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1. BOARD OF COUNTY COMMISSIONERS—SALE OF COUNTY OWNED LAND UNDER 307.09 RC—PROCEDURE OF 307.10 RC MANDATORY—BIDDING: NOMINAL CONSIDERATION.
2. LEASE OF COUNTY OWNED LAND TO STATE—FIFTY YEAR TERM WITH OPTION TO RENEW FOR FIFTY ADDITIONAL YEARS.
3. ADJUTANT GENERAL—5911.01 RC—AUTHORITY TO CONTRACT FOR LEASES FOR ARMORIES—PERIODS EXCEEDING TWO YEARS—1947 OAG 1680 AFFIRMED AND FOLLOWED).

SYLLABUS:

1. A board of county commissioners selling county owned land under the provisions of Section 307.09, Revised Code, must proceed in compliance with Section 307.10, Revised Code, and such sale cannot be for nominal consideration if there is any higher bid.

2. Under Section 307.09, Revised Code, a board of county commissioners may lease county owned land to the State of Ohio for a term of fifty years and grant an option to renew that lease for an additional fifty years.

3. The Adjutant General of the state is authorized by Section 5911.01, Revised Code, to enter into contracts of lease for armories for periods in excess of two years. (Opinion No. 1680, Opinions of the Attorney General for 1947, affirmed and followed.)

Columbus, Ohio, April 9, 1957

Hon. William E. Didelius, Prosecuting Attorney
Erie County, Sandusky, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Board of County Commissioners of Erie County desires to make available to the State of Ohio a parcel of land for the construction of an armory. The property in question is presently owned by the Board of County Commissioners and constitutes a part of the grounds of the Erie County Home.

"The office of the Adjutant General has indicated to the Board of County Commissioners a willingness to accept the site either as an outright grant or under a lease for a term of fifty years with an option to renew said term for an additional term of fifty years. The Board of County Commissioners has indicated a preference for a leasehold arrangement.

"Under the provisions of Section 307.09 of the Revised Code, it would appear that the Board of County Commissioners could lease the site to the State of Ohio for such length of time and upon such terms as the Board of County Commissioners might deem to be consistent with the need of such land for public use by the County. However, Opinion Number 6909 of the Attorney General, dated July 24, 1956, suggests that the term of such a lease should be limited to the expected life of the proposed building.

"The Board of County Commissioners also question its authority to make an outright grant of the site to the State of Ohio. Under Section 5911.03 of the Revised Code it would appear that the Adjutant General may receive gifts of land, but the authority of the Board of County Commissioners to make such a gift would appear to be limited by Sections 307.09 and 307.10. Your opinion is, therefore, requested as to the following:

"1. Is the Board of County Commissioner empowered to lease a parcel of land owned by Erie County to the State of Ohio, at a nominal rent, for the construction of an armory, for a term of fifty years with an option to renew said lease for an additional term of fifty years; and

"2. Is the Board of County Commissioners of Erie County empowered to execute a deed conveying the site to the State of Ohio, for a nominal consideration, for the construction of an armory?"

I shall first consider your second question. Section 5911.01, Revised Code, reads in pertinent part:

"The adjutant general is the director of state armories. He shall provide grounds, armories, and other buildings for the purpose of drill and for the safekeeping of arms, clothing, equipment, and other military property issued to the Ohio national guard or the Ohio defense corps and may purchase or build suitable buildings for such purposes when, in his judgment, it is for the best interest of the state to do so. * * *"

Section 5911.03, Revised Code, provides that the adjutant general may receive gifts of land for armory purposes and Section 5911.05,

Revised Code, provides for the appropriation of property for such purposes. In Opinion No. 476, Opinions of the Attorney General for 1919, page 785, the Attorney General held that the very similar language of Sections 5238 and 5241, General Code, sections analogous to Sections 5911.01 and 5911.05, Revised Code, respectively, conferred upon the adjutant general the power to purchase land for armories. I affirm and follow that opinion. The adjutant general is, then, empowered to purchase land from the board of county commissioners.

Section 307.09, Revised Code, confers upon boards of county commissioners the right to sell land, but that power is limited by the provisions of Section 307.10, Revised Code, which requires advertisement of sale and sale to the highest responsible bidder. Clearly no sale can be effectuated without full compliance with the prescribed procedure, and if any bid higher than that of the adjutant general bidding a nominal amount should be submitted the purpose of the sale would be frustrated. And yet the value to the county of having an armory or a similar public or charitable building might be far higher than the amount of the highest bid. In short, one dissenting individual making a bid at such a sale could frustrate the purpose of the county in making land available for public or charitable purposes. In my opinion, the provisions of Section 307.09, Revised Code, granting boards of county commissioners broad power to lease county lands to municipal corporations, governmental subdivisions, and corporations not for profit are intended to remedy that situation. Section 307.09, Revised Code, reads in pertinent part:

