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ATTORNEY GENERAL OPINION NO. 88- 157

The Honorable Nancy Brown
State Representative, Twenty-Seventh District
15429 Overbrook Lane
Stanley, Kansas 66224-9744

Re: Cities and Municipalities -- Public Recreation and
Playgrounds -- Powers of Recreation Commission;
Acquisition of Real Property by Purchase or Lease

Synopsis: Recreation commissions are creatures of statute,
and have only those powers expressly conferred or
necessarily implied. The authority to purchase
real property generally implies the authority to
lease such property. The legislature intended to
preclude acquisition of real property by a
recreation commission, unless such acquisition
occurs by devise, gift or donation. This
limitation of authority narrows the scope of a
recreation commission's power to contract. Thus, a
recreation commission is not authorized to lease
real property from a unified school district.
However, a commission is authorized to enter into a
contract to become a licensee in order to operate a
recreation system. Cited herein: K.S.A. 1987 Supp.
12-1924, 12-1928; 1987 House Bill No. 2005; 1987
House Bill No. 2424.

* * *

Dear Representative Brown:

As Representative for the Twenty-Seventh District, you have requested our opinion regarding the power of recreation commissions. Specifically, you ask whether a commission operated under the provisions of K.S.A. 1987 Supp. 12-1922 et seq. is authorized to lease real property from a school district.

Being a creature of the legislature, it is axiomatic that a recreation commission has only those powers expressly conferred or necessarily implied by statute. If there is a doubt as to the existence of a power, such doubt should be resolved against its existence. State, ex rel. v. Rural High School District No. 7, 171 Kan. 437, 444 (1951). The expressed powers are enumerated in K.S.A. 1987 Supp. 12-1928, which states in relevant part:

"Every recreation commission appointed pursuant to this act shall have the power to:

. . .

(g) enter contracts;

. . .

(j) acquire title to personal property by purchase, bequest, gift or other donation and acquire title to real property by devise, gift or other donation. Whenever property owned by a recreation commission is sold, the proceeds shall be used for recreation purposes. . . ." K.S.A. 1987 Supp. 12-1928 (emphasis added).

While the statute expressly authorizes a commission to acquire real property by devise, gift or donation, there is silence regarding acquisition by purchase or lease. The power to lease real property is generally implied with the power to purchase. 10 McQuillin, Municipal Corporations, § 28.10 (1981). Our courts have held that a lease is regarded in the law of property as equivalent to a purchase of real property for the term of the lease. Hermes v. Stackley, 10 Kan. App. 2d 342, Syl. ¶ 2 (1985). Therefore, to determine whether a recreation commission is authorized to lease real property, we look to the authorization for acquisition by purchase.

Subsection (j) of the statute expressly authorizes the purchase of personal property. Such is not the case regarding real property. The plain language of the statute indicates that a commission has power to acquire real property only by devise, gift or donation. The maxim expressio unius est exclusio alterius, the inclusion of one thing implies the exclusion of another, is a rule of statutory construction used to determine legislative intent. Application of the rule suggests that by granting authority to acquire real property by devise, gift, or donation, the legislature intended to abrogate the general rule that the commission not have the power to acquire real property. This express exclusion from the general rule implies that the power to acquire real property by purchase does not exist. See LeSueur v. LeSueur, 197 Kan. 495, 500 (1966). However, this rule should not be mechanically used to override a manifest legislative intent to the contrary. In re Olander, 213 Kan. 282, Syl ¶ 1 (1973).

The statutory history indicates that the legislature did not intend a recreation commission to purchase real property. Previously, commissions were governed by K.S.A. 12-1901, et seq. The 1987 legislature repealed those sections, and restructured the statutory scheme. The amendments were initially introduced as 1987 House Bill No. 2005, a product of Proposal No. 16. The Special Committee on Federal and State Affairs filed a report dated October 17, 1986, and included testimony by conferees which indicated that title to real property should be held by recreation commissions. Report on Kansas Legislative Interim Studies to the 1987 Legislature, at page 214. This concern became part of H.B. 2005, which stated in part,

"Every recreation commission appointed pursuant to this act shall have the power to:

. . .

