RESOLUTION NO. 329

PURCHASE OF SILVER LAKE COMMUNITY CHURCH PROPERTY

RESOLVED, that the Board hereby approves the purchase of the property described on Exhibit A attached hereto and by this reference incorporated herein, otherwise known as the Silver Lake Community Church property upon and subject to the following terms:

1. The District shall pay the Church the purchase price of $110,000 in cash at closing (the purchase price has been adjusted to reflect fair market valuation for the one year of free rental and other agreements set forth below):

2. The Church shall be entitled to hold services in the Church on Sundays for one year after closing without payment of rent;

3. Agreement by the Church that the District can modify the downstairs and the large room upstairs in the Church beginning June 1, 1985 so that these rooms will be ready for classroom use by September 1, 1985;

4. The District shall authorize the Church for one year after closing to use Silver Lake Elementary on Sundays for Sunday school purposes only; and

5. Such other conditions as are deemed reasonable and not inconsistent with the foregoing to be included in closing documents by the District's attorneys and approved by Dr. Sjunnesen.

ADOPTED this 19th day of November, 1984.

ATTESTED BY:

Rudy P. Johnson
Secretary - Board of Directors

President - Board of Directors

Job No. 6890
November 29, 1977

EXHIBIT A

LEGAL DESCRIPTION
FOR
SILVER LAKE COMMUNITY CHURCH

(PROPERTY SOUTH OF EXISTING OWNERSHIP)

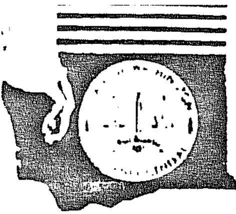
PARCEL A

The northerly 14 feet of the southerly 147.5 feet of the easterly 140 feet of the westerly 276 feet of the NW¼ of the SW¼ of Section 29, Township 28 North, Range 5 East, W.M.

PARCEL B

The northerly 24 feet of the southerly 157.5 feet of the westerly 136 feet of the NW¼ of the SW¼ of Section 29, Township 28 North, Range 5 East, W.M.
EXCEPT the westerly 30 feet thereof for County Road (19th Avenue).

KEGEL & ASSOCIATES, INC. P.S
9800 Highway 99 So.
Everett, WA 98204
(206) 353-1119



OF[illegible]E OF THE ATTORNEY [illegible]ENERAL
SLADE GORTON ATTORNEY GENERAL
TEMPLE OF JUSTICE OLYMPIA, WASHINGTON 98504

DISTRICTS--SCHOOLS--PROPERTY--LEASE OF SURPLUS SCHOOL DISTRICT PROPERTY

(1) Subject to the qualifications stated below, a school district may lease its surplus facilities, under RCW 28A.58.040, to private schools, profit or nonprofit organizations or other governmental agencies so long as the leasing thereof will not interfere with the building's use for school purposes and the tenancy to be granted will not place the facility beyond the control of the district in the event it again becomes necessary for school purposes.

(2) In all such cases some rental, either in money or something of equivalent value, must be paid; and with the exception of a rental to another governmental agency, that rent must be such as will (a) fully compensate the school district for its costs and expenses and (b) encompass the fair rental market value of the rented premises.

(3) If the lease is either to a church-related school or to a private group for the conduct of religious worship or instruction, the property being rented must be sufficiently remote from other property being retained for school purposes to avoid the appearance of an endorsement of the religious activities of the lessee and also prevent any sectarian influence of the remaining public school operations. In addition, a procedure, preferably involving competitive bidding, must be utilized in the formation of the lease which will assure that all prospective tenants, religious or otherwise, have an equal opportunity to rent the property.

- - - - - - - - - -

April 17, 1978

Honorable Ron Dunlap
State Representative, 41st Dist.
3129 - 109th S.E.
Bellevue, Washington 98004

Cite as:
AGO 1978 No. 10

Dear Sir:

This is written in response to your recent request for our opinion on several questions regarding the legal ability

of a school district to lease its surplus facilities to certain outside individuals or groups. Specifically you have asked:

1. To whom can districts rent or lease surplus space?

   (a) Private schools?
   (b) Church-related schools?
   (c) Profit-making organizations?
   (d) Non-profit organizations?
   (e) Governmental agencies?
   (f) Other groups?

