

## Opinion No. 63-26

March 29, 1963

**BY:** OPINION of EARL E. HARTLEY, Attorney General

**TO:** Walter R. Kegel Attorney for Santa Fe Municipal Schools P. O. Box 2081 Santa Fe, New Mexico

### QUESTION

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Do the provisions of Chapter 100, Laws of 1961 (Section 6-1-8, N.M.S.A., 1953 Compilation) requiring the approval of the State Board of Finance prior to the disposition of an interest in realty apply to the situation where a school district grants a lease of real property to a private party or entity?

#### CONCLUSION

State Board of Finance approval is required under Section 6-1-8, N.M.S.A., 1953 Compilation, in cases wherein a school district proposes to lease real property of the school district to a third party or entity.

### OPINION

#### {\*51} ANALYSIS

The applicable portion of Section 6-1-8, N.M.S.A., 1953 Compilation (P.S.) requiring our interpretation is quoted as follows:

"A. Any department, commission, agency or institutional board of this state, or **local public school district is empowered to sell or otherwise dispose of real or personal property belonging to such** state department, commission, {\*52} agency, institution or **local public school district, subject to approval of the state board of finance;** \* \* \* \*

B. . . . And the head of such department, or the president or chairman of the commission, or the governing board of such agency or institution is authorized to execute such deeds, **leases**, right-of-way easements, bills of sale or other documents necessary to convey all or any interest in the real or personal property of the governing authority without warranty." (Emphasis Added).

Under the above statute local public school districts are empowered to sell or otherwise "dispose of" real property belonging to such local public school district subject to receiving approval from the state board of finance. In our opinion the words "dispose of"

include and have application to situations involving a conveyance of a leasehold interest in real property belonging to the school district. The term "dispose of" has been interpreted in a number of cases as including a lease of real property. **United States v. Gratiot**, 39 U.S. 526, 10 L. Ed. 573; **Illinois Life Ins. Co. v. Beifeld**, Ill. Appl. 582; **Hill v. Sumner**, 10 S. Ct. 42, 132 U.S. 118; and **Andrew V. Auditor**, 5 Ohio Dec. 242.

Further amplifying the conclusion that the giving of a lease of school property is included within the term "dispose of" as used in the statute, is the fact that in Subsection B, of Section 6-1-8, quoted in part above, the head of a governing board is authorized to execute "leases."

A lease is generally recognized as a divesture of the right of possession in realty and a conveyance of an interest in the realty for a specified period of time. This constitutes an actual "disposition" of an interest in the realty. In **Tri-Bullion Corp. v. American Smelting and Refining Co.** (1954) 58 N.M. 787, 277 P2d 293, the New Mexico Supreme Court held:

"During the life of a lease the lessee holds an outstanding leasehold estate in the premises, which for all practical purposes is equivalent to absolute ownership. *Baker v. Clifford Mathew Inv. Co.* 99 Fla. 1229, 128 So. 827. The estate of the lessor during such time is limited to his reversionary interest which ripens into perfect title at the expiration of the lease. *Rogers v. Martin*, 87 Fla. 204, 99 So. 551."

Therefore, under the above authorities, we hold that a lease of school realty to another would fall within the purview of Section 6-1-8, supra, and requires the approval of the state board of finance, since this constitutes an actual disposing of realty within the contemplation of the statute. As indicated in Attorney General's Opinion No. 60-157, September 1, 1960, such leases may be entered into without sealed bids.

Implicit in the question presented is the issue of whether or not a school district may legally enter into a long term lease of school property whereby the property is leased to a party for use entirely extraneous to the purpose for which public funds were originally expended to acquire such property. The authorities of other jurisdictions are divided in their opinions as to whether school property may be leased to private entities. See **Atlas Life Ins. Co. v Board of Education**, 83 Okla. 12, 200 P. 171; **Mahoney v. Board of Education**, 12 Cal. App. 293, 107 P. 584; **Board of Education v. Grant**, 118 Cal. 39, 50 P. 5; **Diffenderfer v. St. Louis Public Schools**, 120 Mo. 447, 25 S. W. 542; **Wells v. Pressy** 105 Mo. 164, 16 S. W. 670; **Chicago v. Tribune Co.**, 248 Ill. 242, 93 N. E. 757; **Dalton v. Kimsey** 165 Tenn. 116, 52 S.W. 2d 465; and **Smile v. Taft Stadium {\*53} Board of Control**, 205 P.2d 301. Also see the annotation III A.L. R. 1051. Cases holding contra are: **Madachy v. Huntington Horse Show Ass'n.** 192 S. E. 128; **Lagow v. Hill**, 238 Ill. 428, 87 N.E. 369; **Herald v Board of Education** 65 W. Va. 765, 65 S.E. 102, 31 L.R.A. (N.S.) 588; and **Sugar v Manroe** 108 La. 677, 32 So. 961.

After carefully studying the authorities bearing upon this point, we believe that legislative authorization permitting a lease of school property which is not at the time advantageously useable for school purposes is contained in Section 6-1-8, N.M.S.A., 1953 Compilation, where approval is obtained from the State Board of Finance.

It is important that a distinction should be drawn between a situation whereby a lease of school premises is effected giving an exclusive right of possession and occupancy to a private entity, and cases where school authorities permit temporary or brief usage of school property during hours when the property is not needed for school purposes. State Board of Finance approval is not necessary under Section 6-1-8 N.M.S.A., 1953 Compilation where a school district desires to permit the use of school buildings by private persons or organizations for brief periods for the holding of civic functions, public exhibitions, sporting events, political meetings, lectures and entertainments of various kinds during periods which do not conflict with normal school usage of such property, and where the school does not divest itself of the right of exclusive dominion over the building or property. In such cases the school board may validly charge a proper fee for the granting of permission for such temporary usage and for defraying the expense of utilities, custodial and maintenance costs. Where such permission is not coupled with an agreement granting a right of exclusive possession or control of the premises, the right is in the nature of a license or permissive use of the property and not a disposing of the property. **White v. Fuller**, 38 Vt. 193.

By: Thomas A. Donnelly

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