

VOLUME NO. 36**Opinion No. 38**

COUNTY COMMISSIONERS — Powers, Property of Powers, Property of County, Authority Over, Real Estate, purchase and sale; COUNTY PARK BOARDS — Duties, Development of Park Land, Powers, Expenditures, Sale of Park Land; Sections 16-1009, 16-4802 and 16-4808, Revised Codes of Montana 1947.

HELD: 1. A county park board may not sell county park property.

2. A board of county commissioners may sell land that has been dedicated to the public for park purposes in accordance with the procedures set out in section 16-4808, and it may sell county land which has been used or purchased, but not dedicated, for park purposes subject to the limitations set out in section 16-1009.

3. A county park board may expend its funds only for the improvement of any park land to which the county holds legal title.

4. Montana law does not require a county park board to develop every parcel of park land or any particular parcel of park land.

5. Generally, a county park board may not restrict the use of any county park to the residents of any particular area, although the history and circumstances of each park must be reviewed to determine whether there are any special circumstances that would create an exception to this general rule.

November 6, 1975

Mr. Patrick M. Springer
Flathead County Attorney
County Courthouse
Kalispell, Montana 59901

Dear Mr. Springer:

You have requested my opinion on the following questions:

1. May a county park board sell land that has been dedicated for park purposes, used for park purposes but not dedicated, or acquired by purchase for park purposes?
2. May the board of county commissioners sell land that has been dedicated for park purposes, used for park purposes but not dedicated, or acquired by purchase for park purposes?
3. May the county park board spend money for improvement of park lands within the county that are owned by the federal government, the state government, school districts, other county agencies, or owned privately?
4. May the law regulating county park boards be interpreted to require a county park board to develop every parcel of park land or any particular parcel of park land?
5. Does the law permit restriction of the use of any county park to the residents of any particular area?

Question 1.

A county has only such powers as the law prescribes or as arises by necessary implication. Section 16-801, R.C.M. 1947; **Helena Gun Club v. Lewis and Clark County**, 141 Mont. 490, 379 P.2d 436 (1963). The county park board, being a branch of the county, also has only those powers granted it by law. Those powers are set out in section 16-4802. No power to sell park property is expressly granted therein. Only two subsections within 16-4802 deal with acquisition and disposition of park property. Subsection 1 authorizes the county park board to acquire park property. Subsection 6 authorizes the county park board to lease lands which the board considers inadvisable for improvement. The conspicuous omission from 16-4802 of any reference to a power to sell park property precludes any implication that the county park board may sell county property.

Question 2.

The same is not true for the board of county commissioners, however. Section 16-804(4) empowers the county "[t]o make such orders for the disposition or use of its property as the interests of its inhabitants require". Section 16-1009 authorizes the board of county commissioners "to sell any property, real or personal, however acquired, belonging to the county, and which is not necessary to the conduct of the county's business or the preservation of its property". However, I am of the opinion that 16-1009 does not authorize the sale of county park property dedicated to public use. Property which has been dedicated for public park purposes is held in trust with the governing body holding legal title, and equitable title being in the inhabitants of the political subdivision. See **Hames v. City of Polson**, 123 Mont. 469, 215 P.2d 950 (1950).

Nevertheless, the legislature may authorize the vacation of land dedicated for public park purposes. **Smith v. Town of Hot Springs**, 125 Mont. 458, 240 P.2d 249 (1959); **Lloyd v. City of Great Falls**, 107 Mont. 442, 86 P.2d 395 (1938).

And the 1975 Montana Legislature recently did so by enacting section 16-4808, which authorizes the sale of dedicated park land by the county. Therefore, I conclude that a board of county commissioners may sell dedicated county park land if that property is sold in accordance with the procedure set out in section 16-4808.

A second aspect of your question is whether county lands used or acquired by purchase for park purposes, but not dedicated, may be sold by the county.

