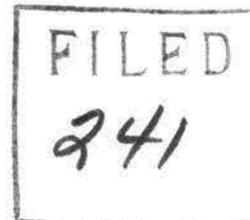


April 3, 1970

OPINION LETTER NO. 241

Honorable Omer H. Avery
State Senator, 21st District
102 Troy Building
Troy, Missouri 63379



Dear Senator Avery:

This letter is in response to your opinion request concerning Ordinance No. 525 of the City of Fulton, approved March 5, 1970, and dealing with the parks and recreation.

It is our understanding that your question is directed to the validity of the ordinance and, in particular, as to whether the ordinance is invalid for the reason that four members of the City Council are constituted voting members of the Commission on Parks and Recreation in addition to nine "citizen" members.

We will address ourselves to that particular question and not attempt to pass upon the entire ordinance in view of the apparent necessity for an early reply to your question.

First of all, we note, and it is clear, that Section 90.010, RSMo 1959, contains general provisions with respect to the establishment of city parks and authorizes the governing body of the city to acquire such property. Likewise, Section 77.140, RSMo 1959, with respect to third class cities authorizes the governing bodies of such cities to purchase, improve and regulate public parks.

The question has been raised concerning whether or not the provisions of the ordinance with respect to the city council members acting as voting members is in violation of Section 90.520, RSMo 1959.

Section 90.520, RSMo 1959, provides:

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"When any incorporated city or town shall have decided to establish and maintain public parks under sections 90.500 to 90.570, the mayor of such city shall, with the approval of the legislative branch of the municipal government, proceed to appoint a board of nine directors for the same, chosen from the citizens at large with reference to their fitness for such office, and no member of the municipal government shall be a member of the board." (Emphasis added)

The above cited section relates to cities having less than 30,000 population and second and third class cities. It is our understanding, however, that although the City of Fulton had a park board, such park board no longer exists and there was no vote with respect to a tax for public parks under Section 90.500. Although obviously the underscored portion of the provisions expressly excludes members of the municipal government, it appears from the facts that we have here that we are not concerned with that section.

Recreation systems of political subdivisions are authorized by the provisions of Sections 64.750, et seq. Section 64.765, RSMo Supp. 1967, provides:

"The governing bodies establishing a system of public recreation may conduct the same through any existing board or body or may establish a separate recreational board or commission, or park and recreational board or commission, and delegate thereto all administrative powers and responsibilities of the governing body under section 64.750 to 64.780. The board or commission shall consist of not less than five nor more than nine persons. Members shall be appointed by the mayor or other presiding officer of each governing body subject to confirmation by a majority vote of the governing body. Members shall serve for a term of five years or until their successors are appointed and qualified, except that members first appointed shall be appointed for such terms that the terms of not more than two of the members shall expire annually thereafter. Any vacancy shall be filled for the unexpired term in the same manner as an original appointment. Members of the board shall serve without pay. Within

*Transferred:
See 67.750
to 67.780
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fifteen days after their appointment they shall meet and organize by selecting one of their members as president and by the election of such other officers as they deem necessary. Subject to the approval of the governing bodies, they shall adopt and promulgate the rules and regulations for the conduct, administration and management of the public recreational program."

Section 64.750, RSMo Supp. 1967, containing definitions, states that "governing body" includes the city council. Under the above quoted Section 64.765, the governing bodies may establish a system of public recreation and may conduct the same through any existing board or body or may establish a separate recreational board or commission or park and recreational board and commission.

We take this to mean that the administrative board or commission designated by the council could be a park board if such a board had been created under the provisions of Section 90.520, and clearly, if there were such a board, no member of municipal government could be a member of such board.

The alternate provisions of Section 64.765 with respect to the establishment of a separate board or commission do not contain any specific provisions prohibiting a member of the municipal government from being a member of the board. We note, however, that such board or commission shall consist of not more than nine persons appointed by the mayor and subject to confirmation by a majority vote of the city council. Vacancies are filled in the same manner as original appointments, and the approval of the city council is required for the adoption and promulgation of rules and regulations.

In State ex rel Walker v. Bus, 135 Mo. 325, the Supreme Court held that incompatibility in offices existed where there is "some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him." Likewise, in State ex rel Smith v. Bowman, 170 S.W. 700, 184 Mo. App. 549 (1914), the Springfield Court of Appeals held at l.c. 702 that "it is against public policy to allow a body of public officials having the appointive power to fill an office to appoint one of their own number to such office."

Thus, we conclude that a member of the city council cannot be a member of a recreational board or commission or park and recreational board and commission established under Section 64.765.

In addition, it is quite clear that the provisions of the ordinance in question providing for thirteen members of such

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commission is in direct conflict with the provisions of Section 64.765 which limits the membership to nine persons.

We note at this time that Section 64.780, RSMo Supp. 1967, provides:

"The provisions of Sections 64.750 to 64.780 shall not in any way repeal, affect or limit the powers heretofore or hereafter granted to any county, city, township, village or school district, under the provisions of any charter or by law, to establish, maintain and conduct parks and other recreational grounds and public recreation."

As we stated earlier, the city council has the authority to establish and maintain parks pursuant to Sections 90.010 and 77.140. Under these sections, the city council has no power to delegate its legislative authority. In Ex parte Lockhart, 171 S.W.2d 660, 350 Mo. 1220 (1943), the Supreme Court held that a city council may authorize others to do things which the council might properly, but cannot understandingly or advantageously do. However, there is a clear distinction between legislative and ministerial powers in that the former cannot be delegated although the latter may. Neill v. Gates, 54 S.W. 460, 152 Mo. 585 (1899); State ex rel Pritchard v. Ward, 305 S.W.2d 900 (1957).

Inasmuch as certain sections of the ordinance clearly vest the Commission with "legislative" authority, such sections violate these fundamental principles.

We, therefore, are of the opinion that the ordinance is defective for the reasons stated.

Yours very truly,

JOHN C. DANFORTH
Attorney General

cc: Honorable W.C. Murphy
Mayor of Fulton
City Hall
Fulton, Missouri 65251