

## **Opinion No. 64-30**

March 10, 1964

**BY:** OPINION OF EARL E. HARTLEY, Attorney General James E. Snead, Assistant Attorney General

**TO:** Mr. R. F. Apodaca, State Fire Marshal, State Corporation Commission Santa Fe, New Mexico

### **QUESTION**

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1. Does a city or county government have the legal power to enter into a lease agreement for property, with or without improvements, which will be used as a fire station?
2. If the answer to question Number 1 is yes, may State Fire Protection Funds be used by the city or county involved to make payments on the leased property?
3. If the answer to question Number 1 is yes, may State Fire Protection Funds be used by city or county governments to maintain, improve, or remodel a fire station located on leased land?
4. If the answer to question Number 1 is yes, may a city or county government use State Fire Protection Funds to build a fire station on leased land?
5. May State Fire Protection Funds be used to pay the salary of any full or part-time fire department employee such as a driver, fireman, chief, radio operator or maintenance personnel?

#### **CONCLUSIONS**

1. Yes, generally.
2. No.
3. Yes.
4. No.
5. See Analysis.

### **OPINION**

## ANALYSIS

Any answer to your first question regarding whether a city or county government has the legal power to lease land with or without improvements requires a certain amount of generalization since local governments vary in their specific powers. In general it may be said that an incorporated city, town, village or county is a municipal corporation, and has all of the powers of a body corporate. These powers include those of buying, selling, holding and leasing real estate. See Opinion No. 6164, 1954. An unincorporated municipality may be obliged to take specific action to acquire the right to enter into contracts for leasing land, but since we have been cited no specific examples to the contrary, we take the position, for the purposes of this opinion, that the cities and counties mentioned in question No. 1 have the power to contract for the lease of land.

Your second question requires a review of the Fire Protection Fund Act, being Sections 58-5-2.3 through 58-5-2.18, N.M.S.A., 1953 Compilation, to determine what limitations the legislature placed on the expenditure of funds distributed to the various recipients of the fund.

Section 58-5-2.10, supra, provides in pertinent part as follows:

"58-5-2.10. Expenditures from moneys distributed from fire protection fund. -- Any amount so distributed from the fire protection fund to any incorporated city, town or village, or to any independent fire district, shall be expended **only for the maintenance of its fire department, the purchase, construction, maintenance, repair and operation of its fire stations, including substations, fire apparatus and equipment**, the payment of insurance premiums upon such fire stations, substations, fire apparatus and equipment, and insurance premiums for injuries or death of firemen as otherwise provided by law. . . ." (Emphasis Supplied).

Section 58-5-2.12 provides as follows:

"58-5-2.12. Land or Buildings. -- No amount so distributed from the fire protection fund to any incorporated city, town or village or to any independent fire district, shall be expended or obligated for the purchase of land or the construction of buildings for fire stations or substations unless all obligations previously incurred for such purposes and to be paid from moneys distributed from the fire protection fund by such city, town, village or districts all have been fully paid and satisfied; and no such amount shall be expended or obligated for the construction of buildings for fire stations or substations unless the city, town, village or independent fire district proposing to expend or obligate for that purpose moneys distributed from the fire protection fund **holds fee simple title, not encumbered by any lien**, to the land on which it proposes to construct any such building." (Emphasis Supplied).

Section 58-5-2.15, supra, provides in pertinent part as follows:

"58-5-2.15. Wrongful expenditure. -- Any person who shall expend, or direct or permit the expenditure of, any moneys distributed from the fire protection fund, **for purposes not expressly authorized** by the Fire Protection Fund Act, or by rules and regulations duly promulgated by the superintendent of insurance pursuant to said act, shall be personally liable to the state of New Mexico for the full amount of such moneys so wrongfully expended, together with interest thereon and costs. . ." (Emphasis Supplied)

From the above quoted statutory language it becomes clear that the legislature intended to specifically delineate the areas within which the distributed moneys of the fire protection fund could be used. Section 58-5-2.15, supra, specifically states that use of fire protection fund moneys "for purposes not expressly authorized by the Fire Protection Fund Act" is a wrongful expenditure. With this section before us, we must look to Section 58-5-2.10 quoted above to determine just what expenditures are "expressly authorized." This section expressly allows expenditure of moneys from the fire protection fund for "maintenance of fire departments," for the "purchase, construction, maintenance, repair and operation of fire stations," and equipment, and for the payment of certain insurance premiums. Nowhere in the section is there any mention of expenditure for payment of rent on leased land or buildings. As a matter of fact, it would appear to have been the intent of the legislature to limit recipients of fire protection fund moneys, with regard to buildings, to the purchase and construction of buildings on land wherein the recipient is vested with fee simple title, unincumbered, see Section 58-5-2.18 above. In view of the strict language used by the legislature it is our opinion that recipients of fire protection fund money cannot legally expend such money for rental payments on leased property.

Although we are of the opinion that fire protection fund moneys cannot be expended for rental payments on leased property, we find that Section 58-5-2.10, supra, quoted above does specifically authorize the use of such moneys for the maintenance of leased property. This section specifically states that the recipients can expend the moneys "for the maintenance of its fire department," and for "the maintenance, repair and operation of its fire stations, including substations, fire apparatus and equipment. . ." Although, as we have stated above, the legislature did not see fit to authorize expenditure of funds for rental payments, it put no limitations on the expenditure of funds for maintenance of fire departments. It is our opinion that maintenance of leased property from the fire protection fund is authorized. The word "remodel" used in question Number 3 presents a problem of interpretation since the statute has no specific reference to such use of funds. A better choice of terms would be "repair" as opposed to "reconstruct." Thus it would seem to be entirely permissible to "repair" leased property, whereas to "reconstruct" would do violence to the authority given by the statute. Whether the use of the funds amounts to "repair" of the property or "reconstruction" thereof is a question of fact to be determined in each case, and the line is hard to draw in the abstract. It is our opinion that remodeling of leased property is permissible where it amounts merely to repair, but when it becomes so extensive as to be a "reconstruction" of the building it is without the authority of the statute.

The answer to question No. 4 regarding the authority of a recipient of fire protection funds to build on leased land is clearly No. Reference is merely made to Section 58-5-2.12 quoted above. A recipient of fire protection fund moneys must have fee simple title, unincumbered, before the moneys can be used to construct buildings.

You ask in question No. 5 whether fire protection funds may be used to pay the salary of any full or part-time fire department employee. The answer to this question depends on the purpose for which the person is employed. Section 58-5-2.10, supra, quoted above, allows expenditure of the funds for maintenance, repair and operation of fire departments and equipment. Thus it would seem obvious that where a person is employed to maintain, repair or operate a fire department or its equipment, his payment from the moneys distributed from the fire protection fund is within the purview of the statute. It goes without saying that the payments should directly relate to services performed whether the services are rendered by a member of the fire department or someone else. This opinion is not inconsistent with Opinion Number 4631 issued January 8, 1945. Any payments must be for maintenance, repair or operation, and cannot be for salaries for "firemen" as such. See also Opinion No. 6164-1955.