STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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OAG–01–20

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Dear Corporation Counsel Swan:

¶ 1. Your predecessor requested an opinion, which you have adopted, regarding a practice by some counties of entering into lease agreements with a private entity, where that lessee obtains gravel from county-owned land. Although the opinion request provides no specific agreement, according to the description, I understand that the lessee provides some of the gravel to the county and also sells some to private entities. The request asks whether such a lease agreement conflicts with a statute, Wis. Stat. § 83.035, and a previous attorney general opinion, OAG-2-01 (Feb. 14, 2001), which discussed the constitutional public purpose doctrine.

¶ 2. I conclude that Wis. Stat. § 83.035 would not govern the gravel lease described because it purports only to address contracts to construct or maintain streets. Rather, a separate statute specifically addresses mineral leases. Further, I conclude that the Wisconsin Supreme Court's interpretation of the public purpose doctrine would not bar a gravel lease where a lessee provides adequate consideration for that property right. To the extent that some statements in OAG-2-01 suggest a different analysis, that portion of the opinion is withdrawn.

¶ 3. The first question involves the meaning of a statute, Wis. Stat. § 83.035. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110. "If this process of analysis yields a plain, clear statutory meaning,

then there is no ambiguity, and the statute is applied according to this ascertainment of its meaning." *Id.* (citation omitted).

¶ 4. The opinion request asks whether Wis. Stat. § 83.035, located in the "COUNTY HIGHWAYS" code chapter, bars leases of county land where a private lessee obtains and sells gravel. More specifically, I understand the request as referring to the following type of agreement: (1) a lease where a private business is granted the right to obtain gravel from county land, some of which the lessee provides to the county for the county's use and (2) the lessee also sells some of the gravel to private entities.[1]

¶ 5. Wisconsin Stat. § 83.035 does not bar such agreements because it does not address the issue. Instead, the statute simply empowers a county board to enter into contracts with certain public entities "to construct and maintain streets and highways":

> Any county board may provide by ordinance that the county may, through its highway committee or other designated county official or officials, enter into contracts with cities, villages and towns within the county borders to enable the county to construct and maintain streets and highways in such municipalities.

Wis. Stat. § 83.035. Consistent with that language, the court of appeals has explained that Wis. Stat. § 83.035 "allows the county to contract with towns for repair of roads lying within the town." *Fond du Lac County v. Town of Rosendale*, 149 Wis. 2d 326, 334, 440 N.W.2d 818 (Ct. App. 1989). On its face, that statute has no application to simply leasing gravel rights.

¶ 6. The opinion request also may have in mind another highway-related statute, Wis. Stat. § 83.018. That statute addresses a different aspect of road construction, namely, the selling of road supplies by a county highway committee to municipalities. It states:

> The county highway committee is authorized to sell road building and maintenance supplies on open account to any city, village, town or

[1] To the extent the request means to reference a situation where a county itself engages in a gravel-selling business, as opposed to simply leasing a property right, that kind of scenario is not analyzed here. Rather, the discussion here is premised on the assumptions stated in the text.

> school district within the county; and any such city, village, town or school district is authorized to purchase such supplies.

Wis. Stat. § 83.018. Like Wis. Stat. § 83.035, however, section 83.018 also does not address the ability to lease gravel rights on county land. On its face, it is about selling "supplies," not leasing property rights.

¶ 7. Rather, other statutes address leases, including mineral leases. A section titled "County administration" specifically contemplates leasing property rights like gas or "mineral rights." Wis. Stat. § 59.52(6)(c). Under that provision, a county board may:

> Direct 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. . . . Oil, gas and mineral rights may be reserved and leased or transferred separately.

Wis. Stat. § 59.52(6)(c).

