STATE OF TENNESSEE
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Opinion No. 13-84

Authority of City and County to Dispose of Surplus Real Property by Private Sale

QUESTIONS

1. Does 2008 Tenn. Priv. Acts ch. 91 ("Private Act Charter") authorize the City of Jellico ("City") to sell surplus real property by private sale?

2. Does the County Financial Management System of 1981, codified at Tenn. Code Ann. §§ 5-21-101 to -130, ("1981 Act"), authorize a county to sell surplus real property by private sale?

OPINIONS

1. Yes. The City may sell its surplus real property by private sale if the City determines that a private sale is the most advantageous manner available.

2. No. Pursuant to Tenn. Code Ann. § 12-2-501, a county that has adopted the 1981 Act is only authorized to sell surplus land by public sale unless the property is historically or architecturally significant and qualifies for private sale.

ANALYSIS

1. Under a private act charter form of government, a municipality can exercise only express or necessarily implied powers either enumerated in its charter or in the general laws applicable to all forms of municipal governments. See City of Lebanon v. Baird, 756 S.W.2d 236, 241 (Tenn. 1988) (observing that "municipalities may exercise only those express or necessarily implied powers delegated to them by the Legislature in their charters or under statutes"). Section 4.09 of the Private Act Charter provides the following requirements for the sale of City property:

> [I]n accordance with Section 2.07(a), by ordinance the mayor (or city administrator if one is appointed) may sell city real estate or other property which is obsolete, surplus, or unusable by the most advantageous manner available, including but not limited to advertisement in a local newspaper requesting sealed bids or directing a public auction.

The City thus has the express power to dispose of surplus real property in the "most advantageous manner available." Because Section 4.09 of the Private Act Charter does not limit

the manner of sale to a competitive bidding process or public auction, the City has discretion in determining the proper way to carry out the sale. If under the facts and circumstances, a private sale is the most advantageous manner available, then the City is authorized to proceed in that manner. If an issue arises regarding the City's decision to sell surplus real property by private sale, a court of competent jurisdiction will evaluate the facts and circumstances that led to such decision and determine whether the City's actions were illegal, arbitrary, or capricious. *See McCallen v. City of Memphis* 786 S.W.2d 633, 642 (Tenn. 1990) (stating that a court invalidation of an action by a local governmental body, whether such action is legislative or administrative in nature, "should take place only when the [local governmental body's] decision is clearly illegal, arbitrary, or capricious").

In addition, Section 4.09 of the Private Act Charter requires the City to authorize the sale of surplus property in accordance with Section 2.07(a), which specifically provides that

> [a]ny action of the board having a regulatory or penal effect, relating to revenue or appropriation of money, awarding franchises, authorizing the borrowing of money, conveying or leasing or authorizing conveyance or lease of any lands of the city, or required to be done by ordinance under this charter or the general laws of the state, is done only by ordinance. Other actions of the board may be accomplished by resolutions or motions.
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> Ordinances and resolutions shall be in written form before being introduced, and a copy shall be furnished to each member of the board and the city attorney in advance of the meeting at which introduced. The board may determine by ordinance or resolution the definition of "in advance." The enacting clause of ordinances is "Be it ordained by the board of mayor and aldermen of the City of Jellico." No action of the board of mayor and aldermen is valid or binding unless approved by the affirmative vote of a majority of the board present at the meeting at which the vote was taken. Any ordinance which repeals or amends existing ordinances shall cite the sections or subsections repealed or amended. Every ordinance, except an emergency ordinance, must be approved on two (2) readings not less than one (1) week apart, and becomes effective after final approval unless its terms provide a later effective date. Only the caption of ordinances and resolutions are required to be read at each reading. Written copies of the ordinances shall be available for public review. Each resolution becomes effective when adopted unless its terms provide otherwise.
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> To meet a public emergency affecting life, health or property, an emergency ordinance may be adopted on two (2) readings on separate days and become effective immediately, by the affirmative votes of three (3) members of the board, if the ordinance contains a full statement of the facts creating the emergency. The mayor has the authority to veto the emergency ordinance under the same guidelines as Section 2.03.

Thus, for the City's ordinance authorizing the sale of surplus property to be effective, it must be in written form, have been furnished to each board member and the city attorney in

advance of the meeting, include the required enacting clause language, and be read and approved by a majority vote of the board at two meetings held not less than one week apart. *Id.* Written copies of the ordinance must also be available for public review. *Id.* If the City does not follow the mandatory provisions of Section 2.07(a), a court of competent jurisdiction could declare the board's action *ultra vires* and void or voidable. *See Baird*, 756 S.W.2d at 241 (stating the general rule that "a municipal action may be declared *ultra vires* for either two reasons: (1) because the action was wholly outside the scope of the city's authority under its charter or a statute, or (2) because the action was not undertaken consistent with the mandatory provisions of its charter or a statute").

2. Under Tenn. Code Ann. § 5-21-118(b)(4) of the 1981 Act, a county's finance director is responsible for the "[p]ublic sale of all surplus materials, equipment, buildings and land." This statutory provision is an express limitation on the method of sale available to a county that has adopted the 1981 Act when disposing of surplus land. *See* Tenn. Att'y Gen. Op. 03-131 (Oct. 3, 2003) (concluding that as long as the county had not adopted the County Purchasing Law of 1957 or the County Financial Management System of 1981, it could sell surplus county real property by private sale). It is important to note, though, that under Tenn. Code Ann. § 12-2-501, enacted by Chapter 115 of the 2013 Tennessee Public Acts and effective on April 12, 2013, a county, upon majority vote, may dispose of real property by private negotiation if the property is historically or architecturally significant and is sold to a nonprofit corporation or trust whose purposes include the preservation of such properties and a preservation agreement is placed in the deed conveying the property from the County to the nonprofit corporation or trust. Thus, unless the surplus property is historically or architecturally significant and meets the other requirements of Tenn. Code Ann, § 12-2-501, a county subject to the 1981 Act is limited to public sale.

In summary, the City is authorized to sell surplus real property by private sale if it determines that a private sale is the most advantageous manner available and it authorizes such sale by ordinance and in compliance with the mandatory provisions of Section 2.07(a) of its Private Act Charter. However, a county that has adopted the 1981 Act is authorized to sell surplus land only by public sale unless the property is historically or architecturally significant and qualifies for private sale under Tenn. Code Ann. § 12-2-501.

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