

OPINION NO. 79-075

Syllabus:

1. The Transportation Research Board of Ohio may lease land to a private developer for the purpose of constructing transportation research facilities in accordance with the general design and building specifications of the Transportation Research Center and subject to the prior approval of the Board, and of sub-leasing such facilities to private persons or corporations who will

operate the facilities solely in a manner consistent with the purposes of R.C. Chapter 5507. (1979 Op. Att'y Gen. No. 79-011 approved and followed.)

2. A private developer engaged in the construction of buildings or facilities on land leased to it by the Transportation Research Board need not comply with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies. (1979 Op. Att'y Gen. No. 79-011 approved and followed.)
3. The Transportation Research Board may agree to purchase buildings or facilities constructed by a private developer on land leased to it by the Board at the end of the term of the lease, provided that the agreement does not purport to obligate or pledge any moneys raised by taxation for the payment of the debt thereby incurred.

To: George Arnold, Chairman, Transportation Research Board of Ohio, Columbus, Ohio

By: William J. Brown, Attorney General, November 8, 1979

I have before me your request for my opinion concerning the authority of the Transportation Research Board to lease land under certain circumstances. Your current request seeks further clarification of the Board's authority to undertake a particular transaction, which I initially considered in 1979 Op. Att'y Gen. No. 79-011. In that opinion I reached the following conclusions with respect to the Board's authority to lease lands:

- 1) The Transportation Research Board of Ohio may lease land located at the Transportation Research Center to a private corporation, solely for purposes consistent with R.C. Chapter 5507, for a nominal sum, under a lease which provides that the corporation will construct and operate transportation research buildings or facilities on such land.
- 2) The corporation may construct transportation research buildings or facilities upon land leased to it by the Transportation Research Board of Ohio, subject to such terms and conditions as the Board deems reasonable and proper. The construction of such buildings and facilities need not be in accordance with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies.

Your current request for an opinion reads, in pertinent part, as follows:

Can the Transportation Research Board lease lands [located at the Transportation Research Center] for nominal sums, i.e. \$1.00 per year, to developers, for the purpose of constructing buildings or facilities, according to the building specifications of the Transportation Research Center and in conformity with the general design of the Transportation Research Center and with the prior approval of such construction plans by the Transportation Research Board, with said developers retaining the ownership of said buildings, and the corresponding right to remove said buildings from said property, and restoring said property to its original condition existant preceding the construction of said buildings, and with the right to release said property for a period of up to 20 years to those customers that comply with [R.C. Chapter 5507], i.e. those persons or entities conducting research in automotive, vehicular, and related

forms of transportation for the development of improved highway facilities for vehicular traffic[?] The developers would pay \$1.00 per year for a period of 20 years, they would collect from the clients, to whom the building is re-leased, a rent commensurate with the cost of construction, and the amortization of the construction, with calculation for profit therein, for the 20 year period or the lease period necessary to pay for the building.

At the end of the lease term, i.e. the lease between the Transportation Research Center and the developer, the building would become the property of the Transportation Research Center by purchasing said building at the fair market value, or the depreciated value, whichever is the lower price of the two.

. . . .

In addition, the Transportation Research Center would have the right to purchase said building at any time during the lease at the fair market value should it be necessary to secure the same by the Transportation Research Board of Ohio.

Can such a program of development be implemented by the Transportation Research Board? The second question is that, if so, does the construction activity need to follow state procedures as are generally followed by state agencies in construction of state facilities? (Emphasis added.)

The transaction described in your current request differs in two respects from that considered in Op. No. 79-011. First, the Board will lease land to a private developer who will construct the buildings and then sublease them to an appropriate user. Second, at the end of the lease term, the Board will purchase the buildings from the developer.

With respect to the Board's authority to lease land to a private developer under the terms and conditions described in your request, I know of no basis for reaching a conclusion different from that set forth in Op. No. 79-011. The Board has, pursuant to R.C. 5507.03(R), the express power to lease sites for the construction and operation of laboratories and other facilities. The statute is not restrictive in terms of the entities to which the land may be leased. It authorizes the Board to lease land to any governmental agency, person, firm or corporation. The Board's power to lease land must, of course, be exercised in a manner consistent with the purposes of R.C. Chapter 5507. Any lease executed by the Board must, therefore, contain adequate assurances that the land will be developed and used for the purpose of conducting research in automotive, vehicular, and related forms of transportation, or for the development of improved highway facilities.

The leasing arrangement described in your request does, in my opinion, contain adequate assurances as to the proposed use of the land. For example, you state that any buildings that will be constructed on the leased site must be built in accordance with the Center's specifications and must be given prior approval by the Board. In addition, you indicate in your request that the lease agreement will limit the developer's right to sub-lease to sub-leasing agreements with persons and entities engaged in transportation research. Because of the existence of these limiting terms and conditions, I find the fact that the proposed lease agreement will be executed between the Board and a private developer who is not directly engaged in transportation research immaterial. It is my opinion that the Transportation Research Board may lease land at the Transportation Research Center to a private developer for the purpose of constructing buildings or facilities in accordance with the general design of the Center and sub-leasing such buildings or facilities to private persons or corporations engaged in transportation research.

