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OPINION	:	No. 80-613
	:	
of	:	<u>November 13, 1980</u>
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SUBJECT: REPURCHASE OPTION—Under a contract for the purchase of a school site in which the seller has an option to repurchase the property at a given price if the site is not used by a specified date for school purposes, the repurchase option is binding upon the school district.

The Honorable Milton Goldinger, County Counsel, Solano County, has requested an opinion on the following question:

Under a contract for the purchase of a school site in which the seller has an option to repurchase the property at a given price if the site is not used by a specified date for school purposes, is the repurchase option binding upon the school district?

CONCLUSION

Under a contract for the purchase of a school site in which the seller has an option to repurchase the property at a given price if the site is not used by a specified date for school purposes, the repurchase option is binding upon the school district.

ANALYSIS

The question presented for analysis concerns the purchase of a school site by the governing board of a school district. Specifically, we are asked whether the board is bound by a repurchase option given to the seller as part of the consideration paid for acquiring the property. The option is exercisable by the seller at a stated price for a fixed period of time if the board does not use the property by a specified date for school purposes. We conclude that the board may enter into such an acquisition agreement and that the repurchase option is binding upon the board.

The authority of a school district board to perform certain acts and carry out its various responsibilities has been the subject of numerous reported cases and opinions of this office. The precise issue at hand, however, has not been analyzed previously.

In the past, the courts have taken an extremely narrow view of the powers held by school district boards. (See *Hughes v. Ewing*, 93 Cal. 414, 417 (1892); *Uhlman v. Alhambra etc., School Dist.* (1963) 221 Cal. App. 2d 228, 234; *City of Oakland v. Oakland Etc., Sch. Dist.* (1956) 138 Cal. App. 2d 406, 409.)

This “limited authority” view was changed as a result of recent legislation implementing a new amendment to the Constitution. In 1972, section 14 of article IX of the Constitution was amended to read in part as follows: “The Legislature may authorize the governing boards of all school districts to initiate and carry on any programs, activities, or to otherwise act in any manner which is not in conflict with the laws and purposes for which school districts are established.”

In response to this constitutional authorization, the Legislature enacted what is now Education Code section 35160¹ to provide as follows: “On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.”

Pursuant to this broad grant of authority, our inquiry now is essentially limited to whether any law precludes the specific conduct in question. (See 60 Ops. Cal. Atty. Gen. 206, 207–208 (1977); 60 Ops. Cal. Atty. Gen. 177, 179–180 (1977).)

¹ All unidentified section references hereafter are to the Education Code.

In determining whether the granting of a repurchase option is (1) in conflict with any law, (2) inconsistent with any law, (3) preempted by any law, or (4) in conflict with the purposes for which school districts are established, we note first that acquiring a school site at the lowest possible price is consistent with school district purposes. Normally a repurchase option has a measurable value, allowing a reduction in the purchase price below the property's fair market value.²

In the example given, exercise of the repurchase option is dependent upon the school district's lack of use of the property for school purposes. Clearly, such a contingent contract right is not in conflict with the purposes for which school districts are established.

We can find no legal impediment to the granting of a repurchase option in the statutes dealing with the acquisition of school property. Indeed, section 39001 authorizes the board to "purchase or improve school lands," section 35270 allows a board to "select and acquire sites within the boundaries of the district," section 35271 grants authority to "acquire property, construct buildings, and maintain classes outside its boundaries on sites immediately adjacent to school sites of the district within its boundaries," and section 35270.5 provides that a "school district may acquire by eminent domain any property necessary to carry out any of the powers or functions of the district."

