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CONSTITUTION OF MICHIGAN: Art 9, § 12

STATE: Long term lease by state as tenant

COUNTIES: Providing suitable courthouse

LEGISLATURE: Concurrent resolution

The state may execute a long term lease. However, an annual appropriation is required if the landlord is to receive the rental payments required by the terms of the lease.

Counties must provide a suitable courthouse at the county seat at its own cost and expense.

The legislature cannot legislate by concurrent resolution.

Opinion No. 4936

February 3, 1976.

Hon. John F. Markes
State Representative
Capitol Building
Lansing, Michigan

You have requested my opinion of several questions which will be responded to *seriatim*.

"1. What Constitutional or statutory authority allows the state to be bound to a lease as a tenant for a long period of years; for example, twenty or thirty years?"

Const 1963, art 9, § 12 provides that no state indebtedness may be issued except for those debts which are expressly authorized by the Constitution. The circumstances under which the state may borrow money over long periods of time is set forth in Const 1963, art 9, § 15, which provides:

"The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted by a vote of two-thirds of the members elected to and serving in each house, and approved by a majority of the electors voting thereon at any general election. The question submitted to the electors shall state the amount to be borrowed, the specific purpose to which the funds shall be devoted, and the method of repayment."

The above provision by its terms relates only to the borrowing of money. However, the Michigan Supreme Court has construed debt limitation provisions as pertaining to the incurring of *any indebtedness*. *School District No. 9 v McLintock*, 255 Mich 197; 273 NW 539 (1931) and *State v Doyle & Associates, Inc.*, 374 Mich 222; 132 NW2d 99 (1965).

A lease is a contract as well as a conveyance of an interest in land. ML&P, Landlord and Tenant, § 12, p 192. The payment of rent is an obligation and part of the contract. ML&P, Landlord and Tenant, § 221, p 329. The question then is whether this obligation is a debt within the above constitutional framework.

The courts have historically approved long-term leases entered into by

governmental bodies as tenants on the theory that payment of rent on such leases is not indebtedness. Long-term leases have been held not to circumvent either debt limitation provisions or the constitutional prohibition against incurring indebtedness. 71 ALR 1326 as quoted in *Walinske v Detroit-Wayne Joint Building Authority*, 325 Mich 562, 579; 39 NW2d 73 (1949).

In *State v Doyle & Associates, Inc.*, 374 Mich 222; 132 NW2d 99 (1965), the Court rejected a transaction labelled a "lease agreement" because testimony revealed that it was actually an attempt to purchase a building by deferred payments. However, the Court did allow the county to enter into a long-term lease and to make monthly payments where the rental was fair and reasonable.

Both *Walinske, supra*, and *State v Doyle & Associates, Inc., supra*, were discussed in the stadium bond case of *Alan v Wayne County*, 388 Mich 210; 200 NW2d 628 (1972). The Court in *Alan v Wayne County, supra*, held *inter alia* that:

"... 'true rent' creates no indebtedness."

Therefore, by analogy and implication, the aforementioned cases lead me to conclude that a lease for a period of years is not a debt owed by the state.

Secondly, it must be determined whether a long-term lease entered into by the state ties the hands of future legislatures. Although it is a basic tenet that an act of one legislature cannot tie the hands of future legislatures, *Atlas v Wayne County Board of Auditors*, 281 Mich 596; 275 NW 507 (1937), the general rule, as set forth in 72 Am Jur 2d, States, §§ 73 and 74, pp 468-470, is:

"* * *

"... The legislature has the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract, and creditors accepting obligations of the state are bound to know that they cannot enforce their claims against the state directly, or against its officers, when no appropriation has been made for their payment. Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity.

"* * *

"The state is only a corporate name for all of the citizens within certain territorial limits. The whole people acting as a public corporation have a right to enter into contracts and make purchases. In doing so, however, they must act through some agency. They may choose to act through any agency created by law, including the legislature, which is the highest representative authority through which the people can act. And where an agreement is entered into by a state through an act of its general assembly, its terms are to be found in the provisions of the act to which it owes its creation. . . . *A public official cannot unreasonably limit the authority of a successor in office, but contracts made by public officers are not invalid merely because their terms of office*

will expire before the contemplated performance of the contracts. Valid agreements can be made before there is an appropriation to pay what is due thereunder if there is express authority of law for making them. The fact that a contract is contingent on a legislative appropriation does not void the arrangement." [Emphasis added]

However, the legislature each year would have to appropriate a sufficient amount of money to satisfy the terms of the lease. This is required by Const 1963, art 9, § 17, which states:

"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

OAG 1937-1938, p 459 (March 22, 1938), held that the State Board of Auditors could lease property for a period longer than two years in duration provided such lease was for a reasonable time, was necessary, was not fraudulent, and was in the best interest of the State of Michigan.

In view of the foregoing, it is my opinion that State of Michigan may execute a lease as a tenant for a period beyond the term of the legislature.

"2. What Constitutional or statutory authority allows the state to provide leased real property for the use of county courts?"

1845 RS, c 13, § 16; MCLA 45.16; MSA 5.291 provides in pertinent part, that:

"Each organized county shall, *at its own cost and expense*, provide at the county seat thereof a suitable court house, . . ." [Emphasis added]

Therefore, the authority and responsibility to provide real property for use as a county court rests solely with the county in which the court is located.

"3. If no such authority presently exists, can the state be authorized to do #1 or #2 by concurrent resolution of the Legislature, or must a public act be passed to establish such authority?"

It is a long-established principle of law in this state that the legislature cannot legislate by concurrent resolution.¹ This principle evolved from Const 1963, art 4, § 22, which provides:

"All legislation shall be by bill and may originate in either house."

Since granting the state the authority to provide leased real property for use as a county court is an act of legislation, it is my opinion that such authority must be established pursuant to a public act.

FRANK J. KELLEY,
Attorney General.

¹ *Becker v Detroit Savings Bank*, 269 Mich 432; 257 NW 853 (1934), *Boyer—Campbell Co v Fry*, 271 Mich 282; 260 NW 165 (1935). OAG, 1933-1934, p 275 (June 21, 1933); OAG, 1937-1938, p 293 (August 4, 1937); OAG, 1941-1942, No 20568, p 249 (July 24, 1941).