

**OPINION
70-339**

July 1, 1970 (OPINION)

Mr. James E. Sperry

Superintendent

State Historical Society

Liberty Memorial Building

RE: State - Peace Gardens - Authority of Historical Society

This is in reply to your request for an opinion of this office with regard to a contemplated agreement between the State Historical Board and the Bureau of Outdoor Recreation to receive funds for improvements at the International Peace Garden. Your letter states that a project proposal was submitted and withdrawn in 1967 due to questions raised by the Bureau of Outdoor Recreation. You indicate that you have been requested to resubmit the project; and on this basis, you would like clarification of your authority to negotiate an agreement.

You enclose with your request for opinion, enclosure 1, a copy of a letter of date January 25, 1967, from Regional Director to the Coordinator of the State Outdoor Recreation Agency which, was assume, contains the questions raised by the Bureau of Outdoor Recreation heretofore referred to. You also enclose enclosure 2, copy of a Board of University and School Lands Patent to State of North Dakota, State Historical Society, Trustee and Trust Deed from International Peace Garden, Inc., to the State of North Dakota, as Trustee for International Peace Garden, Incorporated, dated March 23, 1935, which we assume is the Trust Deed referred to in enclosure 1. You also enclose enclosure 3, which we understand to be the proposed form of contract between the United States and the State of North Dakota, which we assume to be the contract containing the requirements to which reference is made in your letter and in enclosure 1.

We have also received two letters on the general subject signed by John A. Stormon, a practicing North Dakota attorney, who signs as president of International Peace Garden, Incorporated. He furnishes a very interesting history of the International Peace Garden legislation, and an outline of legal principles applicable as well as indicating that International Peace Garden, Incorporated, is and will be cooperative in further contractual arrangements that might be appropriate.

Your first question is stated as:

1. Does the State Historical Society, in regard to subsections 4, 6, and 7 of chapter 55-05-02 of the North Dakota Century Code and other applicable laws of the State of North Dakota, have the authority to enter into such a project agreement with the Bureau of Outdoor Recreation for a project at the International Peace Garden in regard to all

conditions outlined in the enclosed agreement (enclosure 3) and particularly in reference to questions raised regarding paragraphs I.2 and J of the General Provisions?"

Your second question is stated as:

2. Does the State Historical Society have sufficient authority to carry out its responsibility in connection with the admission policy set out in paragraph J of the General Provisions of the project?"

Your letter indicates further that State funds appropriated through the State Outdoor Recreation Agency would be used as matching funds for this project, financed 50 percent by Federal funds and 50 percent by State funds.

We would assume that the Federal agency concerned would in the first instance be the agency to determine whether the arrangements made satisfy its requirements. We hope, however, that our comments in response to your direct questions will be helpful in your determination of your authority in the premises.

We understand the I.2 and J requirements referred to in correspondence (which appear to indicate that these are the major points where difficulty arises) to be those provisions shown on enclosure 3 attachment 1 (December 1965) to form BOR 8-92 page 4, which read as follows:

I. Use of Facilities

* * *

2. The State shall operate and maintain, or cause to be operated and maintained, the property or facilities acquired or developed pursuant to this agreement in the manner according to the standards set forth in the Manual.

J. Nondiscrimination

1. The State shall not discriminate against any person on the basis of race, color, or national origin in the use of any property or facility acquired or developed pursuant to this agreement.
2. The State shall comply with the terms and intent of the Title VI of the Civil Rights Act of 1964, 78 Statute 241 (1964), and with the regulations promulgated pursuant to such Act by the Secretary of the Interior and contained in 43 C.F.R. 17 (1964).
3. State shall not discriminate against any person on the basis of residence, except to the extent that reasonable differences in admission or other fees may be maintained on the basis of residence."

In the first instance does seem doubtful that a discrimination

problem could arise in the administration of the Peace Gardens. If no other reason would exist section 12-22-30 of the 1969 Supplement to the North Dakota Century Code provides:

12-22-30. EQUAL RIGHTS IN PUBLIC PLACES - PENALTY. No person shall be excluded on account of race, color, religion, or national origin from full and equal enjoyment of any accommodation, advantage, or privilege furnished by public conveyances, theaters, or other public place of amusement, or by hotels, barber shops, saloons, restaurants, or other places of refreshment, entertainment, or accommodation. Any person violating any of the provisions of this section or aiding or inciting another person to do the same shall be guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars or by imprisonment in the county jail for not more than thirty days or by both such fine and imprisonment."

We would assume that this statute constitutes both a statement of the public policy of the State as well as the creation of a crime for violation of such policy.

We think it also may be of interest in the way of background material herein, that there have been very substantial changes made in the status of the State Historical Society in recent years. The changes in Chapter 55-01 of the North Dakota Century Code in recent years (see for example the 1967 revision now appearing as section 55-01-01 of the North Dakota Century Code) transforms the situation to such an extent that while the State Historical Society was formerly in the general nature of a private corporate entity charged with certain public responsibilities, the state historical board, as now constituted, is an actuality a State agency. We note also in this respect that subsection 7 of section 55-05-02 was revised in 1965 to specifically designate this state historical board as trustee for the State of North Dakota, and to vest in it the general supervision of the lands therein described and comprising that part of the International Peace Garden located within the State of North Dakota and the United States of America.