2. How much must districts charge the groups named above for rental or lease payment?

   (a) An amount equal to the cost of operating the building?
   (b) Any amount agreeable to the parties involved?
   (c) Fair market value?
   (d) Other?

We respond to the foregoing questions in the manner set forth in our analysis.

ANALYSIS

Public school districts, as you know, may exercise only those powers which have been granted to them by the legislature, either expressly or by necessary implication. See, e.g., Seattle High School Ch. No. 200 v. Sharples, 159 Wash. 424, 293 Pac. 994 (1930); Juntila v. Everett School Dist. No. 24, 178 Wash. 637, 35 P.2d 78 (1934). Thus, the first inquiry to be made in responding to your questions is whether, and to what extent, the legislature has authorized school districts to lease their facilities either to other governmental agencies or to private individuals or organizations. And then, secondly, it will be necessary for us also to discuss certain applicable constitutional limitations because a school district, even in the exercise of an expressly granted statutory power, must obviously abide by the state and federal constitutions as well.

I. Statutory Authorization:

From your letter, with its emphasis upon the term "surplus," we understand your basic concern to be with the rental, to outside groups, of those public school facilities which, at least for the time being, are no longer needed for the conduct of the schools themselves. Thus we may, at the outset, merely make passing note of three statutes which appear to deal, instead, with the occasional rental or other outside use during nonschool hours of classrooms or other school facilities which are still in general use for school district purposes. The first of these statutes is RCW 28A.58.048 which provides that:

"Boards of directors of school districts are hereby authorized to permit the use of, and to rent school playgrounds, athletic fields, or athletic facilities, by, or to, any person or corporation for any athletic contests or athletic purposes.

"Permission to use and/or rent said school playgrounds, athletic fields, or athletic facilities shall be for such compensation and under such terms as regulations of the board of directors adopted from time to time so provide."

The second such statute is RCW 28A.58.105 which reads as follows:

"Every board of directors, unless otherwise specifically provided by law, shall:

"(1) Authorize school facilities to be used for night schools and establish and maintain the same whenever deemed advisable;

"(2) Authorize school facilities to be used for summer schools or for meetings, whether public, literary, scientific, religious, political, mechanical, agricultural or whatever, upon approval of the board under such rules or regulations as the board of directors may adopt, which rules or regulations may require a reasonable rental for the use of such facilities."

And the third statute of like import is RCW 28A.60.190, which deals only with second class school districts and provides that:

> "School boards in each district of the second class may provide for the free, comfortable and convenient use of the school property to promote and facilitate frequent meetings and association of the people in discussion, study, improvement, recreation and other community purposes. . . ."

The rental of surplus school facilities, on the other hand, is now covered - along with sales - by a somewhat more generalized statute, RCW 28A.58.040, which reads, in full, as follows:

> "The board of directors of each school district shall have exclusive control of all school property, real or personal, belonging to the district: said board shall have power, subject to RCW 28A.58.045, in the name of the district, to convey by deed all the interest of their district in or to any real property of the district which is no longer required for school purposes. Except as otherwise specially provided by law, and RCW 28A.58.045, the board of directors of each school district may purchase, lease, receive and hold real and personal property in the name of the district, and rent or sell the same, and all conveyances of real estate made to the district shall vest title in the district." (Emphasis supplied)

In the foregoing statutory context we would view the "rentals" which are thus authorized as being an alternative form of alienation of that property which is no longer (at least for the present) needed for school district purposes. Under the provisions of RCW 28A.58.040, supra, school districts may either sell such property (subject to the procedures contained in RCW 28A.58.045[1/]) or they may rent it - but unlike those short-term or occasional use rentals that are covered by RCW 28A.58.048, RCW 28A.58.105 or RCW 28A.60-.190, supra, the rental by a school district of its surplus property is not statutorily restricted by any listing of

