



COUNTY OF KENOSHA

Joseph M. Cardamone III
Corporation Counsel

Jennifer Kopp
First Assistant

John Moyer
Senior Assistant

Matthew Perz
Senior Assistant

Courthouse
912 – 56th Street, LL13
Kenosha, WI 53140-3747
(262) 925-8020
Fax: (262) 925-8028

March 4, 2022

ADVISORY LETTER IN RESPONSE TO INQUIRY

To: Supervisor William Grady
Kenosha County Board

Questions Presented:

- 1) What jurisdiction or authority does a lease confer upon an entity who is a lessor of a County-owned property relative to activities and fees charged in conducting those activities?
- 2) Will a change to the Parks Ordinance in Chapter 10 of the Municipal Code of Kenosha County, removing a lessee (in this case, the Kemper Center) from the Standards of Issuance section in 10.5(3), impinge on that lessee's ability to organize events or have autonomy in charging fees?

Summary Answers:

- 1) A lease confers real property rights to the lessee from the lessor which allow dominion and control of the property.
- 2) The change in the Ordinance will not impinge on a lessee's fiscal autonomy or ability to organize activities or event. To the contrary, it will clarify that, in lease agreements between Kenosha County as lessor and a lessee, the lease document controls (to the extent detailed in the lease terms) use of the property and permitted organizational and fiscal operations as agreed upon by the parties and as approved by Kenosha County.

Factual Synopsis:

The Kenosha County Parks Division of Public Works has entered into several lease agreements with various entities over the years. Examples spanning nearly fifty years include the Kemper Center, the Biergarten, and Boundless Adventures. These lease agreements are often very detailed in their terms. For example, the Kemper lease is eight pages long and encompasses twenty separate Articles and an Addendum. The Biergarten and Boundless Adventures leases are lengthier documents. In 2022, amendments were

sought to the Chapter 10 Ordinance in the Municipal Code for Kenosha County. Several amendments, related to approval of fees and activities within the parks and a carve-out for those approvals where property was leased from the parks to an entity for purposes of specific use of certain areas of the parks, were submitted for committee and board approval.

The amendment to section 10.4(10) (governing permits) adds “In the absence of a validly executed lease agreement between Kenosha County as Lessor and a Lessee” to the language prohibiting activities by a person or private entity to conduct an activity requiring a fee without a written permit. Section 10.5(3) (Applications for permits) removes the Kemper Center Director from the approval process. Notably, no other leased entity is mentioned in Section 10.5(3) of the Municipal Code for Kenosha County.

Legal Analysis:

A lease of property between the owner of the property and its occupant constitutes one of the most elemental relationships and has been in existence since the beginning of civilization. Consequently, the rights, privileges and principles involved in this relationship have evolved into some of the most important laws. In the common law, leases have been regarded primarily as a conveyance.¹ This also reflects the reality in real estate transactions that leases are detailed, sometimes elaborate, documents wherein parties have exhaustively expressed their intent—or at least had the opportunity to do so. Consequently, covenants in leases have been held mutually independent unless in terms expressly conditional.² Thus, the common law rule that when a lease is a conveyance the promises or covenants are independent in the absence of an expressed dependency.

Subsequent court review of leases have found interpretation of leases as contracts rather than, or in addition to, conveyances. An analysis is often done under review and scrutiny as both conveyance and contract.

Leases share the qualities of both contracts and conveyances, and are interpreted as are other agreements unless there is a conflict with principles of property law." Century Shopping Ctr. Fund v. Crivello, 156 Wis.2d 227, 233, 456 N.W.2d 858, 861 (1990), *overruled on other grounds*, Sampson Invs. v. Jondex Corp., 176 Wis.2d 55, 69-70, 499 N.W.2d 177, 183 (1993). The terms of an unambiguous lease must be enforced unless the lease violates clear public policy. Pelikan v. Spheeris, 252 Wis. 562, 564-67, 32 N.W.2d 220, 221-223 (1948). Generally, a lessor may control the use of leased premises by providing restrictions within the lease agreement and, where a lease provides for specific uses or restrictions, such provisions are enforceable by the courts. See 49 AM. JUR. 2D *Landlord & Tenant* § 238 (1970); 51C C.J.S. *Landlord & Tenant* § 337(a) (1968).³

Accordingly, the Lessor's control of the property is defined and limited by the terms of the

¹ Rock County Sav. & Trust Co. v. Yost's Inc., 36 Wis. 2d 360 (WI Sup. Ct., 1967)

² 6 Williston, Contracts, pp. 585-589, sec. 890.

