Opinion No. 70-53

May 28, 1970

BY: OPINION OF JAMES A. MALONEY, Attorney General

TO: Representative Frank Brown Eddy County District 2 2009 Georgia Carlsbad, New Mexico 88220

QUESTIONS

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Does a municipality have the power to enter into an exclusive contract with a car rental agency at an airport which is publicly funded with local bond money and federal funds?

CONCLUSION

See Analysis.

OPINION

*{*85}* **ANALYSIS**

I. GENERAL POWERS OF THE MUNICIPALITY WITH REGARD TO AIRPORTS.

Basic law concerning municipal airports is found in Section 14-40-4, N.M.S.A., 1953 Comp., which provides in part that:

"The governing body of any municipality may:

A. Acquire . . . and . . . establish, construct, improve, maintain and operate an airport . . .

C. Provide or arrange for services in connection with any airport facility; . . .

E. Sell, lease or otherwise dispose of or allow the use of any real or personal property or any interest acquired or used for the purposes included in the municipal airport law; . . ."

An exclusive contract with a car rental agency at an airport may include both a lease of real property within the *{*86}* airport building and a contract allowing the car rental agency the concession for providing rental cars for patrons at the airport. Under New Mexico law, we believe the same result is reached with regard to the legality of the exclusive contract whether or not the contract is characterized as a lease or a concession contract, or both. Compare, **National Car Rental System, Inc., v. City of New Orleans,** 160 So.2d 601 (La. App. 1964).

It might be argued that the leasing powers under Section 14-40-4 are restricted by Section 14-55-1 which provides that the municipality may only lease real estate used for governmental purposes, and which has a value of more than $ 500.00, upon the approval of certain qualified electors. The key provision in Section 14-55-1 would appear to be the term "governmental purposes." We are unable to find a New Mexico case determining whether or not an airport is a governmental function or a proprietary function. Under the general rule the maintenance of an airport by a municipality is considered a proprietary, as opposed to a governmental, function. See e.g. **Wendler v. City of Great Bend,** 181 Kan. 753, 316 P.2d 265 (1957); **Wren v. City of Corsicana,** 309 S.W.2d 102 (Tex. Civ. App. 1957); **Obitz v. Airport Authority,** 181 Neb. 410, 149 N.W.2d 105 (1967). See generally Annot., 66 A.L.R.2d 634 (1959).

The purpose of the municipal airport law is to **enable** municipalities to acquire and operate municipal airport facilities. Section 14-40-2, N.M.S.A., 1953 Comp., as noted above, Section 14-40-4 does not require a municipality to establish an airport but simply provides that the municipality may do so. See Section 1-2-1(I), N.M.S.A., 1953 Comp. The absence of an imperative legislative command to establish airports would appear to be sufficient evidence for the New Mexico Courts to find that the operation of an airport is a proprietary function. See **Barker v. City of Santa Fe,** 47 N.M. 85, 136 P.2d 480 (1943). See Also **Wren v. City of Corsicana, supra.**

Furthermore, it is well established that when a municipality is authorized to exercise proprietary powers and engages in a business activity, it has the same power to conduct that business as would any private business. **Seaboard Air Line RR Co. v. County of Crisp,** 280 F.2d 873 (5th Cir. 1960); **City of Oakland v. Burns,** 46 Cal.2d 401, 296 P.2d 333 (1956); **Miami Beach Airline Serv., Inc. v. Crandom,** 159 Fla. 504, 32 So.2d 153 (1947); 2 McQuillan, Municipal Corporations § 10.05 (3rd Ed. Rev. 1966).

We conclude, therefore, that the municipal code is sufficiently broad to allow a municipality to contract for a rental car concession or lease airport space to rental car agencies.

II. THE POWER OF MUNICIPALITIES TO GRANT EXCLUSIVE CONCESSIONS OR FRANCHISES.

An analysis of the municipality's power will start with an examination of Article IV, Section 26 of the New Mexico Constitution. That section provides:

The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state.

The importance of this constitutional provision can probably be best determined by a study of constitutional history rather than a legal analysis of constitutional law. Basically, the provision appears to be part of the determination to prevent unequal and partial

legislation or action on the part of government, favoring certain groups or individuals. See generally, Cooley, Constitutional Limitations 389-97 (3rd Ed. 1874). The New Mexico Constitutional Revision Commission recommended its deletion without comment. See Report of the Constitutional Revision Commission, 1967. For collection of cases on the subject, see 16A C.J.S., Constitutional Law, Section 459.

