

OPINION NO. 92-016**Syllabus:**

1. Sections 4 and 6 of Article VIII of the Ohio Constitution do not prohibit a board of education from leasing real property to a private party where the lease arrangement does not effect a union of private and public property.
2. A board of education may lease real property which it determines is not presently needed for school purposes and which cannot be advantageously sold, provided that the lease contains a provision that permits the board of education to terminate the lease upon a determination by the board that the property is needed for school purposes.
3. The authority of a board of education to lease real property is not controlled by R.C. 3313.76-.78.
4. A lease of real property by a board of education may contain a provision that automatically renews the term of the lease solely at the option of the lessee if the board of education determines, prior to the execution of the lease, that the lease of property for the full lease term (including all renewal periods) will be advantageous to the school district, regardless of the fact that it may be renewed solely at the option of the lessee, and that the property is not anticipated to be needed for school use during such lease term.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio

By: Lee Fisher, Attorney General, May 12, 1992

You have requested an opinion concerning a proposed arrangement involving the lease by a city school district of real property located at its high school football stadium to a cellular telephone company for the erection of a monopole communications tower and a building to house the company's equipment, and the company's lease of a portion of its monopole tower to the school district for the installation of lights and loudspeakers. Additionally, the company will permit the school district to use a portion of the company's building as a ticket booth for athletic events.

Your specific questions are:

1. Is a school district prohibited by Article VIII, Sections 4 or 6, of the Ohio Constitution, from entering into a lease relationship with a private company or corporation, such as that which is described [above]?
2. Is a school district permitted to lease property to private individuals, companies or corporations if the board of education decides that the property is not presently needed for school purposes? In this regard, is the authority of a board of education constricted by Revised Code Sections 3313.76, 3313.77 and 3313.78?
3. If the school district is permitted to enter into such a lease, may the lease contain a provision which automatically renews the term of the lease solely at the option of the individual, company or corporation? Must such a lease contain a provision to allow a board of education to terminate the lease if the board later determines the property is needed for school purposes?
4. If the board of education determines, pursuant to its statutory powers, that its entering into a lease such as that proposed is

necessary and proper to the achievement of some other end, such as improved athletic facilities or improved radio communications for its school bus fleet, may it enter into such a lease, even if not otherwise permitted under Ohio law?

This opinion is based on the information which you submitted with your request and not on the actual lease instruments. This opinion is intended to address the specific questions raised in your request, and does not attempt to consider all of the questions that might arise with respect to the validity or enforceability of the various provisions of the leases or other arrangements relating to the transactions. Therefore, the opinion should not be viewed as an approval of any aspect of the proposed leases that it does not specifically address.

Ohio Const. Art. VIII, §4 and 6 Do Not Prohibit a Board of Education From Leasing Real Property to a Private Party

Your first question is whether either Ohio Const. art. VIII, §4 or §6, prohibits the school district from entering into a lease transaction as generally described above. Article VIII, §4 mandates that "[t]he credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual association or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association, in this state, or elsewhere, formed for any purpose whatever."¹ The courts have construed §4 to apply to agencies and instrumentalities of the state. *State ex rel. Saxbe v. Brand*, 176 Ohio St. 44, 197 N.E.2d 328 (1964). In 1978 Op. Att'y Gen. No. 78-040, it was determined that a board of education² is subject to art. VIII, §4 as an agency or instrumentality of the state:

Although there is no case holding that a board of education is an agency or instrumentality of the state for the purpose of Ohio Const. art. VIII, §4, this result may reasonably be inferred from the evident meaning and spirit of the constitutional provision. *Walker v. City of Cincinnati*, 21 Ohio St. 14, 53 (1871) School district funds are clearly public funds and are statutorily regulated as such.

Op. No. 78-040 at 2-95. Thus, the arrangement between the board of education and the cellular telephone company must be examined in light of art. VIII, §4. Since the wording of the prohibitions of §4 and §6 of art. VIII is similar, cases applying these sections are often cited interchangeably. See, e.g., *State ex rel. Eichenberger v. Neff*, 42 Ohio App. 2d 69, 74, 330 N.E.2d 454, 458 (Ct. App. Franklin County 1974) ("[t]he language of Article VIII, Section 4 ... is nearly identical to that in Article VIII, Section 6, and we construe the meaning given to Section 6 ... to be equally applicable to the state under Section 4").

