

OPINION NO. 72-027

Syllabus:

1. The Adjutant General does not have to request the Director of Public Works to dispose of all of the armories noted in Amended House Bill No. 459.

2. The Auditor of State must prepare a deed conveying the Circleville armory to the City of Circleville, and the Governor must execute such deed, within 90 days of the effective date of this Act.

3. The Adjutant General may request the Director of Public Works to dispose of the Galion, Kent and Paulding armories if he determines that they are no longer required for armory purposes.

To: Dana L. Stewart, Adjutant General, Worthington, Ohio

By: William J. Brown, Attorney General, April 12, 1972

I am in receipt of your request for my opinion regarding Amended House Bill No. 459. The questions you have asked can be restated as follows:

a. Must the Adjutant General request the Director of Public Works to dispose of all of the armories noted in the bill?

b. Must the Adjutant General request the Director of Public Works to dispose of any specific armory of the ones listed?

c. May the Adjutant General request the Director of Public Works to dispose of any one of the armories for which there is no possible foreseeable need?

I will answer questions (a) and (c) together since they both involve Section 1 of the Bill. Section 1 reads as follows:

"SECTION 1. If the adjutant general determines that any one or more of the following described parcels of real property is no longer required for armory purposes, he may request the director of public works to sell any such parcel, and the director of public works shall then cause the same to be sold at public auction:

"Parcel No. 1:

"Being situated in the City of Galion, Crawford county, Ohio to wit: Being In-Lot No. 117 of the new or revised numbers of In-Lots in the

City of Galion, Ohio, as the same are consecutively numbered excepting a strip forty-five (45) feet in width off of the east end of In-Lot No. 115.

"Parcel No. 2:

"Being part of Lot No. 32 in the City of Kent, Portage county, Ohio, and further bounded and described as follows:

"Beginning at the point where the west line of said Lot No. 32 intersects the north line of Lake Street, thence north $773^{\circ} 4'$ east along the north line of Lake Street 341.87 feet to an iron pipe which is the true place of beginning; thence continuing north $73^{\circ} 4'$ east along the north line of Lake Street 234 feet to an iron pipe; thence north $18^{\circ} 45'30''$ west a distance of 240 feet to an iron pipe; thence south $73^{\circ} 4'$ west a distance of 234 feet to an iron pipe; thence south $18^{\circ} 45'30''$ east a distance of 240 feet to the place of beginning and containing 1.28925 acres of land.

"Parcel No. 3:

"Being situated in the Village of Paulding, Paulding county, Ohio, to wit: Lot Number One Hundred and Sixty-Nine (169) of the Original plat of the said Village of Paulding, Ohio, fronting on Main Street in said Village; and private passageway twelve (12) feet in width along the east end of Lot Number One Hundred and Sixty-Nine (169). Also a strip of land twenty-two (22) feet wide off the west end of Lot Number One Hundred and Seventy (170) of the original plat of the said Village of Paulding, Ohio, as recorded in Deed Record, Volume 95, Page 157, Paulding county, Ohio." (Emphasis added.)

With regard to the disposal of the three parcels described above, the initial paragraph of the above quoted section clearly vests the exercise of discretion in the Adjutant General. He must, however, exercise this discretion at two different levels of decision-making - the exercise of discretion at one level being a condition precedent to the exercise of discretion at the second level. In other words, the Adjutant General must make a decision at the first level before he can make a decision at the second level.

First, the legislature has provided "[i]f the adjutant general determines any one or more of the * * * described parcels * * * is no longer required for armory purposes * * *." The most reasonable interpretation of this, in light of the whole paragraph, is that the legislature intended the Adjutant General to make a decision or determination as to whether or not the described parcels are needed for armory purposes. But, obviously, the legislature has left this determination entirely up to the Adjutant General or it would not have provided as it did. The Adjutant General's determination in this respect plainly calls for the exercise of discretion.

