

Note from the Attorney General's Office:

1959 Op. Att'y Gen. No. 59-451 was questioned by 1987 Op. Att'y Gen. No. 87-069.

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LEASE—PURCHASE AGREEMENT, COUNTY COMMISSIONERS MAY ENTER INTO WITH PRIVATE CORPORATION TO BUILD JAIL ON COUNTY PROPERTY—BIDS, NO REQUIREMENT TO ADVERTISE FOR—COUNTY COMMISSIONERS, MAY NOT APPOINT SEPARATE COMMISSION TO HANDLE LEASE—PURCHASE—SECTIONS 307.02, 153.36.

SYLLABUS :

1. Under the provision of Section 307.02, Revised Code, the county commissioners of any county may enter into a lease-purchase contract with an individual or corporation for the construction by such contractor of a jail and office building, on land owned by the county, to be paid for by the county in stipulated installments running over not more than twenty-five years, such building, on completion of such payments, to become the property of the county.
2. The county commissioners are not required to advertise for bids before entering into a lease-purchase contract, as authorized by Section 307.02, Revised Code.
3. The county commissioners are without authority to appoint another public authority to supervise the execution of a lease-purchase plan for the erection of a county building, pursuant to Section 307.02, Revised Code; but such commissioners are required, before entering into contract therefor, to comply with the provisions of Section 153.36, Revised Code.

Columbus, Ohio, May 13, 1959

Hon. Bernard T. McCann, Prosecuting Attorney
Jefferson County, Steubenville, Ohio

Dear Sir:

I have before me your request for my opinion relative to the application of Sections 307.02 and 307.09, Revised Code, to a proposed contract by the board of county commissioners with a private organization for the erection of a jail and office building under a lease-purchase plan, as provided in the sections referred to.

The plan is explained in detail and the legal questions involved are set out in a letter from the representative of an organization proposing to enter into such contract. I here quote that letter:

“The Board of County Commissioners
Jefferson County Court House
Steubenville, Ohio

Subject: Request for Legal Opinion on Lease-Purchase
Program for New Jail and Office Building Annex
Jefferson County Commissioners
Steubenville, Ohio

Attention: Bernard T. McCann
Prosecuting Attorney
Jefferson County, Ohio

Gentlemen:

The proposed program which will be outlined in the following paragraphs, has been founded upon an act (Amended Senate Bill No. 441) which was passed by the Ohio General Assembly on March 29, 1957; approved June 17, 1957, and filed in the Office of Secretary of State of Ohio, Ted W. Brown, and which became effective, September 16, 1957; Re: File No. 240, and which in effect authorizes Board of County Commissioners to enter into lease-purchase agreements of county real estate for periods not exceeding twenty-five (25) years, and that sections 307.02 and 307.09 of the Revised Code have been amended as stated above.

Mr. J. S. Bushfield, General Manager and Treasurer of The Guy Johnston Lumber and Supply Company, 810 North Seventh Street, Steubenville, Ohio, a local general contracting firm and Fred H. Clarke and Son, Architects, 1002 First National

Bank Building, Steubenville, Ohio, a local architectural office, desire to form a corporation for the purpose of interesting and selling to the Board of County Commissioners, Jefferson County, Ohio, a complete construction program as follows: to design, engineer, construct, and equip a new combined jail and office building annex on present county owned (purchased) land on which the present condemned county jail building is located, and adjoins and connects to the present county court house structure; and to completely finance and pay for this new jail and office building annex, which will be leased back to the Board of County Commissioners for a period of twenty (20) to twenty-five (25) years for an equitable sum of money each year, and which at the end of this period of years will become the clear property of the county.

The Jefferson County Commissioners have expressed their opinion as willing to deed the purchased parcel of ground adjoining the present court house building, and on which is located the present condemned jail building, to the corporation or body with whom they will make the lease-purchase agreement for a new building in order to make the program more sound and complete.

We, as architects and builders and the would-be major parties in a separate corporation setup specifically for the purpose of financing and erecting this type of building for a county governmental body without a bond issue being passed by the voters, are fully aware that the rights of the commissioners to enter into this type of agreement must be determined as to their validity by statute or constitution of the State of Ohio, so as to be final and binding to all parties.

We solicit the Jefferson County Board of Commissioners for legal opinions and procedures to the following question, which will be required by us as the corporation and lessor who would underwrite and complete the construction program, as outlined in the above paragraphs for a lease-purchase agreement:

- (1) Can county commissioners deed or lease county owned land (purchased or landgrant) to a private group or corporation for the purpose of contracting for a lease-purchase construction program for a period of twenty-five (25) years?
- (2) Can county commissioners deed or lease a county owned building located on county owned land (purchased or land-grant); which building is condemned and would be demolished; to a private group or corporation for the purpose of contracting for a lease-purchase construction program for a period of twenty-five (25) years?
- (3) Can county commissioners legally enter into a lease-purchase contract for a complete construction program

as outlined in the preceding paragraphs, which would bind themselves and their successors for a period of twenty-five (25) years?