Clearly, these property acquisition statutes necessarily authorize the inclusion of a repurchase option provision in the school site purchase agreement. The authority to acquire property for a particular purpose ordinarily carries with it the right to agree upon the consideration for and the conditions of the conveyance. (See *Baker v. City of Palo Alto* (1961) 190 Cal. App. 2d 744, 757.) A condition, for example, in a deed conveying a school site which reverts title to the grantor if the site is not used for school purposes is enforceable against the school district. (See *Walton v. McPhetridge* (1898) 120 Cal. 440, 442–443; see also *Cherokee Valley Farms, Inc. v. Summerville Elementary Sch. Dist.* (1975) 30 Cal. App. 3d 579, 587–589; *Alamo School Dist. v. Jones* (1960) 182 Cal. App. 2d 180, 183–190; *Savanna School Dist. v. McLeod* (1955) 137 Cal. App. 2d 491, 494–496; *Haswan v. Union High School* (1926) 76 Cal. App. 629, 634.) Similarly, a repurchase option given as part of the consideration for a school site should be considered as within the powers of a district board under the circumstances presented herein. (See *Modesto I. Co. v. Modesto City School Dist.* (1931) 213 Cal. 410, 413.)

It has been suggested, however, that certain laws dealing with the disposition of school property would be violated by the inclusion of repurchase option in a contract for the acquisition of a school Site. Specifically, section 39360 provides:

² If the board were satisfied with paying fair market value, it could obtain the property through its power of eminent domain. (See § 35270.5; Code of Civ. Proc. § 1263 310.)

“The governing board of any school district may sell any real property belonging to the school district . . . which is not or will not be needed by the district for school classroom buildings at the time of delivery of title or possession. *The sale . . . may be made without first taking a vote of the electors of the district, and shall be made in the manner provided by this article.*” (Emphasis added.)

Among the provisions of the governing article (§§ 39360–39384) concerning the sale of school district property is section 39363.5, which provides as follows:

“Except as provided for in Article 2 (commencing with Section 39030) of Chapter 1 of this part, *the sale or lease with an option to purchase of real property by a school district shall be in accordance with the following priorities and procedures.*

“(a) First, *the property shall be offered for park or recreational purposes* pursuant to Article 8 (commencing with Section 54220) of Chapter 5 of Part 1 of Division 2 of Title 5 of the Government Code, in any instance in which such article is applicable.

“(b) *Second, the property shall be offered for sale or lease with an option to purchase, at fair market value;*

“(1) In writing, to the Director of General Services, the Regents of the University of California, the Trustees of the California State University and Colleges, the county and city in which the property is situated, and to any public housing authority in the county in which the property is situated; and

“(2) By public notice to any public district, public authority, public agency, public corporation, or any other political subdivision in this state, to the federal government, and to nonprofit charitable corporations existing on December 31, 1979, and organized pursuant to Part 3 (commencing with Section 5110) of Division 2 of Title 1 of the Corporations Code. Public notice shall consist of at least publishing its intention to dispose of the real property in a newspaper of general circulation within the district, or if there is no such newspaper, then in any newspaper of general circulation that is regularly circulated in the district. The notice shall specify that the property is being made available to all public districts, public authorities, public agencies, and other political subdivisions or public corporations in this state, and to other nonprofit charitable or nonprofit public benefit corporations.

“Publication of notice pursuant to this section shall be once each week for three successive weeks. Three publications in a newspaper regularly published once a week or more often, with at least five days intervening between the respective publication dates not counting such publication dates, are sufficient. The written notice required by paragraph (1) of this subdivision shall be mailed no later than the date of the second published notice.

“The entity desiring to purchase or lease the property shall, within 60 days after the third publication of notice, notify the school district of its intent to purchase or lease the property. If the entity desiring to purchase or lease the property and the district are unable to arrive at a mutually satisfactory price or lease payment during the 60-day period, the property may be disposed of as otherwise provided in this section. In the event the district receives offers from more than one entity pursuant to this subdivision, the school district governing board may, in its discretion, determine which of such offers to accept.

“(c) Third, the property shall be made available in writing to the former owner, in accordance with Section 39369.5.

“(d) Fourth, the property may be disposed of in any other manner authorized by law.” (Emphasis added.)

Giving effect first to the “exception” language contained in section 39363.5, we examine the provisions of section 39030:

“Notwithstanding the provisions of Article 4 (commencing with Section 39360) of Chapter 3 of this part and in addition to the requirements placed upon school districts pursuant to Section 54222 of the Government Code, the governing board of any school district *may sell, for less than fair market value*, any school site that is deemed to be surplus property of the district, to any park district, city, or county in which the school district is wholly or partially situated for use or partial use as park or recreational purposes or open-space purposes if the governing board adopts a resolution specifying that it will sell or transfer such property for less than fair market value to such an entity for such a purpose. The offer to sell shall be made in writing, but the terms by which the property may be sold or transferred need not be specifically provided.” (Emphasis added.)

