CITY OF FAIRBANKS
ALASKA
99701

CHARLES M. GIBSON
CITY ATTORNEY

BRETT M. WOOD
DEPUTY CITY ATTORNEY

HERBERT P. KUSS
DEPUTY CITY ATTORNEY

STEVEN J. BERGER
ASSISTANT CITY ATTORNEY

Legal Department
410 CUSHMAN STREET
FAIRBANKS, ALASKA 99701
907-452-1881

MEMORANDUM

TO: Honorable Mayor and members of the City Council

FROM: Herbert P. Kuss, Acting City Attorney HK

DATE: September 4, 1981

RE: Shoreway Drive Parking Lot; Ordinance No. 4027

Background

The Immaculate Conception Church has challenged the City's title rights to Shoreway Drive parking lot (hereafter "parking lot") as a result of the proposed lease under Ordinance No. 4027 to the Yarmon concern. Essentially, the church maintains that under a 1961 contract with the City it quitclaimed its interest in the parking lot (Exhibit A) in part upon the condition that the conveyance be valid for so long as the premises are used for public parking purposes."[1] The contract and

---

[1] The parties to the contract, i.e. City of Fairbanks, Catholic Bishop Vicarate of Northern Alaska, and the Sisters of Charity of the House of Providence, apparently desired to vacate Pennsylvania Avenue. Specifically, the Sisters planned to enhance the hospital facility to the east which required the vacation of Pennsylvania Avenue and the City needed substitute access to Shoreway Drive if Pennsylvania Avenue was vacated.

quitclaim deed (Exhibit B) were delivered into escrow with Title Insurance and Trust Company of Alaska with instructions that delivery of the deed to the City was to occur upon the vacation of Pennsylvania Avenue and a portion of Shoreway Drive.[2] Although an order of vacation for Pennsylvania Avenue was executed on January 8, 1963, no vacation of Shoreway Drive, or any portion thereof, ever took place, nor was the quitclaim deed ever delivered to the City out of escrow. As a matter of law, a lack of delivery presumably invalidates an otherwise valid conveyance. No one is quite sure why the escrow conditions were never executed by the escrow agent (considered the grantor's agent), but one may reasonably speculate that the Sisters had temporarily, at least, abandoned their hospital expansion plans and, therefore, their need for Pennsylvania Avenue. It is interesting to note at this point that the Sisters and Church received a windfall benefit under this bargain while the City received nothing in the exchange. In any event, it appears that further performance under the contract failed for lack of interest.

In 1963 the Sisters renewed their interest in enlarging their health care facilities, but needed financing to do so. At the same time, the City desired to realign North Cushman Street in order to join the unvacated portion of Pennsylvania (Illinois Street). The Church's interest in the venture appeared to be merged with that of the Sisters,

---

[2] It is significant to note that inconsistent with the escrow instructions the contract itself does not mention the vacation of a portion of Shoreway Drive.

viz: to upgrade and enlarge the health care facilities. To accomplish these objectives the parties executed a contract that involved various conveyances necessary to the realignment of north Cushman (Exhibit C). Relevant to this cause the Church agreed to convey a portion of Block 4 for the realignment (paragraph g). In consideration, the City agreed to convey certain land to the Sisters and in addition to discontinue the use of its parking lot on the bank of the Chena River upon the condition that the area be beautified by landscaping at the expense of the Sisters and the Church, and be converted into a park.

While the realignment of North Cushman Street took place the Sisters were unable to secure financing, and failed in their overall plan to expand the facilities and landscape Shoreway Drive. As a result the condition precedent to the City's abandonment of the use of its parking lot never occurred; in fact, use of the parking lot as such continues to this day. As that contract relates to this cause, the best which can be said of the Church's position is that it might have had certain enforceable rights had the Sisters converted the parking lot to a park. Understandably, failure of the hospital expansion plan provided little incentive to the Sisters to use the parking lot as a park, and efforts in that direction were abandoned. Had the Sisters been successful in their expansion plan, it was then proposed that a public parking area be established to the east of the expansion to replace the City's anticipated loss of use of its parking lot.

Analysis

The heart of the issue addresses what property interest, if any, the Church had at the time it quitclaimed its rights to the parking lot in 1961. If it had no legal interests, then it could quitclaim nothing to the City and portions of the 1961 contract which hinge on the sufficiency of this consideration are unenforceable. On the other hand, if it can be shown that the Church had a valid interest, whatever its nature, and despite the fact that the quitclaim deed was never validly delivered out of escrow, the character of that interest would be the same today as it was in 1961. Therefore, a trace of title to Shoreway Drive, in the perspective of historical events, is necessary.