There is, of course, considerable legislation which in practice may result in an exclusive franchise or license being granted by municipalities or *{*87}* executive agencies of the state government. For example: public utility franchises granted by municipalities, Section 14-43-1, N.M.S.A., 1953 Comp.; State Park concessions, Section 4-9-9, N.M.S.A., 1953 Comp.; Common Motor Carrier Certificates of Public Convenience and Necessity, Section 64-27-8, N.M.S.A., 1953 Comp.; License to Conduct Pari-mutual horseracing. Section 60-6-1, N.M.S.A., 1953 Comp. Generally, these franchises or licenses are upheld and construed as not violating constitutional provisions against the granting of exclusive privileges or franchise on the basis that the public interest is served by the regulation of the industry and that all citizens are afforded an equal opportunity to receive the franchise. See e.g. **Haddad v. State,** 23 Ariz. 105, 201 P. 847 (1921).

There is no decision by the New Mexico Supreme Court which clearly indicates that a municipality may grant an exclusive franchise or concession in connection with a proprietary operation. The most nearly analogous case interpreting Article IV, Section 26 involved the granting to a single company the sole and exclusive right to collect, remove and dispose of all classes of garbage within the City of Las Vegas. The New Mexico Supreme Court upheld that exclusive franchise on the basis that it was a reasonable exercise of the police power necessary to prevent disease and satisfy ordinary sanitary requirements and therefore promoted the public health, comfort and welfare. **Gomez v. City of Las Vegas,** 61 N.M. 27, 293 P.2d 984 (1950). See also **Barber's Super Mkts., Inc. v. City of Grants,** 80 N.M. 533, 458 P.2d 785 (1969). The other New Mexico cases interpreting Article IV, Section 26 established no guidelines which could be applied to the present problem. See **State ex rel. Interstate Stream Comm'n v. Reynolds,** 71 N.M. 389, 378 P.2d 622 (1963); **State ex rel. City of Albuquerque v. Lavender,** 69 N.M. 220, 365 P.2d 652 (1961); **State ex rel. State Game Comm'n v. Red River Valley Co.,** 51 N.M. 207, 182 P.2d 421 (1946); **In Re Gibson,** 35 N.M. 550, 4P.2d 643 (1931); **Franklin Fire Ins. Co. v. Montoya,** 32 N.M. 88, 251 P. 390 (1926).

In turning to other jurisdictions, we find two courts upholding exclusive concessions or franchises at airports in the face of constitutional prohibitions against monopolies. In **Bridges v. Yellow Cab Co.,** 241 Ark. 204, 406 S.W.2d 879 (1966), a city granted an exclusive franchise of five years' duration for the operation of a limousine cab service at the municipally owned airport. The court specifically upheld the franchise as not violating Arkansas' Constitutional Article II, Section 19. To the same effect is **Stone v. Police Jury,** 226 La. 943, 77 So.2d 544 (1954).

The courts of Florida have concluded that the granting of exclusive concessions or franchises by municipalities in connection with proprietary functions does not violate the general law relating to the prohibition against exclusive grants by the government. **Panama City v. Seven Seas Restaurant, Inc.,** 180 So.2d 190 (Fla. App. 1965); **Miami Beach Airline Serv., Inc. v. Crandom, supra.** These cases contain the best discussion of the problem, but they do not deal with constitutional prohibitions against exclusive franchises or monopolies. The Florida courts reach the conclusion that municipalities have these powers because when they exercise proprietary functions, they must have the same right and powers as does any private corporation.

In addition to the above cited cases from Louisiana, Arkansas and Florida, numerous jurisdictions have upheld the granting of exclusive franchises or concessions for municipal airport services in the anture of car rentals, taxi cabs, airport limousines and tour buses. These cases all, to some extent, reach the conclusion that such franchises are lawful in view of the fact that the airports are a proprietary function of the municipality. **State v. Daquino,** 56 N.J. Sup. 230, 152 A.2d 377 (1959); **Ricotta v. City of Buffalo,** 3 Misc.2d 625, 149 N.Y.S.2d 829 (Sup. Ct. 1954); **Rocky Mountain Motor Co., v. Airport Transit Co.,** 124 Colo. 147, 235 P.2d 580 (1951); **Ex parte Houston,** 93 Okla. Crim. 26, 224 P.2d 281 (1950); **Tanner Motor Tours v. Brown,** 71 Nev. 73, 280 P.2d 291 (1955); **Harrelson v. City of Fayetteville,** 271 N.C. 87, 155 S.E.2d 749 (1967); See Generally Annot. 40 A.L.R.2d 1060 (1955).

*{*88}* We must conclude, therefore, that in the absence of a decision by the New Mexico Supreme Court some doubt exists as to the constitutionality of the municipality granting an exclusive franchise or concession for a car rental in view of the language of Article IV, Section 26 of the New Mexico Constitution. We feel, however, that the law developed in other jurisdictions would be persuasive and that the New Mexico courts could uphold these concessions on the theory that the airport is a proprietary function and that the exclusive concession is a managerial perogative, reasonably incidental to the conduct of an efficient airport operation.

