



**Butte County Library**

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*Library Branches*

*Biggs | Chico | Durham | Gridley | Oroville | Paradise*

## MEMORANDUM

DATE: July 17, 2017

TO: Library Advisory Board Chair Marylou Johnson and members

FROM: Mel Lightbody, County Librarian

RE: No authorization to sign amended agreement with North Valley Community Foundation

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County Librarian Mel Lightbody and Administration Liaison MaryJo Alonzo met with Kathleen Kehoe Greeson, Chief Deputy County Counsel.

It was Counsel's opinion that the Library Advisory Board does not have the authority to sign any type of amendment to the Library Foundation endowment agreement with NVCF, much as the LAB has been told in previous opinions from Counsel.

There are a few reasons for this.

Before the Library Foundation dissolved its incorporation, it granted the right to direct the future disbursement of earnings of the endowment to the LAB. This is the *sole* power the LAB has with respect to the endowment. The LAB does not have the power to amend the agreement with NVCF, to make any changes regarding the principal of the endowment or to direct NVCF regarding the endowment.

The Library Foundation has dissolved its incorporation and no longer exists, so it cannot grant any additional authority to the LAB or enter into an amendment of the endowment agreement with NVCF.

Since the Library Foundation was a non-profit corporation, and has dissolved, the Board of Supervisors did not have and did not retain any of the powers or authority of the Library Foundation, and as a result, it cannot grant any authority to LAB or any other party with respect to the NVCF endowment.

The agreement must stand as originally written.

# INTEROFFICE MEMORANDUM



**Butte County Administration**

Phone: 538-7371

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TO: Bruce Alpert, County Counsel

FROM: Meegan Condon, Principal Management Analyst

SUBJECT: Library Endowment Agreement

DATE: October 22, 2007

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Per our conversation this morning I like to talk with you about the attached agreement between the North Valley Community foundation and the "Butte County Libraries of Biggs, Chico, Durham, Gridley, Oroville, and Paradise." However please note that the agreement was executed by the Butte County Library Foundation Board, which included Nancy Brower, and not the County.

**Question:**

I'd like to talk with you about who has legal authority from the County's perspective to amend the agreement so that Derek and I can work with North Valley Community Foundation to develop a more straightforward agreement that limits the County's role as a fundraiser and instead designates us simply as a beneficiary.

**Background:**

A number of years ago (before my time) the County received a grant to help with the creation of a Butte County Library Foundation. The Foundation was created as a legal entity and some funds for an endowment were raised, but ultimately the group turned over the funds they had raised to the North Valley Community Foundation who manages these sorts of funds for a large number of non-profits (they are the organization behind the recent "Annie B's" fundraising drive you may have seen in the media). At the same time as turning these funds over to the North Valley Community Foundation the Butte County Library Foundation passed a resolution (attached to the contract) indicating that the Butte County Library Advisory Board shall provide direction on how the earnings from the endowment are spent. After that point from a functional perspective the Library Foundation has ceased to exist even though legally it still exists.

I have a number of concerns related to this agreement. First and foremost I'm not clear that the Advisory Board is an appropriate body to provide direction on the endowment or if legally they can accept such responsibility without BOS action. Second, at this point since there is functionally no organization managing the fund and serving as a liaison to North Valley Community Foundation that responsibility has fallen to Derek Wolfgram and I don't think it's

appropriate for the County to be in a "fundraising" role; however it is to our benefit that this tool is out there. Finally I'm concerned about having a contract that the County is marginally responsible for or at least involved in that was entered into in perpetuity by a group that no longer functionally exists potentially limiting the ability for the contract to be amended.

I have talked with the executive director of the North Valley Community Foundation. She shares my concerns and has some ideas on better contractual structures for a Library endowment.



**OFFICE OF THE BUTTE COUNTY COUNSEL**

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**INTER-DEPARTMENTAL MEMORANDUM**  
CONFIDENTIAL-ATTORNEY CLIENT PRIVILEGE

**DATE: JANUARY 9, 2012**                      **OPINION No.11-379**

**TO: SHARI MCCrackEN, ADMINISTRATION**

**FROM: KATHLEEN KEHOE GREESON, DEPUTY COUNTY COUNSEL** *JK*

**SUBJECT: LIBRARY ENDOWMENT FUND QUESTIONS**

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**I. Questions Asked**

A. Does the County or the Library Advisory Board have any legal right, beyond authorizing distribution of earnings, to the principal in the endowment fund established by the Butte Libraries Foundation (a non-profit) with the North Valley Community Foundation?

