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1. AGRICULTURAL SOCIETY, COUNTY — MAY ACQUIRE FAIR GROUND SITE BY APPROPRIATION PROCEEDINGS —LEASE BETWEEN OWNER AND COUNTY COMMISSIONERS—SECTION 9885-1 G.C.
2. IF ISSUE PRESENTED TO COURT OF EQUITY IN INJUNCTION PROCEEDINGS, COURT AUTHORIZED TO MAKE INDEPENDENT EXAMINATION —QUERY, REAL AND SOLE PURPOSE OF PROCEEDINGS OF AGRICULTURAL SOCIETY TO OBTAIN FINANCIAL BENEFIT UNRELATED TO SERVICE OF PUBLIC NEED.

## SYLLABUS:

1. A county agricultural society, under the provisions of Section 9885-1, General Code, may properly acquire through appropriation proceedings a fair ground site of which it is presently in possession by virtue of a lease to which the owner of such site and the county commissioners are parties.

2. If the issue is properly presented to a court of equity in injunction proceedings, such court would be authorized to make an independent examination of the propriety of an agricultural society's determination to acquire through appropriation proceedings a fair ground site, of which it is presently in possession under a lease by the county commissioners, to ascertain whether the real and sole purpose of such proceedings is to obtain a financial benefit unrelated to the service of the public need.

Columbus, Ohio, February 25, 1952

Hon. Clark Wickensimer, Prosecuting Attorney  
Fayette County, Washington C. H., Ohio

Dear Sir:

Your request for my opinion reads as follows:

“A tract of land which has been improved and used as the Fayette County Fair Grounds is under lease at a substantial annual rental to the Board of County Commissioners of Fayette County for a term of twenty years, beginning January 1, 1951, and ending December 31, 1970, with a provision that it may be sublet to an agricultural society for a county fair. Please advise me whether the Fayette County Agricultural Society, which is a county agricultural society organized under the laws of Ohio, may

procure a fee simple title to this site by appropriation proceedings, if

“(1) The said Agricultural Society decides that it is necessary in its opinion to procure the said site, and

“(2) It is unable to agree with the owners on a price therefor.

“I am assuming that if any such action were taken by the Agricultural Society, it would be done regularly and in good faith. However, please also advise whether in such event the opinion of the Agricultural Society is subject to further independent examination with respect to its correctness or the existence of the necessity to procure the site.

“I realize that if the fee may be so appropriated by the Agricultural Society, it might still be subject to the lease to the Board of County Commissioners. However, for the purpose of your opinion, please do not give significance to this fact unless the existence of the lease would bar such appropriation proceedings regardless of what action the Board of County Commissioners might take in sympathy with the desire of the Agricultural Society to obtain the fee.”

The appropriation of private property by agricultural societies in the exercise of the right of eminent domain is provided for in Section 9885-1, General Code. This section reads:

“When it is necessary in the opinion of any county agricultural society to procure or enlarge any site for the purpose of holding an agricultural fair, and the agricultural society and the owner of the property needed for such purposes, are unable to agree upon the sale and purchase thereof, the agricultural society shall make an accurate plat and description of the parcel of land which it desires for such purposes, and file them with the probate judge, or with the court of common pleas in the county in which the land sought to be taken is located. Thereupon the same proceedings of appropriations shall be had which are provided for the appropriation of private property by municipal corporations in Sections 3681 to 3697, both inclusive, of the General Code.”

It is appropriate to observe at this point that in Opinion No. 1008, Opinions of the Attorney General for 1946, p. 413, it was held that a county agricultural society was without power to acquire by condemnation proceedings premises of which it had present possession under the terms of a lease. This conclusion, however, was almost wholly based on the language in Section 9909, General Code, which limited the exercise

of the power of eminent domain by such a society to the acquisition of property "to enlarge the fair grounds under its control," there being no such element present in the factual situation there under consideration.

This section was repealed, however, in 1949, coincidentally with the enactment of Section 9885-1, which I have quoted above. The present statute contains no language of limitation such as that found in former Section 9909. Rather, in plain and unambiguous terms, it gives the power of eminent domain to any county agricultural society "to procure or enlarge any site for the purpose of holding an agricultural fair." In view of this general grant of power, I am of the opinion that the conclusion stated in the 1946 opinion, *supra*, is no longer tenable. Accordingly, I conclude specifically that a county agricultural society, under the provisions of Section 9885-1, General Code, may properly acquire through appropriation proceedings a fair ground site of which it is presently in possession by virtue of a lease to which the owner of such site and the county commissioners are parties.

Your second question relates to the possibility of a "further independent examination" of the propriety of the society's determination to acquire the fee in such site by appropriation proceedings while in possession thereof under a lease.

It is assumed that the lease here in question has been executed under authority of the provisions of Section 9887, General Code. This section reads in part as follows:

"In any county in which there is a duly organized county agricultural society, the board of county commissioners is authorized to purchase or lease, for a term of not less than twenty years, real estate whereon to hold fairs under the management and control of the county agricultural society, and may erect thereon suitable buildings and otherwise improve the same."

It is clear, where a lease has been executed under authority of this statutory provision, that the primary use of the property so acquired by the county commissioners is required by statute to be the provision of premises for the use of a county agricultural society. Thus, although such society is not technically a party to such contract of lease, it is plain that the society is the principal beneficiary of the contract, and it might well be said, therefore, to be the real party in interest so far as the lessee is concerned. This being the case, the argument could well be advanced that

any objection that could be raised against the county commissioners in an appropriation proceeding by them could be raised against such society as well.