¶ 8. The term "mineral" is undefined, but this office has previously opined that gravel typically "would be included within the meaning of the word 'minerals.'" 67 Op. Att'y Gen. 236, 236 (1978). The U.S. Supreme Court similarly has held that the general term "minerals" in the federal Stock-Raising Homestead Act includes gravel, observing that, "[i]n the broad sense of the word, there is no doubt that gravel is a mineral." *Watt v. W. Nuclear, Inc.*, 462 U.S. 36, 43 (1983).[2] Thus, it would appear that the leasing of mineral rights referenced in Wis. Stat. § 59.52(6)(c) encompasses gravel rights.

¶ 9. The Legislature has provided for broad construction of these kinds of administrative powers. In the immediately preceding subsection, the Legislature instructed that the administrative powers enumerated in subchapter V (which includes section 59.52) are "in addition to all other grants" of power and are to be "broadly and liberally construed and limited only by express language." Wis. Stat. § 59.51(1).

[2] In contrast, the term "valuable mineral" in the federal Pittman Act did not include gravel because it was not considered "valuable" in the applicable historical context, namely, Nevada circa 1919. *See BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 184 (2004).

¶ 10. Consistent with that grant of authority, this office has opined that, although land may not initially be acquired for a non-public purpose, "[c]ounty land initially acquired for valid public purposes, may . . . generally be leased to private entities," potentially subject to certain restrictions. 80 Op. Att'y Gen 80, 81 (1991). For example, applying Wis. Stat. § 59.52(6)(c) to different facts, the Wisconsin Supreme Court has summarized it as meaning that "county boards may convey county property on terms within the board's discretion." *Hart v. Ament*, 176 Wis. 2d 694, 704, 500 N.W.2d 312 (1993) (applying the previous codification of Wis. Stat. § 59.52(6)(c), Wis. Stat. § 59.07(1)(c)). In *Hart*, the court applied the "lease, sell or convey" language, together with a provision about museums, to authorize a "conveyance of museum property" through a lease from a county to a nonprofit corporation. *Id.* at 703–04.

¶ 11. While the foregoing is intended to clarify what general statutory authority is relevant to your question, this opinion is not intended to provide a comprehensive explanation of what steps may be required for a county to exercise authority under Wis. Stat. § 59.52(6)(c) in a particular case. *See*, *e.g.*, Wis. Stat. § 59.02 (describing the exercise of county powers). Similarly, an attorney general opinion is not the vehicle for determining factual matters, including "whether any particular lease arrangement would be permissible." 80 Op. Att'y Gen. at 82 (citing 77 Op. Att'y Gen. Preface, No. 3.C (1988)). That is especially true where, as here, no specific lease is provided and the factual circumstances could matter. *See*, *e.g.*, 66 Op. Att'y Gen 209, 210 (1977) (noting an instance where particular statutory procedure may govern a land sale). It is enough to point out that the highway construction statutes inquired about should not be read to generally govern leases of property rights, including rights to gravel.

¶ 12. The opinion request's second question is whether the gravel-leasing scenario summarized above would violate the constitutional "public purpose" doctrine, as it was discussed in a previous attorney general opinion, OAG-2-01. That opinion discussed whether a county highway department could, consistent with that doctrine, sell salt and sand to private entities. *See* OAG-2-01, at 3. The opinion concluded that the public purpose doctrine would require that the purchaser be subject to a contract that "requires . . . a specific public purpose, such as the sanding/salting of public roads." OAG-2-01, at 4.

¶ 13. While there may be other limits on a particular conveyance, I conclude that the opinion went too far when stating that the constitutional public purpose doctrine always requires a purchaser to have a public purpose. Rather, as applied here, the Wisconsin Supreme Court cases support that a private purchaser would not

need a public purpose if the property rights are conveyed for adequate consideration. To the extent OAG-2-01 suggests otherwise, that language is withdrawn.

¶ 14. While "there is no specific language in the state constitution establishing the public purpose doctrine," the Wisconsin Supreme Court has explained that the doctrine provides this limit: "[P]ublic appropriations may not be used for other than public purposes." *Town of Beloit v. County of Rock*, 2003 WI 8, ¶ 27, 259 Wis. 2d 37, 657 N.W.2d 344. In other words, the public purpose doctrine provides a limit on the "*expenditure* of public funds." *Id.* ¶ 36 (emphasis added).

