FILE

Subject Counties - Property Lease + Rental of

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Office of the Attorney General

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VERN MILLER
Attorney General

June 19, 1974

Opinion No. 74- 202

Mr. Claude S. Heath
Wichita County Attorney
P.O. Box 299
Leoti, Kansas 67861

Re: Lease of County Property

Dear Mr. Heath:

In responding to your opinion request of May 10, 1974, it is our understanding that the county commissioners, pursuant to K.S.A. 65-3410, desire to acquire certain realty in Wichita County for the purpose of solid waste disposal management. For whatever reason, which we feel is entirely within the discretion of the county commissioners, the land will be acquired by purchase rather than condemnation. This will unavoidably result in the acquisition of land in excess of that actually required to fulfill the purposes of K.S.A. 65-3410 and which excess land will eventually be sold pursuant to K.S.A. 19-211, at the most reasonable opportunity.

Until such time as the sale of the excess land will occur you inquire whether the county commissioners may lease such land on a short term year-to-year basis to private agricultural interests in the county.

It is our opinion that under the above circumstance the lease of the excess land is permissible. Any funds generated by such lease should be placed in the county general fund.

The initial approach in answering your inquiry is to determine if statutory authority exists for the Wichita County Commissioners to enter into a lease of the type contemplated for the excess property. The powers of the county commissioners are statutory. K.S.A. 19-212 provides in part that the board of county commissioners of each county shall have power

> "First. To make such orders concerning the property belonging to the county as they may deem expedient . . .
>
> * * *
>
> "Sixth. To represent the county and have the care of the county property, and the management of the business and concerns of the county . . . ."

It is apparent that the county commissioners are the general agents of the county and have the general control and management of county property. The legislature granted the commissioners the power to make such orders concerning the property belonging to the county as they might deem expedient. K.S.A. 19-101, Third and Fourth. In connection with solid waste mangement systems, the county commissioners may acquire all necessary land and do all things necessary for a proper and effective solid waste management system, K.S.A. 65-3410. While there are explicit grants of authority in other sections of the statutes to enter into lease agreements (see K.S.A. 19-110, 19-15,117) there is none for the lease proposed by the Wichita County Commissioners. However, a general rule is that when authority to manage and control property is conferred upon a board, it implies all reasonable means as may be necessary for the effective exercise of the powers conferred and duties imposed. Edwards County Comm'rs v. Simmons, 159 Kan. 41, 53, 151 P.2d 960 (1944); State ex rel. v. Younkin, 108 Kan. 634, 638-39, 196 Pac. 620 (1921). The lease of excess county property under conditions which are stated above is consistent with the general rule. Such authority therefore exists.

A second test to apply is to determine if this particular contract is otherwise objectionable. It was held in Edwards County Comm'rs, supra, a case involving a contract of employment which extended beyond the term of the board of county commissioners, that:

> "the test generally applied is whether the contract at issue . . . is a commitment of a sort reasonably necessary to protection of the public property, interest or affairs being administered." 159 Kan. at 54.

In our opinion we are not prepared to say that the proposed contract is not within the above test as a commitment reasonably necesssary for the protection of county property.

In other cases, however, the Kansas Supreme Court, upon examining a challenged contract otherwise permissible, has held several

to be objectionable on the basis of public policy. For instance, in the case of Glen W. Dickinson Theaters v. Lambert, 136 Kan. 498, 16 P.2d 515 (1932), the city of Hiawatha entered into an agreement for the lease of the municipal auditorium to a private individual for use as a motion picture theater. A competitor to the lessee brought suit challenging the right of the city to enter into the lease agreement. While there was specific statutory authority for the city to lease the building (see K.S.A. 19-15,117) the Court nevertheless found:

> "It has been the policy of our government to exalt the individual rather than the state (State v. Kelly, 71 Kan. 811, 836, 81 Pac. 450) and to have the various units of our government perform governmental functions, leaving to individuals commercial enterprises for profit.
>
> "We conclude that the amendment . . . did not authorize the lease of the building, or any part thereof, for the conduct of a purely commercial enterprise, and if the statute were so construed as to grant such authority it would be void as against the public policy of this state." See also State ex rel. v. Kaw Valley Drainage District, 126 Kan. 43, 276 Pac. 31 (1928).

Thus, where the lease in effect places the county in direct competition with private enterprise, and is commercial in application rather than a governmental function, the public policy of this state will not permit such contracts, even should the contract meet the test of Edwards County Comm'rs.

Where, however, the contract is governmental in nature, the fact that profit may result to the county would not render the transaction objectionable. Incidental revenues would not characterize the transaction as commercial rather than governmental, where the effect of the agreement is one that can be regarded as consistent with the general authority of the board of county commissioners. See Kansas City v. Wyandotte County, 117 Kan. 141, 146, 230 Pac. 79 (1924). In the situation that you have proposed, the excess land would otherwise lie idle until such time as the county could dispose of it through sale. The proposed lease is therefore one designed for the "caring of county property under section 19-212"; it can be characterized as governmental and the lease is therefore not objectionable. See State ex rel. v. City of Garnett, 180 Kan. 405, 408, 304 P.2d 555 (1959). The county will not be surrendering its inherent right to the management and control of the excess land, but is merely providing for reasonable use of the property, not at varience

with the purpose for which it was obtained. See State ex rel. v. City of Coffeyville, 127 Kan. 663, 274 Pac. 258 (1929).

The proposed lease is in our opinion within the authority of the board of county commissioners, as an action designed to care for county property and to provide a means of security and control over otherwise idle land, until such time as a sale can be accomplished pursuant to K.S.A. 19-211. We do not understand that the lease will place the county in competition with private enterprise, which would otherwise make the proposal objectionable to public policy.

Yours very truly,

VERN MILLER
Attorney General

VM:MCC:jsm