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309 I. O. O. F. BUILDING - BROADWAY AND OAK STREET - TELEPHONE 4-1437
EUGENE, OREGON

November 8, 1954

SUMMARY OF MEMORANDUM

With respect to the limitations of O.R.S. 275.330:

(a) A special or general election by the voters of Lane County authorizing disposition of the property in question would release the County from the action of the County Court of Dedember 7, 1854.

(b) An absolute gift of the property or a lease for nominal consideration is permissible where a public purpose is the motivation for the transaction.

(c) A 99-year lease at reasonable rental is not prohibited by this statute, but this office advised that it would be wise to obtain a declaratory judgment in this regard before substantial expenditures are made.

(d) There are possibilities for joint agreements between the County and the City which may or may not evolve a transfer of interests in the land by virtue of the statutory permission given in O.R.S. 190.010 and 190.040.

With respect to limitations in the Mulligan Deeds:

(a) It is the opinion of this office that the language used in the Mulligan deeds is non-restrictive in nature, and that claims asserted on the basis of this language could be successfully defeated should litigation arise.

Respectfully submitted,

/S/ Eugene C. Venn

EUGENE C. VENN, District Attorney

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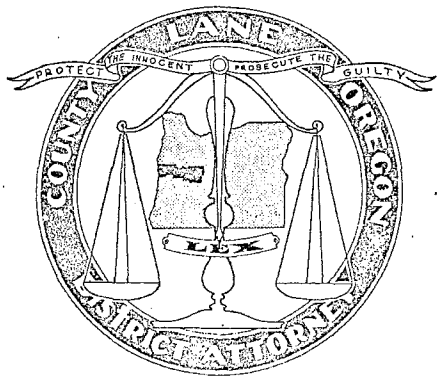

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EUGENE, OREGON

November 8, 1954

Lane County Board of Commissioners
Courthouse
Eugene, Oregon

Gentlemen:

At your request this office submits herewith this memorandum regarding possible allocation of County property to the City of Eugene to be used in connection with a proposed City Library, the specific property being the Southeast Park block located in the public square.

At the present writing this office is not advised of any specific plan or proposal regarding this matter. This memorandum, therefore, embraces only the general problems which will confront the governmental agencies involved in future planning. Be advised at the outset, however, that this office is of the opinion that a workable plan can be effected, though the form of that plan must be left to future study and deliberation.

1. The State of Oregon has upon its books legislation relating to the limitation of the power of alienation by the county in certain situations. One such piece of legislation is C.R.S. 275.330. This statute cannot be assumed to be obsolete nor forgotten, since the legislature has dealt with it by way of amendment as recently as the 1951 session.

The statute provides, in part:

> "(1) Upon the entry of an order by the county court setting aside the real property for county forest, public park or recreational area, the lands shall be set apart for such use and thereafter may not be <u>alienated</u> by county court for any purpose unless authorized by a majority of the voters of the county in a regular or special election, <u>except</u> that the county court may convey the lands to the state, or an incorporated city or town or the United States Government <u>for public use; provided</u> that such conveyance may be made without the payment of compensation,. . ." (Then follows provisions for relief from taxation of lands so conveyed and providing for agreements as to management of timber lands. Section (2) relates to procedures of the court as to publication of notice, hearing and orders.)

It appears that on December 7, 1954, the county court, consisting of the three county commissioners, did cause an order to be entered setting aside the particular

area as a park and recreational area. Assuming that the 1854 proceedings are legally unimpeachable, the statute has apparent application to the problem at hand.

(a) A special or general election by the voters of Lane County authorizing disposition of the property in question would release the county from the 1854 order and the apparent restrictions of the statute.

(b) A deed without consideration, i.e., a gift of the property to the City is permissible where a public purpose is the motivation of the transaction.

2. The question arises as to whether or not some transfer of an interest in the property in question can be accomplished whereby the county can receive reasonable remuneration.

This office calls your attention to the term "alienated" in the statute. While there is no case reported from the Oregon Supreme Court interpreting this term, or any other term of the statute, and while there is no comparable legislation in other states which has received judicial interpretation, the word "alienate" has been interpreted in slightly different contexts by the courts in other states. These cases indicate a positive split of authority as to the proper interpretation of the word "alienate" as it may appear in deeds, wills, corporation charters, ordinances or statutes. Some of the cases adhere to the proposition that "alienation" contemplat an absolute surrender and parting of title to the property, and acts short of such divestment of title, while they are usually accomplished by some form of conveyance, are not properly denominated as an "alienation".

Hubbell v. Hubbell, 113, N.W. 512, 515, 135 Iowa 687
Stark v. Duvall, 54 P. 453, 454, 7 Okl. 213
Gould v. Head, 41 F. 240, 245.
Orell v. Bay Mfg. Co., 36 So. 561, 563, 83 Miss. 800, citing Stark v. Duvall.
Contrary authority holds that an alienation results from any voluntary transfer of an interest in land, as distinguished from transfers by operation of law, as, for example passing of title by testate or intestate succession. Rabbbun v. Allen, 7 A2d 273, 275 63 R.I. 109, and others.

(a) From the foregoing authorities it is concluded by this office that an absolute deed giving all right, title and interest, or a free-hold interest, to the grantee must be done by way of a gift and for a public purpose as indicated in 1.(a) above, but that a lease was not intended by the legislature to be an "alienation". Consequently a lease for an extended period of time may be permissible under the statute even though the county receives valuable consideration and remuneration for such lease.

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3. Your attention is next invited to the term "conveyance" used in the "exception clause" and the "proviso clause" of the statute under consideration. Here the legislature has departed from the use of the term "alienated" and employed the term "conveyance" and the question is presented whether, in doing so, the legislature intended to include leases as well as deeds within the prohibition of the statute.