---

1/ RCW 28A.58.045, to which reference is made in RCW 28A.58.040, supra, further regulates the sale of surplus real property by a school district but not its rental. Accord, letter opinion dated November 17, 1972, to then state Representative Al Williams, copy enclosed.

designated purposes. Cf., our previous letter opinion of February 24, 1959, to the Superintendent of Public Instruction, copy enclosed, at p. 6, where we likewise concluded that such express statutes as RCW 28A.58.048 and RCW 28A.58-.105, supra, do not impliedly negate the ability of a school district to rent surplus school property for other purposes - the point being that those statutes deal only with the rental of nonsurplus facilities for use during nonschool hours while both the implied authority which was found to exist in our earlier opinion and the express statutory authorization which now appears in RCW 28A.58.040, supra, relate to the rental of surplus school district property.2/

Insofar as it related to the rental of surplus school facilities this same 1959 opinion is also worthy of further note. The reason that it relied on the doctrine of implied authority in that regard was simply that RCW 28A.58.040, supra, did not then exist in its present form - that statute being a product of the legislature's later enactment of the present state education code in 1969.3/ Nevertheless, we there said that a school district could legally rent out its surplus buildings or the like for noncommercial purposes if:

> ". . . (1) the space is not required for school purposes; (2) the leasing or renting thereof will not interfere with the building's use for school purposes; (3) the tenancy to be granted . . . either by a lease or rent agreement will not be for an unreasonable term so as to place this portion of the building beyond the control of the district in the event that the same should become necessary for school purposes; (4) a reasonable rental charge is imposed for the use of the space by the [lessee] corporation."

To the extent that this prior opinion only sanctioned rentals for noncommercial purposes in accordance with those four criteria we think that it may, even then, have been more restrictive than necessary. And now, given the unqualified (as to purpose4/) express authorization of RCW 28A.58.040,

---

2/ See also, to the same effect, AGO 63-64 No. 111, a copy of which is also enclosed.

3/ See chapter 223, Laws of 1969, 1st Ex. Sess.

4/ Contrast, once again, RCW 28A.58.048, RCW 28A.58.105 and RCW 28A.60.190, supra.

40,
a
atec
cop

supra, it is most definitely our opinion, contrary to what we earlier concluded when dealing only with the implied authority of a school district, that if all four elements of the above-quoted text are present the rental may be for either commercial or noncommercial purposes. Basically, we are now persuaded that there is simply no good reason why a school board should be precluded from renting truly surplus property to an outside group even for a commercial purpose so long as the other factors which we identified in our 1959 opinion are all present. As the Idaho Supreme Court aptly observed in the recent case of Hansen v. Kootenai County Bd. of County Comr's, 93 Idaho 655, 471 P.2d 42 (1970):

> "The general rule that a municipality can lease its property to a private business when not needed for public purposes is supported by convincing rationale. There is no purpose in requiring property not needed for public use to lie idle when it could be leased, thus relieving the taxpayers of the cost of maintenance and upkeep on the property. . . ." 471 P.2d at 49. See also, Atlas Life Ins. Co. v. Board of Education, 83 Okla. 12, 200 P. 171 at 172 and 173 (1921)5/

With this one notable exception, however, we are otherwise of the view that what we said in the above-quoted excerpt from our prior opinion continues to reflect the current state of the law on the subject. To begin with, the first two elements of its four-pronged test are, of course, fairly obvious; i.e., the facilities being rented must be surplus and their rental must not interfere with the continuing use of possibly adjacent nonrented facilities for school purposes. Thirdly, however, since a rental rather than a sale is involved (even though the property is presently surplus) the school district must retain the right to terminate the lease and retake possession within a reasonably short period of time if, and when, the property is again needed for school purposes. See, e.g., Cottrill v. First Huntington Nat. Bank, 119 W. Va. 120, 192 S.E. 131 (1937), where the court invalidated a certain lease of vacant school district real property not so much because of the long-term (20 years) of the lease

---

5 See also, Winkenwerder v. Yakima, 52 Wn.2d 617, 624, 328 P.2d 873 (1958) and Com'l Waterway Dist. No. 1. v. King County, 200 Wash. 538, 560, 94 P.2d 491 (1939).

itself but because, in its judgment, a prior termination clause within the lease was too narrowly drafted with regard to both the reasons and the time period within which the school district could regain possession for school district purposes.

