

**LETTER OPINION**  
**94-L-331**

December 14, 1994

James Sperry, Superintendent  
State Historical Society  
North Dakota Heritage Center  
612 East Boulevard Avenue  
Bismarck, ND 58505

Dear Superintendent Sperry:

Thank you for your November 2, 1994, letter concerning the proposed lease agreement between the International Peace Garden, Inc. ("Corporation") and the North American Wildlife Enforcement Museum, Inc. Specifically, you ask:

1. Whether the International Peace Garden, Inc. may lease property held in trust by the state of North Dakota without the consent of the state or without the state being a party to the lease agreement.
2. Whether the proposed lease agreement is in compliance with the trust requirements outlined in North Dakota Century Code (N.D.C.C.) ch. 55-05-02.
3. What is the role of the State Historical Board in this matter?

The answer to your first question centers on interpreting the extent of the authority of the Corporation to oversee the use of International Peace Garden property. N.D.C.C. § 55-05-02(4) vests "the control, custody, possession, supervision, management, and operation of" the International Peace Garden in the Corporation. As this office has previously explained, the state of North Dakota is the trustee and legal title holder of International Peace Garden property in North Dakota, with the Corporation as the entrustor, and the beneficiary as "the General Public, not only of the State of North Dakota and United States but on an international basis." Letter from Attorney General Helgi Johanneson to Superintendent James E. Sperry (July 1, 1970).

In interpreting the statute, words must be given their plain, ordinary and commonly understood meaning, and consideration should be given to the ordinary sense of statutory words, the context in which they are used, and the purpose which prompted their enactment.  
Coldwell Banker - First Realty, Inc. v. Meide & Son, 422 N.W.2d 375

James Sperry  
December 14, 1994  
Page

(N.D. 1988). In this case, control is defined, in part, as "to exercise authority over." *Webster's New World Dictionary*, p. 309 (2d ed. 1982). Custody is defined as "a guarding or keeping safe; care; protection; guardianship." *Id.* at 349. "Possession" is defined, in part, as "a possessing or being possessed; ownership, occupancy, hold, etc." *Id.* at 1112. A lease is defined under N.D.C.C. ? 47-16-01 as "a contract by which one gives to another temporary possession and use of real property for reward and the latter agrees to return such possession to the former at a future time." Given the broad grant of authority to the Corporation under N.D.C.C. ? 55-05-02, it is not surprising that this office has previously concluded "that the authority to run the Peace Garden rests exclusively with the Board of Directors of the International Peace Garden, Inc." Letter from Attorney General Robert O. Wefald to Superintendent James E. Sperry (Feb. 14, 1984).

Therefore, it is my opinion that the Corporation has the authority to lease International Peace Garden property as incidental to its broad grant of authority to take control, custody, and possession of the International Peace Garden under N.D.C.C. ? 55-05-02. However, this grant of authority must be exercised consistent "with the original plans and purposes for the establishment of [the] International Peace Garden." N.D.C.C. ? 55-05-02(4).

This brings into consideration your second question, that is, whether the proposed lease agreement is in compliance with the trust requirements outlined in N.D.C.C. ? 55-05-02. N.D.C.C. ? 55-05-02(2) provides that the property transferred in trust to the state of North Dakota "must be used and maintained as an 'International Peace Garden' as a memorial to commemorate the long existing relationship of peace and good will between the people and the governments of the United States of America and the Dominion of Canada." N.D.C.C. ? 55-05-02(3) provides that if the property is not "used and maintained as an International Peace Garden, it then must revert unconditionally to the state of North Dakota and upon such reversion becomes the absolute and unconditional property of the state of North Dakota." Whether the lease agreement is consistent with the original plans and purposes for the establishment of the International Peace Garden is a question of fact for the Corporation's board of directors and the State Historical Board, as trustee for the state of North Dakota, to determine.

This leads into your third question, that is, what is the role of

James Sperry  
December 14, 1994  
Page

the State Historical Board in this matter.

N.D.C.C. ? 55-05-02(7) provides that the State Historical Board, as trustee for the state of North Dakota, "shall have general supervision of the lands herein described and comprising that part of the International Peace Garden located within the state of North Dakota." The trust power of general supervision is specifically limited to two purposes. The first purpose of which the State Historical Board has general supervision is to see that the terms of N.D.C.C. ch. 55-05, and the trust imposed by that chapter, are complied with by the Corporation. The second purpose of the State Historical Board's trust power of general supervision is "for the purpose of cooperating with [the] corporation in the promulgation, promotion, and development of the International Peace Garden." Accordingly, even though the Corporation may lease International Peace Garden property without the consent of the state or without the state being a party to the lease agreement, the potential application of the reversion provision under N.D.C.C. ? 55-05-02(3) makes it a prudent practice in this case for the Corporation to obtain the State Historical Board's approval as a method to ensure that the reversion provision is not implicated. The simplest way to accomplish this is for the State Historical Board to be a party to the lease agreement if that is agreeable with the Corporation's board of directors.

Having said this, it is important to note that the warranties of title and quiet possession outlined in section four of the lease agreement are overstated in light of the state of North Dakota's reversion interest under N.D.C.C. ? 55-05-02(3). Accordingly, that provision should be reworded to account for the state's interest. Additionally, the lease agreement should be modified to identify and explain the State Historical Board's role as trustee for the state of North Dakota and therefore protector of the state's interest. Further, section 5 of the lease contains the phrase "shall not be void or voidable" and section 6 is titled "Used Prohibited." I wonder whether "Not" was intended and whether the title of section 6 should be "Uses Prohibited." Finally, the arbitration provision in section 13a omits stating any specific standards or objectives which would provide helpful guidance for the arbitrators in resolving disputes under that section. To assist the Corporation in making these modifications, Assistant Attorney General David Clinton, as general counsel to the State Historical Board, is available and willing to provide recommended changes to the lease agreement. Mr. Clinton may be reached by writing this office or by telephone at (701)328-3148.

Sincerely,

James Sperry  
December 14, 1994  
Page

Heidi Heitkamp  
ATTORNEY GENERAL

dec\jfl

cc: Steven F. Gorder, Superintendent, International Peace  
Garden

Richard C. Lord, President, International Peace  
Garden