The Oregon Supreme Court has enunciated the rule of law that a lease is a conveyance of lands and tenements by a person for life or years and may be conveyed by deed. (122 Or. 285, 1927). This proposition is recognized in the discussion above with respect to the term "alienated" wherein it is acknowledged that a lease may be done by conveyance and still not amount to an alienation.

But a lease is also a contract, and it is a fundamental proposition of law that it must be supported by consideration to have binding legal effect.

Young v. Neill et al, 190 Or. 161
Bevan v. Templeman et al, 145 Or. 279, 289
Bingham v. Honeyman, 32 Or. 129
Noyes v. Stauff, 5 Or. 129
Feaster v. Fagan, 113 N.W. 478, 135 Iowa 633
Ward v. American Health Food Co. 96 N.W. 388, 391, 119 Wis. 12

Thus, while a tenancy for years may be limited by deed, the landlord-tenant relationship has as one of its cardinal features, the return of consideration by the tenant, the City in this instance.

If the Oregon Supreme Court were to adopt this interpretation, the statutory interpretation as to the proviso clause would result in the conclusion that the legislature intended the terms "alienated" and "conveyance" in this statute to apply to total divestments of the County's interest in land, and not to leases, since the proviso is that the "conveyance" be without consideration. The legislature could not have intended the lease to be without consideration, since it would then be no lease at all. Consequently, the statute does not forbid a leasing agreement for valuable consideration.

(a) It is the opinion of this office, therefore, that a 99 years lease at reasonable rental is not prohibited by this statute but cautions that it would be wise to obtain a declaratory judgment of the rights of the parties before extensive expenditures are made.

4. You may also be advised that the position of the City and County in this matter may be strengthened by the fact that a beneficial public purpose is the objective of the proposals. Judicial favoritism for furthering a public purpose is commonplace. Illustrative of this is the dictum of the New York Court in discussing a lease of City lands in the face of a statute prohibiting "alienation";

". . . it cannot be accurately said that a lease of the public property specified in section 71 is void, if it necessarily carries out a public purpose authorized in any other section."

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Unfortunately, the Court saw no fundamental public purpose being served in the New York situation, which this office feels is contrary to the situation now at hand in Lane County.

5. If you choose to reject the plans suggested above, it might be well to consider the possibility of an over-all agreement between the City of Eugene and Lane County. By Statute, local governments are given authority to enter agreements for joing performance of functions.

Oregon Revised Statutes 190.010 provides:

"Municipalities, districts or commissions situated in any county or counties, may, whenever it is deemed for their best interests, enter into written agreements with such county or counties, or with each other, for the joint performance of any and all similar administrative functions and activities of their local governments through consolidated agencies, or by means of institutions, buildings, swimming pools or other recreational or educational facilities and equipment jointly constructed, owned, leased or operated."

Oregon Revised Statutes 190.040 provides:

"No agreement authorized by O.R.S. 190.010 shall be entered into for a period of more than two years from the date thereof; but such agreements may be renewed for a period of not exceeding two years at any one time. The limitation prescribed in this section is not applicable to contracts to jointly own, construct, maintain and operate public parks, athletic fields, swimming pools, other types of recreational or educational facilities and equipment or county and city governmental buildings."

These statutory provisions have not received judicial interpretation but merited the attention of the State Legislature as recently as the 1953 session.

(a) The possibilities of joint agreements with respect to this property and the proposed library for the City of Eugene are manifold under these statutory provisions. This office also feels that this express statutory authority to enter long term agreements between county and city with respect to educational buildings and other properties strengthens, if it does not certainly establish, the proposition that O.R.S. 275.330 was not intended by the legislature to apply to a leasing agreement.

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6. You have also inquired concerning the possible restrictions as to the use which the County can make of this property contained in the original deed to the Court from Charnel Mulligan and wife.

An examination of the deed on record shows the following as the only possible language in the deed which could be construed as a restriction:

> "Witnesseth: That the said party of the first part for and in consideration of the sum of one dollar to them in hand paid, the receipt whereof is hereby acknowledged and for the further consideration that Eugene City; Seat of Justice for said County of Lane has been located, partly thereon, have bargained and sold by these presents. . ."

The Oregon Supreme Court has adhered to the rule espoused by the great weight of authority in this country that restrictive covenants in deeds are to be strictly construed. The Court has said:

> "And an estate upon condition cannot be created by deed, except where the terms of the grant will admit of no other reasonable interpretation...Our conclusions on this point are strengthened by the fact that the appellants are invoking a technical rule of the common law, which rule has never been favored by the courts, but is always construed strictly."
> Raley v. Umatilla County, 15 Or. 180, 181.

The reason for this rule is that the courts abhor a forfeiture which would result if a restriction were allowed liberal interpretation.
See excellent analysis in Estates and Conditions Subsequent and Estates on Special Limitation, by Kenneth J. O'Connel, Professor of Law, University of Oregon, College of Law, 18 Oregon Law Review 63 at p. 76.

Of great importance also is the fact that the Mulligan deeds were granted for a public purpose. This circumstance has been taken by the Oregon Supreme Court as an indication that a forfeiture is not intended by conditional or limiting words in the deed. City of Portland v. Terwilliger, 16 Or. 465.

(a) It is the opinion of this office that the words quoted above from the Mulligan deeds is non-restrictive in nature.

(b) It is the opinion of this office that claims asserted on the basis of this language could be successfully defeated should litigation arise.

Respectfully submitted,

EUGENE C. VENN, District Attorney

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