centered on the trunk deck lid of each marked vehicle. The lettering shall be three inches high, in uppercase “ISBELLA” bold type, with a ten degree right slant.

⁴ We note that, although rule 311-3-01(B) requires that vehicle markings conform “substantially” to the standards prescribed therein, any latitude provided by the modifier, “substantially,” is limited to the manner in which the authorized markings must conform to the rule’s “standards for design, color, and placement.” The limited scope of this latitude is further delineated by the next succeeding sentence of division (B), which states that, “[m]easurements and placement may be adjusted in proportion to the size and shape of the vehicle.” Thus, the standard of substantial conformance grants counties limited discretion to adjust the appearance and placement of graphics, authorized by rule 311-3-01, in relation to the characteristics of a particular vehicle. The standard does not constitute authority for the display of graphics that are not otherwise required or sanctioned by rule of the commission.

color.”⁵ These cases emphasize the importance of, and reasons for, ensuring that law enforcement vehicles be immediately and easily recognizable as such. As the Ohio Supreme Court reiterated in *State v. Heins*, 72 Ohio St. 3d 504, 506, 651 N.E.2d 933 (1995), “[i]t requires little imagination to contemplate the unfortunate consequences should a frightened motorist believe that he [or she] was being forced off the road by a stranger. The General Assembly sought to avoid such mischief by requiring police officers on traffic duty *to be identified clearly.*” (Citation omitted and emphasis added).⁶ See *City of South Euclid v. Varasso-Burgess*, No. 68409, 1995 Ohio App. LEXIS 4517 at *8 (Cuyahoga County Oct. 12, 1995) (the markings on a police vehicle must “distinguish [it] from an ordinary passenger car” and “provide fair notice that the passenger car is a police vehicle,” belonging to “a public law enforcement officer acting under color of law”); *City of Parma Heights v. Nugent*, 92 Ohio Misc. 2d 67, 71, 700 N.E.2d 430 (Parma Municipal Court 1998) (“the main purpose of R.C. 4549.13 is to provide sufficient identification of the vehicle to a person stopped by an officer to establish that it is a police officer and not some person impersonating a police officer”); *State v. Kaplan*, 74 Ohio Misc. 2d 55, 57, 658 N.E.2d 825 (Parma Municipal Court 1994) (the requirement that police vehicles have minimum markings identifying them as such “is done not only for the protection of the officer, but also for the protection of traffic defendants, especially in situations presented to the court by the parties in which a stop recently occurred ... by persons impersonating police

⁵ R.C. 4549.13 reads: “Any motor vehicle used by a member of the state highway patrol or by any other peace officer, while said officer is on duty for the exclusive or main purpose of enforcing the motor vehicle or traffic laws of this state, provided the offense is punishable as a misdemeanor, shall be marked in some distinctive manner or color and shall be equipped with, but need not necessarily have in operation at all times, at least one flashing, oscillating, or rotating colored light mounted outside on top of the vehicle.” See also R.C. 4549.14 (an arresting officer is incompetent to testify in the prosecution of a person charged with a misdemeanor motor vehicle or traffic offense if the officer was at the time of the arrest using a motor vehicle not marked in compliance with R.C. 4549.13). *Accord* Evid. R. 601(C). Originally, R.C. 4549.13 (G.C. 12616) permitted sheriffs to “determine the marking and color of the motor vehicles for their respective departments.” 1939 Ohio Laws 271 (S.B. 69, filed May 4, 1939). The county sheriffs’ standard car-marking and uniform commission was established in 1959 in order to standardize markings for use by sheriffs state-wide. 1959 Ohio Laws 310 (Am. S.B. 257, eff. Oct. 23, 1959).

