

**OPINION
65-77**

December 14, 1965(OPINION)

Mr. M.C. Hiaasen
State's Attorney
Benson County

RE: Counties - Office Space - Lease

This is in reply to your letter of December 7, 1965, in regard to the matter of rental of county office space, telephone conversation with the attorney general, and general discussions as of date December 9, 1965, with Mr. Adams of this office.

You inform us that the project to which your question relates consists of the city's deeding its memorial hall to a private corporation, which private corporation will remodel said building, and which private corporation will then lease same to the board of county commissioners for office space. You inform us further that under the proposed arrangement the county will furnish approximately \$6,500.00 per year in rental for the office space used.

You call our attention to our letter addressed to Mr. V. A. Helberg of October 19, 1965, in regard to utilization of this building. You further inform us that the corporation that intends to accept and remodel this building desires to lease such office space to the board of county commissioners for a period of not less than seven years and possibly for ten years.

We do not believe that there is any serious problem with regard to the power of a county to contract. Section 11-10-01 of the North Dakota Century Code provides:

COUNTY A CORPORATE BODY - POWERS. Each organized county is a body corporate for civil and political purposes only. As such, the county may sue and be sued, contract and be contracted with, and in all cases where lands have been granted to it for public purposes and any part thereof has been sold and the purchase money or any part thereof is due and unpaid, all proceedings necessary to recover possession of such lands or to enforce the payment of the purchase money shall be instituted in the name of the proper county."

Likewise we do not believe that there is any serious problem with regard to the power of the board of county commissioners to provide office space for county officers. Section 11-10-20 of the North Dakota Century Code provides:

BOARD OF COUNTY COMMISSIONERS TO PROVIDE OFFICES, COURTROOM, JAIL - WHERE PUBLIC RECORDS KEPT. The board of

county commissioners shall provide a courtroom and jail, and shall provide offices in the courthouse of the county for the sheriff, county treasurer, register of deeds, auditor, clerk of the district court, state's attorney, county judge, county superintendent of schools, and any other officer who has charge of public records. If there is no courthouse in the county or if the courthouse erected has not sufficient capacity, such offices shall be furnished by the county in a suitable building at the county seat, at the lowest rent to be obtained."

We further presume that the amounts to be annually expended by the board of county commissioners will not be greater than the usual annual tax levies of your county and therefore would not be prohibited by section 11-11-18 of the North Dakota Century Code.

The only remaining problem with the legality of the proposed lease agreement we would note is that relative to the fact that the lease contract in question is intended to last beyond the term of the current board of county commissioners.

We note in McQuillin Municipal Corporations, Second Edition Revised, Vol. 3, page 1282, section 1356, the following:

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 powers shall have ceased to exist. Consequently, independent of statute or charter provisions, it is generally held that the hands of successors cannot be tied by contracts relating to legislative functions, but may as to contracts relating to business affairs, for example, the governmental power to fix rates for water. And in a case holding that a municipality has no authority to bind itself to levy a certain fixed annual tax in perpetuity for the use of a water company which agrees to supply the city with water, the following language is used: 'A contract to pay a definite sum for a specified period is binding on the successors of the municipal officials who made the contract. Such a contract is not entered into in virtue of the governmental or legislative functions of the city, whereas the power to levy a tax belongs to the class of legislative and governmental powers. In the one case successors may be bound, in the other they cannot be.' So a municipality 'just about to merge its individuality into another and larger corporate entity may not make a contract from which it can derive no benefit during its independent existence and which

would deprive its successor of a portion of the power expressly granted to that successor by the legislature.'

Generally, contracts for public utilities, such as water supply, gas, electricity, etc., are considered as relating to the business affairs of the municipality, rather than the legislative or governmental powers, and it is no objection thereto that they bind the municipality beyond the term of the office of the officers making the contract. So a council may give a lease to municipal property for a time extending beyond the term of such council, and may take a lease from a third person for a term not to expire until after such council would be out of office. So contracts for public printing are generally not invalid because they extend beyond the term of some of the board, and it has been held that where county commissioners are expressly empowered to contract for public printing for a term not to exceed two years, and a prior contract is about to expire, a new contract for two years may be made in the last week of the board's official existence.

"On the other hand, it has been held that a board of supervisors cannot contract for sprinkling county roads for a period longer than the existence of the board. And where power to contract for lighting is given and no limit as to duration is fixed, there is no implied limit to the official life of the council enacting an ordinance providing therefor. Where the council is prohibited from entering into any contract 'which is not to go into full operation during the term for which all its members are elected,' a condition in an accepted bid cannot be waived by the bidder after the terms of members of the council have expired, in order to validate a sale thereunder. * * *"

We note also in 63 C.J.S, page 549, Municipal Corporations, section 987, the following:

While the question of whether a municipal council, board, or officer may bind successors by contract is generally determined according to the nature of the power exercised in making the contract, a doubt has been expressed as to whether a simple classification of contracts as involving or not involving only the proprietary or business powers of the municipal corporation is an accurate test of power to make a contract binding on successors; and it has been held, without reference to this classification, that a contract made by the council or other governing body of a municipal corporation is neither void nor 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.

The council or other governing body of a municipal corporation may bind its successor in office by a contract for a term of years where such contract is made in the exercise of its proprietary or business powers. The same power

attaches to any city officer who has the requisite authority to make the contract and who makes it for a period extending beyond his term. The rule applies to the making of a lease of city property, to an arrangement with a neighboring county for the care of the city's contagious disease patients at the county hospital, and to a contract for services with respect to the construction of a public building. * * *

We have not found a specific decision of the Supreme Court of this state on the precise type of circumstances you present. However, on the basis of the facts you present, assuming that in view of surrounding facts and circumstances the lease arrangement is fair, just and reasonable, and in the words of the above-quoted section 11-10-20 of the North Dakota Century Code furnishes offices in a 'suitable building at the county seat, at the lowest rent to be obtained', we see no reason why the current board of county commissioners could not enter into a valid lease arrangement such as is apparently contemplated with this private corporation, and bind the county for the contemplated period of seven to ten years. We are, of course, assuming that the county's cost of renting same would be within current tax levies.

HELGI JOHANNESON
Attorney General