

Washburn County Corporation Counsel

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August 7, 2017

Hon. Brad D. Schimel
Wisconsin Attorney General
17 West Main Street
P.O. Box 7857
Madison, WI 53703-7857

Re: A lease agreement with a gravel crushing business to provide gravel for municipal road projects from county-owned lands cannot provide for the sale of gravel to private entities by the lessee

Dear Sir:

This is a request for an opinion of the Attorney General regarding what I perceive to be a practice by several counties throughout the state to circumvent the provisions of § 82.035, Wis. Stats., a practice now being urged upon Washburn County.

Washburn County sought gravel for several road projects in the north portion of its jurisdiction. A suitable site was found on county lands under forest law. Having no gravel crushing equipment of its own, the Highway Department entered into a lease agreement with a private contractor who drafted a lease that included a provision that the contractor could sell gravel to private individuals from the site with permission of the Washburn County Highway and Dam Committee. Such sales would be lucrative to the county.

The County Forester objected to the lease after the contractor locked the site and put up no trespass signs, citing county forest law. That issue was eventually resolved with the approval of a petition to remove the property from county forest law. The controversy broadened, however, when the township in which the gravel pit was located objected to private sales. If I as corporation counsel was ever asked to review the original lease, I must confess I overlooked the private sales provision. However, the Chair of the Highway Committee consulted me on the matter of such private sales after the restriction created by the county forest issue was resolved. During the time of withdrawal, the County placed a moratorium on the exercise of the lease provision. After withdrawal had been accomplished, the contractor requested permission to start selling

I concluded that § 83.035, Wis. Stats., allowed sales of road materials to municipalities and school districts only and only to those governmental entities located in the county. A law firm in Madison representing the contractor called and attempted to convince me that

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the interposition of a lease somehow scrubbed a sale of the sort contemplated by the lease of the taint of illegality. The argument they advanced was "Well, other counties do it all the time". That much is true. However, I countered that not only is the law unambiguous, the Attorney General issued an opinion that stated that not only were such sales impermissible, but further stated that it is just fine to sell to a private individual IF – and this is the big if – the full county board agrees and the contract entered into contains an enforceable provision that the private party agrees not to sell road materials to private individuals. OAG 2-01.

The Highway Commissioner and Committee Chair just returned from a conference at which the topic of leases of this sort were being entered into and that the conference's sponsor – the Wisconsin Counties Association – were of the opinion that leases of this sort are a safe harbor against the prohibition of private sales. They urged me to contact a lawyer at the WCA for clarification. However, the WCA is a lobbyist organization. So I look to the attorney general for his unbiased declaration. The prior opinion is crystal clear in my mind.

This request for an opinion may be taken by you as the settlement of a bet and it does seem that way. I only offer that the issue seems to be of statewide concern given that the practice of private sales through the use of third party leases. There is no litigation pending or even threatened in this matter.

Very Truly Yours,

Jeffrey R. Kohler

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cc: Mr. Frank Scalzo, Washburn County Highway Commissioner
Mr. Thomas Ricci, Chair – Washburn County Highway and Dam Committee