⁶ Other statutes address the need for clearly identified law enforcement vehicles by prohibiting persons who are not law enforcement officers from displaying on their vehicles emblems or markings that are used, or similar to those used, by law enforcement agencies. See R.C. 311.281(B) (“[n]o person, except a county sheriff or the deputies of a county sheriff, shall mark a motor vehicle in a manner similar to that prescribed for county sheriffs and their deputies by the county sheriffs’ standard car-marking and uniform commission”); R.C. 2913.441(A) (“[n]o person who is not entitled to do so shall knowingly display on a motor vehicle the emblem of a law enforcement agency or an organization of law enforcement officers”).

officers in traffic stops for the purposes of committing crimes upon the traffic offender”); 1949 Op. Att’y Gen. No. 241, p. 23, 26 (“[t]he marking of vehicles used in patrolling the highways and enforcing the traffic laws have long since been held by police officials to be of great importance not only as to its bearing on the safety and protection of the law-abiding citizens, but also on the detection and apprehension of law violators”). *See also State of Indiana v. Whitney*, 176 Ind. App. 615, 377 N.E.2d 652 (1978).

Although R.C. 4549.13 was enacted to require minimum markings on law enforcement vehicles used in the enforcement of traffic laws, while the vehicle marking provisions of R.C. Chapter 311 are intended to standardize the appearance of sheriff vehicles state-wide, the need for law enforcement vehicles to be unmistakably and readily identifiable underlies both statutory schemes. A citizen followed or stopped by a vehicle with extraneous markings, unrelated to law enforcement, may be as easily misled, with the attendant dangers, as one who is stopped by a vehicle with no markings at all.

We further note that the inability to determine whether a vehicle is that of the county sheriff, or say a commercial delivery vehicle, could have a detrimental impact on the prosecution of certain criminal offenses. For example, in *State v. Williams*, 84 Ohio App. 3d 129, 133, 616 N.E.2d 540 (Clermont County 1992), the court held that the avoidance of apprehension constitutes resisting arrest, which is a criminal offense prohibited by R.C. 2921.33. The operation of “a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person’s motor vehicle to a stop” is also a criminal offense that is prohibited by R.C. 2921.331(B). The elements of these offenses may be difficult to prove beyond a reasonable doubt if a defendant has grounds to argue that the vehicle pursuing him did not resemble that of a law enforcement officer.⁷ *See State of Michigan*

⁷ The culpable mental state required to convict for a violation of R.C. 2921.33, resisting arrest, is recklessness. A person is considered to act recklessly when, “with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.” R.C. 2901.22(C).

For purposes of R.C. 2921.331, willfully eluding or fleeing a police officer, the 1974 Committee Comment to R.C. 2901.22 states that “willfully” equates with “purposely,” and “[p]urpose is defined in terms of a specific intention either to cause a certain result, or to engage in conduct of a certain nature regardless of what the offender intends to accomplish through that conduct.” *See* R.C. 2901.22(A) (a person is said to act purposely “when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature”).

v. King, No. 224919, 2001 Mich. App. LEXIS 303 at *4-*5 (Dec. 18, 2001) (“[d]efendant’s defense to the charge of fleeing and eluding was that he did not know that he was being pursued by police ... because the police car that was pursuing him was not sufficiently ‘marked’ as a law enforcement vehicle”).

Prohibitions of R.C. 307.42 and R.C. 307.43

The display of corporate advertising on sheriff vehicles also may be violative of R.C. 307.42, which prohibits county officials and employees from using or permitting the use of any vehicle acquired pursuant to R.C. 307.41 “except in the transaction of public business or work of the county,” and R.C. 307.43, which prohibits a person from “us[ing] or driv[ing] any automobile ... owned, hired, or leased by the board of county commissioners for the use of any county official or employee, for any purpose other than the transaction of official business or in a ridesharing arrangement.” *See also* R.C. 307.99(A) (whoever violates R.C. 307.42 is subject to a fine of not less than twenty-five dollars nor more than one hundred dollars); R.C. 307.99(B) (whoever violates R.C. 307.43 is subject to a fine of not less than twenty-five dollars nor more than two hundred dollars, and may be imprisoned not less than ten nor more than sixty days). These prohibitions are obviously intended to prevent county personnel, and others, from using county vehicles for their personal use or for other purposes unrelated to that of the county’s business. Arguably, however, the prohibitions against the use of a county vehicle for purposes other than the transaction of official business or to carry out the work of the county also are violated when a significant function of a vehicle used by the county sheriff is to promote private business interests, regardless of the fact that the county may receive consideration therefor.

