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OAG 2-01

February 14, 2001

Ms. N. L. Bergstrom
Corporation Counsel
Lincoln County
Health & Human Services Center
607 North Sales Street
Merrill, WI 54452

Dear Ms. Bergstrom:

You have requested my opinion on three questions related to the permissibility of the practice, by county highway departments, of selling certain winter road maintenance supplies at cost to local municipalities or to private parties. Your first question is:

1. Is it permissible for a county highway department to sell sand/salt to municipalities for their own use?

In answering this question, I first must consider whether a county highway department has statutory authority to sell sand/salt to municipalities. You have stated the opinion that such a sale is authorized by Wis. Stat. § 83.035 as a contract for road maintenance. I disagree. That statute says that a county board may authorize its county highway committee to enter into contracts with municipalities “to enable *the county* to construct and maintain streets and highways in such municipalities.” Wis. Stat. § 83.035. The sale of sand/salt by a county to a municipality for *the municipality’s* own use is not a way of enabling the county to maintain streets and highways in the municipality. Such sales are therefore not authorized by Wis. Stat. § 83.035.

Direct statutory support for the sale of sand/salt to municipalities can, however, be found in Wis. Stat. § 83.018, which specifically authorizes county highway committees to sell road maintenance supplies to any city, village, town or school district within the county. This statute specifically authorizes county highway departments to sell sand/salt and other road maintenance supplies to municipalities and, on its face, places no limits on how those supplies may be used.

[=OAG 1-01, 1-2] Even where statutory authority exists, however, it is also necessary, as you have noted, to determine whether the sales in question would violate the public purpose doctrine, which prohibits the use of public funds, public equipment or public supplies to provide a benefit that is primarily private, rather than public, in nature. *See State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973); *Heimerl v. Ozaukee County*, 256 Wis. 151, 155, 40 N.W.2d 564 (1949); 76 Op. Att’y Gen. 69 (1987); 61 Op. Att’y Gen. 304, 305 (1972). Because

the public purpose doctrine is a constitutional rule, it limits the authority conferred on counties and other municipalities by statute. *See State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683 (1967); 76 Op. Att’y Gen. at 70. Even where statutory authority for a county’s action exists, the county must be cautious not to exercise that authority in a way that contradicts the public purpose doctrine. *See* 76 Op. Att’y Gen. at 70; *Bowman*, 34 Wis. 2d at 69.

Whether the sale of sand/salt by a county highway committee to a municipality for the municipality’s own use would violate the public purpose doctrine depends on the use to which the sand/salt would be put by the municipality. Use of the sand/salt to provide safe winter passage on public roads would be a valid public purpose and sale for that purpose, or for some other public purpose, would be permissible. If, however, the municipality were to use the salt for a private purpose – such as to provide winter passage on a private road, private driveway or private parking lot – then the sale would violate the public purpose doctrine. *See* 76 Op. Att’y Gen. at 72; 67 Op. Att’y Gen. 304 (1978); 50 Op. Att’y Gen. 98, 100-01 (1961). Counties may not enter into contractual arrangements with municipalities to provide services where the benefit to be provided is primarily private in nature. *See Heimerl*, 256 Wis. 151 *passim*.

A mere possibility that public funds may be used to promote a public purpose is not enough to validate an expenditure, if the possibility of the public benefit is too remote and uncertain. *See Bowman*, 34 Wis. 2d at 71-72. The public purpose doctrine therefore imposes control and accountability requirements on government-funded activities. *See Jackson v. Benson*, 218 Wis. 2d 835, 897, 578 N.W.2d 602 (1998). There must be some type of limitation or control to insure that the materials in question will be used for a public purpose. *See State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 176, 277 N.W. 278, 280 N.W. 698 (1938). The amount of control and accountability required is such as is reasonably necessary under the circumstances to attain the public purpose. *See Jackson*, 218 Wis. 2d at 897.