It is my opinion that 16-1009 is controlling here. Therefore, the board of county commissioners may sell land used or purchased, but not dedicated, for park purposes so long as that land is not necessary to the conduct of the county's business or to the preservation of its property. It should be noted, however, that property may be dedicated for park purposes by means other than pursuant to a formal offer of dedication. Dedication may be implied when the conduct of the property owner manifests an intent to dedicate the land. See **Arnold v. City of San Diego**, 120 Cal. App.2d 353, 261 P.2d 33 (1953). Because the question of whether land has been impliedly dedicated to the public use depends upon the facts of each case, I recommend that, before attempting to sell land which has been used or purchased by the county for park purposes, you review the history of that property to determine whether a dedication by implication has taken place and section 16-4808 is controlling.

Question 3.

Your third question, briefly stated, is whether the county park board may expend county park funds for improvement of county park lands administered by other county agencies or for improvement of park lands owned by non-county governmental entities or by private citizens.

Once, again, we must begin with the premise that the county park board has only those powers prescribed by law or as arise by implication therefrom. Section 16-4802(1) authorizes the board "to furnish and equip and to manage and control" those parks which it has acquired. Subsection 3 allows it to establish and maintain "grounds, parkways, drives and walks in the parks and recreation areas **of the county.**" (Emphasis added)

Although subsection 1 may limit expenditure of park board funds to parks acquired by the park board, subsection 3 clearly limits expenditures to the park lands "of the county". Therefore, I conclude that the county park board may expend its funds for the improvement of any park land to which the county holds legal title. Because every part of section 16-4802 which provides for the expenditure of park board funds specifies that it is to be spent for county parks, there can be no implication that a county park board can, and it is my opinion that it cannot, expend money for the improvement of non-county park lands.

Question 4.

Your fourth question concerns whether Chapter 48 of Title 16 requires the county park board to develop every parcel of county park land.

Section 16-4802 gives the county park boards the power to develop county parks. It does not require them to do so. In addition, subsection 6 of 16-4802

provides that the county park board may lease such county park land as the board deems it advisable not to develop as a park. Therefore, my conclusion is that a county park board is not required to develop all its county parks or park land.

Question 5.

Your final question deals with whether the law permits a county park board to restrict the use of any county park to the residents of a particular area.

My research has revealed no statutory guidelines or case authority on this issue in Montana. In other jurisdictions the general rule is that use of public parks cannot be restricted to the residents of a particular area. **Higginson v. Slattery**, 212 Mass. 503, 99 N.E. 523 (1912). However, the exclusion of non-residents from city park facilities has been upheld where the original deed of dedication did not dedicate for general public use. **Campbell v. Town of Hamburg**, 281 N.Y.S. 753 (1935). In addition, courts have upheld the exclusion of non-residents from overcrowded city park facilities. **McClain v. City of South Pasadena**, 155 Cal. App.2d 423, 318 P.2d 199 (1957). Even so, these cases do not involve the exclusion of taxpayers whose tax monies go directly to maintain a park from which they are excluded. And they involve the use of facilities to which access could easily be limited, such as a swimming pool.

Therefore, it is impossible to state a rule of law that would apply without exception to every county park in Montana. However, it is my opinion that county park boards may not restrict the use of any county park to the residents of any particular area, although the history and circumstances of each park must be reviewed to determine if there are any special circumstances that would create an exception to this general rule. Of course, no such restriction should be made without also considering whether the constitutional guarantee of equal protection under law would be violated thereby.

THEREFORE, IT IS MY OPINION:

1. A county park board may not sell county park property.
2. A board of county commissioners may sell land that has been dedicated to the public for park purposes in accordance with the procedures set out in section 16-4808, and it may sell county land which has been used or purchased, but not dedicated, for park purposes subject to the limitations set out in section 16-1009.
3. A county park board may expend its funds only for the improvement of any park land to which the county holds legal title.
4. Montana law does not require a county park board to develop every parcel of park land or any particular parcel of park land.
5. Generally, a county park board may not restrict the use of any county park to the residents of any particular area, although the history and circumstances of each park must be reviewed to determine whether

there are any special circumstances that would create an exception to this general rule.

Very truly yours,
ROBERT L. WOODAHL
Attorney General