³ Rock County, 36 Wis.2d, at 368.

lease document. The question addressed here concerns leased property within the Kenosha County Parks and the effect of the lease on the relationship between the lessor (County), the lessee (party in relationship with the County such as the Kemper Center, Pringle Nature Center, the Biergarten, Boundless Adventures, and Lakeland Little League for example). Under either a contract or conveyance analysis, the negotiated lease agreement details the dominion and control of the property in relation to the parties to that document. In other words, the lease agreement determines the level of authority and control retained by the lessor with regard to activities and fees charges by the lessee in conducting activities.

In the case of the Kemper lease with Kenosha County, the negotiated lease contains understandings of the use of the premises. Article VI of the lease confirms the intent of the parties that the lessee shall operate the Kemper Center property for the benefit of all Kenosha County citizens. The lease details that it is dedicated to, among other objectives, historical preservation, educational and cultural programs, and recreational activities subject to rules and regulations established by the Parks, the lessor, or its agent.⁴

Specific duties of the lessor in this Agreement are spelled out in Article X of the Lease Agreement. The lessor is explicitly responsible for operational and maintenance costs including utilities for the premises. The lessee is also the overseer and day to day manager and operator of the premises. This includes program development, scheduling of activities and events, and maintaining good order. Thus, the terms of the lease grant a significant degree of control over the operations, programming, and activities on the grounds of the Kemper Center.

Article X goes on to state that the lessee shall have the right to all fees, rentals, and other revenues that may be generated.⁵ Revenue is to be used for operations of the premises and for programming as Article X goes on to delineate. Finally, a trust (The Kemper Center Trust) was to be established and maintained for the purpose of establishing an endowment. The Trust was to be used for operating and maintaining the premises. This language established a functional model for fees, and grants autonomy to Kemper Center Inc. with regard to collection and use of fees for programming and activities. The Lease document confers certain rights upon Kemper Center Inc. and, by its terms, allows for control of programming, activities, and the collection and use of revenues.

The Kenosha County Ordinance in Chapter 10 legislates the general use and operations of Kenosha County Parks property. Those parts of the Parks that are subject to a lease agreement are different in control and operation from other Parks areas. The leased areas are subject to the lease terms. A court of law will honor the terms of a lease, as it would a contract or conveyance, as a “meeting of the minds” wherein negotiated and articulated written terms control use of the leased premises. This is a significant real estate or property relationship which is why approval by the County Board is sometimes needed. Based on this, removal of the language in the former ordinance concerning Kemper Center approval of certain parks activities or fee control is appropriate because there is language also being inserted to carve out leased property in the parks for control by lease terms. Just as it would be inappropriate to require both Parks and Lessee approval of any activity or fee collection (or other term covered by a lease) which is

⁴ See Article VI, Lease Agreement between Kenosha County (Lessor) and Kemper Center Inc. (Lessee).

⁵ This language is found in paragraph five of Article X of the Lease document.

controlled by a contractual or conveyance document, it is inappropriate to single out any one lessee (in this case Kemper) to be bound by that requirement.

The changes proposed to the Chapter 10 Ordinance relating to approvals or fee control of a leased portion of the parks are appropriate as the changes recognize the primacy of the lease document as it controls use and function of the leased property. The ordinance changes simply distinguish between normal control and administration over parks properties and those portions therein which are subject to an approved lease document.

Conclusion:

Leases, like a contract or conveyance, confer rights to a lessee from a lessor. Courts of law have recognized the ability of parties to contract and convey property rights and dominion and control over certain property. The proposed amendments to the Municipal Code of Kenosha County clarify that where a lease arrangement exists between Kenosha County and an entity relating to County Park property, the lease provisions will control the activities, fee arrangements and other pertinent details normally relevant to a permit application process. Consequently, the existence of an approved lease document obviates the need for approval by any entity for activities, programming, fees, or like issues so long as the lease addresses those issues.