(j) acquire and hold title to property. . . ." 1987 House Bill No. 2005, § 7.

Section 7(j) of the proposed bill was intended to change the then existing law which required that title to real property be held by the city or school board operating the system. See Minutes of the House Committee on Local Government, February 3, 1987, attachments 2, 3. At the request of the conferee for the League of Kansas Municipalities, H.B. 2005 was amended to allow a commission to purchase personal

property, but real property could be acquired only by gift or donation. Minutes, February 5, 1987, at page 2.

1987 House Bill No. 2005 was eventually withdrawn and replaced by 1987 House Bill No. 2424. The conceptual amendment to H.B. 2005 regarding acquisitions of real and personal property was included in the new bill. See Minutes, March 2, 1987, attachment 1. Those provisions of H.B. 2424 were enacted by the 1987 legislature, and were codified at K.S.A. 1987 Supp. 12-1928, quoted above. In summary, subsection (j) does not authorize a recreation commission to purchase or lease real property.

Additionally, we note that K.S.A. 1987 Supp. 12-1928(g) is a grant of authority to become a party to a contract. By definition, a lease involves a contractual relationship. Black's Law Dictionary 800 (5th ed. 1979). However, common sense dictates that this express authority to contract is limited in scope to subject matters within the recreation commission's express or implied power.

"Ordinarily, the local corporation is permitted to enter into all contracts which are proper and reasonably necessary to enable it to perform the functions expressly conferred and those which are necessarily implied. . . ."
10 McQuillin, Municipal Corporations, § 29.05 (1981).

To read subsection (g) so broadly that it encompasses authority to lease real property strains the notions of express and implied power regarding acquisition of real property. Such a reading would conflict with subsection (j). See Board of Public Utilities, etc. v. City of Kansas City, 496 F. Supp. 389, 395 (D. Kan. 1980) (statute required board to use only city attorney for legal services, authority to contract not authority to hire independent counsel).

Our opinion to this point is confined to whether a recreation commission may enter into a lease. A lease is an interest in real property and an estate in the land for a period of time. A lease is distinguishable from a license, which is an authority to do an act on real property without passing an estate in the property. A license permits the licensee to enter and occupy the land for a specific purpose without becoming a trespasser. The fact that the privilege is paid for by the licensee pursuant to a written agreement does not transform the license into a lease. The manifest intent of

the parties will generally determine whether the agreement is a lease or a license. See Gage v. City of Topeka, 205 Kan. 143, 146 (1970).

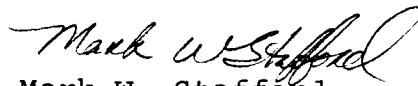
The statutes governing recreation commissions anticipate that the commissions become licensees, not tenants of property in which the right of possession belongs to the city or school district. The city or school district is directed to cooperate in providing property for recreational purposes, and the operation of the recreation system is to be delegated to the recreation commission. K.S.A. 1987 Supp. 12-1924. The recreation commission is authorized to conduct activities on property under its control and management, or on other public property with proper consent. K.S.A. 1987 Supp. 12-1928(b). As previously discussed, a commission is expressly authorized to enter into contracts, which would impliedly include a license contract.

In conclusion, it is our opinion that recreation commissions are creatures of statute, and have only those powers expressly conferred or necessarily implied. The authority to purchase real property generally implies the authority to lease such property. The legislature intended to preclude acquisition of real property by a recreation commission, unless such acquisition occurs by devise, gift or donation. This limitation of authority narrows the scope of a recreation commission's power to contract. Thus, a recreation commission is not authorized to lease real property from a unified school district. However, a commission is authorized to enter into a contract to become a licensee in order to operate a recreation system.

Very truly yours,



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