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FILE NO. S-797

COUNTIES:
Leases Beyond the Term
of the County Board

Honorable John J. Bowman
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DuPage County
207 S. Reber Street
Wheaton, Illinois 60187

Dear Mr. Bowman:

I have your letter wherein you state, in part:

"The County of DuPage is the owner in fee simple of certain real estate, and wishes to lease said real estate to certain parties.

* * *

Can the county board, as lessor, lease premises which it owns, for a term which would exceed the life of the county board which authorized said lease?"

The County of DuPage is not a home rule unit.

Counties, which are not home rule units, have only those

powers granted to them by the Constitution and by law (Ill. Const., art. VII, sec. 7), plus those powers that may be implied as necessary to carry out their expressed powers. Heidenreich v. Ronske, 26 Ill. 2d 360.

In your letter you indicate that the County of DuPage wishes to lease land that it owns pursuant to the authority delegated to the county by the second paragraph of section 24 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 303), which provides:

> "Second—To sell and convey or lease any real or personal estate owned by the county."

The County of DuPage holds property in trust for the benefit of the inhabitants of the county. As was said in Sherlock v. Village of Winnetka, 59 Ill. 389, at page 398:

> "[T]he corporation is bound to administer such property faithfully, honestly and justly, and if it is guilty of a breach of trust by disposing of its valuable property, without any, or a nominal, consideration, it will be regarded in the same light as if it were the representative

> of a private individual, or of a private corporation; that the mere fact in such a case, that the forms of legislation are used in committing such breach of trust, will make no difference in the character of the act. It will not be, in any sense, the exercise of a political power delegated for public purposes, and the privilege of exemption from judicial interference terminates where legislative action ends."

You have asked whether the present county board, by authority of the second paragraph of section 24, may lease county owned property so as to bind successor county boards. The majority rule is that the governing body of a unit of local government may bind successors in office by a contract made in the exercise of proprietary or business powers, but may not bind successors in the exercise of legislative or governmental functions. See, cases cited at, 63 C.J.S. Municipal Corporations, sec. 987, p. 549 (1950); 10 McQuillin, Municipal Corporations, sec. 29.101, p. 491 et seq. (3rd Ed. 1966 revised Volume); 149 A.L.R. 336.

One noted authority restates the law as follows:

> "Statutes and charters sometimes authorize municipal boards to make contracts which will extend beyond their own official term, and the

> power of the legislature in this respect is well settled. Respecting the binding effect of contracts extending beyond the terms of officers acting for the municipality, there exists a clear distinction in the judicial decisions between governmental and business or proprietary powers. With respect to the former, their exercise is so limited that no action taken by the governmental body is binding upon its successors, whereas the latter is not subject to such limitation, and may be exercised in a way that will be binding upon the municipality after the board exercising the power shall have ceased to exist. * * **
> 10 McQuillin, Mun. Corp. Sec. 29.101, pp. 491-492 (3rd Ed. 1966 revised Volume.)

If one governing body of a county could restrict future county boards, in the exercise of legislative or governmental functions, then, this would seriously undermine fundamental concepts of democracy. The ability to legislate to conform with the will of the people and to meet the needs of the people is obviously essential. Particularly, one county board ought not to be able to pledge the revenue of the county for such a long period of time that the county is severely handicapped in coping with future, unforeseen problems as they arise. The ability to meet day to day needs is essential to effective government.

The governing body may execute a contract or a lease that binds it successors if the contract or lease is pursuant to a proprietary function because, here, a county or other unit of local government is acting for the private benefit of itself and its inhabitants; thus, it may exercise its business powers in the same manner as a private corporation. The distinction between governmental powers and proprietary powers was noted at page 282 of Illinois Trust & Savings Bank v. City of Arkansas City, 76 F. 271 (8th Cir., 1896);

> "* * * A city has two classes of powers,-- the one legislative, public, governmental, in the exercise of which it is a sovereignty and governs its people; the other, proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. * * * But in the exercise of the powers of the latter class * * * it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. * * **

The minority rule might best be called a rule of reason. A contract or lease made by a governing body is neither void or voidable merely because some of its executory

features may extend beyond the term of office of the members of the governing body where, at the time of its execution, it is apparently fair, just and reasonable and is prompted by the necessities of the situation or in its nature is advantageous to the municipality. Denio v. Huntington Beach, 22 Cal. 2d 580, 140 P.2d 392, 149 A.L.R. 320 (1943).

In Denio, the city of Huntington Beach entered into a contract for the receipt of legal services. The term of the contract extended beyond the terms of the members of the city council that created the contract. The California Supreme Court refused to declare the contract void.