¶ 15. OAG-2-01 suggested that the doctrine went beyond limiting public expenditures to also require a private purchaser to have a public purpose. However, the cases support a narrower rule. While a public aim would be necessary if the government expends funds or gives away valuable public property, that constitutional concern is absent where there is no expenditure or gift in the first place.

¶ 16. OAG-2-01 cited *Hermann v. City of Lake Mills*, 275 Wis. 537, 82 N.W.2d 167 (1957), to support the premise that a private purchaser must always have a public purpose. OAG-2-01, at 4. However, *Hermann*, read as a whole, does not support that blanket conclusion.

¶ 17. *Hermann* addressed a city's selling of park property to a corporation. *Hermann*, 275 Wis. at 540. There was a dispute about whether the "city in effect made a gift of part of the value of the property." *Id.* at 541. Notably, it was undisputed that the purchaser had "a private rather than a public purpose." *Id.* at 543. However, and important here, that conclusion did not end the inquiry. Rather, the court proceeded to discuss whether the purchaser's "payment represent[ed] only part of the fair market value of the property" or a full payment. *Id.* at 542. Lacking sufficient evidence on that point, the court remanded to determine whether the price was for "fair market value." *Id.* at 544. Thus, read as a whole, *Hermann* does not stand for the proposition that private aims automatically void a transaction. Rather, the remand there was to determine whether there was adequate consideration, *absent* a public purpose. *Id.* at 542, 544.[3]

[3] The court further explained that "consideration . . . necessary to support a sale . . . does not have to be money"; it could be, for example, construction. *Hermann*, 275 Wis. at 542. In other words, while the cases at times speak in terms of "fair market value," the required adequate consideration is not limited to fair market value sales, and the analysis also contemplates some "discretion." *See id.* at 544.

¶ 18. Of significance to the lease scenario here, *Hermann* also noted cases where the "power of municipal authorities to lease municipal real estate" was recognized. *Id.* at 544 (discussing, for example, *Smith v. City of Wisconsin Rapids*, 273 Wis. 58, 63, 76 N.W.2d 595 (1956)). Treating it the same way as a sale, *Hermann* noted that the "adequacy of the consideration agreed to be paid by the lessees" would be the relevant question under its public purpose analysis. *Id.*

¶ 19. *Hermann* thus supports the proposition that a sale or lease of property rights for adequate consideration generally would suffice for purposes of the constitutional public purpose doctrine. Absent some other barrier, the conveyance would not be void merely because the purchaser lacked a public purpose; rather, where there is adequate consideration, no public resources have been given away. OAG-2-01 therefore was mistaken when it cited *Hermann* for the proposition that a purchaser must always have a public purpose.

¶ 20. The other cases and opinions cited in OAG-2-01 would not dictate a different result. *See* OAG-2-01, at 1–4. To the contrary, some of those sources do not discuss the topic at hand, and the others simply reinforce that the public purpose doctrine concerns expenditures. *See*, *e.g.*, *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973) ("Public funds may be expended for only public purposes."); *Heimerl v. Ozaukee County*, 256 Wis. 151, 155, 40 N.W.2d 564 (1949) ("[T]he expenditure of public funds for a private purpose is unconstitutional . . . ."); *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 62, 148 N.W.2d 683 (1967) ("[P]ublic appropriations may not be used for other than public purposes."); *Jackson v. Benson*, 218 Wis. 2d 835, 896, 578 N.W.2d 602 (1998) (concerning "expenditure"); *State ex rel. Wis. Dev. Auth. v. Dammann*, 228 Wis. 147, 176, 280 N.W. 698 (1938) (concerning "expenditures"); *State ex rel. Am. Legion 1941 Convention Corp. of Milwaukee v. Smith*, 235 Wis. 443, 463, 293 N.W. 161 (1940) (discussing an "expenditure"); 76 Op. Att'y Gen. 69, 70 (1987) ("Public funds must be spent for public benefit."); 67 Op. Att'y Gen. 304, 309 (1978) (in context of plowing private property, discussing that counties may be limited when undertaking certain tasks that mimic a private business, and noting difficulties of ensuring payment); 61 Op. Att'y Gen. 304, 305 (1972) ("[W]here the benefit is primarily private in nature, use of county or town funds and county or town equipment is prohibited."); 50 Op. Att'y Gen. 98, 101 (1961) (discussing limits on a county engaging in a private driveway construction business).