III. BIDDING REQUIREMENTS.

The requirement that government deal fairly with the public in its business dealings is established in the Public Purchases Act, where competitive bidding is required under certain circumstances. Sections 6-5-17 to 35, N.M.S.A., 1953 Comp., (1969 Supp.) That act deals exclusively with the purchase by governmental agencies of goods or services. In this instance, the government is not purchasing goods and services for itself, but is allowing the car rental agency to offer services to others.

Under the State Park and Recreation Law the legislature contemplated the granting of concessions in state parks. See Section 4-9-9, N.M.S.A., 1953 Comp. The law does not require that such concession contracts be let only after competitive bids. This office held in interpreting that statute that the competitive bid requirements of the Public Purchases Act could not be read into the park concession law. Opinion of the Attorney General No. 60-12, issued January 28, 1960.

The question of whether or not an exclusive car rental concession contract must be let only upon competitive bidding has been the subject of litigation in other jurisdictions. It appears to be the rule that, in the absence of some statutory or constitutional provision requiring bidding, exclusive car rental concessions may be let by the public agency without bidding. **Hertz Drive-Ur-Self System, Inc. v. Tucson Airport Authority,** 81 Ariz. 80, 299 P.2d 1071 (1956); **People ex rel. Adamowski v. Daley,** 22 Ill. App.2d 87, 159 N.E.2d 18 (1959). These cases follow the general rule that municipalities may enter into contracts without letting the contracts on bids, in the absence **of** some specific statutory or constitutional requirement. See 10 **McQuillan,** Municipal Corporations **§** 29.31 (3rd Ed. Rev. 1966).

IV. THE EFFECT OF FEDERAL FUNDING.

The granting of funds by the United States Government through the Federal Aviation Agency for the construction of local government airports is done with certain strings attached. 49 U.S.C. **§** 1349(a) provides in part that:

"There shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended."

The terms landing area and air navigation facility are defined terms under the federal law.

"'Landing area' means any locality, either of land or water, including airports and intermediate landing fields, which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo."

49 U.S.C. § 1301(22)

"'Air navigation facility' means any facility used in, available for use in, or designed for use in, aid of air navigation, including land areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft."

49 U.S.C. § 1301(8).

Like the court in **Hillsborough County Aviation Authority v. National Airlines,** 63 So.2d 61 (Fla. 1953), we *{*89}* believe that the definitions are sufficient to limit the area in which the federal government will not allow exclusive concessions to be granted. In **Hillsborough** the question involved the use of a neon sign on a hanger, which the court felt could not be brought under the terms of landing area or air navigation facility. See also **Park v. Board of Aviation Trustees,** 96 N.H. 331, 76 A.2d 514 (1950) where a

lease was held invalid as obviously granting exclusive rights to landing areas or air navigation facilities.

The question of whether an exclusive concession contract for taxi service or rental car agencies is prohibited by the federal law has been raised in at least two reported cases but the courts have failed to rule specifically on the question. In **Olin's Miami Rent-a-Car, Inc. v. Board of County Comm'rs.,** 217 So.2d 144 (Fla. App. 1969) the court noted the federal statute in discussing an exclusive car rental franchise but held that even if the contract violated the federal act it was still valid under the state law, under the decision in **Miami Beach Airline Service, Inc., v. Crandom, supra.** In **Friend v. Lee,** 221 F.2d 96 (D.C. Cir. 1955) Hertz contested an exclusive car rental contract given to Avis for the Washington National Airport. The District Court dismissed the complaint, and the Circuit Court reversed, holding that the complaint stated a cause of action insofar as it alleged an abuse of discretion in granting the contract, but the effect of 49 U.S.C. § 1349 was not considered by the court.

In one federal case the District Court held that the statute was not violated, but the Circuit Court reversed on other grounds. In **Patton v. Administrator,** 112 F. Supp. 817 (Alas. 1953), rev'd, 217 F.2d 395 (9th Cir. 1954) the District Court construed the statute to allow the granting of an exclusive contract for taxicab and tour guide service. The decision was rendered on a motion to dismiss the complaint. On appeal, the Circuit Court reversed, holding that the complaint had stated a cause of action for possible interference with interstate commerce. The Court felt that there were not enough facts to enable the District Court to interpret 49 U.S.C. § 1349 under the facts alleged in the complaint.

We conclude that under the Municipal Code and specifically under the Municipal Airports Act a municipality has the power to enter into an exclusive contract providing car rental services at a municipal airport and that on the better authority, such contract would not violate the New Mexico Constitution. Furthermore, we find no requirement that such contracts must be let only upon competitive bids. Finally, although the federal courts have not met the issue squarely, we do not believe that such exclusive contracts violate the federal law prohibiting the exclusive rights for the use of landing areas or air navigation facilities at airports upon which federal funds have been expended.

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