B. Is the agreement entered into by the Butte Libraries Foundation and North Valley Community Foundation valid into perpetuity? If it is not, and one of the parties no longer exists (the Butte Libraries Foundation), who is considered the "owner" of the principal funds?

**II. Brief Answers**

A. No. North Valley Community Foundation holds the principal of the endowment fund in trust for the benefit of the Butte County Libraries.

B. Yes, probably. The terms of the agreement regarding the endowment fund are set and it would be difficult to change the current terms. Technically, there may not be an "owner" of the principal in the endowment fund.

**III. Factual Background and Analysis**

You have asked us to consider questions of ownership related to the Butte County Library endowment fund. On May 15, 2002, the Board of Directors of the Butte Libraries Foundation (the "Libraries Foundation") entered into an agreement entitled the Designated Endowment Fund Agreement between North Valley Community Foundation and Butte County

Libraries of Biggs, Chico, Durham, Gridley, Oroville and Paradise (the "Agreement").<sup>1</sup> You have provided us with a copy of two resolutions of the Libraries Foundation, both dated on or around May 15, 2002. The first resolution states that the Libraries Foundation entered into an agreement to transfer all existing cash to the North Valley Community Foundation ("North Valley") for "investment management purposes." The resolution specifies that separate funds will be established for each of the six libraries in Butte County. The second resolution states that the Libraries Foundation had entered into an agreement with North Valley for investment management purposes and future direction as to the disbursement of earnings from the endowment is vested with the Butte County Library Advisory Board. Both resolutions attach the Agreement.

The Articles of Incorporation of the Libraries Foundation were filed with the California Secretary of State on September 7, 1995. The Libraries Foundation was formed as a nonprofit public benefit corporation. The stated "specific and primary purpose" of the Libraries Foundation was to "assist the Butte County Public Libraries in providing free access to information, educational and recreational materials and lifelong learning opportunities to the diverse cultural, linguistic, urban and rural communities they serve." The Libraries Foundation was permitted to exercise "all rights and powers conferred on nonprofit corporations under the laws of the State of California," so long as such acts were not in conflict with the primary purpose of the Libraries Foundation. The Libraries Foundation has since dissolved and is no longer in existence.

You have also told us recently the Butte County Board of Supervisors gave the power to direct disbursement of earnings to the Library Advisory Board. Further, we understand that the process for disbursement of earnings is as follows: the Library Director provides the Library Advisory Board with proposals for utilizing the earnings of the endowment fund and the Library Advisory Board considers and approves the expenditures, which are then submitted to North Valley by the Library Director. North Valley then provides the earnings requested to the County for use as proposed in the Library. We consider your questions in turn below.

**A. The County and the Library Advisory Board do not have rights to the principal of the endowment fund.**

As a preliminary matter, we consider the definition of an endowment fund as it provides context for our analysis. California Probate Code section 18500 et seq., the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") governs the management of endowment funds. Section 18502 states that an "endowment fund" is defined as "an institutional fund... that under the terms of a gift instrument, is not wholly expendable by the institution on a current basis..." An "institutional fund" is defined as a "fund held by an institution exclusively for charitable purposes..."

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<sup>1</sup>The name of the agreement incorrectly identifies the Butte County Libraries of Biggs, Chico, Durham, Gridley, Oroville and Paradise as the "Donor." In fact, the Donor was the Butte Libraries Foundation. The agreement is not of the highest quality and lacks certain terms that are standard in agreements (termination, assignment, notice, etc.) We do not have a resolution of the Libraries Foundation approving the terms of the Agreement or authorizing the Libraries Foundation to enter into the Agreement, although this concern is somewhat diminished by the members of the board of the Libraries Foundation itself executing the Agreement.

