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COUNTY COMMISSIONERS—NO AUTHORITY TO LEASE TO PRIVATE INDIVIDUAL OR CORPORATION LAND OWNED BY COUNTY—NO AUTHORITY TO LEASE STONE CRUSHER AND EQUIPMENT ERECTED ON SUCH LAND—USE, TO EXTRACT AND CRUSH STONE FOR COMMERCIAL SALE.

SYLLABUS:

The commissioners of a county have no authority to lease to a private individual or corporation land owned by said county, together with a stone crusher equipment erected thereon by the county, to be used by such person or corporation for the extraction and crushing of stone and the commercial sale thereof.

Columbus, Ohio, July 24, 1945

Hon. Marvin A. Kelly, Prosecuting Attorney
Portsmouth, Ohio

Dear Sir:

I have before me your request for my opinion reading as follows:

“Some time ago the Scioto County Commissioners leased certain land in Scioto County, Ohio, upon which they obtained limestone, paying a royalty on the amount of stone crushed.

The Commissioners placed at their expense a crusher equipment on the said land. At this time, they wish to sub-lease this lease to a private corporation, together with the crusher. The private corporation is to furnish the Commissioners six hundred tons of crushed stone and assume the payments and the royalty agreed on in the original lease, but after the six hundred tons have been used the Commissioners are to pay the private corporation the cost, plus 15% for any additional amount of crushed stone they use.

The question is, can the Commissioners sub-let their lease and the use of county purchased crusher equipment for a private corporation?"

The proposition of your commissioners appears to involve a contract whereby there is leased to a private corporation certain land containing limestone, which land the county holds pursuant to a leasehold for which it is obligated to pay a rental by way of royalties on the amount of stone taken out and crushed. The proposition also involves a lease to said company of crusher equipment which the commissioners have placed on this land at their own expense.

Section 7214, General Code, provides in part as follows:

"The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material.
* * *"

This section of the statute was under consideration by my immediate predecessor in an opinion found in 1941 Opinions Attorney General, page 341, wherein it was held:

"1. Under the provisions of Section 7214, General Code, the county commissioners may lawfully contract for the acquisition of road material by becoming the lessee of real estate with the exclusive right to enter upon such real estate for the purpose of processing and removing gravel therefrom, for a reasonable period of years, with an option to renew for a like period and with a proviso that the commissioners may, on thirty days' notice, cancel such lease.

2. As consideration for such lease, the county commissioners may lawfully pay annually to the lessor a rental of one dollar plus monthly payments on a royalty basis for all sand and gravel removed by such commissioners for road purposes, provided that the provisions of Sections 2414 and 5625-33, General Code, be complied with."

Section 2486, General Code, reads in part as follows :

"When, in their opinion, the county would be benefited thereby, the commissioners may make, execute and deliver contracts or leases to mine iron ore, stone, coal, petroleum, gas, salt and other minerals upon lands owned by such county, to any person, association or corporation who may comply with the terms prescribed by the commissioners as to consideration, rights of way, occupancy of ground for necessary purposes, and all other matters of contract shall be such as the commissioners deem most advantageous to the county."

This section appears to me to be sufficient authority for the commissioners to contract with a private individual or corporation to take stone from land which the county owns, either in fee or under leasehold. Consideration for such sub-lease might well be in part at least the assumption of the rentals or royalties payable by the county under its base lease.

If, therefore, the contract proposed related only to the lease of the land in question to a private corporation, there would appear to be no legal obstacle. However, it is complicated by the proposal to rent to the private company also the use of the stone crusher equipment purchased and installed by and belonging to the county. Furthermore, it appears that except for the obligation to furnish the county 600 tons of crushed stone and to assume the royalties under the original lease, the proposed contract would give the company the unlimited right to use the crusher equipment for the conduct of its own business. The contract, therefore, must be considered as an entirety and if it is in violation of the law in any particular, the entire contract must fall.

Section 7200 of the General Code reads in part as follows :

"The county commissioners may purchase such machinery, tools or other equipment for the construction, improvement, maintenance or repair of the highway, bridges and culverts under their jurisdiction as they may deem necessary. * * * All such machinery, tools, equipment and conveyances belonging to the

county shall be under the care and custody of the county surveyor. All such machinery, tools, equipment and conveyances owned by the county shall be plainly and conspicuously marked as the property of the county. * * *.”

Many requests have come to this office for opinions relative to the right of the county commissioners to lease equipment purchased by the county for road improvement as well as other machinery and equipment, and some ingenious arguments have been advanced as to the propriety of permitting such property to be leased. In an opinion found in 1931 Opinions Attorney General, page 626, it was held that township trustees might legally lease road machinery belonging to the township, to the county surveyor. This opinion was based not upon any direct statutory authority, but rather on the proposition that the township trustees were authorized by law to cooperate with the county in road improvement.

In Opinion No. 4767, found in Opinions Attorney General, 1935, page 1300, the then Attorney General relying upon the former opinion, but giving it a rather broad interpretation, held:

“The board of county commissioners may lease equipment owned by the county to township trustees *or private persons* so long as such action does not interfere with the county’s use of the same, notwithstanding the surveyor has the custody thereof.”
(Emphasis added.)

In the course of that opinion it was suggested that such equipment deteriorates very rapidly when not in use and its value decreases because of new inventions, and it would therefore be to the financial advantage of the county to rent it before it became antiquated.

In a later opinion, rendered January 27, 1944, being No. 6660, my immediate predecessor held:

“County commissioners are without authority to lease to private persons, road machinery or automobiles or other various county offices. (1935 Opinions Attorney General, No. Code, or furniture or equipment purchased for the use of the various county offices. (1935 Opinions Attorney General, No. 4767 overruled in part.)”

The 1935 opinion above noted was overruled in so far as it held that the commissioners were authorized to lease equipment to private persons.

While some obvious advantages might accrue to the county in making the arrangement which you propose, it is evident that it could be capable of great abuse and loss to the county. The proposed contract as you set it out, would contemplate that when the county has received its initial quota of 600 tons of crushed stone, thereafter the commissioners would pay to the corporation the cost of additional stone plus 15% and the corporation would have the unlimited use of the county's property, including the stone crusher, without any further consideration paid to the county. This would mean in effect that the county would be subsidizing the corporation to the extent of the cost of the crusher equipment for the conduct of its private business and without any consideration to the county except the initial payment of six hundred tons of stone, and the county might in time find its equipment partially or wholly worn out.

This arrangement, in addition to involving the leasing or letting of the machinery belonging to the county without express or implied authority, appears to me to be in violation of the provisions of Article VIII, Section 6 of the Constitution, which prohibits any county from raising money for or loaning its credit to, or in aid of, a private corporation.

Accordingly, in specific answer to your question it is my opinion that, the commissioners of the county have no authority to lease to a private individual or corporation land owned by said county, together with a stone crusher equipment erected thereon by the county, to be used by such person or corporation for the extraction and crushing of stone and the commercial sale thereof.

Respectfully,

HUGH S. JENKINS

Attorney General