2000 Op. Att’y Gen. No. 2000-042 Distinguished

The conclusion reached in this opinion may, at first blush, appear to conflict with 2000 Op. Att’y Gen. No. 2000-042, which concluded that a board of county commissioners that operates a county transit system may let, as an incidental use of its benches, shelters, and buses, advertising space on that property. *Id.* at 2-256. The opinion is, however, easily distinguishable from the circumstances you have presented.

Aside from the factual distinction that, in this instance, the board of county commissioners is not seeking to solicit sponsors to pay for advertisements displayed on county vehicles, but rather to acquire for a nominal cost privately-owned vehicles that display corporate advertising on them, the board of county commissioners simply does not have the breadth of authority to make use of the vehicles acquired under R.C. 307.41 for county officers and employees as it does in operating a county transit system under R.C. Chapter 306. R.C. 306.04

authorizes the board to lease, manage, control, and operate the transit system's property, and to sell, lease, release, or otherwise dispose of real or personal property. The board is, furthermore, explicitly authorized by R.C. 306.04 to fix and charge rates and other charges for the use of its property. Perhaps most significantly, however, is the lack of a regulatory scheme precisely dictating the way property used by the transit authority must look, and thus limiting the ability of the county to display advertising on its property. Obviously the need, as a practical matter, to distinguish a public bus from other vehicles on the road, as well as the underlying concern for public safety if the vehicle were indeed misidentified, are less apparent than in the case of a law enforcement vehicle. We distinguish 2000 Op. Att'y Gen. No. 2000-042, therefore, and conclude that it does not lend support for the county's authority to enter into the proposed agreement.⁸

Other Terms of the Agreement

Although your request for an opinion is limited to the propriety of displaying corporate advertising on vehicles used by the sheriff, we would be remiss if we did not identify additional concerns raised by the proposed agreement.

Indemnification

First, the agreement would require the county to accede to a broadly worded indemnification clause, under which it would be required to indemnify, defend, and hold harmless the company, its licensors, advertisers and sponsors, and their personnel. The county would have the obligation to "promptly pay upon demand by Indemnitees all losses, damages, liabilities, costs, expenses and reasonable attorney fees expended by Indemnitees in the, defending or settlement of any claims or litigation asserted against Indemnitees" in connection with the program. (§ 12.b) As summarized in 1999 Op. Att'y Gen. No. 99-049 at 2-303, "[i]n

⁸ In *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), the United States Supreme Court examined the constitutionality of a municipal policy excluding political advertising from public buses but allowing other types of advertising. In upholding the policy, the Court found that, in providing transportation services to its commuters, the city was engaged in commerce, and the advertising space, "although incidental to the provision of public transportation, is a part of the commercial venture." *Id.* at 303. The Court thus held that no public forum was provided on the buses for purposes of First Amendment protections. Because state action was present, however, the Court cautioned that "the policies and practices governing access to the transit system's advertising space must not be arbitrary, capricious, or invidious." *Id.* See also *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority*, 163 F.3d 341 (6th Cir. 1998) (holding that a transit authority, "through its policies and actions, demonstrated an intent to designate its advertising space a public forum," and thus its refusal to accept a union's advertisement was subject to strict scrutiny to determine whether the refusal was necessary to serve a compelling state interest and narrowly drawn to achieve that interest). *Id.* at 355.

the exercise of its authority to enter into contracts, a board of county commissioners has discretion to agree upon any contractual terms, including an indemnification or hold harmless clause, provided that the terms come within its statutory authority and are not in conflict with constitutional provisions.” In order to comply with these constitutional and statutory conditions, the agreement must specify “a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1).”⁹ *Id.* (syllabus, paragraph one). In this instance the agreement provides for no such maximum dollar amount. In order to comply with Ohio Const. art. VIII, § 6, the county must also assure that the agreement “provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless the private entity.”¹⁰ *Id.* (syllabus, paragraph two).

