

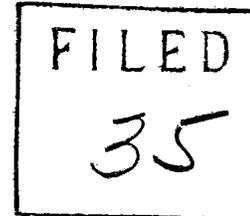
ARMORIES:  
NATIONAL GUARDS:  
MUNICIPAL  
CORPORATIONS:

The State has power to purchase or lease armories. Municipal corporations has no right in absence of statute to sell armories to state.

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July 18, 1941.

Capt. Kyle T. Graham  
Adjutant General's Office  
Jefferson City, Missouri



Dear Sir:

This department is in receipt of your request for an official opinion, which reads as follows:

"Enclosed herewith is letter dated June 26 from Ewing, Ewing and Ewing, attorneys-at-law, Nevada, Missouri, relative to the building of an armory in that city.

"Your attention is invited to the underlined question in the second paragraph of this letter: 'If, after the structure was completed, assuming that the structure was satisfactory, would it be possible, if the city then decided to do so, for the city to convey this property to the State of Missouri and receive what would have otherwise been paid to assist in the erection?'

"It is requested that you render this office an opinion as to whether or not, under the statutes of Missouri, a transaction of this nature would be legal."

There are two questions presented in your request:

- (1) Does the State of Missouri have the right to purchase an armory?

- (2) Does a municipal corporation have the right to sell an armory to the state?

Article V, Section 7 of the Constitution of Missouri provides as follows:

"The Governor shall be commander-in-chief of the militia of this State, except when they shall be called into service of the United States, and may call out the same to execute the laws, suppress insurrection and repel invasion; but he need not command in person unless directed so to do by a resolution of the General Assembly."

Article XIII, Section 1 of the Constitution of Missouri provides:

"All able-bodied male inhabitants of this State between the ages of eighteen and forty-five years, who are citizens of the United States, or have declared their intention to become such citizens, shall be liable to military duty in the militia of this State: Provided, that no person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service in such manner as shall be prescribed by law."

Article XIII, Section 7 of the Missouri Constitution reads:

"The General Assembly shall provide for the safe-keeping of the public arms, military records, banners and relics of the State."

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From these provisions of our organic law it will be seen that that instrument recognizes and provides for the militia as a state institution of which the chief executive of the state is made the commander-in-chief, and it is designated therein as being "a militia of the state", and every able-bodied male inhabitant of the state between the ages of eighteen and forty-five, who are citizens of the United States, or who have declared their intention to become citizens thereof are made members thereof. The arms with which they are equipped are recognized as being the public property of the state.

There is no statute which specifically gives to the state the right to purchase or lease an armory, however, it is a well recognized principle of law that a state may acquire all property needed by it in its governmental capacity. State ex rel. Davis vs. Green, 116 So. 66, Guame vs. City of Redlands, 73 Pac. 917, In re Opinion of Justices, 234 Ala. 555, 176 So. 367.

Furthermore, this power of the state to purchase or lease armories is recognized by various statutes of this state. Section 15017 R. S. Mo. 1939 provides, in part:

"\* \* \* The military council shall formulate plans for the organization, instruction, equipment and maintenance of the military forces of the state, provide for encampment and all other field and armory instruction and make allotments of funds and supplies appropriated or furnished for the support, equipment and maintenance of the military forces of the state. \* \* \*"

Section 15063, R. S. Mo. 1939, provides as follows:

"All armories owned by this state or by any organization of the national guard and all buildings leased by the state for military purposes shall be exempt from taxation for all purposes during the period of such ownership."

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Section 15064, R. S. Mo. 1939, reads:

"Upon the application of all posts of the grand army of the republic, camps of the united confederate veterans, camps of the united Spanish war veterans and of other societies composed of veterans of any war in which the forces of this state have participated, the officer in charge of any armory owned or leased by the state may permit the use of such armory for the meeting of such veteran societies without charge on dates when the same is not in use for military purposes."

The right of the state to lease a building for use as an armory was recognized in State ex rel. vs. Fleming, 275 Mo. 509, 204 S. W. 1085. Therefore, we believe that the State of Missouri may acquire, by purchase, an armory for the use of the national guard of this state.

The question now arises whether a city may sell an armory to the state. For the purpose of this opinion we will determine whether the City of Nevada, a city of the third class, has a right to do so. However, what is said herein is equally applicable to all other cities and towns of this state.

The General Assembly has specifically given to all cities and towns of this state the right to build or acquire armories for the National Guard of Missouri. Section 7364, R. S. Mo. 1939, provides:

"All cities, towns, villages and counties in this state are hereby given power and authority to build or acquire, by purchase, lease, gift or otherwise, suitable armories, drill halls and headquarters, and the land necessary therefor, for such organizations of the national guard of Missouri as may be stationed or located therein, and to provide for the maintenance and repair of the same."

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Section 7365, R. S. Mo. 1939, reads as follows:

"In case any organization of the national guard of Missouri now or hereafter occupies any armory, drill hall or headquarters not owned or leased by the city, town, village or county wherein it is located, such city, town, village or county is hereby given power and authority to provide for the maintenance and repair of such armory, drill hall or headquarters."

