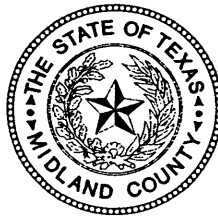


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May 7, 2002

RQ-0543-JC

The Honorable John Cornyn  
Attorney General  
209 W. 14<sup>th</sup> St.  
Austin, TX 78701

FILE # ML-42591-02  
I.D. # 42591

Dear Attorney General Cornyn:

In my capacity as Midland County Attorney, and under the authority of *Tex. Gov't. Code §402.043*, I ask your opinion in regards to the following legal questions.

1. May a County enter into a multi-year lease of real property that does not require the Lessee to make payments and that requires the County to spend unlimited county funds in each year of the lease?

In 1968, Midland County accepted a deed of real estate from the Museum of the Southwest for the sole purpose of leasing the property back to the Museum for the operation of an art museum. The original lease was for a period of ten (10) years, but through subsequent amendments, the term was extended to fifty (50) years. Following is a more detailed account of the transactions involving the property.

On July 9, 1968, real estate was deeded to the Museum of the Southwest, to be used for public museum purposes and to be known as the "Fred and Juliette Turner Memorial Museum." The deed further provided that if at any time prior to January 1, 1979 the premises are not used for public museum purposes the land would revert to the grantors. On July 10, 1968 the Museum of the Southwest conveyed this real estate to Midland County by a deed, subject to the terms, provisions, covenants and conditions set forth in the Deed to the Museum of the Southwest. On October 18, 1968, a Confirmation Deed was signed which corrected the name of the grantor from The Museum of the Southwest to The Midland Museum Corporation.

On September 5, 1968 Midland County entered into a lease agreement with The Museum of the Southwest by which it leased the real estate conveyed in the July 10th deed. On October 18, 1968, the parties executed an Amendment and Confirmation of Lease Agreement, which corrected the Lessee's name to The Midland Museum Corporation. The lease had a term of ten (10) years and provided that as consideration Lessee paid to Lessor "the sum of \$1.00 and other

good and valuable consideration.” The lease provides that Midland County shall have several responsibilities, including the following:

“5. Lessor shall maintain the grounds at the leased premises (and the sprinkler equipment) and the exterior of the buildings thereon (including without limitation roofs, walls, foundations, doors) in a condition and state of repair consistent with the present dignity and appearance of the premises.

6. During Lessee’s occupancy of the premises, Lessor agrees to furnish, or bear the cost of, all utilities (except telephone), including water, electricity, gas, heating and refrigerated air conditioning in season; the cost of telephone service shall be borne by Lessee; Heating and air conditioning equipment and plumbing shall be serviced and maintained by Lessor.”

On September 25, 1978, the parties executed a Renewal of Lease Agreement. The renewal provided that the lease term would continue until August 31, 1988. On March 25, 1985 the parties again renewed the lease agreement and provided that the lease would run until August 31, 1988 and if the Museum completed an addition before August 31, 1987 the lease would extend for fifty (50) years from September 1, 1968.

On May 8, 1989 the parties executed an Amended and Restated Lease Agreement which provided that the lease “would be for a term of fifty (50) years commencing on the first day of September, 1968.” The Amended and Restated Lease Agreement contains the following provisions regarding the duties of the Lessor, Midland County:

“3. Lessor shall insure against fire and damage to the buildings and structures located on the leased premises. . . .

5. Lessor shall maintain:

(a) the exterior structural condition of the buildings on the premises including foundations, walls, roofs and doors; and

(b) the grounds and landscaping at the leased premises in accordance with the standards and dignity befitting a museum and local ordinances as they may apply.”

In each year of the lease, Midland County has spent substantial sums of money complying with its obligations under the lease. For example, in Fiscal Year 2000 Midland County’s costs in meeting its obligations were \$64,176.31, which included \$42,886.66 for water, gas and electricity, \$14,089.65 for equipment maintenance and \$7,200.00 for landscaping. The lease does not require any payments by the Lessee and, in fact, Midland County has not received any payments from the Lessee. Therefore, the lease requires Midland County to spend funds and does not require the Lessee to make any lease payments.

The original lease was for a period of ten (10) years and the Amended and Restated lease is for a period of fifty (50) years. Neither the original nor amended lease contain any provision allowing the county to terminate the lease prior to the end of the stated term, except upon breach

by the Lessee. The lease provides that compensation for the lease is the total sum of One Dollar (\$1.00) and does not provide for any monthly or annual rental payments. Under the terms of the lease, Midland County will be obligated to expend funds during every year of the lease.

