

are extended to embrace territory in which there is a public highway formerly under the jurisdiction of a county, its control passes to the municipal corporation. The city does not merely succeed to the rights of the county in the highway, but holds the highway under the authority of the state just as it holds any other street and with all the powers over it and rights in it which it may exercise as to its other streets. * * *

It is, therefore, my opinion that should the city adopt a valid annexation ordinance and thus include the adjacent highway, it will assume the responsibility for the maintenance of that highway.

(No. S-995—November 5, 1975)

OFFICERS: *Duty of State's Attorney When County Board Leases Public Property for Private Purpose.* A county may not lease public property for a private purpose. When county board leases public property for private purpose, the state's attorney has the authority to commence legal action against the county board.

CONSTITUTION CONSTRUED: Illinois Constitution of 1970, article VIII, section 1(a).

STATUTES CONSTRUED: Illinois Revised Statutes 1973, chapter 14, paragraph 5.

Hon. Roger W. Thompson, State's Attorney, Logan County, Lincoln, Illinois.

I have your letter wherein you state in part:

"The County of Logan has for many years owned a tract of farm land of approximately 240 acres. The tract was originally purchased and used as the County 'poor farm' pursuant to provisions of the Counties Act. However, the last resident of the poor farm left the premises in about 1952, and since that date the farm has not been used, to my knowledge, for any public purpose. Instead, the farm has been leased on a standard fifty-fifty crop share basis to a tenant in the same manner as other crop share leases used in this County.

* * *

The Attorney General's Office has previously issued Opinions F1236 in 1964, F1478 in 1965, F1926 in 1968, and your most recent opinion NP-843 issued on November 27, 1974, consistently holding that leases of a County farm for nongovernmental purposes is in contravention of §24 of the Counties Act (Chapter 34, §303, Illinois Revised Statutes). Nevertheless, the Logan County Board, and I am sure other county boards throughout the State of Illinois, continue to hold farming lands and operate farms in violation of statute.

* * *

I am reluctant to bring a lawsuit against the Board either by way of mandamus or suit for declaratory judgment, as the Board holds the purse strings for my budget as State's Attorney, and I do not want to otherwise engender ill-feelings. Nevertheless, I am cognizant of my duties as an elected public official and to the citizens and taxpayers of this County, and believe that I can no longer avoid any legal responsibilities which the law may impose upon me concerning illegal use of public properties. I, therefore, wish to raise the following specific questions:

1. Do I have the duty to force the County Board to dispose of the farm, either by way of an action in mandamus or suit for declaratory judgment?
2. If the answer to the previous question is in the affirmative, may the court, incidental to such suit, decide upon the manner in which the farm is to be sold, i.e., at public or private sale, for cash or on an installment contract, as a whole or in parcels?

3. Would the plaintiff in such suit be the County of Logan and the defendants the County Board of the County? In other words, who or what is the proper party plaintiff and who or what is the proper party defendant?
4. May the proceeds from the sale of the farm, if the same is ordered sold, be earmarked for a specific purpose, e.g., construction of the proposed Logan County Public Safety Complex?"

Section 24 of "AN ACT to revise the law in relation to counties" (Ill. Rev. Stat. 1973, ch. 34, par. 303 as amended by P.A. 79-955) gives counties the power to lease their property. The power to lease public property granted by section 24 does not authorize counties to lease their property for private purposes. (1964 Ill. Att'y. Gen. Op. 214; 1965 Ill. Att'y. Gen. Op. 176.) Section 1(a) of article VIII of the Illinois Constitution provides that "public funds, property, or credit shall be used only for public purposes". In opinion No. NP-843 I stated that this section reaffirmed the rule that counties are not empowered to lease public property for private purposes. This rule was explained in *Yakley v. Johnson*, 295 Ill. App. 77 at 80-81 as follows:

"Counties are mere political divisions of the territory of the State, as a convenient mode of exercising the political, executive and judicial powers of the State. They were created to perform public, and not private, functions. They are wholly public in their character, and are a portion of the State organization. All their powers are conferred, and duties imposed, by the constitution and statutes of the State. They are public, and all the property they hold is for public use. It belongs to the public, and the county is but the agent invested with the title, to be held for the public."

The facts outlined in your letter indicate that Logan County is leasing county farm land for private purposes. Counties, such as Logan County, which are not home rule units can exercise only the powers expressly delegated by the legislature or those that are necessarily implied from expressly granted powers. (Ill. Const., art. VII, sec. 7; *Heidenreich v. Ronske*, 26 Ill. 2d 360.) There is no statutory authority that authorized Logan County to lease its property for private purposes. In addition, the leasing of property by Logan County for private purposes violates section 1(a) of article VIII of the Illinois Constitution.

The constitutional mandate is only that public property be used for public purposes, not that property be disposed of if not so used. Therefore, the answer to your first question is that you, as state's attorney, have no duty to compel the county board to dispose of the farm. Though the foregoing responds to the precise question you have posed, there is implied in your first question the query whether you have the authority and the duty to commence any action against the county board.

