

JUNE 30, 1959

HONORABLE JOHN A. KERVICK
State Treasurer
State House
Trenton, New Jersey

CHARLES F. SULLIVAN
Division of Purchase and Property
State House
Trenton, New Jersey

FORMAL OPINION 1959—No. 14

GENTLEMEN :

A plan has been suggested whereby the State will be in a position to select the site desired for the proposed agricultural building. This plan contemplates that the State acquire, without cost, an option on such site from the owner of the land. Bids would then be let for the construction of the building which would include the cost of purchasing the land in question at the option price obtained by the State. The land and building would then be leased-back to the State under an agreement giving the State an option to ultimately purchase the land and building. The lease with option to purchase provision has been authorized by the Attorney General in Formal Opinion 1959, #2, dated February 18, 1959.

There are many advantages to the proposal that the State acquire an option on the site where it desires the agricultural building to be constructed. The plan appears more desirable than one in which the State would first purchase the land in question and then let bids for the construction of a building designed for that site. The alternative to the State actually purchasing the land in advance is to seek bids for construction of a building on land owned or acquired by the ultimate lessor.

In choosing the land in advance, the State will have the advantage of designing a building with a particular location in mind or of acquiring land most suitable for the type of building intended to be constructed. Contractors who bid for the construction of the building would be on an equal footing. The land variable will be eliminated from the bidding and only construction cost, based upon a fixed set of plans, would constitute the variable factor in bids.

You have asked if the State can validly acquire an option on the land in question, without cost to the State, and transfer said option to the ultimate purchaser of the land in connection with the construction, lease-back agreement. It is our opinion that this proposal is legal since it contemplates a transaction whereby a valuable consideration is obtained by the State in furtherance of a public purpose. We assume that in the option, the purchase price fixed for the land will have been determined by the same formality as in fixing the price for land to be purchased by the State.

Article VIII, Section III, paragraph 3 of the New Jersey Constitution, provides :

"No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

We do not consider the transaction outlined above a gift of land or money by the State. We assume that the State acquires the option, without cost, because of the inducement given the owner of the land by the improved prospect of selling the land to someone who will build the agricultural building. The option, therefore, would not cost the State anything to acquire. Nevertheless, the option to purchase the land has value, a value intimately connected with the ultimate proposal for the construction of the agricultural building. In transferring this option to the successful bidder, the State will have received valuable consideration for the transfer. The consideration at the outset is the ability of the State to select a desired site, without purchase or cost to the State. The consideration on the consummation of the plan is the ultimate construction of a building desired by the State on such land which will be leased to the State and as to which building and land the State will acquire an option to purchase at a future time.

We note that an option to purchase land is neither land owned by the State nor an appropriation of money. The option to purchase does not obligate the State to consummate the purchase. It is, in this case, an assignable right to purchase acquired without cost to the State. The transfer of this right would not literally or otherwise be a "donation of land" within the meaning of Art. VIII, §III, par. 3 of the 1947 Constitution. *See: Kirzenbaum v. Paulus*, 51 N.J. Super. 186, 199 (L. Div. 1958).

More significantly, however, the transfer of the option to purchase is for a valuable consideration derived by the State. Therefore, the transfer cannot be deemed a gift or donation and is not prohibited by the constitutional provision aforesaid. *Trustees of Rutgers College in New Jersey v. Richman*, 41 N.J. Super. 259, 295, 298 (Chan. Div. 1956). In the latter case Judge, now Justice, Schettino said, "Donations of land and appropriations of money by the State have been sustained in cases in which * * * the recipient has furnished or agreed to furnish a substantial *quid pro quo* to the State." (at 295). And, at 298, "The accomplishment of an important public objective or a moral duty to the citizens of the State is sufficient to sustain the validity of the appropriations," citing *Morris & Essex Railroad Co. v. City of Newark*, 76 N.J.L. 555, 560 (E. & A. 1908).

In the *Morris & Essex* case, *supra*, the Court of Errors and Appeals sustained an agreement between the City of Newark and certain railroad companies whereby the City agreed to pay a portion of the cost for elevating or depressing certain railroad lines in the City of Newark. The Court held that this agreement did not contravene the provisions of the 1844 Constitution comparable to those of the 1947 Constitution with which we are now concerned. *Cf. Kirzenbaum* case, *supra*, at 199. The court held that the contract was validated by virtue of the consideration obtained by the City for the moneys so spent, in accomplishing an important public objective.

Under the circumstances, the above proposal cannot be considered a constitutionally prohibited gift or transfer. You are therefore authorized to employ this plan in connection with the proposed agricultural building.

Very truly yours,

DAVID D. FURMAN

Attorney General of New Jersey

By: THEODORE I. BOTTER

Deputy Attorney General

JULY 20, 1959

HON. EDWARD J. PATTEN
Secretary of State
State House
Trenton, New Jersey

FORMAL OPINION 1959—No. 15

DEAR MR. PATTEN:

We have been asked whether any public official has a duty to supply petition forms to be used in connection with the county-wide referenda on the application of L. 1959, c. 119, the new Sunday Closing Law, and whether such petitions need be executed or verified in any particular manner.

L. 1959, c. 119 provides generally for a Sunday Closing Law to become effective if approved by a majority of the voters at a general election. Section 8. The question is to be put on the ballot if the county clerk receives a petition signed by not less than 2,500 registered voters of the county 45 days prior to the election. Section 6.

The forms for petitions should be provided by the county clerks in the respective counties. R.S. 19:9-1 defines election supplies to include "all things other than ballots and equipment as may be necessary to enable the provisions of this title to be carried out properly." It seems clear that this includes petition forms. R.S. 19:10-1 provides that all petitions of nomination are to be preserved by the officer with whom they are filed for two years. R.S. 19:9-2 specifies which papers are to be supplied by the Secretary of State. These do not include petitions for use within a single county. Additionally, this same section provides that all other blank forms and supplies for the general election shall be "furnished, prepared and distributed by the clerks of the various counties * * *." Thus the forms are to be provided by the county clerks. However, the form is not specified. Therefore, the county clerks may use any reasonable form. County clerks may also accept petitions on forms which have been privately prepared.

With regard to your second question, it is our opinion that no verifications need be affixed to the petitions. The Sunday Closing Law under consideration does not contain any express requirement for verification but merely requires that the petition be signed by not less than 2,500 registered voters of the county. L. 1959, c. 119, section 6.

However, R.S. 19:1-4 provides the general rule for the application of the provisions of Title 19, Revised Statutes, subject to certain qualifications, to the determination of public questions by referendum. It is stated that:

"Except as in this title otherwise provided, the provisions for the election of public and party offices shall also apply to the determination of public questions under the referendum procedure so far as may be."

A "public question" is defined in N.J.S.A. 19:1-1 as:

"'Public question' includes any question, proposition or referendum required by the legislative or governing body of this State or any of its political subdivisions to be submitted by referendum procedure to the voters of the State or political subdivision for decision at elections."