It is Midland County's belief that the lease agreement violates Art. 11, §7 of the Texas Constitution, which states in pertinent part as follow:

But no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund . . .

Art. 11, §7 prohibits a county from incurring a debt without establishing a tax to cover interest on the obligation and creating a sinking fund to reduce the principal. *City-County Solid Waste Control Bd. v. Capital City Leasing, Inc.*, 813 S.W.2d 705 (Tex. App.-Austin 1991) A contract that violates these constitutional provisions is void and the governmental unit involved need not pay any related obligation. *Id.*; *Texas & New Orleans R.R. Co. v. Galveston County*, 169 S.W.2d 713 (Tex. 1943). Midland County did not establish a tax to cover interest on the lease obligation nor did it create a sinking fund.

A contract creates a debt unless the county's obligations under the contract will be satisfied out of current revenues or out of some fund then within the immediate control of the governing body. *City of Bonham v. Southwest Sanitation, Inc.*, 871 S.W.2d 765, 768 (Tex. App.-Texarkana 1994, writ denied); *Tex. Atty. Gen. Op. JC-0139* (1999). A contract that runs for more than one (1) year and does not reserve to the governing body the right to terminate at the end of each budget period is a commitment of more than current revenues and is a debt. *Bonham*, 871 S.W.2d at 768. In other words, if a contract that requires a county to expend money is for a term greater than one (1) year and it does not give the county the right to terminate at the end of each year, the contract is void.

The Attorney General recently addressed this issue in *Tex. Atty. Gen. Op. JC-0395* (2001). In that situation, the District Attorney's predecessor leased a postal-meter system for fifty-one (51) months, and the lease payments were to be made from county funds. Your office ruled that because the multiyear contract neither provided for the levying of a tax, the creation of a sinking fund nor permitted the county to terminate the contract at the end of each year, it created an unconstitutional debt. In *JC-0395* you state as follows:

"Under Article XI, section 7 of the Texas Constitution, a multiyear contract requiring expenditures of county funds that is not accompanied by the levy and collection of designated taxes must allow the county to terminate the contract at the end of each year. See TEX. CONST. art. XI, § 7 (prohibiting county generally from incurring debt); *City of Bonham v. S.W. Sanitation, Inc.*, 871 S.W.2d 765, 768 (Tex. App.-Texarkana 1994, writ denied) (defining "debt" and indicating that multiyear contract that provides right to terminate at the end of each year does not create debt)."

The lease agreement with the Museum of the Southwest violates this constitutional principal. In addition to being obligated to pay the Museum's utilities and maintain the grounds and landscaping "in accordance with standards and dignity befitting a museum," the lease changes Midland County's right to maintain its property into an obligation owed to the Museum. Nothing in the contract contemplates that Midland County would satisfy its obligations out of current revenues, and it would have been impossible for Midland County to satisfy its obligations for future years out of current revenues. The lease also does not give Midland County the right to terminate the lease at the end of each budget period. Therefore, it appears that the lease creates an unconstitutional debt and is, therefore, void.

2. Would a lease such as the one described above violate Article III, section 52 of the Texas Constitution which prohibits an impermissible gift or grant of public moneys?

The Museum of the Southwest is a private non-profit corporation. Article III, section 52 of the Texas Constitution precludes counties from making unconditional gifts or donations to private entities, "expenditures which, by definition, lack sufficient controls to ensure that an authorized public purpose is achieved." *Tex. Atty. Gen. Op. JC-0113 (1999)*; *Kordus v. City of Garland*, 561 S.W.2d 260, 261 (Tex. App.--Tyler, 1978, writ. ref'd n.r.e.).

A lease of public property to a private entity does not violate Art. III, §51, however, if the transaction serves a public purpose and an adequate rental is paid. *Tex. Atty. Gen. Op. H-1217 (1978)*. An agreement providing for rental or lease payments at less than fair market value, however, would amount to an unconstitutional gift or grant of public money. *LO-97-030 (1997)*. In considering any lease of public property, a political subdivision is free to negotiate terms very much like private parties, unless public auctions or bids are required. The significant limitation is that public property may not be leased at less than its fair market value. 35 *David B. Brooks, County And Special District Law § 9.23 (Texas Practice 1989)*.