These statutes have been held constitutional by this department in an opinion rendered to Honorable Lewis M. Means, Adjutant General of Missouri, May 31, 1940, wherein it is stated that the acquiring of an armory by a city or town is for public purpose. This is the rule in other jurisdictions as will be noted in *Jordon vs. Duval*, 68 Fla. 48, 66 So. 298, *Pierce County vs. Clausen*, 95 Wash. 214, 163 Pac. 744. *State ex rel. Ill. Armory-Board vs. Kelly*, 16 N. E. (2d) 693. See also 46 A. L. R. 723, as was said in the *Clausen* case, *supra*:

"\* \* \* The mobilization and training of a state Militia may be a state purpose, but it is likewise a public purpose to which every political subdivision of the state may be called upon to contribute to the full extent of its power and ability. \* \* \*"

While a municipal corporation in Missouri may legally acquire an armory, it does not necessarily follow that such municipal corporation may dispose of or alienate such armory by sale. While Sections 7364 and 7365, *supra*, gave all cities and towns the right to acquire an armory, there is no provision allowing such corporations to sell the same. The only right, by statute, a city has to dispose of its property is that given in Section 6865, R. S. Mo. 1939, in which it is said that a city of the third class in this state may "purchase, hold, lease, sell or otherwise dispose of any property, real or personal, it now owns or may hereafter acquire;". However, such right given in general

terms has always been held to mean only such property that is not used for public purpose and has not been dedicated to a public use. McQuillan on Municipal Corporations, Volume 3, Section 1242 and cases cited.

The general rule is that the charter or legislative act is the source of power as to the property rights of municipal corporations, and that when silent the implied power exists to acquire and alienate property. This general rule is subject to the qualification stated by Mr. Dillon, thus:

"Municipal corporations possess the incidental or implied right to alienate or dispose of the property, real or personal, of the corporation, of a private nature, unless restrained by charter or statute; they cannot, of course, dispose of property of a public nature, in violation of the trusts upon which it is held, and they cannot, except under valid legislative authority, dispose of the public squares, streets, or commons." 3 Dillon, Mun. Corp. (5th Ed.) Section 991."

3 McQuillin, Mun. Corp. Section 1140, states the same rule and says this:

"All property held by the city in fee simple, without limitation or restriction as to its alienation, may be disposed of by the city at any time before it is dedicated to public use. In other words, the city has the right to sell or dispose of property, real or personal, to which it has the absolute title and which is not affected by a public trust, in substantially the same manner as an individual unless restrained by statute or charter; and, this power is an incidental power inherent in all corporations, public or private.

Thus, land held by the city in full use and ownership--e. g., commons acquired by confirmation under act of Congress--may be sold when no longer needed for public use. So land bought for a public purpose, if not actually so used cannot be said to be affected by a public trust, and hence may be sold."

1 Devlin on Real Estate (3d Ed.) Section 348a, recognizes the same doctrine, and says that--

"When title is vested in a municipal corporation by deed, without limitation or restriction as to its alienation, the property may be conveyed at any time before it is dedicated to a public use."

While at common law a municipal corporation could, unless restrained by its charter, dispose of its lands and other property just as private individuals could, in this country it is generally held that a municipal corporation has no implied power to sell property which is devoted to a public use, but property of which the public use has ceased, or which has never been devoted to any public use, may be sold by the municipality owning it, by virtue of its implied power. 19 R. C. L. 773.

These rules have been followed in Missouri. State ex rel. City of Excelsior Springs vs. Smith, 82 S. W. (2d) 37. Matthews vs. Alexandria, 68 Mo. 115.

Under the facts as presented in the instant case, the City of Nevada, in acquiring and holding the armory, would do so for a public purpose and public use. There is no statute which allows such cities to sell the armory. Under the common law, it could sell only if the property has ceased to be used for the public or if it was never in fact dedicated to the public for its use. Neither of these two situations are present here. The only case that we can find upon this subject is that of State ex rel. Parker vs. City of Lawrence, 92 Pac. (2d) 31, cited by the Supreme Court of Kansas in 1939. In that case the City of Lawrence voted a bond issue to be used for the construction of a national guard armory, which armory was to be leased to the state. The court said, at l. c. 32:

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"\* \* \* It is worthy of note that the statutes quoted give the cities authority to donate an armory to the national guard or donate the use of land or buildings but nowhere do these sections give the city the right to furnish the armory and charge rent for it. At this junction it must be pointed out that the authority for the action contemplated by the city must be found in the statutes. We are unable to find such authority."

We believe the holding in the above case, decided under facts identical with those in the instant case, is applicable herein.

It might be well to point out that those cases which hold that a municipal corporation may sell property which has never been dedicated to public purpose and use are not applicable here because a city can only tax for a public purpose, and if they built an armory and paid for it with tax money, while at the time they had no intention to use it for a public property, it would be a fraud upon the taxpayer and would be illegal and void.

Therefore, before a city may sell an armory, it will be necessary that the General Assembly pass a statute giving to them such right. This opinion is written upon the law as it is in Missouri at the present time. However, we point out that if the state would wish to acquire an armory, an appropriation would have to be made by the General Assembly and we believe that it would be an easy matter to have the General Assembly at the same time enact a statute allowing cities to sell armories which they had theretofore acquired.

#### CONCLUSION

It is, therefore, the opinion of this department that the State of Missouri may purchase or lease armories for the use of the national guard of Missouri. It is further

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the opinion of this department, that cities and towns who have acquired armories may not sell such armories to the state in absence of a statute specifically allowing such a sale.

Respectfully submitted,

ARTHUR O'KEEFE  
Assistant Attorney General

APPROVED:

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VANE C. THURLO  
(Acting) Attorney-General

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