Attached is U.S. Survey No. 2159 (Exhibit D), made by the U.S. Department of the Interior in 1934.[3] The Survey distinctly shows the interposition of Shoreway Drive to Block 4 -- the situs of the hospital and church. As described by the survey, the Sisters of Charity were conveyed title to Block 4 in 1939 by the townsite trustee for the townsite of the North Additon to Fairbanks (Exhibit E). The property conveyed was described as "All of Block Four (4)". Noteably, no portion of Shoreway Drive was conveyed to the Sisters.

---

[3] Although this area was not officially platted until 1935 it had been annexed by the City of Fairbanks with other adjacent properties in September, 1921.

Some time between 1939 and 1961 the Sisters conveyed a southwest portion of Block 4 to the Church. A title search of the grantor-grantee index for this period shows no recorded conveyance. This, however, may not be unusual under the circumstances considering the parties, their mutual denominational interests, and the probable assessment by the Church that it didn't need the protection which the recording system normally provides. It may suffice to conclude at this point that the Church acquired no greater property interest in the southwest portion of Block 4 than the Sisters themselves had.

However, having established that the Church had no cognizable property interest in Shoreway Drive as might have been conveyed to it by the Sisters, what interest, then, did the Church purport to quitclaim to the City in the 1961 contract which was never fully executed?

As best we can tell from an examination of the record, the Sisters and the Church likely felt they had a legitimate claim in the river accretions to Shoreway Drive. Apparently, between 1941 and 1960 the Chena meandered slightly southward at this portion of its course and left accretions to the northern banks. This, of course, broadened Shoreway Drive, particularly at that point where the Cushman Street bridge joined North Cushman Street, and later became a convenient parking place which through continued usage assumed its identity as a parking lot[4] for hospital and Church patrons. Thus, when in 1961 the

---

[4] A portion of the parking lot eroded during the 1967 flood but was filled by the City afterwards to its present form.

Church quitclaimed its interests in the parking lot it most probably enveloped accretions to Shoreway Drive. [5]

Property law clearly instructs that river accretions pass to the ownership of adjacent landowners. Neither the Church nor the Sisters can demonstrate that they have ever been landowners adjacent to the Chena River. Furthermore, as was similarly argued recently in Gregor v. City of Fairbanks, where the landowner in part claimed rightly to accretions of the Noyes Slough adjacent to a public right of way (Circle Avenue), the proposition that an intervening right of way owned by the public does not diminish the rights of property owners on the other side was clearly rejected by case law which treated public ownership no differently from private ownership in terms of rights to accretions. Any accretions to Shoreway Drive inured to the benefit of the City of Fairbanks.

If the City of Fairbanks owns Shoreway Drive in fee simple, then, of course, it may deal with the parking lot as it sees fit. It may sell, lease, use or otherwise hypothecate its interests accordingly. Thus, not unlike other municipal property held in a proprietary revenue generating capacity, lease of the parking lot is not beyond its chartered powers.

---

[5] To date, the Church itself cannot truly identify the interest it quitclaimed to the City, but simply assumes it was a fee simple interest in the parking lot.

Shoreway Drive has had two owners, namely: the United States and the City of Fairbanks. The United States, as a public entity, could not dedicate Shoreway Drive to itself, so its interests in streets and roadways in the Addition had to be fee simple. Remaining areas were subject to be homesteaded, and upon application could be conveyed by patent to successful applicants. When the City annexed the Addition in 1921, the fee simple interest of the United States to the streets and roadways in the Addition passed to the City as a matter of law. The fact that Shoreway Drive has at various times been referred to as a dedicated street does not alter its true status as fee simple property acquired by the City from the United States.

Nowhere does the record support the proposition that at the time the City entered into the 1961 contract with the Sisters and the Church, the City previously conveyed or vacated Shoreway Drive or any portion thereof. Therefore, in quitclaiming whatever interest the Church felt it had in Shoreway Drive, it in fact had no title or possessory interest and, therefore, nothing to convey. In terms of the contract itself, the Church's consideration was illusory because had the City timely (circa 1961-1963) sought specific performance to have the deed delivered out of escrow in order to realize the benefit of its bargain, it would have acquired no more than that which it already had: Shoreway Drive and its accretions.

In the final analaysis, therefore, if the Church claims a fee simple reversion to the parking lot upon the basis that the City

violated a condition of the quitclaim conveyance, it is clear that its interest in the lot can be no greater than the interest it initially quitclaimed -- which is nothing. We submit, therefore, that under facts known to us, the proposed lease of the parking lot (insofar as the City intends to lease property it owns) is valid and the probabilities good that the City would prevail in litigation with the Church over ownership to the parking lot.

HPK/bjw