A county may transfer public funds to a private entity if it serves a public purpose and the county retains some degree of control over the performance of the contract in order to insure that the county receives its consideration, viz., accomplishments of the public purpose. *Key v. Commissioners Court*, 727 S.W.2d 667, 669 (Tex. App.--Texarkana, 1987, no writ); *LO-96-035 (1996)*. A county's authority to enter into a contract with a private organization, however, is limited to powers that are either expressly or by reasonable implication conferred on the county by the constitution and statutes. See *Tex. Const. Art. V, § 18*; *Galveston, H.& S.A. Railway Co. v. Uvalde County*, 167 S.W.2d 305, 306 (Tex. Civ. App. - San Antonio 1942, writ ref'd w.o.m.); *Attorney General Opinions JM-103, JM-65 (1983)*; *MW-329 (1981)*. Therefore, your office held that "the authority of the commissioners court to contract with a non-profit organization to promote voter registration is dependent on the county's authority to perform the service that will be furnished under the contract." *Tex. Atty. Gen. Op. JM-157 (1984)*.<sup>1</sup>

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<sup>1</sup> See also, *Tex. Atty. Gen. Op. H-1123 (1978)* ( a county was authorized to contract with a rape crisis center for the performance of services which the county might itself have performed.); *Tex. Atty. Gen. Op. MW-60 (Likewise, since McLennan County and the City of Waco are authorized by article 6081t jointly to operate a zoo, we believe that they may jointly contract with the Central Texas Zoological Society to operate the facility.)*

When the commissioners court is granted a power or charged with a duty, it has implied authority to exercise broad discretion to accomplish the intended purpose. *Anderson v. Wood*, 152 S.W.2d 1084, 1085 (Tex. 1941). Counties possess only the powers expressly or by necessary implication authorized by the Texas Constitution or statutes. *Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). This rule applies to the power to make expenditures. *Tex. Atty. Gen. Ops. JM-220* (1984); *JM-191* (1984); *JM-65* (1983); *H-1170* (1978).

The Museum of the Southwest is an art museum. I have not located any Constitutional or statutory authority that would allow Midland County to operate an art museum or to contract with a private organization to do so. A Commissioners' Court may establish and maintain a museum to aid in the exhibition of horticultural, agricultural, livestock, mineral, and other products that are of interest to the community. *Tex. Loc. Gov't Code §§319.001-919.002*. Another provision that allows counties to operate museums is *Tex. Loc. Gov't Code §333.002*, which states that the governing bodies of a county with a population of 20,000 or less and a municipality with a population of 10,000 or more and that is located within the county may jointly erect, equip, maintain, and operate a museum. Counties with a population of 2.2 million or more are also allowed to operate museums, with no apparent restriction of the type. *Tex. Loc. Gov't Code §316.021*. Furthermore, the commissioners court of a county with a population of 2.2 million or more may enter into a contract with a nonprofit organization authorizing the nonprofit organization to manage and operate a museum. *Tex. Loc. Gov't Code §316.022*. The legislature's enactment of these specific provisions allowing counties to operate museums in certain circumstances indicates that counties do not have the authority to operate museums absent authorizing legislation. Midland County has a population of 116,000 according to the 2000 census. There does not appear to be authority, therefore, for Midland County to operate an art museum or to contract with a private organization to do so.

3. Does a county have legal authority to acquire property for the purposes of operating an art museum or contracting with a private organization to do so?

A commissioners courts does not have a general power to acquire real property. "While the commissioners courts have a broad discretion in exercising powers expressly conferred on them, nevertheless the legal basis for any action by an such court must be ultimately found in the Constitution or the statutes." *Canales v. Laughlin*, 214 S.W.2d 451, 453 (Tex. 1948). Therefore, whether a county may purchase real property depends on whether the purchase falls within a power expressly conferred by law. *Tex. Atty. Gen. Op. LO 93-90* 1993)

*Tex. Loc. Gov't Code §292.001* provides that a commissioners court may purchase, construct, or provide by other means, including a lease, "a building or rooms, other than the courthouse, for the housing of county or district offices, county or district courts, justice of the peace courts, county records or equipment (including voting machines), or county jail facilities, or for the conducting of other public business, if the commissioners court determines that the additional building or rooms are necessary." In addition, the commissioners court may lease or rent to any person any part of the building or rooms that are not necessary for the purposes described by Subsection (a). *Tex. Loc. Gov't Code §292.001(c)*. *Section 292.001* would appear to allow a county to lease space in an authorized county building to an entity that desired to

operate a museum, but it does not allow a county to acquire land or a building for non-county purposes, such as operating a museum.