The courts have held that a union of public and private property violates the prohibitions of Ohio Const. art. VIII, §6 (and thus §4), where the public entity and the private entity each own parts of a property such that, when the parts are taken together, they constitute but one property. *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959).³ The prohibitions of art. VIII, §6 and their

¹ Ohio Const. art. VIII, §6, which sets forth similar prohibitions directed at counties, cities, towns and townships, provides in relevant part, that "[n]o laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, ... to raise money for, or loan its credit to, or in aid of, any [joint stock] company, corporation, or association."

² Your request letter refers to the authority of a "city school district." However, since the management and control of a city school district is vested in the board of education of the district, R.C. 3313.47, and the board of education has corporate powers, R.C. 3313.17, the authority properly at issue is that of the board of education of the city school district.

³ However, *Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959) noted that the transaction which it found to be an impermissible union of

application to transactions involving public and private entities were further analyzed in 1977 Op. Att'y Gen. No. 77-047. There, my predecessor examined a proposed lease of county land to a builder for the purpose of constructing a building to be leased back to the county, with ownership of the building to remain in the builder's name. On those facts, the opinion concluded that

[T]he land and building do not in the strict and primary sense of the term constitute a single property. Although a building might generally be considered a fixture of the realty to which it is annexed, it need not, in every case, become such. Where an article belonging to one party is attached to the realty of another party, the status of the article as either a fixture or a chattel may be controlled by agreement of the parties. *Teaff v. Hewitt*, 1 Ohio St. 511 ([1853]).

Op. No. 77-047 at 2-167. Accordingly, it was determined that the lease of the property to the builder and the lease back of the building to the county did not violate art. VIII, §6.

In reaching this conclusion, the opinion distinguished the cases of *Alter v. Cincinnati*, 56 Ohio St. 47, 46 N.E. 69 (1897) and *Village of Brewster v. Hill*, 128 Ohio St. 343, 190 N.E. 766 (1934).⁴ Both *Alter* and *Brewster* "involved a union of public and private property that was so inextricable that both parties were wholly dependant upon one another for their worth and usefulness. They both involved entire systems that, although operated as single entities, were owned by two different parties." Op. No. 77-047 at 2-166; *see also* Op. No. 78-040 at 2-96 (a joint venture proposed by a board of education and a private corporation whereby both "contribute property, money, skill and knowledge in the operation of a common enterprise for mutual profit and gain" violates Ohio Const. art. VIII, §4).

In the proposed arrangement between the cellular telephone company and the board of education, the property owned by the company and the property owned by the school district are not inextricable or wholly dependent upon one another for value or usefulness. According to the information you provided, the ownership of the land and the improvements will remain separate for the duration of the transaction, and, upon termination of the board's lease to the company, the board will have the right to acquire title to all improvements from the company, for one dollar. Additionally, the board will maintain title to its lighting and loudspeaking equipment at all times. The parties clearly contemplate that the business of each will be conducted separately, and that the value and usefulness of the property owned by each is not wholly interdependent. Under these circumstances, the lease of real estate by the board of education to the cellular telephone company for the erection of a monopole tower and a building, and the corresponding lease of a portion of the monopole tower and building by the company to the board, do not violate Ohio Const. art. VIII, §4.

public and private property was distinguishable from a leasing arrangement. "It is clear that this is neither a situation where a city is merely leasing a part of its property to a private corporation, nor is it a situation where a private corporation is leasing its property to a city." *Id.* at 466, 159 N.E.2d at 746.

⁴ *Alter v. Cincinnati*, 56 Ohio St. 47, 46 N.E. 69 (1897) concerned a statute that permitted cities to contract with a private party for the construction of a waterworks to be owned and controlled in part by the city and in part by the private party. The issue in *Brewster v. Hill*, 128 Ohio St. 343, 190 N.E. 766 (1934) was a proposal by which a private contractor was to furnish machinery to generate electrical current to a city that would provide the necessary foundations and buildings for such equipment. A portion of the price of the machinery was to be paid from the expected income of the plant.