> "It is our opinion, however, that the law is settled in California that a contract made by the council or other governing body of a municipality, which contract appears to have been fair, just, and reasonable at the time of its execution, and prompted by the necessities of the situation or in its nature advantageous to the municipality at the time it was entered into, is neither void nor voidable merely because some of its executory features may extend beyond the terms of office of the members of such body. In the absence of some other ground of avoidance, such a contract is binding upon the municipality and may not be summarily canceled by a successor council. * * * The council of a municipal corporation is a

> continuing body and in legal contemplation remains the same council regardless of changes in its personnel. * * **

It should be noted that the legal services sought by the city pertained to the protection of the city's legal claim to offshore oil, gas and other hydrocarbon substances. Most payments were to be made to the attorneys from royalties the city received from the recovered oil.

The technical legal distinctions between a lease and a contract do not have a fundamental bearing on the determination as to whether a county board may bind its successors. There are numerous cases where courts have validated or invalidated lease agreements on the same principles that are applied to contracts. See, 47 A.L.R. 3d 119, 120.

Illinois has not expressly adopted the governmental-proprietary rule nor has this jurisdiction expressly rejected the rule. In Millikin v. County of Edgar, 142 Ill. 528, plaintiff was appointed keeper of the county poor house for three years. He performed his duties for approximately 10 months when the county board discharged him. In declaring

the contract to be invalid, the court stated, at pages 532-533:

> "* * * At the time the contract was attempted to be made, the members of the board of supervisors were elected annually. Each member held his office for the term of one year, and no longer. The board was clothed with authority to levy taxes to raise funds to support paupers, but this power was required to be exercised annually. In view of these provisions of the statute it would be an unreasonable construction of the statute relied upon, to hold that the legislature intended to clothe the board with authority to enter into a contract with a keeper of a poor house, to run for the term of three years. If the board had the power to enter into a binding contract of this character for three years, no reason is perceived why it might not make a contract for five or even ten years, and if this could be done, the hands of succeeding boards would be tied and their powers taken from them. If this important power, the supervision of a poor farm and the care of the unfortunate, may be so far delegated as was attempted in this case, the county might be deprived, in a great measure, of one of the most important affairs entrusted to its care and supervision. The statute should not receive a construction which might lead to such disastrous results, unless the language employed would admit of no other reasonable interpretation.
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> * * *

Thus, in the Millikin case, the court places reliance on the governmental nature of the duty to oversee the poor plus the fact that the revenues needed to pay the

keeper of the county poor house were derived from taxes collected annually. Thus, future revenue of the county was allocated by this employment contract.

The court in Millikin cited Stevenson v. School Directors, 87 Ill. 255, and Davis v. School Directors, 92 Ill. 294, as authority for its holding. Both cases involved teacher employment contracts executed by a board of school directors for a term that extended beyond the life of the board that executed the contract. The court declared that the school directors were powerless to enter into contracts with teachers existing substantially beyond the current school year. An important caveat was issued by the court in the Stevenson case at page 258:

> "There is, doubtless, no objection to contracts for the teaching of terms extending for a reasonable time beyond the current school year, when such contracts are entered into in good faith, and not for the purpose, merely, of forcing upon the district an unsatisfactory teacher or defeating the will of the voters at the annual election. But we think the spirit and intent of the law are clearly repugnant to the idea that one board of directors may, by contracts wholly to be carried out in the future, divest future boards of directors of the power to select the teachers they shall desire, for the terms to be commenced after their organization.

* * *

In E. St. Louis v. E. St. Louis Gas, Light and Coke Co., 98 Ill. 415, the city of East St. Louis contracted with a private corporation whereby the corporation promised to furnish gas for the lighting of streets. The duration of the contract was for 30 years. The contract began on October 3, 1874. The gas company brought suit to recover for the cost of gas furnished to the city between the months of March to August of 1877. The court, at page 425, declares that a city may not abridge or limit its governmental or legislative powers.

> "* * * But the particular objection which is taken to this contract, as it has been made, is its term of duration,—for thirty years. In this respect it is insisted the contract is an abridgment of the legislative or governmental power of the city, in that it barters away the power of the legislative body of the city to legislate on the subject for thirty years.
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> The doctrine, as declared in 1 Dillon on Mun. Corp. §61, is referred to, viz: 'Powers are conferred upon municipal corporations for public purposes, and as their legislative powers can not, as we have just seen, be delegated, so they can not be bargained or bartered away. Such corporations may make authorized contracts, but they have no power as a party to make contracts or pass by-laws which shall cede away, control or embarras their legislative or governmental powers, or which shall disable them from performing their public duties.' It is contended that under this doctrine the contract stands condemned, and is void.