Next, we follow the priorities listed in section 35363.5, which first require that the property be offered for sale pursuant to Government Code sections 54220–54225. (See also § 39360.5.) These provisions of the Government Code require a school district, among other local agencies, to dispose of surplus land as follows:

“Any agency of the state and any local agency disposing of surplus land shall, prior to disposing of such property, notify in writing the following entitles of their intent to dispose of the property and *offer such land for park or recreational purposes or for open-space purposes to the following entitles at fair market value* prior to disposal.

“(a) To any park or recreation department of any city within which the land may be situated.

“(b) To any park or recreation department of the county within which the land is situated.

“(c) To any regional park authority having jurisdiction within the area in which the land is situated.

“(d) To any local agency, redevelopment agency or housing authority within which the land is situated.

“(e) To the State Resources Agency or any agency which may succeed to its powers.” (Gov. Code § 54222; emphasis added.)

If the application of Government Code section 54222 does not result in the sale of the property, other governmental agencies must be given the opportunity to purchase it pursuant to subdivision (b) of section 39363.5.

After these provisions have been followed, the former owner of the property may be entitled to repurchase it when the school district board issues notices to the public and accepts the highest net bid of a responsible person. (See §§ 39366–39369, 39371–39377; *Al J. Vela & Associates, Inc. v. Glendora Unified School Dist.* (1980) 108 Cal. App. 3d 444, 449–450; *Uhlmann v. Alhambra etc., School Dist.*, *supra*, 221 Cal. App. 2d 228, 234.) Section 39369.5 provides:

“(a) In the event that the governing board of a school district, intends to sell real property pursuant to this article, the former owner from whom the district acquired the property shall be accorded the right, prior to the final acceptance of bids, to purchase the property at the tentatively accepted

highest bid price.

“(b) At any time after the notice of meeting given pursuant to Section 39369, and prior to the date of such meeting, the prior owner from whom the district acquired the property may submit to the governing board written notice of intention to purchase the property at the tentatively accepted highest bid price. Such notice does not constitute an offer to purchase.

“(c) Bids, both written and oral, shall be submitted and acted upon by the governing board in the manner otherwise prescribed by this article, except that the acceptance of a bid shall be tentative only, subject to the right of the former owner to purchase the property.

“(d) Upon receipt of bids, the governing board shall offer to sell the property to the former owner at the tentatively accepted highest bid price, subject to the terms and conditions of sale initially fixed by the board.

(e) In the event that the former owner rejects the offer, the governing board shall sell the property to the highest responsible bidder, by final acceptance of the bid theretofore tentatively accepted.”

Hence, the Legislature has given former owners of school property special consideration in repurchasing their former property.

The situations involving the sale of surplus school property to other governmental entities or to the highest bidder can be distinguished, however, from the situation where a repurchase option is contained in the contract acquiring a school site. We do not believe that the statutes dealing with the disposition of school property limit the scope of the statutes authorizing the acquisition of school sites where the purposes served by the two statutory schemes are different. (See *California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 846; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

It would not appear reasonable to construe the property disposition statutory scheme in a manner that would penalize school districts. If a district can acquire a school site for less than its fair market value by giving a repurchase option, the disposition statutes should not require otherwise. These statutes are applicable where the district acquires full title to property without restrictions of any sort. (See §§ 35273–35274.) Nothing in these statutes indicates that a district is required to obtain full title so that something remains for disposition after the site is no longer needed or used for school purposes.

The acquisition statutes, on the other hand, authorize the purchase of what is necessary for the use and benefit of the district. An agreement to reconvey property when it is not needed for school purposes given is part of the consideration for its acquisition carries out this legislative purpose and cannot be said to be inconsistent with the purposes of the disposition statutes.

Knowing of no other statutes that would be violated under the circumstances considered herein, we conclude that a contract for the purchase of a school site containing an option to repurchase the property at a given price if the site is not used by a specified date for school purposes is binding upon the school district.