¶ 21. Other cases reflect similar reasoning. *See*, *e.g.*, *Glendale Dev., Inc. v. Bd. of Regents of Univ. of Wis.*, 12 Wis. 2d 120, 135, 106 N.W.2d 430 (1960) (stating that question of whether a government land sale violated public purpose doctrine "goes to the sufficiency of the consideration received"); *Newell v. City of Kenosha*, 7 Wis. 2d

516, 525, 96 N.W.2d 845 (1959) (discussing adequate consideration). Likewise, this office has opined that, "[a]lthough a county may not make a gift of property to a private corporation, it may, under section 59.07(1)(c) [now section 59.52(6)(c)], convey property upon such terms as the county board approves. Consideration for a conveyance need not be monetary." 80 Op. Att'y Gen. 341, 343 (1992). A past opinion has recognized that the same reasoning would apply to mineral rights: "county mineral rights cannot be given away" without "legal consideration." 67 Op. Att'y Gen. at 237.

¶ 22. A more recent case helps confirm the expenditure-based trigger for the constitutional public purpose analysis. For example, more recently, the Wisconsin Supreme Court addressed the doctrine in *Town of Beloit*. Like the cases noted above, there, the court addressed the doctrine in the context of "expenditure of public tax monies." 259 Wis. 2d 37, ¶ 19. The Town of Beloit had used public money to develop its property for eventual sale. *Id.* In recognizing a public purpose for that expenditure, the court noted as relevant that "any profit realized from the sale of the subdivision would in fact benefit the Town . . . in that the profit would go into the Town Treasury and ultimately benefit all of the citizens of the town by way of decreased taxes and reduced debt." *Id.* ¶ 47.[4]

¶ 23. Lastly, I note that one court of appeals case could suggest a different analysis, but the precedent cited above counsels otherwise. In *Bishop v. City of Burlington*, 2001 WI App 154, 246 Wis. 2d 879, 631 N.W.2d 656, the court of appeals used phrasing that suggested that a purchaser offering adequate consideration *also* must use the property for a public purpose. There, the court asked whether "the conveyance serves a direct public purpose *and* . . . adequate consideration exists." *Id.* ¶ 30 (emphasis added). That phrasing did not seem to require an expenditure to trigger the analysis. However, *Bishop*'s statement does not change the established analysis for two reasons. First, the *Bishop* court was not presented with the question here: whether a sale for adequate consideration, standing alone, would suffice. Rather, both adequate consideration and a public purpose were present there. *See id.* ¶ 29. Second, and more to the point, the Wisconsin Supreme Court precedent, including the more recent *Town of Beloit*, applies the doctrine to expenditures, not standalone sales. Indeed, rather than purport to change the analysis, *Bishop* cited

[4] As discussed, the public purpose doctrine is triggered by an expenditure. However, if a court were to analyze a standalone sale (without an expenditure component), such sales might be analyzed using *Town of Beloit*'s reasoning that a public purpose generally is served when benefiting public coffers. 259 Wis. 2d 37, ¶ 47.

Hermann, but it simply did not discuss *Hermann*'s adequate consideration analysis. *See id.* ¶¶ 15–16.

¶ 24. In summary, the highway construction statute cited in the opinion request, Wis. Stat. § 83.035, does not address mineral leases on county land and so does not forbid them. Further, Wisconsin Supreme Court precedent supports that the constitutional public purpose doctrine is triggered only where there is an expenditure or gift of public funds or property. As the cases explain, that may occur when conveying property for inadequate consideration.

Sincerely,

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JLK:ADR:jrs