The county board, the county officers and the people are statutory clients of a state's attorney. (Ill. Rev. Stat. 1973, ch. 14, par. 5.) In *People ex rel. Courtney v. Ashton*, 358 Ill. 146, it was contended that a state's attorney was not authorized to institute or prosecute actions against the county or county officers since the county and its officers were clients of the state's attorney. The court rejected this contention

and held that when the interests of the people and the county board or county officers conflict, the state's attorney has the authority to represent the side which he believes to be right. Therefore, you, as state's attorney, have the authority to commence civil actions against the Logan County Board and criminal actions against members of the county board.

Section 5 of "AN ACT in regard to attorneys general and state's attorneys" (Ill. Rev. Stat. 1973, ch. 14, par. 5) imposes a duty on state's attorneys to commence civil and criminal actions. That section provides in pertinent part:

"§ 5. The duty of each State's Attorney shall be:

(1) To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned.

* * *

A state's attorney is required to investigate the facts that serve as the basis for a legal action. (*People v. Pohl*, 47 Ill. App. 2d 232; *O'Hair v. People*, 32 Ill. App. 277.) Once the facts have been investigated, the state's attorney has a duty to exercise his discretion in deciding whether or not to commence an action. (*People ex rel. Hanrahan v. One 1965 Oldsmobile*, 52 Ill. 2d 37; *People v. Rhodes*, 38 Ill. 2d 389.) As state's attorney of Logan County, you have a duty to investigate the facts surrounding the leasing of county farm land by the county board. You then have the duty to exercise your discretion in good faith to determine whether a civil or criminal action should be commenced.

Your first question indicates that you are contemplating an action of mandamus or suit for declaratory judgment. No opinion is expressed as to the form of the action which you in your discretion may choose to institute. However, I will note that there appears to be no basis for a writ of mandamus since the county board has no ministerial duty to dispose of the farm in question.

In view of the fact that the county board cannot be ordered to sell the farm, the answer to your second and fourth questions is in the negative.

The issue of proper parties posed in your third question is dependent upon the nature of the civil action which you may decide to institute. Since no opinion has been expressed as to the form of the civil action you might choose to commence, no opinion can be given regarding the proper parties to any such action. The proper parties in a criminal prosecution would, of course, be the People of the State of Illinois and the defendant or defendants you determine to be criminally liable.

(No. S-996—November 12, 1975)

HIGHWAYS: Highway Purpose—Maintenance Storage Facility. Land purchased by the Department of Transportation as the site of proposed maintenance storage facilities is land acquired for a highway purpose.

HIGHWAYS: Disposal of Land Purchased for a Highway Purpose—Resale to Original Owner. Land purchased by the Department of Transportation for a highway purpose but no longer needed may only be sold back to the original owner if said land was used for residential purposes.

HIGHWAYS: Disposal of Land Purchased for a Highway Purpose—Public Auction. Land purchased by the Department of Transportation for a highway purpose but no longer needed may upon approval by the Governor be sold at public auction.

STATUTES CONSTRUED: Illinois Revised Statutes 1973, chapter 121, paragraphs 4-501 and 4-508.

Langhorne Bond, Secretary, Department of Transportation, State of Illinois, Springfield, Illinois.

I have your letter wherein you state:

"Funds were provided under House Bill 1757 of the 72nd General Assembly for the purchase of sites for the construction of maintenance storage facilities. A site on Ridgeland Avenue south of Illinois Route 83 in Worth Township was one of the sites selected and purchased in fee in 1962 with these funds. After purchase, the real estate was inventoried under the State Property Act, (Chapter 127, Section 133(b)1 through 133(b)12).

The site was not utilized for the purpose for which it was purchased and as it is no longer needed it has been determined to dispose of it so as to return it to the tax rolls. The land is vacant and has substantially increased in value since its purchase. In determining our procedure toward disposing of the subject property, it is necessary that your opinion be obtained on the following questions:

1. May a parcel of real estate acquired pursuant to such an appropriation, and inventoried under the State Property Act be sold under Section 4-508 of the Highway Code? It is noted that Section 4-508 covers only land acquired for highway purposes or remnants of land so acquired under the provision of Section 4-501. Such purchases under Section 4-501 of the Highway Code would seem to be exempt from inventory under Section 133(b)3 of the State Property Act.
2. If your answer to Question 1 is in the affirmative, would section 4-508(c) be applicable as the land is vacant but the owner from whom the land was acquired still resides in a dwelling on the remainder of the property?
3. If your answer to Question 1 is in the negative, is there any other existing statutory authority to dispose of the property?"

The Department of Transportation is a State agency which has only those powers conferred upon it by the legislature. (*Dept. of Public Works & Bldgs. v. Ryan*, 357 Ill. 150.) The power to authorize the sale of State owned real estate belongs to the General Assembly; in the absence of any statutory authority, a State agency lacks the power to sell State property. (1919-20 Ill. Att'y. Gen. Op. 406.) Your first question requires a determination of whether section 4-508 of the Illinois Highway Code (Ill. Rev. Stat. 1973, ch. 121, par. 4-508) gives the Department of Transportation the power to sell land originally acquired by the Department for the construction of a maintenance storage facility.