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June 9, 1987

ATTORNEY GENERAL OPINION NO. 87- 88

Mr. Gerald E. Williams
City Attorney
City of Lenexa
40 Corporate Woods
P.O. Box 25830
Overland Park, Kansas 66225

Re: Cities and Municipalities -- Parks, Public Squares, and Market Squares -- Land for Park Purposes; Acquisition by Lease

Synopsis: K.S.A. 12-1301 empowers a city to acquire by lease land to be used as a public park for the use and benefit of the people of the city. As long as the lease specifies that the city's obligation is limited to periodic payments made from funds budgeted and appropriated for that purpose, the cash-basis law is not a barrier to such an agreement. In the absence of contrary legislation, the home rule powers conferred upon cities by Article XII, § 5 of the Kansas Constitution empower a city to sublease public park land to an individual for the purpose of constructing and maintaining a public golf course. Cited herein: K.S.A. 10-1101; 10-1116b; 12-1301; Ks. Const. Art. XII, § 5.

* * *

Dear Mr. Williams:

As City Attorney for the city of Lenexa, you request our opinion on the legality of a lease and a subsequent sublease

proposed by the city for the provision of park services. The agreements call for a lease of land by the city from a private party for the purpose of establishing a golf course, and a sublease by an individual from the city to construct and maintain the golf course. Specifically, you inquire whether the lease conforms with the cash-basis statutes, and whether the city has the power to enter into the sublease.

Initially, we note that cities may enter into contracts and leases for various reasons, including parks and recreational purposes. Such power is expressly granted by K.S.A. 12-1301, which states in relevant part:

> "[a]ny city may acquire by purchase, or lease . . . land within or without the limits of said city to be used as a public park for the use and benefit of the people of said city."

In our opinion, the proposed recreational facility may be included within the definition of a public park. In City of Wichita v. Clapp, 125 Kan. 100 (1928), an airport was held to be within the proper and legitimate uses for which public parks are created. The court noted that a "park may be devoted to any use which tends to promote popular enjoyment and recreation." 125 Kan. at 101, citing Dillon, Municipal Corporations, 5th ed. § 1096, p. 1749. Since a golf course will be used to promote popular enjoyment and recreation, we believe that it too falls within the statutory definition of a public park.

Your first inquiry involves the application of the cash-basis law, K.S.A. 10-1101 *et seq*. Lease agreements which do not result in the creation of obligations extending beyond the budget year are not prohibited by the act. K.S.A. 10-1116b states in relevant part:

> "[n]othing in the provisions of K.S.A. 10-1101 *et seq*. shall prohibit a municipality from entering into . . . a lease agreement . . . if [the agreement] specifically states that the municipality is obligated only to pay periodic payments or monthly installments under the agreement as may lawfully be made from . . . funds budgeted and appropriated for that purpose during such municipality's current budget year . . . ."

Article III, section 3.01(c) of the proposed lease appears to satisfy the requirement of K.S.A. 10-1116b, as the city's failure to budget necessary funds for the lease in the future results in the termination of the agreement.

Your second inquiry concerns whether the city may sublease land to an individual for the purpose of constructing and maintaining a golf course. We are aware of case law which indicates that such a sublease would be invalid. See, e.g., State, ex rel., v. City of Coffeyville, 127 Kan. 663 (1929); Dickinson Theatres v. Lambert, 136 Kan. 498 (1932). In City of Coffeyville, the court noted that municipal corporations may exercise only those powers which are conferred by law. As the city had no statutory power to sublet an airport to a private individual, the court held that the city's agreement was an improper exercise of corporate power. 127 Kan. at 668. In Lambert, the court held that the city's lease of a public building for the purpose of carrying on a purely commercial enterprise was void as against the public policy of the state. 136 Kan. at 502. While this authority initially appears relevant to the situation at hand, we believe a subsequently enacted constitutional amendment has rendered these cases inapplicable to your inquiry.

