

January 30, 1973

OPINION LETTER NO. 14
Answer by letter-Wood

Mr. Joseph Jaeger, Jr.
Director of Parks
State Park Board
Post Office Box 176
Jefferson City, Missouri 65101



Dear Mr. Jaeger:

You have requested my official legal opinion on the following question:

"Does the Missouri State Park Board have the legal authority to lease certain lands under its jurisdiction and improvements thereon to a not-for-profit corporation on a long-term basis, i.e., 25 years with a 25-year option?"

You advise us that the Lake of the Ozarks Yachting Association, Inc. has approached the Park Board with a request to so lease the land and buildings known as the Camp Pa He Tsi area of Lake of the Ozarks State Park. It is our understanding that such lease would provide for periodic rental payments representing fair market value for the use of the land, transfer to the lessor of ownership of all improvements constructed by the lessee during the lease at the expiration or termination thereof, and exclusive use of the leased premises by the lessee during the currency of the lease subject only to reasonable supervision and inspection by the lessor.

The Lake of the Ozarks Yachting Association, Inc. was incorporated by pro forma decree of the circuit court of Miller County, Missouri, on or about June 24, 1953, pursuant to the law relating to Religious and Charitable Associations, Chapter 352, RSMo. The objects and purposes of the corporation, as stated in its articles of association, are:

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"1. To promote safety and to increase respect for Pilot Rules on the Lake of the Ozarks.

"2. To promote and encourage the racing and cruising of yachts and motor boats and to develop interest in boating in general upon the Lake of the Ozarks.

"3. To establish and enforce uniform rules for the government of all Association sponsored races, cruises and other activities in which two or more craft shall compete or take part.

"4. To instruct and educate members of the Association and the general public in the operation of boats and other watercraft upon the Lake of the Ozarks.

"5. To promote and carry on activities which shall be beneficial to yachting and to the development of recreational activities upon the Lake of the Ozarks."

In our opinion, the only statutory basis for the proposed lease would be that contained in the following statute:

"2. The park board may award by contract to any suitable person, persons, corporation or association the right to construct, establish and operate public services, privileges, conveniences and facilities on any land, site or object under its control for a period not to exceed twenty-five years with a renewal option, and may supervise and regulate any and all charges and fees of operations by private enterprise for supplying services and operating facilities on state park areas."
(emphasis ours) Section 253.080(2), RSMo

We believe this statute authorizes the Park Board to enter into agreements for the operation by private corporations of park lands and improvements only so long as such remain open to and accessible to the general public. It does not, in our opinion, authorize the Park Board to grant leases of park lands to private corporations so that such may be used exclusively by the private corporation and its invitees. The Lake of the Ozarks State Park

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is owned by the state of Missouri pursuant to a conveyance from the United States in 1946 based upon an Act of Congress dated June 6, 1942 (56 Stat. 326; 16 U.S.C.A. §459r). This Act of Congress, in providing for the conveyance of "recreational demonstration projects" to the various states, stipulated that the grantee states "use the property exclusively for public park, recreational, and conservation purposes." (56 Stat. 327; 16 U.S.C.A. §459t; emphasis ours). The ensuing deed executed by the Secretary of the Interior expressly conditioned the conveyance upon the state of Missouri's use of the property "exclusively for public park, recreational, and conservation purposes." (emphasis ours).

We have found this definition of the term "public park":

". . . But, in the idea of a public park is comprehended more, than a use, either occasional or limited by years, or susceptible of coexistence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land, to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed, and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them, as that there is need of permanency and exclusiveness of public possession and control, as against the exercise of any private right therein. . . ." The Brooklyn Park Commissioners v. Armstrong, 45 N.Y. 234, 240 (N.Y. 1871)

As thus understood, we do not feel that the state of Missouri could fulfill its commitment to use the Lake of the Ozarks Park exclusively for "public park" purposes by leasing a portion of it for up to 50 years to a private corporation.