Local municipalities, like counties, are subject to the public purpose doctrine. Any municipality purchasing sand/salt from a county highway department for its own use thus has an independent constitutional obligation to use the sand/salt only for a public purpose. I believe that this legal duty of the purchasing municipality constitutes a reasonable regulation for control and accountability that sufficiently safeguards against use of the sand/salt for a private purpose. A county selling sand/salt to a municipality is entitled to assume, in good faith, that the purchasing municipality will itself satisfy its own obligations under the public purpose doctrine.

[=OAG 1-01, 2-3] My answer to your first question, therefore, is that it is permissible for a county highway committee to sell sand/salt to a municipality for its own use, as long as the county officials believe, in good faith, that the purchasing municipality does not intend to unlawfully use the sand/salt for a private purpose. It would be desirable, nonetheless, for the county to include in the terms of sale of the sand/salt a clause expressly prohibiting use of the materials for private purposes. While such a “public purpose” clause is probably not legally

required for sales to municipalities, it would perform the useful function of reminding the purchasing municipalities that they, too, are subject to the public purpose doctrine.

Your second question is:

2. Is it permissible for a county highway department to sell sand/salt to municipalities acting as middle-men for private contractors?

As already noted, Wis. Stat. § 83.018 authorizes county highway departments to sell sand/salt to municipalities and there is no statutory limit on how such supplies may be used. The answer to your second question therefore depends on whether the sale of sand/salt to municipalities acting as middle-men for private contractors would violate the public purpose doctrine. This office has, in the past, repeatedly stated the opinion that statutes authorizing counties and local municipalities to provide road maintenance services or materials to private parties must be narrowly construed to include implicit restrictions that prohibit any application that would violate the public purpose doctrine. *See* 76 Op. Att’y Gen. at 70; 67 Op. Att’y Gen. at 305.

As with your first question, then, the answer to your second question again depends on whether there are sufficient limitations or controls to make it reasonably probable that the sand/salt will be used for a public purpose. A private contractor who purchases sand/salt from a municipality might use the sand/salt to provide safe winter passage on public roads (or for some comparable public purpose), or might use it for a private purpose, such as clearing private roads, driveways or parking lots. The terms of such a sale, therefore, must include reasonable regulations for control and accountability under the public purpose doctrine. It is obvious, however, that the municipality that sells sand/salt to a private party is in the best position to control the terms of that sale. It would be unreasonable to require a county that sells sand/salt to a municipality to also exercise supervision over any subsequent re-sale of the sand/salt by the municipality. Rather, as previously noted, the county is entitled to assume, in good faith, that local municipalities will meet their own obligations under the public purpose doctrine.

The answer to your second question, therefore, is that it is permissible for a county highway committee to sell sand/salt to municipalities acting as middle-men for private contractors, as long as the county believes, in good faith, that the purchasing municipality does not intend to unlawfully resell the sand/salt for a private, rather than a public, purpose. Again, however, it would be desirable for the terms of such a sale to include a clause prohibiting resale of the sand/salt for private purposes.

[=OAG 1-01, 4] Your third question is:

3. Is it permissible for a county highway department to sell sand/salt to private vendors?

In answering this question, I first must consider whether a county highway department has statutory authority to sell sand/salt to private parties. You have not cited any statute that specifically authorizes such sales. Sales to private parties are not authorized by Wis. Stat. § 83.018, which authorizes county highway committees to sell road maintenance supplies to municipalities, but not to private parties. My review of the statutes has found no provision specifically authorizing a county highway department to sell supplies to private parties. A county board, however, may “[d]irect the clerk to lease, sell or convey or contract to sell or convey any county property, not donated and required to be held for a special purpose, on terms that the board approves.” Wis. Stat. § 59.52(6)(c). I conclude from this that the county board may itself direct the sale of sand/salt to private parties or may, by ordinance, authorize the county highway department to make such sales. In the absence of such an ordinance, however, a county highway department lacks power to sell supplies to private parties.