Licensing Provisions

The licensing provisions of the agreement may also run afoul of Ohio Const. art. VIII, § 6. *See* note 10, *supra*. Section 13 of the agreement would require the county to acknowledge the company’s right to license products relating to the agreement “that bear a similar or the same characteristics as the Vehicles with the Sponsor themes.” If the company manufactured, produced, marketed, or sold products bearing the seal or name of the county, the company would be required to pay a royalty to the county. Under section 15 of the agreement the county would grant to the company “an exclusive license and world-wide right, with rights to sublicense through multiple tiers of sub-licensees, to reproduce and make derivative works of the [county’s] Vehicles and ... insignias and seals (including, without limitation, [the county] Seal, [county] Law Enforcement insignia, photographs or renderings of the Vehicles with [county] Indicia present, Officers and [county] employees with the Vehicles, with [county] Indicia, and any other promotional Products pre-approved by the [county]) for use in connection with the manufacture, packaging, advertising, promotion, sale and distribution of Products.” The county would have the right to pre-approve the products bearing its seal, name, or any photo or drawing of a product or use thereof.

⁹ R.C. 5705.41(D)(1) prohibits counties as well as other political subdivisions and taxing units from making any contract involving the expenditure of money unless there is attached a certificate from the fiscal officer that the amount needed to meet the contractual obligation has been appropriated for that purpose and is in the treasury or in the process of collection free from other encumbrances. Any contract made without such a certificate is void. *Id.*

¹⁰ Ohio Const. art. VIII, § 6 prohibits a county, city, town or township from becoming “a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association.” It has been interpreted as prohibiting a county from “undertak[ing] obligations that are disproportionate to the benefits received.” 1999 Op. Att’y Gen. No. 99-049 at 2-307. *See also* 1996 Op. Att’y Gen. No. 96-060.

The receipt of royalties by the county is not necessarily violative of Ohio Const. art. VIII, § 6. *See* 1996 Op. Att’y Gen. No. 96-051 at 2-196 n.5. However, the county’s grant of a license to the company, and the right of the company to sub-license, reproduce, and make derivative works of the vehicles, using the county’s seal, name, and insignia, and photographs of county officers and employees, in order to promote the company’s business interests or the sponsors’ products could well constitute the type of enterprise that would violate the lending aid and credit prohibition of Ohio Const. art. VIII, § 6.

Furthermore, rule 311-3-01(D) requires that a sheriff’s vehicle display the great seal of the state. *See* R.C. 5.04; R.C. 5.10 (describing the great seal of the state). An agreement permitting a private company to reproduce images of the great seal of the state in order to market its business would likely run afoul of R.C. 5.10, which prohibits the reproduction of the design of the great seal, except as required by law, “unless permission to do so is first obtained from the governor.”¹¹ R.C. 5.10 states that, “[n]o person shall use or permit to be used any reproduction or facsimile of the great seal or a counterfeit or nonofficial version of the great seal for any purpose not authorized by the governor.” *See also* R.C. 5.99 (“[w]hoever violates section 5.10 of the Revised Code shall be fined not more than five hundred dollars, or imprisoned not more than thirty days, or both”).

Conclusion

In conclusion, a board of county commissioners has the authority to purchase and lease vehicles for the use of the county sheriff and his employees, and to regulate the use of such vehicles. However, in light of the statutory scheme establishing the county sheriffs’ standard car-marking and uniform commission, and the rule promulgated by the commission specifying the markings that may be displayed on sheriffs’ vehicles, the board of commissioners is without authority to lease vehicles for the use of the county sheriff and his employees that display corporate advertising.

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

¹¹ Pursuant to R.C. 5.10, the governor may authorize reproduction of the design of the great seal when the purpose is to:

- (A) Permit publication of a reproduction of the great seal of the state of Ohio;
- (B) Aid educational or historical programs;
- (C) Promote the economic or cultural development of the state in a manner deemed appropriate by the governor.

1. A board of county commissioners has the authority pursuant to R.C. 307.41 to lease as well as purchase motor vehicles for the use of the county sheriff and his employees. (1955 Op. Att'y Gen. No. 4806, p. 68, overruled due to statutory change.)

2. A board of county commissioners may not lease, for the use of the county sheriff and his employees, vehicles displaying the designs, decals, and themes of corporate advertisers. (2000 Op. Att'y Gen. No. 2000-042, distinguished.)

Respectfully,

JIM PETRO
Attorney General