



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612

ROBERT T. STEPHAN
ATTORNEY GENERAL

December 31, 1980

MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
ANTITRUST: 296-5299

ATTORNEY GENERAL OPINION NO. 80- 269

Mr. Robert C. Johnson
Attorney at Law
P.O. Box 32
Herington, Kansas 67449

Re: Federal Jurisdiction--Surplus Property of Federal
Agencies--Public Airport Authorities; Lease of
Airport Property

Synopsis: Under the plain and unambiguous terms of a lease of real property, the City of Herington had no obligation to pay for the lessee's electricity consumed in the operation of a water system used by lessee. The City had a right to receive payment for said electricity, but apparently waived that right. The Tri County Public Airport Authority, to whom the City granted the real property in question, took said property subject to the terms and conditions of the lease, and likewise incurs no obligation for payment of the electricity bills, under said terms and conditions of the lease.
Cited herein: K.S.A. 27-315 et seq., 58-2502, 58-2516.

* * *

Dear Mr. Johnson:

As counsel for the Tri-County Public Airport Authority, Herington, Kansas you have asked for our opinion concerning the Airport Authority's obligations under a lease. You advise that the City of Herington owned certain real property in Dickinson County, Kansas. On June 12, 1961, the City and the Herington Cattle Company (herein, Cattle Company) executed a ten-year lease agreement for a portion of that

Mr. Robert C. Johnson
Page Two
December 31, 1980

property. This lease by its terms terminated on June 12, 1971. No new lease was executed nor did the Cattle Company surrender the premises. The Cattle Company continues in possession of the property, presumably under a year-to-year tenancy, pursuant to K.S.A. 58-2502. In 1978, the City created the Tri County Public Airport Authority (herein Airport Authority) pursuant to K.S.A. 27-315 et seq. City property, including that occupied by the Cattle Company, was deeded to the Airport Authority.

You further advise that the Cattle Company operates two electric water wells on the leased property. Prior to its grant of the leased property to the Airport Authority, the City had been providing free electricity to its tenant, the Cattle Company.

Apparently since the execution of the original lease, a bill for electricity for operation of the wells was never submitted to the Cattle Company during the several years the Cattle Company was the City's tenant. The Airport Authority was not given notice of this practice prior to the grant of land to the Airport Authority, and was not put on notice until the city submitted a bill in 1980 to the Airport Authority for the Cattle Company's electricity consumption. The charges for this electricity amount to some \$350.00 to \$400.00 per month.

In this factual context, you inquire whether the officers of the Airport Authority may lawfully provide free electrical services to the tenant Cattle Company, in light of the Kansas "public purpose" doctrine. As early as 1875, in the case of State, ex rel. Griffith v. Osawkee Township, 14 Kan. 419, the Kansas Supreme Court declared that public policy forbids the appropriation of public funds for a solely private purpose. Id. at 420 (now at 322, 323). The Court thus enunciated the "public purpose" doctrine which remains today an important principle in the Kansas law. See Attorney General Opinion No. 80-200, and opinions cited therein.

Before considering the specific question you have raised, we deem it appropriate first to determine whether the Airport Authority has any obligation under the lease to make the payments in question. You have provided us copies of the lease agreement and addenda thereto executed by the City and the Cattle Company in 1961. Although the original lease has, by its terms, expired, the terms of the original writing are relevant to a determination of the obligations of landlord and tenant under the holdover tenancy. The majority rule is that the terms of the year-to-year tenancy implied from the holdover are the same terms as of the expired lease. Those terms are generally determined by looking to the original written lease. Bishop Cafeteria Company of Omaha v. Ford, 177 Neb. 600, 129 N.W.2d 581 (1964).

Mr. Robert C. Johnson
Page Three
December 31, 1980

Moreover, the terms of the original lease are relevant to a determination of the Airport Authority's obligations under the current arrangement because, as K.S.A. 58-2516 provides, "[a]llienees of lessors and lessees of land shall have the same legal remedies in relation to such land as their principal." This section codifies the common law rule that grantees take the land subject to the terms and conditions of a lease of the property granted to them. See 51C C.J.S., Landlord and Tenant, §93(2).

The relevant portions of the lease are as follows:

"10. It is further agreed as a part of the rental that the said CITY shall operate and maintain the water utilities as located on said airbase property so as to furnish an adequate supply of water to said COMPANY. COMPANY to make own connections with existing service on said facility.