This brings us, then, to the fourth requirement which is that ". . . a reasonable rental charge is imposed for the use of the space by the lessee. . . ." But for reasons which will next be apparent this requirement, although also still valid, should more properly be discussed as a part of the next section of this opinion dealing with constitutional limitations - to which we now may turn.

II. Constitutional Limitations:

As heretofore explained a school district, in addition to its need for statutory authorization, is also subject to certain constitutional restrictions or limitations in the exercise of even its expressly granted powers. First and foremost of these restrictions is that contained in Article VIII, § 7 of our state constitution which says that:

> "No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation."

It is this provision which, by and large, constitutes the underlying basis for the fourth, or "reasonable rental," element to which we referred in our February 24, 1959 opinion to the Superintendent of Public Instruction, supra. What is constitutionally required in the case of any rental of school district property to a private person or organization (as earlier also explained in our letter opinion of November 17, 1972, to Representative Al Williams, supra) is that there be a sufficient rental imposed to avoid the possibility of an unconstitutional gift of the property involved - and merely because the parties have agreed to a certain rental amount does not necessarily mean that this amount is sufficient. Instead, what is required is that the public lessor receive a

rental amount which represents a fair return, under all the surrounding factual circumstances, for the use and occupancy, by the private person or organization involved, of the particular property. As a general rule this means, in the case of school district property, a rental rate based upon a consideration of at least (a) the additional expenses (e.g., utilities, janitorial services, administration and maintenance), if any, incurred by the district as a result of the rental and (b) the fair rental market value of the resulting use and occupancy, per se. We should further note, however, that the entire rental need not be paid to the school district in money. Thus, for example, a portion of the rental in a given case could be in the form of maintenance services, security, etc., that are provided by the private user and have a measurable value to the school district.

But what if the lessee, on the other hand, is another public agency; e.g., a county, city or town - or, perhaps, even another school district? In such a case a considerably greater latitude is available in fixing the rental rate because of the fact that, according to previous rulings by our state supreme court, Article VIII, § 7, supra, is inapplicable to purely intergovernmental transactions. See, e.g., Rands v. Clarke County, 79 Wash. 152, 139 Pac. 1090 (1914). Nevertheless, in our opinion, there still must be some monetary or other rental paid to the school district in such cases by reason of the fact that the applicable statute (RCW 28A.58.040, supra), in effect, says so. In other words, even though the constitution does not require some rental to be paid in the intergovernmental transaction context the statute does - because the authorization which is thereby granted is to "rent," and not merely to allow the free use of, surplus school district property. The practical result, however, in the case of an intergovernmental rental agreement is that the rental amount may thus legally be whatever amount the two governmental agencies involved agree upon.

In addition to the limitations imposed by Article VIII, § 7, supra, there is one other area of significant constitutional restraint upon the rental of property by a school district to be noted - particularly in the light of part (b) of your first question. That area is, of course, where the tenant or lessee is a sectarian religious organization of some kind. In such cases what we have said thus far with regard to

the rental of school district property to a private person or organization, generally, will apply as well. But in addition, it will also be necessary for the district in this situation to be concerned with the ramifications of what is commonly referred to as the "establishment" clause of the First Amendment to the United States Constitution[6/] along with Article I, § 11 (Amendment 34) of our state constitution which similarly provides that:

> ". . . No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: . . ."

Also of concern, in such cases, is Article IX, § 4 of our state constitution which further requires that:

> "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence."