“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 subdivision 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.” (Emphasis added)

The legislative history of Section 307.09, Revised Code, and the analogous Section 2447, General Code, clearly suggest such a purpose. Section 2447, General Code, as enacted in 1915, 106 Ohio Laws, 399, did not contain provisions analogous to the emphasized portion of Section 307.09, *supra*. In the case of *Minamax Gas Co. v. State, ex rel. McCurdy*, 33 Ohio App., 501, in 1929, it was held that a board of county commissioners could not lease real estate owned by the county for a definite term "and thereby embarrass themselves and their successors in using the property for public purposes." In 1931, the General Assembly amended Section 2447, General Code, significantly broadening the power here under discussion, 114 Ohio Laws, 87, and in 1935, provisions substantially analogous to the current provisions were enacted, 116 Ohio Laws, pt. 2, 149. This legislative history strongly suggests that the purpose of the emphasized portion of Section 307.09, Revised Code, is to enable boards of county commissioners to grant to governmental authorities or charitable corporations sufficient interests in county lands to justify them in constructing substantial improvements thereon. By granting long term leaseholds on liberal terms, boards of county commissioners are able to secure to their counties the benefits of sales of county lands to governmental subdivisions and charitable corporations without being compelled to face the dilemma inherent in public sales.

The county is specifically authorized by Section 307.09, Revised Code, to lease real estate for public purposes to municipal corporations or other political subdivisions. Now the question is presented whether the state itself can be a party to such a contract under this section.

The state is divided into the several governmental subdivisions, and is in fact the sum of these subdivisions. It would be illogical to take the position that each of the parts has an authority but the whole does not. Thus, if a lease is authorized to a component part of the state, it would follow that a lease with the state itself would likewise be authorized.

The rationale of the ruling in Opinion No. 6909, Opinions of the Attorney General for 1956, referred to in your request, was that boards of township trustees should not erect buildings on leased lands unless the lease was for a term long enough to extend over the estimated life of the building. In that opinion it was also suggested, but not held, that a board of county commissioners cannot grant a ninety-nine year lease, renewable forever. The problems peculiar to ninety-nine year leases

renewable forever would not attach to such a lease as that proposed, for fifty years renewable for an additional fifty years.

In short, it appears to me that a board of county commissioners is empowered to enter into a lease as proposed. Further, the adjutant general is authorized by Section 5911.01, *supra*, to enter into contracts of lease such as here proposed—that is, for periods of more than two years. Opinion No. 1680, Opinions of the Attorney General for 1947, page 132. In that opinion the then Attorney General cited Section 5625-36, General Code, corresponding to Section 5705.44, Revised Code, which reads in pertinent part:

“When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge.”

He then said, at page 134:

“The provision last quoted, Section 5625-36 General Code (5705.44, Revised Code,) appears to recognize without explicitly so stating, that leases may run for a considerable number of years and that the sum which may be required to pay the annual rental in future years will have to be appropriated from year to year by the the taxing authority in its annual appropriation. Regardless of the fact that the subdivision may not have funds available for such appropriation or may decline or neglect to appropriate same, the lease would nevertheless be binding upon both parties. Likewise, in the case of a lease to the state, such lease for a term of more than two years would be binding upon both parties notwithstanding the fact that a suit could not be maintained against the state and notwithstanding the fact that the failure of the General Assembly to include the rental charge in its future biennial appropriations might make it impossible to pay the rent.

“In effect, the lessor who makes a lease with the state for a term of years must be considered as taking the chance that the lease may fall by reason of the refusal or failure of the General Assembly to make the appropriation. However, that does not in my opinion affect the right of the officer of the state who is properly authorized in the premises, to enter into such lease. My understanding is that leases made to the state or any of its de-

partments generally carry in them a provision recognizing that the continued payment of the rental agreed upon beyond the current biennium is subject to and conditioned upon appropriations being made by the General Assembly.”

Accordingly, in specific answer to your questions, it is my opinion, and you are advised :

1. A board of county commissioners selling county owned land under the provisions of Section 307.09, Revised Code, must proceed in compliance with Section 307.10, Revised Code, and such sale cannot be for nominal consideration if there is any higher bid.

2. Under Section 307.09, Revised Code, a board of county commissioners may lease county owned land to the State of Ohio for a term of fifty years and grant an option to renew that lease for an additional fifty years.

3. The Adjutant General of the state is authorized by Section 5911.01, Revised Code, to enter into contracts of lease for armories for periods in excess of two years. (Opinion No. 1680, Opinions of the Attorney General for 1947, affirmed and followed.)

Respectfully,
WILLIAM SAXBE
Attorney General