

HERMAN G. BODEWES
R. MARK MIFFLIN
DAVID A. HERMAN
CREIGHTON R. CASTLE
CHRISTOPHER E. SHERER

MATTHEW R. TRAPP
JASON E. BROKAW
ABBY L. SGRO
JOHN M. GABALA

OF COUNSEL:
ROBERT S. COHEN
JOHN L. SWARTZ
RONALD W. PERIARD

GIFFIN WINNING COHEN & BODEWES, P.C.

A T T O R N E Y S A T L A W

Please reply to:
POST OFFICE BOX 2117
SPRINGFIELD, ILLINOIS 62705-2117

TELEPHONE (217) 525-1571
FACSIMILE (217) 525-1710

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ESTABLISHED 1911

D. LOGAN GIFFIN
(1890-1980)

MONTGOMERY S. WINNING
(1892-1966)

C. TERRY LINDNER
(1903-1987)

ALFRED F. NEWKIRK
(1904-1980)

JAMES M. WINNING
(1921-2013)

Mr. Michael McCreery
United Counties Council of Illinois
217 E. Monroe, Suite 101
Springfield, IL 62701

**Re: *Non-Home Rule County Lease
Inquiry***

Dear Mike:

Issue:

May a non-home rule county enter into a contract to lease a public building to an ambulance provider for a term exceeding two years?

Analysis:

Section 5-1049.2, entitled "Lease of county property," specifically provides a county may lease public real estate when in the opinion of the county board, the real estate is no longer necessary, appropriate, required for the use of, profitable to, or for the best interests of the county.¹ As such, a county possess the requisite statutory authority to enter into a contract to lease county property.

You have also inquired about the permissible length of such a lease. Section 5-1049.2 of the Counties Code specifically provides that the county board may, by an ordinance passed by three-fourths vote, lease county real estate for any term not exceeding 99 years.² An exception to this 99-year provision exists in situations where the county board authorizes an individual county officer to enter into a lease on behalf of the county. In that situation, the term of the lease is limited to 2 years.³

¹ 55 ILCS 5/5-1049.2, enacted by P.A. 88-962, Art. 5, § 5-1049. 2, added by P.A. 88-526, § 7.1, eff. Dec. 23, 1993 ("The authority to lease shall be exercised by an ordinance passed by three-fourths of the county board members then holding office, at any regular meeting or at any special meeting called for that purpose.").

² See 55 ILCS 5/5-1049.2.

³ 55 ILCS 5/5-1049.2 (the county board may authorize any county officer to make leases for terms not exceeding 2 years in a manner determined by the board).

A prior opinion of the Illinois Attorney General (“AG”) has previously addressed the issue of whether the term of the lease may exceed the term of the board authorizing it, *i.e.*, whether a current board may bind successor boards by the terms of a lease.⁴ According to the AG’s opinion, the general rule is that a local governmental body may not bind its successors in matters that are essentially legislative or governmental but may do so with regards to matters which are business or proprietary in nature.⁵ The underlying reasoning involves the idea that the fundamental concepts of democracy could be implicated if a current county board could restrict future county boards in the exercise of basic legislative or governmental functions.⁶ However, in its opinion, the AG opined that a county board “may execute a contract or a lease that binds it[s] successors if the contract or lease is pursuant to a proprietary function because, here, a county or other unit of local government is acting for the private benefit of itself and its inhabitants; thus, it may exercise its business powers in the same manner as a private corporation.”⁷

Here, the lease of county real estate to an ambulance provider could reasonably be described as an exercise of the county’s business powers as opposed to traditionally legislative or governmental functions. However, if the terms of the lease would be in some way integral to selecting a provider, then the county could be viewed as exercising more traditional governmental functions. That said, to the extent that the term of the lease is not part and parcel to selecting a provider, a lease term exceeding the term of the current county board would likely be permissible under the circumstances presented.

The case you specifically inquired about, *Millikin v. County of Edgar*, 142 Ill. 528 (1892), is often cited for the broad proposition that it is contrary to the effective administration of a political subdivision to allow elected officials to tie the hands of their successors with respect to decisions regarding the welfare of the subdivision.⁸ However, *Millikin* is distinguishable from the set of facts presented here. *Millikin* concerned a public employment contract and not a county’s power to lease public property. In *Millikin*, the Edgar County board of supervisors appointed Millikin steward of the county poorhouse for a three-year term.⁹ However, less than a year into his appointment, the board discharged him.¹⁰ Thereafter, Millikin brought an action against the board, which the trial court dismissed.¹¹

On appeal, both the appellate and supreme courts affirmed the trial court’s judgment.¹² The supreme court noted that the creation of poorhouses and the appointment of their keepers was a power conferred on the counties by statute.¹³ However, the court also found although the statute did not place a time limit on how long Millikin could be appointed, the term of the county board members themselves was just one year.¹⁴ Specifically, the supreme court found that “[i]f the board had the power to enter into a binding contract of this character for three years, no reason is

⁴ See Ill. Atty. Gen. Op. No. S-797 (1974), p. 3.