The Board of Education Has Authority to Lease Real Property to a Private Party Under Limited Circumstances

Your second question asks whether a board of education is permitted to lease property to private individuals, companies, or corporations if the board determines that the property is not presently needed for school purposes, and whether the board's authority in this regard is controlled by R.C. 3313.76-.78.

A board of education, as a creature of statute, has only the authority expressly granted by statute and that authority which is necessarily implied therefrom. *Verberg v. Board of Educ.*, 135 Ohio St. 246, 20 N.E.2d 368 (1939). Although there are no provisions of the Revised Code that expressly authorize a board of education to lease real property which is not presently needed for school purposes, prior opinions of the Attorney General have inferred such authority. See 1963 Op. Att'y Gen. No. 622, p. 624; 1956 Op. Att'y Gen. No. 7225, p. 738; 1953 Op. Att'y Gen. No. 2534, p. 158; 1932 Op. Att'y Gen. No. 4588, vol. II, p. 1006.

The basis of these opinions is the authority of the board of education to acquire and hold property. R.C. 3313.17 provides that a board of education is "capable of ... acquiring, holding, possessing, and disposing of real and personal property." Although R.C. 3313.17 does not generally authorize a board of education to acquire land for the purpose of leasing for profit, there are circumstances that justify a board of education in leasing property which it had acquired for school purposes. As was stated in 1932 Op. No. 4588 at 1007-08:

When a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may be said, in my opinion, that the power to lease that property temporarily, until it may be advantageously sold, is an incident to the possession of the property. If such property cannot be advantageously sold, and may be leased so that the school district receives some benefit from the ownership of the property which it would not receive if it lay idle, it certainly cannot be said that the board exceeds its powers in so leasing the property.

Citing the rationale in this opinion, one of my predecessors also determined that it was permissible for a board of education to lease property not then needed by the board to a corporation, and to allow the corporation to construct and operate a swimming pool or such leased property, so long as the agreement provided that at any time the board determined the property was needed for school purposes or that it should be sold, the lease of the premises would terminate. 1953 Op. No. 2534.

Thus, the authority of the board of education to lease property is limited by the duty of the board to preserve the availability of property to which it holds title for school purposes "where a present or probable future need therefor exists or is likely to arise." *State ex rel. Baciak v. Board of Educ.*, 55 Ohio Law Abs. 185, 189, 88 N.E.2d 808, 810 (Ct. App. Cuyahoga County 1949). Although a board of education may lease real property which it determines is not presently needed for school purposes and which cannot advantageously be sold, the board is required to preserve the availability of the real property for future need. As noted in the discussion of your third question below, the lease must, therefore, provide for termination by the board of education if it is determined that the property is needed for school purposes in the future.⁵

⁵ This opinion, as noted above, does not address the viability or enforceability of the specific provisions of the proposed leases, including the exact form of the provision for termination of the lease by the school board. An appropriate termination clause might, for example, permit the company to remove the improvements made by it and return the premises to the board in the condition they were in at the beginning of the lease. However, a termination clause which would cause the board to suffer penalties or which would require the board to purchase the improvements made by the company may exceed the board's authority.

R.C. 3313.76-.78 Do Not Control the Lease of Real Property by the Board of Education

The lease of real property by a board of education pursuant to the authority discussed above is not controlled by R.C. 3313.76-.78. These statutes, along with R.C. 3313.75,⁶ govern the use of schoolhouses and school grounds for purposes other than the education of pupils of the school district. While they authorize the board of education to permit the use of schoolhouses and school grounds for various purposes, they do not contemplate the grant of a leasehold or other interest in the real property. Essentially, R.C. 3313.76-.78 authorize the board to grant a license for the use of schoolhouses and school grounds. A license is "an authority to do some act or series of acts on the land of another without passing any interest in the land." *Ripple v. The Mahoning Nat'l Bank*, 143 Ohio St. 614, 619, 56 N.E.2d 289, 291 (1944) (citations omitted). A lease, on the other hand, "is a contract for the possession and profit of land by the lessee and in recompense of rent or increase to the lessor, and is a grant of an estate in the land." *Id*; see also *DiRenzo v. Cavalier*, 165 Ohio St. 386, 135 N.E.2d 394 (1956).