While none of these constitutional provisions serve entirely to preclude the rental of school district (or other public) property to a religious organization they do impose very stringent restrictions on any such rentals. Thus, for example, in an opinion dated October 10, 1956, to the University of Washington (a copy of which is enclosed for your immediate reference), this office approved of the rental of the University's football stadium for the conduct of a religious meeting but solely on the basis of its being a "one time only" use - further conditioned upon the payment to the University of the fair rental value of the property. And similarly, in the more recent case of Pratt v. Arizona Board of Regents, 110 Ariz. 466, 520 P.2d 514 (1974), the supreme court of that state (under a virtually identical provision of the Arizona Constitution[7/]) likewise upheld the rental of certain state university property for a religious function (specifically, a Billy Graham crusade) only on the following limited basis:

6/ Applicable to the states through the due process clause of the Fourteenth Amendment.

7/ Arizona Constitution, Article II, § 12.

> ". . . the twin keys to the use of this stadium for the purpose stated are fair rental value and the occasional nature of the use. The lease to a religious group, on a permanent basis, of property on the University campus, for example, would be an entirely different matter because by the permanency of the arrangement, the prestige of the State would be placed behind a particular religion or religion generally. Also, the lease of campus facilities for occasional use, but not for fair rental value, would violate the provision of our Constitution as being an appropriation or application of State property for religious purposes."8/

This line of reasoning, however, has particular application to school buildings that are currently in use for the conduct of school district activities. In the case of such buildings (assuming the payment of a fair rent, a nondiscriminatory use policy and a separation of the religious activity from school district activities) the basic problem is that the conduct of a religious activity over an extended period of time may actually or by appearance unconstitutionally place the endorsement or prestige of the school district either behind a particular religion or behind religion, generally. But what if, instead, the buildings (as here) are surplus to the current needs of the school district and no longer in use by the district? In that situation, although we have found no decided cases directly in point, a slightly different analysis is conceivably in order.

To begin with, assuming that it obtains full market value, a school district clearly may sell its surplus property even to a religious organization, for there is nothing in either the federal or state constitution which precludes a church, for example, from purchasing either unimproved or improved real estate solely because that property is owned by a public agency. In fact, any reading of the constitution to the contrary - so as to discriminate against an

---

8/ 520 P.2d at p. 517. The amount of the rental, i.e., $39,995 for seven days, was not alleged to be less than a fair rental value.

otherwise competitive prospective purchaser merely because it is a church or religious in nature - would itself be highly suspect as constituting unwarranted hostility towards religion or an unconstitutional infringement upon the free exercise of religion which is guaranteed by the First Amendment to the United States Constitution, See, e.g., Niemotko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); and Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1951). As noted by the court in Zorach, at page 314, supra:

> ". . . Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. . . ."

But given that premise, may not the same conclusion logically follow also in the case of even a long-term rental of surplus buildings which lawfully could be sold, at least if certain additional facts are present. Suppose, for example, that a school district determines that a certain school building is surplus to its current needs because of a decline in student population. But because of an anticipated need for the building at some foreseeable point in the future the district decides simply to rent it out for, say, one year for the purpose of obtaining revenue for the maintenance of school district programs. Pursuant to the rental arrangement, the renter would have full control and possession of the building, and full responsibility for its maintenance. In order to insure the best possible rental return during this period the district, although not statutorily required to do so, then issues a call to the public for rental bids and, in response, the highest bid is submitted by a church organization which desires to use the building as a church school. It is then further determined that this use will not be associated in the minds of the public with the operation of the school district or result in sectarian influence within the public school system, because the building to be rented is separated geographically from any site upon which the school district conducts activities. Query: Under those circumstances is the

school district nevertheless constitutionally prohibited from accepting the bid and entering into the resulting rental agreement simply because the high bidder is a religious organization proposing to use the building as a church school? We do not think so.

In the case of nonsurplus property the problem, basically, is the appearance of an endorsement which is, at least, more pronounced in the case of a long-term lease than in that of a one time only or occasional rental. Once again, in the words of the Arizona court in Pratt v. Arizona Board of Regents, supra,

> ". . . The lease to a religious group, on a permanent basis, of property on the University campus, for example, would be an entirely different matter because by the permanency of the arrangement, the prestige of the state would be placed behind a particular religion or religion generally. . . ."

