

Opinion No. 58-231

December 12, 1958

BY: OPINION OF FRED M. STANDLEY, Attorney General Alfred P Whittaker, Assistant Attorney General

TO: General Glen S. Albright, NMARNG, Ass't The Adjutant General, The Adjutant General's Office, Santa Fe, New Mexico

QUESTION

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May the State Armory Board lawfully construct an armory on land held by the Board under a 99-year lease?

CONCLUSION

Yes, but not under the facts on which the instant request is based.

OPINION

ANALYSIS

We understand that the State as lessee has entered into an agreement with the City of Las Cruces as lessor whereby the City leases to the State a tract of land described in the lease for a period of 99 years at a rental of \$ 1.00 annually. The lease further provides as follows:

"It is understood and agreed that the premises are to be used for the construction of such buildings and improvements as the State may require for National Guard purposes and shall be used for National Guard purposes.

It is further expressly understood and agreed that if at any time during the term of this lease the State should abandon the premises, the same shall revert to the City of Las Cruces free of any obligations of this lease contract and all improvements which may have been constructed thereon by the State shall be and become the property of the City of Las Cruces.

It is expressly agreed that should the lessee default in keeping and performing any of the covenants and agreements of this lease imposed upon it, the lessor may, at its election, cancel this lease and repossess the property."

We further understand that the armory to be constructed is considered to have a life of 25 years.

In our view, the State Armory Board has statutory authority to lease property for its statutory purposes. The governing statute clearly contemplates control by the Board of property "rented or leased by the state"; and the authority "to acquire property deemed necessary for military purposes. . . by purchase, grant, gift or condemnation" is not to be read as excluding the exercise of the lesser power to lease. See Sec. 9-7-3, N.M.S.A., 1953. This office has heretofore held that a political subdivision of the State having the power to lease property and construct buildings may construct a public building on property subject to a 90-year lease. See Opn. No. 57-80, issued April 24, 1957. Accordingly, the mere fact that it is proposed to construct an armory on land subject to such a lease does not invalidate the proposal. The principal legal question would be whether the State, in expending State funds in the construction of the armory, would thereby be effecting a donation to the lessor, if the improvements constructed retain value at the termination of the lease and become the property of the lessor. Since the opinion request is based upon the assumption of a life of 25 years for the proposed buildings, no donation in violation of Art. IX, Sec. 14, of the Constitution of New Mexico would occur upon expiration of the lease. That provision reads as follows:

"Neither the state, nor any county, school district, or municipality, except as otherwise provided in this Constitution, shall directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation, or in aid of any private enterprise for the construction of any railroad; provided, nothing herein shall be construed to prohibit the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons."

However, an affirmative answer to your general inquiry does not justify the specific proposal reviewed. The provisions of the lease quoted above expressly state that the premises are to be used for National Guard purposes and provide for an election in the lessor to repossess the property for default by the State in performing any of its agreements. The lease further expressly provides that upon termination of the lease all improvements thereon shall become the property of the lessor. Accordingly, the proposed project is subject to the same objection which was found in Opn. No. 57-156, which declined to approve the use of State funds for the construction of New Mexico National Guard facilities on land conveyed to the State subject to various conditions subsequent. Although not expressly stated in that opinion, the implicit basis for the conclusion necessarily was the fact that the forfeiture of improvements to the grantor effected a violation of Art. IX, Sec. 14, of the Constitution of New Mexico, above quoted.

We conclude that the proposal here considered also provides for such a violation and that the Board's statutory authority does not permit the proposed arrangement.

In reaching this conclusion, we recognize that Art. IX, Sec. 14, has been held to be inapplicable in situations involving an alleged lending of credit under legislative sanction by one subordinate governmental agency to another. **Wiggs v. City of Albuquerque**, 56 NM 214, at pp. 225-226 (1952); **White v. Board of Education of Silver City**, 42 N.M. 94 at pp. 104-106 (1938). In the **Wiggs** case, the Court upheld a proposal for the construction by the City of Albuquerque of an auditorium to be located on lands of the

University of New Mexico for the use of both parties as specified in the agreement between them. In the **White** case, the Court upheld the validity of a proposal by a school district to join with a state educational institution for the construction of school buildings on land belonging to a State educational institution from proceeds of a bond issue of the school district. The Court concluded that the proposal did not violate Art. IX, Sec. 14, for the reason that the constitutional prohibition was not applicable to the lending of credit by one subordinate State agency to another. In so concluding, the Court at page 105, 42 N.M., quoted from the opinion of the Supreme Court of California in **City of Sacramento v. Adams**, 153 Pac. 908, 910, construing a similar constitutional provision. Our Court quoted the following:

"The court said: 'We are satisfied that this cannot be construed as applicable to the giving or lending of the credit of one of the agencies of the state or the making of any gift by one of such agencies, to the state itself. The state is not a corporation within the meaning of this section. This was squarely held of a substantially similar provision of the Constitution of the state of Washington in *Lancey v. King County*, 15 Wash. 9, 45 P. 645, 34 L.R.A. 817. See also *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24. It is to be borne in mind that the state itself has absolute control of all the property of such of its agencies as cities, towns, counties -- is, in a sense, the ultimate owner thereof.'"

These two decisions by our Supreme Court should be considered as validating proposals for the joint construction, operation and financing of necessary public facilities by two or more agencies or subdivisions of the State. However, in the absence of a holding to that effect by the New Mexico Supreme Court and in the absence of compelling authority from other jurisdictions, we do not feel that the decisions referred to above go so far as to authorize the expenditure of large sums of State money on facilities which may be lost, even to a municipal corporation of the State. Certainly the Legislature, in conferring broad powers on the Board in Sec. 9-7-3, did not contemplate that the Board, by contract, might agree (in effect to the eventual diversion of state funds to the use of a different subdivision or agency of the state, for a different purpose, on terms fixed by the contract. To the contrary, the Legislature did contemplate that all dispositions of property by the Board would require approval by the state board of finance. The statute quoted expressly so provides; and this procedure applies generally to the disposition of property by any state agency. See Sec. 6-1-8, N.M.S.A., 1953.

Accordingly, we conclude that under the facts presented the construction of an armory on land held subject to the lease quoted above in part, would involve a potential violation of Art. IX, Sec. 14, of the Constitution of New Mexico, in the absence of explicit agreement for compensation to the State for the value of any improvements on the property in the event of a forfeiture.