Of course, even where a county board authorizes the county highway department to sell sand/salt to private parties, those sales still must satisfy the public purpose doctrine. The concerns in this regard are the same as the concerns already discussed under your first and second questions. The mere possibility that a private party buying sand/salt from a county might use the materials for a public purpose is not enough to satisfy the public purpose doctrine. Rather, there must be “reasonable regulations for control and accountability to secure public interests.” *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, 235 Wis. 443, 453, 293 N.W. 161 (1940).

[=OAG 1-01, 4-5] Because a private party buying sand/salt from a county, unlike a local municipality, is not itself subject to the public purpose doctrine, I believe that the public interest is adequately secured only if the private party is under a contract that requires the use of the sand/salt for a specific public purpose, such as the sanding/salting of public roads. Before selling sand/salt to a private buyer, therefore, the county should require the buyer to document the existence of such a contract. In addition, the terms of the sale of the sand/salt to the private party must include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. *See Hermann v. Lake Mills*, 275 Wis. 537, 542-43, 82 N.W.2d 167 (1957) (sale of municipal parking lot to private corporation invalid where there was no binding commitment requiring the corporation to continue to devote the lot to a public purpose). Such an agreement could be given teeth by the use of liquidated damages or by making future sales contingent on compliance. The general notion that the public would benefit from other uses of sand/salt – such as to provide safe winter passage on a private road, private driveway or private parking lot – is insufficient, in my view, to satisfy the public purpose doctrine. In addition, I believe that, under ordinary circumstances, the public purpose doctrine prohibits a county from

selling road maintenance supplies to a private party that intends to resell the supplies on the private market.

The answer to your third question, therefore, is that it is permissible for a county highway department to sell sand/salt to private vendors if the county board has approved such sales by ordinance, if the private vendor shows that it is subject to a contract that requires it to use the sand/salt for a specific public purpose and if the terms of sale include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. Purchases by private vendors only for the purpose of resale on the private market, however, ordinarily do not satisfy the public purpose doctrine.

Your letter also raises an additional issue. You have suggested that the practice, by a county highway department, of wholesaling sand/salt to private parties, either directly or through a middle man, itself serves the public purpose of providing safe winter passage for all taxpayers because the strict storage regulations for sand/salt make it infeasible for private vendors to stockpile enough sand/salt to meet local needs throughout the long winter. In your view, county intervention in the sand/salt market is justifiable because of this alleged inability of the private market to meet local needs on its own.

Assuming that the costs of complying with sand/salt storage requirements are as onerous as you suggest, I do not believe that the burden thereby imposed on the private sand/salt market is, in itself, sufficient to justify county intervention in that market. Under the public purpose doctrine, a county may stockpile sand/salt only to promote a public purpose, not to promote private interests. If county intervention in the sand/salt market is necessary to provide safe winter passage on public roads, or to secure a comparable public interest, then such intervention is permissible, if accompanied by adequate safeguards. The county may not, however, act as a wholesaler of sand/salt where that activity would only reduce the cost to private contractors of meeting private needs.

Sincerely,

James E. Doyle
Attorney General

JED:TCB

[=OAG 1-01, 6]CAPTION:

It is permissible for a county highway department to sell road sand/salt to municipalities, either for their own use or for resale, as long as the county officials believe, in good faith, that the purchasing municipality does not intend to use or resell the sand/salt for a private, rather than a public, purpose. It is permissible for a county highway department to sell sand/salt to private parties only if the county board has approved such sales, if the purchasing private party shows that it is subject to a contract that requires it to use the sand/salt for a specific public purpose and if the terms of sale include a binding and enforceable agreement by the buyer to use the sand/salt only for the specified public purpose. Under ordinary circumstances, a county may not sell road maintenance supplies to a private party that intends to resell the supplies on the private market.