But where, instead, the property is both surplus and physically removed from other school district facilities this "appearance" factor would seem to us largely to disappear. True, the building would still be in public ownership under a long-term lease but that could also be so in the case of a "sale" in the event that, for example, the sale was made pursuant to an installment contract with title retained as security. Yet we have no doubt that such a sale would be constitutionally defensible.

On the other hand, if any of the critical elements of our above-stated hypothetical case were to be eliminated the result could well be different. For example, if the lease was negotiated privately rather than through a call for bids, with other potential lessees thereby being excluded, the essential neutrality required by the constitution might well be lost. And if the building in question were to be one located in close physical proximity to other structures to be retained for public school use, both the "endorsement" problem of the Pratt case, supra, and the "sectarian influence" factor under Article IX, § 1, supra, could possibly come into play. Therefore, in the final analysis, what we are here attempting to sanction is, perhaps, a fairly limited approach. Nevertheless, it is one which, in our considered opinion, would be found by the courts to be acceptable for the above-stated reasons.

III. Application of Legal Principles to Questions Presented:

In closing let us attempt briefly to apply the various legal principles which we have heretofore established to the specific questions which you have asked and, thereby, answer those questions:

(1) Subject to the qualifications stated below, a school district may lease its surplus facilities, under RCW 28A.58.040, supra, to any of the entities listed in your first question (i.e., private schools, church-related schools, profit or nonprofit organizations or governmental agencies) so long as the leasing thereof will not interfere with the building's use for school purposes and the tenancy to be granted will not place the facilities beyond the control of the district in the event they again become necessary for school purposes.

(2) In all such cases some rental, either in money or something of equivalent value, must be paid; and with the exception of a rental to another governmental agency, that rent must be such as will (a) fully compensate the school district for additional costs and expenses to the district that result from the use, and (b) encompass the fair rental market value of the rented premises.

(3) If the lease is to either a church-related school or to a private group for the conduct of religious worship or instruction, the foregoing requirement regarding the rental amount must first be met with particular care.9/ In addition, the property being rented must be sufficiently remote from other property being retained for school purposes to avoid the appearance of an endorsement of the religious activities of the

---

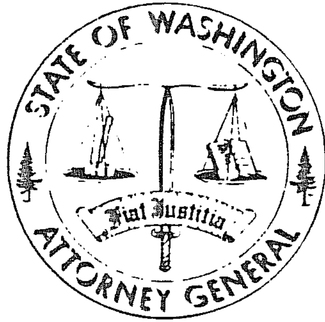
9/ The rental amount in the case of a rental to a private school subject to sectarian control or influence is of particular constitutional sensitivity. A series of state supreme court cases involving aid at public expense to sectarian schools teaches that so much as a small and indirect benefit to such schools at public expenses is prohibited. Most recently in Weiss v. Bruno, 82 Wn.2d 199, 509 P.2d 973 (1973) our court emphasized at page 206 that: ". . . There is no such thing as a 'de minimus' violation of article 9, section 4. Nor is a violation of this provision determined by means of a balancing process. The words of article 9, section 4 mean precisely what they say; the prohibition is absolute."

lessee and also prevent any sectarian influence of the remaining public school operations. And finally, a procedure, preferably involving competitive bidding, must be utilized in the formation of the lease which will insure that all prospective tenants, religious or otherwise, have an equal opportunity to rent the property.

Beyond this we can, in the abstract, say little more. In the final analysis, each case must depend upon its own peculiar facts - and each school district must similarly depend on the sound advice of its own legal counsel (either the prosecuting attorney of the county in which the district is located or such private counsel as has been retained for that purpose) with regard to the overall legality of a given proposal. We trust that you will understand and will nevertheless find the foregoing to be of assistance.

Very truly yours,

SLADE GORTON
Attorney General



PHILIP H. AUSTIN
Deputy Attorney General

ROBERT E. PATTERSON
Assistant Attorney General

mg

Enclosures