The question thus arises whether the right of the commissioners to maintain such an action would be subject to the limitations noted in *Sargent v. Cincinnati*, 110 Ohio St., 444. The syllabus in that case is as follows:

"1. In a proceeding to assess compensation for taking private property by a municipality for waterworks purposes under favor of Section 3681, General Code, the only issue to be tried is the value of the property.

"2. In such case the question of the public need and the adaptability of the property to the intended use is a political question and not justiciable. If, however, the property sought to be appropriated is already used for the purposes intended, under rights granted by a valid perpetual lease in full force and effect, and the property owner desires to raise this issue, injunction will lie in an independent suit to determine whether the public need is being supplied.

"3. In such case the notice given to the property owner by Section 3680, General Code, does not afford the landowner an opportunity to have that issue determined in a judicial proceeding, and does not, therefore, afford a full, complete and adequate remedy."

In the opinion by Marshall, C. J., in the *Sargent* case, it was observed that:

"It is not claimed by the city that the owner is interfering with or limiting the use, or that the time will ever come when the city will be denied the use and occupation thereof for the purposes intended; but, on the contrary, with commendable frankness, counsel for the city have admitted that the property is less valuable at this time than it was when the lease was executed, and it therefore inferentially follows that the *real and sole purpose of this proceeding is to obtain a financial benefit which would have no relation whatever to the manner of serving the inhabitants of the city of Cincinnati with a supply of water.*"  
(Emphasis added.)

The writer then went on to say:

"The city of Cincinnati is in the full, free, undisturbed, uninterrupted possession of the property covered by its lease and may use the same for waterworks purposes forever. It has

entered into a legal obligation to pay to the successive owners the sum of \$2400 per annum. This obligation may not be impaired by any legislative or judicial proceeding. Without considering or deciding whether the city of Cincinnati may maintain a condemnation proceeding to acquire the reversionary interest upon the payment of an additional sum of money while at the same time recognizing its obligation to pay the rentals stipulated in its lease of May 6, 1869, we have reached the conclusion that upon the allegations of the petition in the instant case the city of Cincinnati should not further proceed in the pending compensation case."

It is obvious, of course, that the Sargent case may easily be distinguished from that here under study in that we are here concerned with a lease for a term of years rather than one in perpetuity. Despite this distinction, however, we can hardly ignore the clear indication in the opinion in this case that where the real and sole purpose of a proceeding in appropriation is to obtain a financial benefit which would have no relation to the furtherance of the purposes for which the property in question is to be used, the propriety of the determination of the appropriating agency to acquire such property will be subject to examination in injunction proceedings to ascertain whether the public need is being supplied.

This is not to say, of course, that in the situation you have described such purpose to obtain a financial benefit unrelated to the public need exists, or is even suggested. If it is the intention of the society, as has been indicated to me, to acquire merely the reversionary interest of the present owner, leaving such owner in the full enjoyment of his rights as lessor for the period of the lease, then it is difficult to understand how such a purpose to obtain a financial benefit could be asserted. If, however, it be the intention of the society to acquire an immediate estate in fee, including the rights of the present owner as lessor, then it is conceivable that such purpose might, upon full consideration of the facts, be found by a court of equity to exist. The possibility of the existence of such a purpose will more readily be appreciated by considering the nature of real property appropriation proceedings. In *Sowers v. Schaeffer*, 155 Ohio St., 454, the syllabus reads as follows:

"1. A land appropriation proceeding is essentially one in rem; it is not the taking of the rights of persons in the ordinary sense but an appropriation of physical property. In the event there are several interests or estates in the parcel of real estate appropriated, the proper method of fixing the value of each interest or estate is to determine the value of the property as a whole,

with a later apportionment of the amount awarded among the several owners according to their respective interests, rather than to take each interest or estate as a unit and fix the value thereof separately. The separate interests or estates as between the condemner and the owners are regarded as one estate. (In re Appropriation by Supt. of Public Works, 152 Ohio St., 65, approved and followed.)

"2. In a land appropriation proceeding, where there are several different interests or estates in the property, it is proper on direct examination to admit testimony as to the value of the individual structures, buildings and improvements on the property as well as the rental values thereof, the businesses conducted thereon and all special features relative to the property which may either enhance or lessen its value.

"3. The rule of valuation in a land appropriation proceedings is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted.

"4. Ordinarily, in fixing compensation for property taken by appropriation proceedings, the total award should not be less than the fair market value of the property to be appropriated but it cannot exceed the fair market value of the property as a whole even though there are various interests or estates in the property.

Under the application of these rules, it could conceivably happen that the present owner of land sought to be appropriated has made a lease of it at a rental very advantageous to himself and at such a rental price as would constitute a fair return on an investment clearly in excess of the present "fair market value of the property as a whole," regardless of the "various interests or estates in the property." In such case it must be obvious that if such lease is extinguished in appropriation proceedings, and the owner-lessor is limited in his compensation to such present fair market value, he will suffer a financial loss while the lessee will obtain a financial benefit in being relieved of an onerous contract.

Whether facts exist in the present case which would justify the intervention of a court of equity is clearly an issue which only such court can decide after a full examination of the whole matter. It would obviously be improper for me, as an officer of the executive department, to invade the province of the courts by undertaking to assemble all the facts of the matter and to express an opinion as to how a court would resolve such issue if properly presented to it. My advice to you on this

point, therefore, must be limited to the statement of my conclusion, in view of the rules stated in the Sargent case, *supra*, that if the issue is properly presented to a court of equity in injunction proceedings, such court would be authorized to make an independent examination of the propriety of an agricultural society's determination to acquire through appropriation proceedings a fair ground site, of which it is presently in possession under a lease by the county commissioners, to ascertain whether the real and sole purpose of such proceedings is to obtain a financial benefit unrelated to the service of the public need.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General