The Lease May Permit Automatic Renewals at the Option of a Private Entity Under Certain Circumstances

Your third question asks whether, if the board of education is permitted to lease real property to a private individual, company or corporation, the lease may contain a provision which automatically renews the term of the lease solely at the option of the individual, company or corporation. You have also asked whether the lease must contain a provision permitting the board of education to terminate the lease if the board determines that the property is needed for school purposes.

R.C. 3313.17 generally authorizes the board of education to enter into contracts. R.C. 3313.47 vests the board of education with the authority for "the management and control of all of the public schools of whatever name or character in its respective district." This statute, along with R.C. 3313.20,⁷ has been construed to require the board to maintain the management and control of the schools. See generally *Dayton Teachers Ass'n v. Dayton Bd. of Educ.*, 41 Ohio St. 2d 127, 323 N.E.2d 714 (1975); *Xenia City Bd. of Educ. v. Association*, 52 Ohio App. 2d 373, 370 N.E.2d 756 (Greene County 1977).

A provision authorizing an automatic renewal of the lease at the sole option of a private party raises a question as to whether the board has relinquished in part the management and control of a school district. A similar issue was addressed in *Xenia City Board of Education*. In that case, a provision of a collective bargaining agreement required any contract proposal upon which negotiations had reached an impasse between the board and the Xenia Education Association to be referred to binding arbitration. The court determined that the binding arbitration provision "conflicts with and abrogates the board's duties and responsibilities to enter into new collective bargaining agreements ... and to manage the schools in the public interest." 52 Ohio App. 2d at 376-77, 370 N.E.2d at 758. The court's concern was that a new employment contract could eventually be written by arbitrators, without regard to the management and control of the board of education.

A provision in a lease of real property by a board of education to a private party that allows the private party solely to determine whether the lease shall be renewed might abrogate, in part, the duty of the board to control and manage the schools. As discussed above, the board's authority to lease real property is derived from its authority to acquire and hold property for school purposes, and is limited to a temporary lease of property that is not presently needed for school purposes. Such

⁶ R.C. 3313.75 applies only to schoolhouses, and thus clearly has no application to the question at hand.

⁷ R.C. 3313.20 authorizes the board of education to make certain rules necessary for the government of the board and school employees, pupils, and other persons entering upon school grounds or premises.

a lease permits the school district to benefit from the ownership of the property during the period it continues to own such property pending its use or sale. 1932 Op. No. 4588. If the board reasonably determines, prior to the execution of the lease, that the lease of property for the full lease term (including all renewal periods) will be advantageous to the school district regardless of the fact that it may be renewed solely at the option of the private party, and that the property is not anticipated to be needed for school use during such lease term, then the duty of the board to manage and control the school district will not be abrogated by the renewal provision.

The Lease Must Provide for Termination by The Board of Education if the Property Is Needed for School Purposes

As noted above, the board of education must retain the effective right to terminate the lease at any time if it subsequently determines that the property is needed for school purposes. As discussed in the answer to your second question, the board of education's authority to lease property that is not presently needed for school use is limited by the board's duty to preserve the availability of the property for future need if and when it arises. *Baciak*. This can be accomplished only by a provision in the lease that permits the board to terminate the lease upon a determination by the board that the property is needed for school purposes.

Since I have determined that the board of education has the authority, with certain restrictions, to lease real property, there is no need to answer your fourth question.

Conclusion

On the basis of the foregoing analysis, it is my opinion, and you are hereby advised, that:

1. Sections 4 and 6 of Article VIII of the Ohio Constitution do not prohibit a board of education from leasing real property to a private party where the lease arrangement does not effect a union of private and public property.
2. A board of education may lease real property which it determines is not presently needed for school purposes and which cannot be advantageously sold, provided that the lease contains a provision that permits the board of education to terminate the lease upon a determination by the board that the property is needed for school purposes.
3. The authority of a board of education to lease real property is not controlled by R.C. 3313.76-.78.
4. A lease of real property by a board of education may contain a provision that automatically renews the term of the lease solely at the option of the lessee if the board of education determines, prior to the execution of the lease, that the lease of property for the full lease term (including all renewal periods) will be advantageous to the school district, regardless of the fact that it may be renewed solely at the option of the lessee, and that the property is not anticipated to be needed for school use during such lease term.