Only after the Adjutant General has first determined that any one or more of the parcels are no longer required for armory purposes, may he then exercise his discretion at the second level

of decision-making. After the Adjutant General has made such a determination, the legislature has then provided "he may request the director of public works to sell any such parcel ~~or~~." It should be noted that this provision is clearly an enactment by the legislature parallel to Section 5911.10, Revised Code, which also uses the word "may". That Section reads as follows:

"In case any armory erected or purchased by the state becomes vacant by reason of the disbandment of the organization quartered therein, the governor and the adjutant general may lease such armory for periods not to exceed one year; or, when authorized by an act of the general assembly, may sell said armory or lease the same for a period of years, the proceeds to be turned into the state treasury." (Emphasis added.)

The word "may", when used in a statutory authorization to a public official, connotes no command or mandate - it is only permissive, enabling that official if he so decides to do a thing he would be otherwise unable to do. "May", in a statutory authorization, clearly conveys discretion in making the decision as to the particular thing authorized. Further, the legislature has demonstrated its awareness of this import of the word "may" when it provided in the final clause of the first paragraph that "the director of public works shall then cause the same to be sold at public auction". The word "shall" clearly leaves the Director of Public Works no discretion whatsoever in determining whether or not a parcel is to be sold - upon request he must cause the parcel to be sold. If the legislature had intended to limit the Adjutant General's discretion or deny it to him altogether, it would have used the word "shall" or "must" in place of the word "may" in this Bill and in Section 5911.10, supra. Where, as here, the words "shall" and "may" were used in the same statute, the Supreme Court made the following comment (State, ex rel. v. Klinger, 114 Ohio St. 212, at pages 214-215 (1926)):

"In a statute the word 'may' may be construed in a mandatory sense only, where such construction is necessary to give effect to the clear policy and intention of the Legislature; and where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation, its use is merely permissive and discretionary. * * * Where by the use in other provisions of the statute of the word 'shall' or 'must,' it appears that the Legislature intended to distinguish between these words and 'may,' 'may' will not be construed as imperative." Carlin v. Freeman, 19 Colo. App., 334, 75 p., 26.

"The court is therefore of the opinion that the language 'may appropriate to each post,' etc., is to be construed as conferring upon the county commissioners discretionary power in the premises, and that the same is not mandatory.

"If it is to be mandatory upon the county commissioners to make provision for this laudable purpose, the remedy is with the Legislature and not with this court."

In light of the foregoing, I conclude that the Adjutant General has discretion to decide whether or not to dispose of any one or more of the three parcels once he has determined that such is no longer required for armory purposes, and that under Section 5911.10, supra, he may lease the parcels from year to year until he determines that they should be sold. The fact that Section 2 of the Bill requires the Galion parcel to be first offered for sale to the Galion Y.M.C.A. at \$15,000 less than its appraised value is immaterial since this is a legislative mandate to the Director of Public Works and not to the Adjutant General.

Sections 5 and 6, relating to the parcel of land located in Circleville, Ohio, involve different considerations. Since both of these Sections relate to the Circleville parcel, they must be read together. Section 5 authorizes the Governor to convey the Circleville parcel to the City of Circleville. Section 6 reads as follows:

"SECTION 6. To effectuate the conveyance authorized in Section 5 of this Act a deed shall be prepared by the auditor of state, with the legal assistance of the attorney general, and shall be executed by the governor, countersigned by the secretary of state, recorded in the office of the auditor of state, and delivered to the city of Circleville within ninety days of the effective date of this act." (Emphasis added.)

This language is definitely mandatory, requiring the deed to be prepared, executed, and delivered to the City of Circleville. If it was not the intent of this Bill to deed over the land to Circleville, then Section 5 would have been inserted under Section 1 as parcel number 4. Since this was not done, it is reasonable to conclude that the Circleville land must be deeded over to the City of Circleville within 90 days of the effective date of this Act.

In specific answer to your questions it is my opinion, and you are so advised, that:

1. The Adjutant General does not have to request the Director of Public Works to dispose of all of the armories noted in Amended House Bill No. 459.

2. The Auditor of State must prepare a deed conveying the Circleville armory to the City of Circleville, and the Governor must execute such deed, within 90 days of the effective date of this Act.

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