- (4) Can county commissioners legally deal directly with a private group or corporation for a negotiated lease-purchase contract without legal advertizing for bids or following the present standard rules for bidding on public works, as set forth by the Ohio Revised Code?
- (5) Would there be a limit to the amount of money which the county commissioners could pay as a yearly installment to amortize the intended lease-purchase contract over a twenty-five (25) year period?
- (6) Could the county commissioners, acting as a governmental body, appoint a public authority; either through their office or through the courts; to administer and supervise the construction program and the terms of a lease-purchase agreement with a private corporation for twenty-five (25) years for the county commissioners?
- (7) If question No. 6 is an affirmative answer, would such a public authority have legal rights and powers to negotiate, administer, borrow money, and act as custodian under the terms of a lease-purchase contract for a construction program for twenty-five (25) years for the county commissioners?
- (8) Would the private group or corporation involved in the lease-purchase contract with the county commissioners be required to pay taxes (federal taxes excluded) assessments, maintenance, repair, etc., on the new jail and office building?
- (9) Would the private group or corporation be required to pay Ohio State Sales tax on the material used in the construction program as set forth under the terms of a lease-purchase contract?
- (10) Can the county commissioners enter into a net lease-purchase contract with a private group or corporation, wherein the terms of such lease-purchase contract over the twenty-five (25) year period would include in the yearly installment payment that the county commissioners should pay any taxes and assessments required on the building and property, and all expenses of maintenance, repair, insurance, upkeep, etc., required?

Sections 307.02 and 307.09, Revised Code, were amended by an act which became effective September 16, 1957. Section 307.02, Revised Code, insofar as pertinent reads as follows :

“The board of county commissioners of any county, in addition to its other powers, may purchase, for cash or *by installment payments, enter into lease-purchase agreements*, lease with option to purchase, lease, appropriate, construct, enlarge, improve, rebuild, equip, and furnish a courthouse, county offices, jail * * * and other necessary buildings * * * such real estate adjoining an existing site as is necessary for any of such purposes, * * *”

(Emphasis added)

Section 307.09, Revised Code, reads in part as follows:

“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, unless such lease is part of a lease-purchase agreement, in which case the lease may be for a period not exceeding twenty-five years; * * *”

(Emphasis added)

The portions of these sections referring to “lease-purchase plan” were introduced with the amendment aforesaid. There is a practical absence of adjudications or opinions bearing on this feature of the law, or the meaning of the phrase.

Section 307.02, *supra*, in authorizing “lease-purchase” procedure for acquisition of county buildings, furnishes no specifications or restrictions as a guide for procedure, and I cannot amplify the law, but must conclude that it is left to the sound discretion of the county commissioners to make such stipulations in the contract as will secure the desired result and protect the interests of the county. This would obviously include the requirement of adequate bond from the contracting organization.

Coming to the specific questions presented, I have the following general observations to make. The organization proposed to be formed for the purpose of building the improvements will be referred to herein as the “company.”

The plan presented appears to contemplate that the Company will erect the proposed building on land owned by the county and now occupied by the jail which has been condemned, and is to be demolished. The Company will lease the building so to be constructed to the county at a rental which will in twenty-five years pay the entire cost of the improvement, at which time it is to become the absolute property of the county.

Of course, such an arrangement amounts to an installment sale rather than a lease. It was so held by my immediate predecessor, in considering

a similar plan for the erection of a schoolhouse. In Opinion No. 2820, Opinions of Attorney General for 1958, issued on October 1, 1958, it was said :

“On examination, it is apparent that although your inquiry designates the proposed contract a ‘lease-purchase contract,’ it is, in essence, merely an attempt to purchase the heating system on an installment plan.”

That is what is apparently expressly authorized by said Section 307.02, as a means of acquiring county buildings without resorting to the customary process of providing the necessary funds by the issue of bonds or otherwise, and entering into a contract for such construction.

Since it appears clear that the plan contemplated by the Company involves the erection of the building in question on land owned by the county, I can see no place in the scheme for either a conveyance or lease by the county of its land on which the building is to be erected, now occupied by the jail, nor do I consider that Section 307.02, supra, in referring to a lease-purchase plan contemplates that the county should either convey or lease its land to the Company. The building is to be built with the consent and agreement by the county, on county land. The Company in turn will execute the purchase-lease of the building to the county.

Section 307.09, supra, in my opinion, has no relation to the proposed plan. It appears to relate only to a sale or lease of county property or to an installment sale by the county through a lease-purchase plan.