The courts of other states have ruled upon questions very similar to the one you present us. In one such decision, the Nebraska Supreme court held invalid a city's agreement granting a private association the exclusive use and control of the city owned race track, grandstand, and accompanying grounds for a period of 25 years. The court observed:

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"If a race track, for holding race-meets, is a proper improvement for a public park, it must be under the control of the park commissioners of the city. The city had the right to acquire the lands for a public park. When so acquired it must be used for a public park, and the public must be allowed access thereto, subject only to rules and regulations made by the board of park commissioners and ordinances of the city. Neither the park commissioners nor the city have authority to delegate to, or share with, appellees herein, or any person, the making of rules and regulations governing the control of its public park. Neither the park commissioners nor the city had the power to grant to appellee the exclusive use and control of said race track.

* * *

"The city had power to grant to appellee a license or concession to hold in said park race-meets, for short periods of time, for the entertainment of the public, the same as it might grant a concession for providing refreshments or any other amusement for the public. . . . A city has no power to grant a concession in its public park or public property without reserving to its proper officers the power of supervision and control of the use of the park for the benefit of the public." Nebraska City v. Nebraska City Speed & Fair Ass'n., 186 N.W. 374, 376-377 (Neb. 1922)

An Illinois Court of Appeals struck down a lease granted by the Chicago Park District to a not-for-profit corporation organized to promote the sport of shooting and to conduct and maintain a shooting club.

"The lease granted to plaintiff what was tantamount to an exclusive use of a portion of a public park, since it could under the terms thereof effectually bar the general public from the use of its club house and its shooting facilities. . . ." Lincoln Park Traps v. Chicago Park Dist., 55 N.E.2d 173, 177 (Ill. App. 1944)

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The Illinois court also observed that the lease was invalid because it "granted special privileges to the members of a private club."

The Kentucky Court of Appeals held that the city of Ashland could not contract with the Ashland Baseball Club, which controlled professional, high school, American Legion, and Elks baseball teams, so as to give the club the "exclusive use" of an athletic field located in the city park:

"The grant of public power and right imposes a corresponding public duty and responsibility. Official dominion and discretion may not be surrendered, nor public functions delegated, in whole or in part, to another person who is not answerable to the people. . . .

"It seems to us that the proposed contracts would in effect give to the various clubs the right and power to exclude the general public from the use of a substantial part of the park for an indefinite, although extended period of time. This would not be consistent with its free public use. The Board would surrender its sole and exclusive control of the management of this part of the public property. Its dominion and administration would be less than absolute. . . ." Board of Park Com'rs. of Ashland v. Shanklin, 199 S.W.2d 721, 723-724 (Ky.App. 1947)

In discussing a similar case involving the city of Louisville Board of Park Commissioners, the Kentucky court also observed that the statutes governing these boards ". . . manifest the legislative intent to lodge in both bodies as trustees for the people the exclusive custody and control of their properties."

And, finally, the Supreme Court of Georgia held that if a city acquired and held property for park purposes, it did so in its governmental capacity and therefore could not lease the property to a private corporation:

". . . Nor could the operation of the facility by the plaintiff be construed as a public use by a showing that the plaintiff is a non-profit corporation which may devote any profits from its operation to charitable purposes, or that benefits may flow to the city in carrying out an ultra vires contract made in its

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behalf. . . . Although the lease provided that at least one day a week must be left open for the use of the general public nevertheless, those who might wish to use it at other times must use it subject to the uses and rules prescribed by the plaintiff private corporation or else be denied its use."
Jonesboro Area Athletic Association v. Dickson,
181 S.E.2d 852, 856 (Ga. 1971)

Accordingly, we are of the opinion that the Missouri State Park Board is not authorized to enter into the proposed lease of a portion of Lake of the Ozarks State Park to the Lake of the Ozarks Yachting Association, Inc.

Yours very truly,

JOHN C. DANFORTH
Attorney General