> At first blush the contract may seem objectionable, as unnecessarily tying up the hands of the city council for such a length of time, though some excuse therefor may be found in the presumed difficulty of securing a contract for the construction of such expensive works as are here involved, without the assurance of patronage for some considerable length of time, and in the mention in the company's charter of thirty years as the time for the exclusive supply of the city with gas light.
>
> Whether this length of time of the running of the contract be a valid objection to it, we deem it unnecessary to determine for the purpose of this suit, and would not be understood as expressing any opinion in that regard, for, admitting that the contract can not be upheld in this respect, it is an objection, we conceive, which applies only to the executory part of the contract, and has no application to the executed part of it. * * **

The court shied away from adopting a strict governmental-proprietary rule. The gas company was suing for payment of services already rendered, thus, the court in holding that the company was entitled to payment for services rendered found it unnecessary to reach the issue of the legality of a thirty year contract. See, also Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill. App. 325, 339.

In City of Rock Island v. Central Union Telephone Co., 132 Ill. App. 248, the telephone company contracted with the city to be allowed to erect its poles and wires in the streets and public ways of the city. The contract was for 99 years. The city attempted to repeal the ordinance authorizing the contract. The telephone company sought injunctive relief and the city defended on the grounds that the contract was void because it attempted to bind successor city councils. The court held against the city stating at page 264:

> "* * * It is manifest that if a city cannot bind itself by contract beyond the term of office of the aldermen then in office, capital can never be obtained to build street car lines, water-works and telephone lines within cities. Public policy and the general good of the people forbid such a conclusion, unless required by the statutes. In this state the city has power to make such a contract as that here involved.
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> * * *

Thus, in determining whether or not a county board may enter into a lease that binds its successors, the following criteria are pertinent:

> (1) Is the lease being executed in support of a legislative or governmental function?

(2) Will revenues of the county be pledged beyond the term of the county board executing the lease?

(3) What is the duration of the lease?

(4) Do circumstances necessitate a lease beyond the term of the county board?

(5) Is the lease reasonable?

Application of these principles may be found in Aven v. Steiner Cancer Hospital, 5 S.E. 2d 356 (Ga., 1939). In Aven, the city of Atlanta proposed to lease a tract of land owned by the city to a hospital in consideration of treatment by the hospital of the city's poor. The term of the lease was 35 years. Taxpayers sought to enjoin the hospital from executing this agreement. The court declared that the lease violated the rule that one governing body may not bind its successors so as to prevent free legislation in matters of municipal government. Although this rule had been codified in Georgia, the court noted it was not of statutory origin. The court made the following notations concerning a lease that attempted to bind successor city councils: (1) "The evidence for the plaintiffs tended to show that the property in question has a rental value of

$300 per month, and there was no evidence to the contrary. Under the record, therefore, it must be taken that the use of the property is not without some value. Thus, while the lease does not amount to an appropriation of money, it does attempt to appropriate a property right of substantial yearly value for the benefit of the poor, continuously for the period of thirty-five years." (2) "While the city would be authorized to lease its property for a period of years upon a valid consideration, acting for that purpose in its proprietary capacity, such is not the effect of the agreement under consideration." (3) "If the agreement should be executed and given effect, it would necessarily prevent free legislation in regard to all of these matters concerning care of the poor. The proposed undertaking will not merely grant a lease on the city's property; it will bargain away governmental discretion." (4) "We do not mean to say that every contract or undertaking entered into in behalf of a municipality on authority of its council, and involving a governmental function, must be considered as void as to any extension whatever beyond their own tenure. While the question is not involved in the present case, it may be that the rule should be so applied as

to allow, in case of necessity, reasonable overlapping to avoid suspension or disruption of municipal government during periods of change in administration." (5) "We think it should be said as a matter of law that the period of the lease will involve an overlapping for an unreasonable time with respect to the rule that one city council cannot bind itself or its successors in matters of municipal government."

In direct answer to your question, I am of the opinion that the present county board of the County of DuPage may not enter into a lease for governmental purposes if the term of the lease extends beyond the life of the present county board, except, where, for administrative purposes, it is necessary to extend beyond the term of the current board for a short period or if circumstances are such that the county must of necessity enter the lease agreement and it cannot be reasonably executed without a duration time that extends beyond the term of the county board.

I might add that any lease of county property must be for a public purpose. (See, Ill. Const., art. VIII, sec. 1.) Additionally, unless authorized by law to make a gift or donation

of the rental value of the land, the county must lease the land for an adequate consideration. See, Ill. Atty. Gen. Op. S-691, dated January 30, 1974.

Very truly yours,

ATTORNEY GENERAL