You have also asked if the construction activity undertaken by a private developer pursuant to a leasing agreement with the Transportation Research Board

must be in accordance with the procedures generally followed by state agencies in the construction of state facilities. I considered this issue at length in Op. No. 79-011. Again, I find no basis for altering the conclusion reached therein merely because the Board now is proposing to lease the land to a private developer, who will be an intermediary between it and the ultimate lessee or operator. For the reasons given in Op. No. 79-011, it is, therefore, my opinion that a private developer may construct transportation research buildings or facilities upon land leased to it by the Board, subject to such terms and conditions as the Board deems reasonable and proper. The construction of such buildings and facilities need not be in accordance with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies.

You have also asked whether the Transportation Research Board has the authority to agree to purchase the buildings built by a private developer on land leased to it by the Board at the end of the lease term.

The Transportation Research Board has, pursuant to R.C. 5507.03(F), the express power to acquire transportation research facilities. Since the powers of the Board must, pursuant to R.C. 5507.22, be liberally construed, the power to acquire facilities must be construed as authorizing the Board to purchase transportation research facilities. Moreover, the Board is expressly empowered to enter into an agreement or contract for the acquisition of a facility ". . . upon such terms and conditions and for such period as it finds to be reasonable and proper. . . ." R.C. 5507.03(J)(1). It is, therefore, my opinion that the Board has the power to agree to purchase a transportation research facility constructed by a private developer upon land leased to it by the Board at the end of the lease term.

Although the Board possesses the statutory authority to purchase a transportation research facility in the manner described in your request, its authority must be exercised within the limitations imposed by the Ohio Constitution, unless the Board is expressly exempt from such limitations. In order to determine which constitutional limitations may be applicable to the proposed agreement between the Board and a private developer, it is significant to note that an unconditional promise to make a purchase in the future constitutes the creation of an indebtedness on the part of the promisor. State ex rel. Kitchen v. Christman, 31 Ohio St. 2d 64 (1972); State v. Medbery, 7 Ohio St. 522 (1857). Thus, any agreement that unconditionally obligates the Transportation Research Board to purchase a facility at a future date is subject to the constitutional constraints on the power of state officers and agencies to incur debts.

Various constitutional provisions impose restrictions on the power of state officers and agencies to incur debts. The most notable of these provisions, for the purposes of this opinion, are Ohio Const. art. II, §22 and art. VIII, §3. Ohio Const. art. II, §22 requires that there be an appropriation before money may be withdrawn from the state treasury, and reserves to each biennial general assembly the discretionary power to make all appropriations for that two year period. If the General Assembly authorizes a state agency to incur a liability, direct or contingent, without making a corresponding appropriation to pay that liability, a debt is created. Ohio Const. art. VIII, §3, however, prohibits the creation of a debt by or on behalf of the state, unless such debt is expressly permitted in the Constitution. The rule deducible from these limitations is that no state officer or agency may enter into a contract, except in cases specified in the Constitution, whereby the General Assembly will, two years after, be bound to make an appropriation. State v. Medbery, supra.

With respect to your particular inquiry, since the term of the lease will extend beyond two years, the proposed agreement creates a debt prohibited by Ohio Const. art. VIII, §3, unless there is constitutional authority to the contrary. The requisite countervailing authority is provided by Ohio Const. art. VIII, §13. As I noted in Op. No. 79-011, the Transportation Research Board is, by virtue of Ohio Const. art. VIII, §13, exempt from the limitations imposed by Ohio Const. art. VIII and art. XII, §§6 and 11. The exemption conferred in art. VIII, §13 is not, however, absolute; rather, it is qualified by the proviso that ". . . moneys raised by taxation

shall not be obligated or pledged for the payment of bonds or other obligations issued or guarantees made pursuant to laws enacted under this section." It is, therefore, my opinion that the Board has the authority to agree to purchase a transportation research facility constructed by a private developer on land leased to it by the Board at the end of the lease term, provided that the agreement does not purport to obligate or pledge any moneys raised by taxation for the payment of the debt thereby incurred.

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

1. The Transportation Research Board of Ohio may lease land to a private developer for the purpose of constructing transportation research facilities in accordance with the general design and building specifications of the Transportation Research Center and subject to the prior approval of the Board, and of sub-leasing such facilities to private persons or corporations who will operate the facilities solely in a manner consistent with the purposes of R.C. Chapter 5507. (1979 Op. Att'y Gen. No. 79-011 approved and followed.)
2. A private developer engaged in the construction of buildings or facilities on land leased to it by the Transportation Research Board need not comply with the procedures generally applicable to the construction of buildings and facilities for the use of state agencies. (1979 Op. Att'y Gen. No. 79-011 approved and followed.)
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