"11. COMPANY agrees to purchase all power from the City Water & Electric Department in accordance to rate schedule to be agreed upon. The City Water & Electric Department to furnish power at one point to be selected by CITY and COMPANY agrees to build transmission from said point to site of COMPANY'S operation."

A supplemental agreement between the City and the Cattle Company was executed on August 7, 1961, with the relevant portion of that addenda providing:

"It is further agreed between the parties that the said City does not by virtue of this agreement nor by Article 10 of the original agreement guarantee a supply of water beyond that capable of being produced by the reasonable operation and maintenance of the wells, pumps and transmission lines as now installed on said facility, and that the only obligation of said City is to maintain said existing system, it being agreed that maintenance shall include the periodical cleaning of said wells to remove sand and other deposits."

Clearly, notwithstanding the City's past practice of providing free electrical services to the Cattle Company, the agreement provides that the Company will purchase "all power." The agreement further provides that the City's "only obligation" with respect to the

Mr. Robert C. Johnson
Page Four
December 31, 1980

supply of water was to maintain the existing water system, under Article 10 of the original agreement and the above-quoted provision of the August 7, 1961 supplemental agreement. In our judgment, the City (and thus its successor-in-interest, the Airport Authority) had no obligation to provide free electricity used in the operation of the wells.

Kansas law provides that where there is a writing that is clear and unambiguous on its face, it cannot be contradicted by parol evidence of an antecedent or contemporaneous agreement. Williams v. Safeway Stores, Inc., 198 Kan. 331, 338 (1967). The test of whether language is ambiguous is whether the language can be understood to have two or more possible meanings. Wood v. Hatcher, 199 Kan. 238, 242 (1967). The language of the lease and addenda is clear and unambiguous: the Cattle Company agreed to purchase "all power," all the electricity it would need for its operations, from the City Water and Electric Department; the City agreed that its "only obligation" concerning the water system was to maintain the system, and made no agreement to supply electricity consumed in the operation of the system.

Notwithstanding the plain and unambiguous language of the lease, the Cattle Company might advance an argument to show that it was entitled to free electricity for the operation of the wells. The Cattle Company could argue that the parol evidence rule is circumvented by the subsequent conduct of the parties, showing that the failure of the City to bill the Cattle Company is evidence that the parties interpreted the lease as so providing. We discount that argument, however, in light of the general rule that an unambiguous lease agreement will not be modified by the parties' subsequent conduct. "In the absence of ambiguity in the provisions of a lease, courts will enforce the instrument in accordance with its plain language, regardless of the construction put upon it by the parties." 49 Am.Jur.2d, Landlord and Tenant, §142.

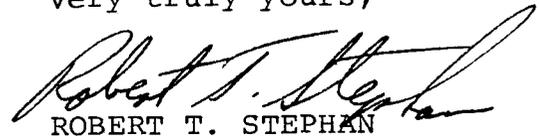
Moreover, it is our opinion that, rather than being a lease covenant imposing an obligation on the Airport Authority, as the City's successor, to furnish electrical power to the Cattle Company, in plain and unambiguous terms, the agreement concerning the furnishing of electricity was in the nature of a personal agreement between the City and the Cattle Company. Clearly, the Airport Authority has no legal authority to operate electrical utility services, or to function as a public utility. Rather, the original parties to the lease agreed that Cattle Company would purchase all power from the city utility, the City Water and Electric Department. The Airport Authority succeeds to no rights or obligations under that specific agreement. See generally 51C C.J.S., Landlord and Tenant, §240, concerning collateral covenants.

Mr. Robert C. Johnson
Page Five
December 31, 1980

In summary, we conclude that under the plain and unambiguous terms of a lease of real property, the City of Herington had no obligation to pay for the lessee's electricity consumed in the operation of a water system used by lessee. The City had a right to receive payment for said electricity, but apparently waived that right. The Tri County Public Airport Authority, to whom the City granted the real property in question, took said property subject to the terms and conditions of the lease, and likewise incurs no obligation for payment of the electricity bills, under said terms and conditions of the lease.

In view of the foregoing conclusions, it is not necessary to address your question whether the payments in question would violate the "public purpose" doctrine.

Very truly yours,


ROBERT T. STEPHAN
Attorney General of Kansas


Steven Carr
Assistant Attorney General

RTS:BJS:SC:phf