In *Tex. Atty. Gen. Op. JM-191(1984)* office ruled that a county may not construct a facility for the sole use of another political subdivision. Therefore, a commissioners court was not authorized to purchase land and provide for the construction of a building for the sole purpose of providing office space to an appraisal district. The county could, however, purchase land and construct an office building for legitimate "county purposes" and then lease unused space in that building to the appraisal district.

4. Does a county have authority to acquire land which would meet the requirements of *Tex. Loc. Gov't Code §331.001(2)(A)* if the purpose of the acquisition is not to maintain the land as a historic building or site, but to house an art museum?

*Tex. Loc. Gov't Code §331.001* authorizes a county to acquire the following:

- (1) land and buildings to be used for public parks, playgrounds, or historical museums; or
- (2) land on which are located:
  - (A) historic buildings, sites, or landmarks of statewide historical significance associated with historic events or personalities;
  - (B) prehistoric ruins, burial grounds, or archaeological or vertebrate paleontological sites; or
  - (C) sites including fossilized footprints, inscriptions made by human agency, or any other archaeological, paleontological, or historic buildings, markers, monuments, or historical features.

The real property that was acquired by Midland County in 1968 may or may not have qualified as a historic building or site under *§331.001*. The intent of Midland County in acquiring the property, however, was not to operate it as a historic site or building, but to contract with the Museum of the Southwest to operate it as an art museum.

5. What is the effect of the 1968 deed to Midland County if Midland County did not have authority to acquire the property?

When a commissioners court takes an action without any legal authority, the action is void. *Canales v. Laughlin, 214 S.W.2d 451 (Tex. 1948)*. Clearly, a conveyance of land that does not follow statutory procedures is void. *Tex. Atty. Gen. Op. JM-335 (1985)*. Although I have not found any legal authority that addresses this exact legal issue, it appears that an acquisition of real estate without authority would be void.

6. Would the lease described above be void or voidable if it was entered into without complying with the requirements of Chapter 263 of the Local Government Code?

*Section 263.001* of the Local Government Code requires that a lease must be made at a public auction held in accordance with that section. *Section 263.007* provides that a

commissioners court may adopt a procedure by which the county may sell or lease real property through a sealed-bid procedure after publishing notice in the newspaper. Before following the sealed-bid procedure, the county must also first obtain an appraisal of the property's fair market value and determine a minimum bid based upon the appraisal. Another procedure a County may follow is to contract with a real estate broker to sell the real property. *Tex. Loc. Gov't Code §263.068*. Under that procedure, the real property must be sold to the person who submits the highest cash offer.

A conveyance of land by a county is void if it is not done in a manner prescribed by statute. *Wilson v. City of Calhoun*, 489 S.W.2d 393, 397 (Tex. Civ. App. - Corpus Christi 1972, writ ref'd n.r.e.). In *Tex. Atty. Gen. Op. JM-1043(1989)* your office stated as follows:

We find ample authority for the rule that a disposition of county property not made in compliance with the public auction requirements of what is now section 263.001, and not falling within an exception to these requirements under chapter 263, is void. See, e.g., *Hardin County v. Nona Mills Co.*, 112 S.W. 822 (Tex. Civ. App. 1908, no writ); *Jack v. State*, 694 S.W.2d 391 (Tex. App.-San Antonio 1985, writ ref'd n.r.e.).

There is no indication and has been no suggestion by anyone that the lease in question was entered into following a public auction, sealed-bid procedure or contract with a real estate broker. It is my opinion that the lease is void if the statutory procedures were not followed.

Thank you for your assistance and attention to this matter. Please do not hesitate to contact me at any time if you have any questions or require any additional information or briefing on this matter.

Sincerely,



Russell W. Malm

cc: Bill Morrow, Midland County Judge  
Jimmy Smith, Midland County Commissioner  
Mike Bradford, Midland County Commissioner  
Josie Ramirez, Midland County Commissioner  
Randy Prude, Midland County Commissioner  
Brian Carney, Attorney for Museum of the Southwest  
Duke Edwards, President, Board of Trustees of the Museum of the Southwest