

Note from the Attorney General's Office:

1958 Op. Att'y Gen. No. 58-2363 was overruled by 1980 Op. Att'y Gen. No. 80-028.

2363

TOWNSHIP PARK PROPERTY—MANAGED BY TOWNSHIP TRUSTEES—MAY NOT BE LEASED—§505.10 R.C.

SYLLABUS:

Boards of township trustees owning property used for park purposes are without authority to lease such property.

Columbus, Ohio, July 11, 1958

Hon. Edward R. Ostrander, Prosecuting Attorney
Lake County, Painesville, Ohio

Dear Sir:

I have your request for my opinion relative to the authority of a board of township trustees owning public park property, not controlled and managed by a board of park commissioners as provided in Sections 511.18 to 511.31, inclusive, Revised Code, to lease such property to a board of education of an exempted village school district for the purpose of providing temporary classroom facilities. You further state that the geographical area of the school district and the township is the same.

Since boards of township trustees possess only such powers as are expressly conferred or must necessarily be implied from express powers, a search of the applicable statutes reveals that express authority for leasing this particular property is lacking.

In Informal Opinion No. 2, Informal Opinions of the Attorney General for 1946, dated January 7, 1946, it was held that township trustees are authorized by Section 3281, General Code, Section 505.10, Revised Code, to sell and convey township property which is not needed for township purposes, but this statute does not in terms empower the trustees to lease the same. This authority appears to be based upon the lack of an express power to lease. The statutory authority referred to above, Section 505.10, Revised Code, reads in pertinent part:

“The board of township trustees may accept, on behalf of the township, the donation by bequest, devise, deed of gift, or otherwise, of any property, real or personal, for any township use. *When the township has property which the board, by resolution, finds it does not need, the board may sell and convey such property.* Such sale must be by public auction and upon notice thereof being published once a week for three weeks in a newspaper published, or of general circulation, in such township the last of such publication to be at least five days before date of sale.” (Emphasis added)

It has been held that the power to lease is included within the power to sell. In this regard I invite your attention to the cases of the *Minamax Gas Co. v. The State, ex rel.*, 33 Ohio App., 501, *Reynolds v. Commissioners*, 5 Ohio 204, and Opinion No. 3410, Opinions of the Attorney General for 1931, p. 948, Opinion No. 1250, Opinions of the Attorney General for 1924, p. 110; and Opinion No. 4312, Opinions of the Attorney General for 1935, p. 650.

The legal basis for all of these holdings, appears to be the case of *Reynolds v. Commissioners, supra*. The “syllabus” of that opinion which has been quoted as authority for this proposition was prepared at a time before the syllabus rule of the Supreme Court was adopted. Subsequent Supreme Court authority would appear to have changed drastically. The broad statement contained in the following “syllabus” of *Reynolds v. Commissioners, supra*, is: “Where real estate is vested absolutely in the county commissioners, for public purposes, they may dispose of it in the same manner as individuals could.”

The facts in this case arose out of a contract to make a lease in 1823. The case was one in chancery to require the successor commissioners to execute the lease.

The language upon which the attorney general in the 1924 Opinion, *supra*, relied and upon which the court of appeals relied in the *Minamax* case, *supra*, appears to have been changed by subsequent authority, both statutory and case law.

Subsequent to the decision in the *Minamax* case, *supra*, the General Assembly saw fit to amend then Section 2447, General Code, to allow boards of county commissioners to lease county property not needed for public use. The General Assembly has found no necessity to amend Section 505.10, *supra*. Boards of township trustees, like boards of county commissioners possessing only limited authority granted by statute, cannot be held to have such broad authority as that stated in the following terms in *Reynolds v. Commissioners*, *supra*:

“Believing that the commissioners possess the powers of individuals, we enforce contracts against them in the same manner. The execution of this agreement is not an official duty created by law, and therefore properly the subject of a mandamus; but the right springs from contract, to enforce which an appeal may be properly made to our general chancery powers.”

I believe it unnecessary to allude to subsequent authority which by implication has modified this broad expression of authority. For such reason, I cannot accept it and apply such a rule in the situation which you present.

In Opinion No. 1232, Opinions of the Attorney General for 1957, p. 638, in which I had occasion to consider the authority of a board of township trustees to *acquire* property *by lease*, I held that since the authority to *acquire by lease* had not been specifically granted by statute and since other sections of the statutes relating to boards of township trustees and boards of county commissioners provided expressly for the modes of acquiring property, that such authority to *acquire by lease* was not included within the authority to *purchase*.

Parity of reasoning would impel me to the same conclusion. Once acquired, property is held by public boards for the use of the public; therefore, when public property is disposed of, the statutory authority must be found for such disposal as was required to be found when such pur-

chase was made. This principle must be applied in the absence of statutory authority to the contrary.

Other statutory provisions relating to county-held property has been provided for leasing such property to other political subdivisions of the state. Section 307.09, Revised Code, provides in that particular:

“If the interests of the county so require, the board of county commissioners may sell any real estate belonging to the county and not needed for public use, or may lease it, but no such lease shall be for a longer term than one year; provided the board may grant leases, rights, and easements to municipal corporations or other governmental subdivisions for public purposes or to corporations not for profit for hospital or charitable purposes, including among other such purposes memorial structures and underground structures, on or in lands owned by the county where such lease, right, or easement is not deemed by the board to be inconsistent with the need of such land for public use by the county. Any such lease, right, or easement granted to a municipal corporation or other governmental subdivision, or to corporations not for profit for hospital or charitable purposes, may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the public. In case of the sale of such real estate not used for county purposes, and in case of such a grant of lease, right, or easement to a municipal corporation or other governmental subdivision or to corporations not for profit for hospital or charitable purposes, all or such part of the proceeds thereof as the board designates may be placed by the board in a separate fund to be used only for construction, equipment, furnishing, maintenance, or repair of the county buildings and acquisition of sites therefor.”
(Emphasis added)

Since such a detailed procedure has been provided with certain limitations I cannot apply the purported principle that the power to sell includes the power to lease as it relates to boards of township trustees and their authority to lease township property.

It is to be further noted that when *township park property* is held by a board of park commissioners under the authority of Sections 511.18 to 511.31, inclusive, Revised Code, an *election* must be held before a sale of township park property may be made. No provision has been made to authorize a lease.

If the *Minamax* case would appear to apply to your situation, the lease must be subject to revocation by the board of township trustees whenever the needs of the township so require; this right may well be

exercised at a time when the use of the property for school purposes by the board of education might be adversely affected. Without considering the authority of a board of education to enter into such a lease, the questions of policy which the board would be required to consider upon entering into such an agreement, are matters beyond the scope of an opinion by this office, for they are to be determined in the first instance by the board of education in whose discretion this determination has been granted; but such board would surely be well advised to give serious consideration to such questions of policy.

Therefore, in specific answer to your query it is my opinion and you are advised that boards of township trustees owning property used for park purposes are without authority to lease such property.

Respectfully,

WILLIAM SAXBE

Attorney General