⁵ Ill. Atty. Gen. Op. No. S-797 (1974), p. 3.

⁶ Ill. Atty. Gen. Op. No. S-797 (1974), p. 4.

⁷ Ill. Atty. Gen. Op. No. S-797 (1974), p. 5.

⁸ See *Village of Oak Lawn v. Faber*, 378 Ill. App. 3d 458, 472 (2007); *Cannizzo v. Berwyn Township 708 Community Mental Health Board*, 318 Ill. App. 3d 478, 482-83 (2000).

⁹ *Millikin*, 142 Ill. at 530.

¹⁰ *Millikin*, 142 Ill. at 531.

¹¹ *Millikin*, 142 Ill. at 531.

¹² *Millikin*, 142 Ill. at 531.

¹³ *Millikin*, 142 Ill. at 532.

¹⁴ *Millikin*, 142 Ill. at 532.

perceived why it might not make a contract for five or even ten years, and if this could be done, the hands of succeeding boards would be tied and their powers taken from them.”¹⁵

Importantly, *Millikin*, as well as the line of cases which follow it, deal exclusively with public employment contracts.¹⁶ Inherent in those public employment contracts is the fact that appropriations are being pledged to pay a contract that will last beyond the term of the board executing it.¹⁷ In this case, however, public funds are not being pledged as there would be no appropriation being made. Instead, revenue would be derived by the county from the lessee.¹⁸ Further, unlike the statute in *Millikin*, the statute conferring power on the counties in this case specifically places a time limit on how long a county may lease property.¹⁹

While not itself dispositive of the issue, we note a potential way to possibly limit arguments involving successor county boards could be to consider including in the lease agreement language to the following effect: “This lease may be terminated by lessors or their successors in office at any time that they may so desire, but in so doing a written notice of such termination shall be served on lessee who shall not be compelled to remove from premises until expiration of [___] number of days after receipt of such notice.”

Finally, you have asked whether a county could lease the county property to either a public or private entity. Pursuant to Section 4 of the Intergovernmental Cooperation Act, a county may lease its property to another unit of local government with which it already has an agreement.²⁰ A county could also lease the property to a private entity under certain circumstances. The central issue in this context is not who leases the property but rather the purpose of the use underlying the lease.²¹ A lease may be made between a unit of local government and a non-governmental entity if a public purpose is being met.²² Here, it appears clear that an ambulance provider serving a county would reasonably satisfy the public-purpose requirement.

¹⁵ *Millikin*, 142 Ill. at 532-33.

¹⁶ See *Grassini v. DuPage Township*, 279 Ill. App. 3d 614, 620 (1996) (finding a town administrator's four-year employment contract with DuPage Township void where it extended beyond the remaining period of service of the officials who had authorized the contract); *Cannizzo*, 318 Ill. App. 3d at 487 (holding employment contracts of former executive director of township community mental health board void even though board members had staggered terms of appointment, because the contracts extended beyond the term of the township supervisor in office at the time of the execution of the contracts, and the board was appointed by the supervisor); *Village of Oak Lawn*, 378 Ill. App. 3d at 477 (finding an employment contract may slightly exceed the term of the municipality's officers to bridge the transitional period as new members take office where the employee is otherwise terminable at will).

¹⁷ Section 8-1-7 of the Municipal Code addresses this concept with respect to employment contracts requiring appropriations and expenditures by a municipality. See 65 ILCS 5/8-1-7(b) (municipality may make contracts for a term exceeding one year but not exceeding the term of the mayor or president holding office at the time the contract is executed).

¹⁸ Note that depending on the terms of the lease, the potential could exist for a future board to argue the amount of the revenue from the lease was insufficient.

¹⁹ 55 ILCS 5/5-1049.2; 55 ILCS 5/5-1005(2).

²⁰ 5 ILCS 220/4.

²¹ Ill. Atty. Gen. Op. No. S-1288 (1977), p. 2; *People ex rel. City of Salem v. McMackin*, 53 Ill. 2d 347, 355 (1972) (even an incidental or minor benefit to a private interest is not sufficient to invalidate an act whose principal purpose is public in nature).

²² Ill. Const. 1970, Art. VIII, § 1(a); see also Ill. Atty. Gen. Op. No. S-1288 (1977), p. 2; Ill. Atty. Gen. Op. No. S-825 (1974), p. 9.

Conclusion:

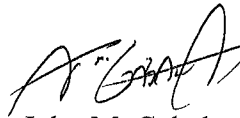
In sum, it is the opinion of this office that a county may lease county property to an ambulance provider for a term exceeding two years.

Sincerely,

GIFFIN, WINNING, COHEN & BODEWES, P.C.,



Herman G. Bodewes



John M. Gabala

Disclaimer: This opinion was prepared by Giffin, Winning, Cohen and Bodewes, P.C., at the request of UCCI and is to be used solely by UCCI and its members. The State's Attorney is the attorney for the County. Legal advice, if requested, should be sought from the State's Attorney.