Effective July 1, 1961, Article XII, § 5 of the Kansas Constitution was amended granting to cities the powers of home rule. The Constitution provides that:

> "[c]ities are hereby empowered to determine their local affairs and government . . . . Cities shall exercise such determination by ordinance passed by the governing body . . . subject only to enactments of the legislature of statewide concern applicable uniformly to all cities . . . ." Ks. Const., Art. XII, § 5(b).

Prior to passage of this amendment, the legislature granted powers to cities by statute. Martin, Home Rule for Kansas Cities, 10 Kan. L. Rev. 501 (1962). However, the effect of home rule is that the legislature now limits, rather than grants, authority to cities. C.F., Moore v. City of Lawrence, 232 Kan. 353, 356 (1982) and Syl. ¶ 1.

Attorney General Opinion No. 61-302 addressed the effect of the Home Rule amendment upon the power of a city to lease municipally owned real property to a private corporation. In

that opinion, Attorney General William M. Ferguson was asked whether the city of Herington could lease to a private corporation for profit a portion of its municipal airport property. General Ferguson recognized that in the past the Attorney General's office had consistently opined that Kansas cities could not lease municipally owned real property to private persons or corporations for use in private enterprises without specific statutory authority. (See State, ex rel., v. City of Coffeyville, 127 Kan. 663 (1929); Dickinson Theatres v. Lambert, 136 Kan. 498 (1932), supra.) However, he emphasized that the rationale of these opinions was that prior to 1961 Kansas cities had only such powers as were specifically granted by the legislature. In this instance, there was no specific statutory authorization for a city to lease its airport.

Opinion No. 61-302 took into consideration the effect of the Home Rule amendment, which clearly states that cities are empowered to determine their local affairs. Since there was no statutory prohibition effective under the Home Rule amendment which would prohibit the city from leasing municipally owned property, General Ferguson opined that the city could lease its property to a privately owned corporation even without specific statutory authorization.

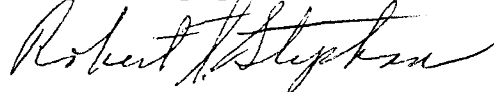
We concur with the conclusion reached in Opinion No. 61-302, and believe similar reasoning can be applied to the situation at hand. In our opinion, the language in the Home Rule amendment can only be interpreted to mean that cities now possess the authority to do all things not specifically restricted or prohibited by the legislature or which contravene public policy. See also Attorney General Opinions No. 61-279; 61-302. The question of leasing property to a private individual is a local affair, and we know of no restrictive legislation which would prohibit such an arrangement. Further, we do not feel such an agreement would violate public policy.

We recognize that cities may not exercise their home rule powers unreasonably under the guise of their police power. Community Antenna TV of Wichita, Inc. v. City of Wichita, 205 Kan. 537 (1970). However, we do not believe that the creation of a joint commercial enterprise between a city and a private developer is an unreasonable exercise of home rule powers. Private gain may accompany public benefit. See generally, State ex rel., Tomasic v. City of Kansas City, 237 Kan. 572 (1985). Accordingly, in our opinion, the city of Lenexa may, through the exercise of its home

rule powers, sublease public park land to a private individual for the development of a recreational facility, as long as the facility will benefit the general public.

In conclusion, K.S.A. 12-1301 empowers a city to acquire by lease land to be used as a public park for the use and benefit of the people of the city. As long as the lease specifies that the city's obligation is limited to periodic payments made from funds budgeted and appropriated for that purpose, the cash-basis law is not a barrier to such an agreement. In the absence of contrary legislation, the home rule powers conferred upon cities by Article XII, § 5 of the Kansas Constitution empower a city to sublease public park land to an individual for the purpose of constructing and maintaining a public golf course.

Very truly yours,



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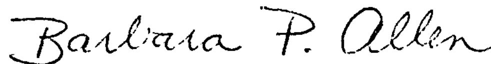

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