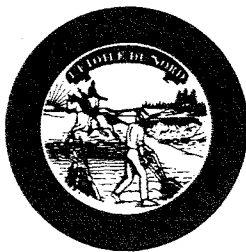


Willard Munger
State Representative

District 7A
St. Louis County



Minnesota House of Representatives

Irv Anderson, Speaker

CHAIR, ENVIRONMENT & NATURAL RESOURCES COMMITTEE

COMMITTEES: ENVIRONMENT AND NATURAL RESOURCES FINANCE; RULES AND LEGISLATIVE ADMINISTRATION;
GENERAL LEGISLATION, VETERANS AFFAIRS & ELECTIONS;
LEGISLATIVE COMMISSION ON MINNESOTA RESOURCES;
LEGISLATIVE COMMISSION ON WASTE MANAGEMENT; LEGISLATIVE WATER COMMISSION

Elizabeth Gohl
Committee Administrator

Norma Christensen
Legislative Assistant

February 4, 1997

Noel Knudson
Long Range Planning Committee Chair
Park Point Community Club
3026 Minnesota Ave.
Duluth, MN 55802

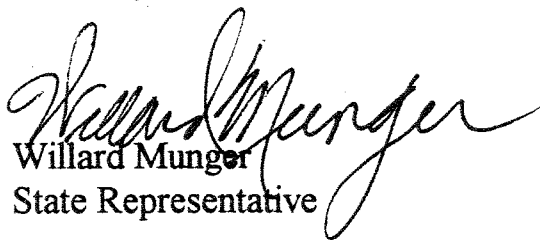
Dear Mr. Knudson:

Finally I am able to send you a reply from Attorney General H.H.Humphrey's office regarding concerns surrounding Minnesota (Park) Point in Duluth.

Assistant Attorney Andrew Tourville, Jr., did the necessary research which occupied more time than expected.

If you have questions, comments or concerns, please feel free to contact me.

Sincerely,


Willard Munger
State Representative

c: Rep. Mike Jaros

Encl.





STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

PUBLIC AND HUMAN RESOURCES
SUITE 900
445 MINNESOTA STREET
ST. PAUL, MN 55101-2127
TELEPHONE 612-297-1074

January 28, 1997

Representative Willard Munger
Minnesota House of Representatives
State Office Building
100 Constitution Avenue
St. Paul, MN 55115-1298

Dear Representative Munger:

Attorney General Humphrey asked me to respond to your questions about the Sky Harbor Airport located on Minnesota (Park) Point. I apologize for the delay; it took longer than I had expected to complete the necessary research.

The airport occupies a portion of lands which the State conveyed to the City of Duluth in 1939. The State's quit claim deed contains the following condition:

that the City of Duluth shall use said land for purposes of public recreation and public health and that the facilities provided on said land shall be open upon equal terms to all persons whether residents of the City of Duluth or elsewhere, and that title to said land shall revert to the State and the State shall be entitled to take possession thereof upon breach of the aforesaid conditions.

There are now plans to expand the airport which would involve cutting about 15 acres of old forest and also plans to allow construction on these lands of a hangar with a private residence attached.

You have raised essentially two areas of inquiry: 1) whether the lands conveyed by the State are being used consistent with the terms of the deed; and 2) whether 1969 Minn. Laws ch. 577, § 13 regarding the powers of the Duluth Airport Authority is constitutional. We assume that negative answers to these questions might provide grounds for challenging the forest harvest. While we are not in a position to render an opinion in this matter,¹ nonetheless, we have analyzed the questions and offer the following informal comments.