Going at this point to your specific questions, we note that the heretofore recited requirements of I.2 and J indicate that the "State shall operate and maintain, or cause to be operated and maintained", that the "State shall not" and that the "State shall comply", with regard to certain requirements. Quite obviously a State being a legal rather than a physical entity must necessarily operate through officers, employees, or contractors rather than acting directly. Operations and maintenance not doing particular acts and compliance would, therefore, have to be through such officers, employees or contractors in any event. In the instant situation, considering the statutory and contractual provisions and, of course, the covenants specified in the trust deed, it would appear that some phases of the operations of the State would necessarily be through or in cooperation with the International Peace Garden, Incorporated. From reading the material submitted with your letter, the statutes, etc., we think it is clear that the International Peace Garden, Incorporated, is not in a position to prevent the state from operating in accordance with the contractual provisions specified.

The problem that apparently has caused concern in past considerations of the subject has apparently been whether the state, to the extent operations must be through International Peace Garden, Incorporated, can require compliance with these contractual provisions. We think it can, and we hope the following will clarify our thinking on that point.

The obvious purpose of the trust deed forwarded is to vest the legal title to the premises concerned in the State of North Dakota, though with the obligations of a beneficial use of same as an International Peace Garden. The State is obviously the trustee and legal title holder thereunder. Equally, obviously, the entrustor is the International Peace Garden, Incorporated. The beneficiary, or cestui que trust, is not so clearly designated. However, looking to the four corners of the instrument and the obvious beneficiary of an "International Peace Garden", we would assume that for most purposes the General Public, not only of the State of North Dakota and the United States but on an International basis, would be considered the beneficiary or cestui que trust. Some phases of the instrument might appear to indicate that International Peace Garden, Incorporated, see for example paragraph d thereof and subsection 4 of section 55-05-02 of the North Dakota Century Code, has some of the features of a beneficiary or cestui que trust; though again, looking to the instrument as a whole, we would assume these provisions are to enable the entrustor to carry out and to assist in carrying out the provisions of the trust and its general purpose of establishment and maintenance of International Peace Garden. Chapter 55-05 of the North Dakota Century Code, as amended, to date constitutes acceptance by the state of the legal title to the lands and the trust imposed thereon.

Paragraph d of the trust deed, and subsection 6 of section 55-05-02 of the North Dakota Century Code, was inserted in the trust deed and in the statute for the purpose of establishing that the State of North Dakota was not, by acceptance of these lands and the trust imposed therewith, volunteering to finance the establishment or maintenance of the International Peace Garden or the purposes of the International Peace Garden, Incorporated, with regard to these premises. We note, however, that the language of this paragraph does not indicate that no state money can be expended in maintenance or operation of this project. It merely indicates that the state shall in no manner be responsible for such maintenance or operation; i. e., that they cannot by reason of the enactment of these statutory provisions be required to maintain or operate these lands as an International Peace Garden. While perhaps not directly relevant to this point, we think the very unusual provisions of paragraph c of the trust deed throw considerable light on the intentions of both the entrustor and trustee. We are familiar with the usual idea of an entrustor providing that in the event the trust purpose fails the corpus of the trust will revert to the entrustor. In this instance, however, the provisions of said paragraph c is that if said described land shall at any time cease to be used and maintained as an International Peace Garden, that then such land shall unconditionally revert to the State of North Dakota, etc. Comparing paragraphs c and d, it appears that the State of North Dakota cannot be held liable by the entrustor for financial support for the International Peace Garden; and that in the event there is a failure of the project, the

State of North Dakota ultimately owns an absolute and unconditional title to the property.

To this point, the State of North Dakota is trustee of the premises for the purpose of establishment, maintenance and operation of the International Peace Garden and is not assuming liability for such maintenance and operation. Paragraph g of the trust deed and subsection 7 of section 55-05-02 of the North Dakota Century Code (as amended, as previously mentioned) provides, in effect, that the State of North Dakota acting directly through its agency, the state historical board, shall have general supervision of the lands therein described for the purpose of seeing that the terms of the chapter and trust imposed by the chapter are complied with by the International Peace Garden, Incorporated, etc.

To attempt to summarize, the general context of the entire trust deed and legislation considered to this point, it would appear to us that the State of North Dakota has accepted the legal title to the premises subject to the right of the International Peace Garden, Incorporated, to maintain and operate an International Peace Garden upon the premises under the supervision of the State of North Dakota, acting through its State Historical Board. In this light, it would appear to us that any action taken by the International Peace Garden, Incorporated, in furtherance of the trust purpose would be in the nature of an action taken by a state officer, employee, or contractor, in carrying out any other function of the state government. In view of the provisions of the deed and chapter, there might well be some questions as to the propriety of the state of North Dakota acting contrary to the provisions of the basic trust agreement; however, we can see no way in which the proposed contractual arrangement (enclosure 3) in any manner contravenes the purposes of the basic trust agreement. To the contrary, we would think the primary purpose of the trust, i. e., establishment, and operation of an International Peace Garden, would further rather than conflict with such provisions as the discrimination provisions of the proposed contract.

On such basis, it must be our opinion that the State Historical Board, in regard to subsections 4, 6 and 7 of section 55-05-02 of the North Dakota Century Code, as amended to date, and the other applicable laws of the State of North Dakota, does have the authority to enter into such a project agreement with the Bureau of Outdoor Recreation for a project at the International Peace Garden in regard to all conditions outlined in the enclosed agreement (enclosure 3) and particularly in reference to questions raised regarding paragraphs I.2 and J of the General Provisions. It must further be our opinion that the State Historical Society does have sufficient authority to carry out its responsibilities in connection with the admission policy set out in paragraph J of the General Provisions of the project.

We trust the within and foregoing will be sufficient for your purposes.

HELGI JOHANNESON

Attorney General