Accordingly, I can see no relevancy to the plan here proposed in the matters contained in questions 1, 2 and 3. In my opinion the county commissioners have no authority to convey the title of the site in question to the Company, certainly not by deed of gift, and there would appear to be no possible excuse for a sale ; nor is there any reason or excuse for a lease from the county to the Company. When the building is completed it will be located on county land but belong to the Company, and the only lease-purchase agreement involved in the transaction will be that whereby the Company agrees to build the building, and sell it to the county on installments running for twenty-five years.

I do not consider that there is any authority in law for the county, for the purpose of the proposed agreement, to convey its property to the Company either by deed or lease. Accordingly, since your first three questions are all predicated on a conveyance by the county of its land, my answer to each of those questions must be in the negative.

(4) This proposed plan bears no resemblance to the ordinary procedure whereby the county lets a contract for the construction of a building, which, under the law, would require advertisement for bids and an award to the lowest responsible bidder. If the proposed arrangement is to be entered into, I find nothing in the statutes which appears to call for competitive bidding to determine the party with whom the lease-purchase contract shall be made. Accordingly, my answer to the fourth question would be in the affirmative.

(5) I know of no limitation on the amount of money which the county commissioners could pay as a yearly installment to amortize the proposed lease-purchase contract over a twenty-five year period. That amount would have to be determined in advance from estimates of the cost, based upon approved specifications.

I would, however, call your attention to the provisions of Section 5705.41, Revised Code, which require, in case of contracts which are to be performed over a period of years, that the auditor's certificate must be first obtained that the amount required for the first year has been appropriated and is in the treasury. Subsequent payments must be covered by appropriation from year to year.

The limitation of Section 153.24, Revised Code, imposed on counties in the erection of public buildings only applies where bonds are to be issued.

(6) I find it difficult to understand the meaning and purpose of the sixth question as to the appointment of a public authority through the office of the commissioners or through the courts to administer and supervise the construction program contemplated. I know of no power vested in the county commissioners to employ some other *public authority* to perform a duty which appears to me to rest upon them, with the assistance and direction which they would have a right to command of the county engineer.

However, you may have in mind a "county building commission" for which the county commissioners may provide, under the provisions of Section 153.21, Revised Code. That section, however, applies only when a bond issue has been approved by the electors, and accordingly does not appear to be available in the procedure.

In this connection, I do deem it necessary to direct your attention to Section 153.36, Revised Code, which reads as follows:

“If the plans, drawings, representations, bills of material, and specifications of work, and estimates of the cost thereof in detail and in the aggregate, required in sections 153.31 to 153.35, inclusive, of the Revised Code, relate to the building of a courthouse or jail, or an addition to or alteration, repair, or improvement thereof, they shall be submitted to the board of county commissioners, together with the clerk of the court of common pleas, the sheriff, and probate judge, and one person to be appointed by the judge of the court of common pleas, for their approval. If approved by a majority of them, a copy thereof shall be deposited with the county auditor and kept in his office.”

Section 153.31, Revised Code, referred to, deals with any “public building” which the county commissioners propose to “erect or *cause to be erected*,” and while it was passed long before the “lease-purchase” plan was introduced into the law, it appears just as essential that the plans, etc. for the building proposed to be erected under the new plan, should have the prior approval of the officers named in said Section 153.36.

(7) The answer to Question No. 6 makes it unnecessary to consider the seventh question.

(8) As to the obligation of the company to pay certain taxes and assessments, I would consider that a matter for them to be advised by their own counsel. As to the elements of maintenance and repair on the new buildings, that would appear to me to be a matter to be determined by the contract.

(9) Again as to the liability of the company for sales taxes, I would leave that to the advice of their own attorney.

(10) It appears to me that the items of expense involved in this question are such as should be determined in the contract between the county and the organization in question. As to the land belonging to the county, since the title remains in the county, it would be exempt from taxation. The improvements thereon in process of construction by the Company would, in my judgment, be the property of such organization until the lease-purchase contract should have been concluded and the leasehold rights of the organization released to the county. I think it is safe to assume that those improvements on the property, as long as they are in the ownership of the Company, would be subject to taxation which should be borne by the Company, although they might be considered in arriving at the total consideration, as embodied in the contract.

It is accordingly my opinion and you are advised :

1. Under the provision of Section 307.02, Revised Code, the county commissioners of any county may enter into a lease-purchase contract with an individual or corporation for the construction by such contractor of a jail and office building, on land owned by the county, to be paid for by the county in stipulated installments running over not more than twenty-five years, such building, on completion of such payments, to become the property of the county.

2. The county commissioners are not required to advertise for bids before entering into a lease-purchase contract, as authorized by Section 307.02, Revised Code.

3. The county commissioners are without authority to appoint another public authority to supervise the execution of a lease-purchase plan for the erection of a county building, pursuant to Section 307.02, Revised Code; but such commissioners are required, before entering into contract therefor, to comply with the provisions of Section 153.36, Revised Code.

Respectfully,

MARK McELROY

Attorney General