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FILE NO. S-995

COUNTIES:
Duty of State's Attorney When County Board Leases Public Property for a Private Purpose

Honorable Roger W. Thompson
State's Attorney of Logan County
Room 31 Courthouse
Lincoln, Illinois 62656

Dear Mr. Thompson:

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 non-governmental 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 authorizes 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.

Very truly yours,

ATTORNEY GENERAL