STATE OF NEBRASKA
Office of the Attorney General
2115 STATE CAPITOL BUILDING
LINCOLN, NEBRASKA 68509-8920
(402) 471-2682
FAX (402) 471-3297

DON STENBERG
ATTORNEY GENERAL

L. STEVEN GRASZ
SAM GRIMMINGER
DEPUTY ATTORNEYS GENERAL

#91056

STATE OF NEBRASKA
OFFICIAL
JUN 19 1991
DEPT. OF JUSTICE

DATE: June 18, 1991

SUBJECT: Transfer of State highway right-of-way to City of Lexington

REQUESTED BY: G.C. Strobel, Director-State Engineer
Nebraska Department of Roads

WRITTEN BY: Don Stenberg, Attorney General
Warren D. Lichty, Assistant Attorney General

In your letter of May 22, 1991, you inquired whether our Opinion No. 125 dated October 2, 1970, has application to the current proposal that your Department donate certain lands belonging to it in fee simple, to be used by a private agency for a museum. Specifically, you ask whether the Department of Roads may transfer excess State highway right-of-way to the City of Lexington, Nebraska for no consideration.

We believe such a transfer could be accomplished. However, to do so, the Department would need specific legislative authorization which would address the statutory prohibition against conveyances of real property for no consideration by the Department.

Neb.Rev.Stat. §39-1325 (Reissue 1988) provides:

> The department shall have the authority to sell and convey, with the approval of the Governor, any part of or any interest in real property held by the department which is no longer deemed necessary or desirable for highway purposes. <u>The sale or conveyance of such real property shall be in such manner as will best serve the</u>

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> interests of the state and will most adequately conserve highway funds.

Neb.Rev.Stat. §39-1326 (Reissue 1988) provides the procedures to be used in such sales, and concludes:

> . . . All money received from the sale of such property shall be deposited in the state treasury and credited to the Highway Cash Fund.

In Patteson v. Johnson, 219 Neb. 852, 367 N.W.2d 123 (1985), our Supreme Court states at page 859:

> The Board of Educational Lands and Funds in leasing school land is limited by the authority granted it by the Legislature. It has no other power.

We believe it goes without saying that the Department of Roads of the State of Nebraska, which is a code agency, has only such powers as are given it by the Legislature. And the only powers given the Department of Roads to dispose of land owned by it in fee simple are contained in Neb.Rev.Stat. §§39-1323.01, 39-1325, and 39-1326 (Reissue 1988). All of these sections speak of the Department receiving money in consideration for such leases or sales.

In State ex rel. Brownell Bldg. Co. v. Cochran, 113 Neb. 846, 205 N.W. 568 (1925), it was held:

> Executive state officers have no general authority to enter into executory contracts thereby binding the state, and the state is not bound by contracts made by them in excess of their authority.

It would appear therefore, that the Department of Roads, having no authority to donate the ownership or use of any property which it owns in fee simple to anyone, may not do so without specific legislative authorization. LB 500 authorizes the conveyance of the property in question from the Game and Parks Commission to the Department of Roads, but does not authorize the Department of Roads to make the proposed conveyance to the City of Lexington.

You have asked whether our Opinion No. 125 dated October 2, 1970, applies to the aforesaid situation. While the greater part of that opinion deals with the disposition of property not owned in fee simple absolute, we believe that portion citing sections 39-1325 and 39-1326 is applicable.

You also inquire whether, because of the 90/10 funding, the State could sell the property for 10% of its value if the federal government waived its 90% reimbursement right. We believe the federal government's rights to 90% of the market value proceeds after disposition of the land are immaterial in this instance. The Department of Roads is the absolute owner of this property. In other words, it has the entire right and benefit in and to a property valued at 100% of its value.

In addition, and perhaps more importantly, the letter you provided from the Federal Highway Administration (FHA) to Senator Kerrey dated May 10, 1991, states the FHA would, as a condition to its approval of the transfer, require the Department of Roads to waive its claim to any payment under 49 C.F.R. §18-311(c)(3). As stated above, Nebraska law requires the Department of Roads to convey property in a manner which would most adequately conserve highway funds.

We have no desire to impede the transfer of the property in question for development as a museum site. Our analysis is based on the clear language of §39-1325. We suggest that if a transfer of the property is desired, the Department is authorized under §39-1323.01 to enter a lease with purchase option agreement with the City of Lexington at full market value. A lease or sale for no consideration would require additional legislative action and should take into consideration the requirements of the Federal Highway Administration so the Department of Roads is not penalized.

Sincerely yours,

DON STENBERG
Attorney General

Warren D. Lichty
Assistant Attorney General

APPROVED BY:

Attorney General

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