In our case, the Agreement itself indicates that this is an endowment fund and only provides instructions for distribution of earnings, not principal. The recitals section of the Agreement states “The Foundation is willing and able to create this *endowment*...”[emphasis added] Section 2 of the Agreement states that the “primary purpose” of the fund is to support “the Butte County Libraries within the meaning of Code section 509(a)((1)...”<sup>2</sup> These facts together support the concept that the intention of the Libraries Foundation was to establish an endowment fund. This means that the fund is subject to the UPMIFA rules found in the Probate Code and limits what actions may be taken with respect to the funds. For example, UPMIFA restricts what actions the investment company may take with the principal and if the investment company were to propose changing any major terms of the endowment the courts or the Attorney General may become involved. By forming an endowment, the Libraries Foundation limited the control other parties might have over the principal amount.

You have asked us to consider whether the County in general or the Library Advisory Board in particular have any rights to control the principal of the endowment fund. All indications are that they do not. First, the endowment fund was established by the owner of the funds, the Libraries Foundation. The Libraries Foundation was a nonprofit corporation, an entity separate from the County, and it has dissolved and is no longer in existence. Second, prior to dissolving, the Libraries Foundation passed a resolution that stated (1) that all existing cash assets had been transferred to North Valley for investment management and (2) the direction of “*disbursement of earnings* from this endowment” is vested in the Library Advisory Board. This clearly indicates that the Libraries Foundation intended to provide the Library Advisory Board with control of the use of the disbursement of earnings of the endowment fund, but not the principal. The resolution clearly provides that the principal (“all existing cash assets”) was transferred into the care of North Valley. Therefore, there is no indication that the Libraries Foundation ever transferred any right to the principal of the endowment fund to the County or the Library Advisory Board. We note that the intended purpose of the endowment fund found in section 2 of the Agreement is “to provide support to the Butte County Libraries...to carry out its role and mission as described by its governing documents.” Although this does not provide a right to the principal of the endowment, it does ensure that the purpose of the investment (and therefore distributed earnings) are for the benefit of the Butte County Libraries.

**B. The Agreement may be valid into perpetuity, even without an “owner” of the principal.**

Generally, endowments are intended to be permanent. Section 18504(c) of UPMIFA states: “terms in a gift instrument designating a gift as an endowment, or a direction...in the gift instrument to use only “income,” “Interest,” “dividends,” or “rents, issues or profits,” or “to preserve the principal intact,” or words of similar import have...the following effects: to create an endowment fund of *permanent duration*...” [emphasis added] “As discussed above, the Agreement clearly states that it is an endowment fund, and indicates that *earnings* would be distributed (not principal). The Agreement supports the concept that Libraries Foundation

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<sup>2</sup> Section 5096 of the Internal Revenue Code defines charitable organizations.

intended to create an endowment, which based on UPMIFA as well as the language of the Agreement, would indicate the endowment was meant to be permanent.<sup>3</sup>

You have also asked us to consider whether there is an owner of the principal in the endowment fund. The restrictions placed on endowment funds indicate that the traditional concept of "ownership" may be less meaningful once funds are placed with an institution as an endowment. The Libraries Foundation dissolved and did not transfer rights to the principal to any party. There does not appear to be an "owner" of the principal. However, this seems a technical point since under the circumstances, North Valley is obligated to invest and manage the endowment funds for charitable purposes as required by UPMIFA. The County and the Library Advisory Board have the ability to determine (with some limitations, it must be for the benefit of the Butte County Libraries) how to use the earnings that are distributed by North Valley.

#### **IV. Conclusion**

The County and the Library Advisory Board do not appear to have rights to the principal in the endowment fund managed by North Valley. The Agreement is probably valid in perpetuity and there does not appear to be a technical owner of the principal. This is a less important point than if we were discussing a liquid cash asset, as the funds are held by North Valley and they have an obligation to invest and manage the assets for the benefit of the libraries pursuant to UPMIFA. If you have any questions or if we can provide any further assistance, please let me know.

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<sup>3</sup> Further, the terms of the Agreement do not provide for termination of the Agreement by the parties. The terms cannot be amended as Libraries Foundation no longer exists – however, we should consider that this might have been the intent of the parties and followed the requirements of UPMIFA.