As to the first question, we understand that there is no question about the portion of the lands conveyed by the State that is not being used for the airport - that that portion clearly serves

¹ See Minn. Stat §§ 8.05-8.07, a copy of which is attached for your review.



the purposes expressed in the deed. As to the part being used for the airport, the law is that, in general, when a City acquires land from the State, it is bound by the conditions set forth in the deed. See Kronshnabel v. St. Paul, 272 Minn. 256, 137 N.W.2d 200 (1965) (hereinafter Kronshnabel); 11A McQuillin, The Law of Municipal Corporations, § 33.74 at n. 5 (3d. ed. 1991) (hereinafter McQuillin) (If the use of the property is dedicated by the State, it is the intention of the State that controls the use of the property; however, the State may change the original use for other public uses). The conditions remain valid even after the passage of over 40 years because the Marketable Title Act, Minn. Stat. § 541.023 (1996), does not apply to this kind of land. Kronshnabel, 272 Minn. at 263, 137 N.W.2d at 205. The City holds the property, because of the governmental purposes imposed upon its use, not in a proprietary capacity, but in a sovereign capacity or for the benefit of the general public. See, e.g., Id., at 259-260, 137 N.W.2d at 203; 23 Am. Jur. 2d, Dedication, § 66 at n. 79 (1983) (citing St. Paul v. Chicago, M. & St. P. Ry. Co., 63 Minn. 330, 352, 63 N.W. 267, 65 N.W. 649, 68 N.W. 458, 460 (1895-96)).

It is beyond question that the public recreation and public health purposes contained in the deed encompass many different kinds of activities. See e.g. 10 McQuillin, § 28.52.10 at n.1 (3d ed. 1990), citing McLauthlin v. Denver, 280 P.2d 1103 (1955) (use of public recreation grounds may vary with the recreational preferences of the public) and n. 6 (collecting cases regarding authorized uses of park lands): Annotation, Uses to Which Park Property May Be Devoted, 144 A.L.R. 486 (1943). The usual rule is that such dedications will be construed broadly. In the St. Paul v. Chicago, M. & St. P. Ry. Co. case noted above (where the dedication was a private dedication), the Minnesota Supreme Court stated:

[N]o narrow or unreasonable definition should be placed upon the nature of the use to which the property has been dedicated . . . It is only when there has been a clear diversion of the property to a use inconsistent with that for which it was dedicated that courts would feel warranted in interfering; and this will usually be largely a question of fact, depending upon the facts and circumstances of each particular case.

63 Minn. at 353, 68 N.W. at 460 quoted in John Wright & Assoc., Inc. v. Red Wing, 259 Minn. 111, 116, 106 N.W.2d 205, 208 (1960) (construing use of a building dedicated by deed for wide-ranging municipal purposes including entertainment).

There are several Minnesota Supreme Court cases which illustrate situations when the Court enforced the terms of a dedication. For example, in the Kronshnabel case, the Court construed a dedication in a State deed that the land was to be used "for educational purposes, and as a perpetual playground for the children of [St. Paul]" to prohibit the City from selling a portion of the land to a private college for an athletic field without legislative authorization to change the usage of the property. In Headley v. Northfield, 227 Minn. 458, 35 N.W.2d 606 (1949) (hereinafter Headley), the Court prohibited the City of Northfield from authorizing use of a parcel dedicated by plat for public square purposes, and that had been traditionally used as a public park, for a high school athletic field and playground. The Court reasoned that the area

would "no longer remain free and common for use by all the public, but . . . shall be occupied to the exclusion of the general public by grounds specially constructed and equipped for particular athletic and physical activities and by persons engaged thereon in them." Id. at 465, 137 N.W.2d at 610. See also Zumbrota v. Strafford Western Emigration Company, 290 N.W.2d 621 (Minn. 1980) (hereinafter Zumbrota) (prohibiting City of Zumbrota from selling a parcel dedicated by plat as a "public square . . . for public use," and that had been used as a public park, to a private developer to construct a senior citizen's residence on the grounds the general public would be excluded from the property).

As you already know from Op. Atty Gen. 59-A-40 (April 8, 1946) (1946 Report of Atty. Gen. No. 171), there is case law that park lands can be devoted to airports. It was on the basis of this old Kansas and Oklahoma case law (still the leading cases in this area of the law), that our office opined that the City of Duluth could lease a portion of the particular lands about which you are concerned to a private organization for an airport (characterized as a sky park) without effecting a reversion of the property. The Opinion assumed that the remainder of the property would be available for the uses contemplated in the deed and that the lease would be entered into in compliance with 1945 Minn. Laws ch 303, § 17, subd. 4 (codified at Minn. Stat. § 360.038, subd. 4 (1996)). This subdivision, part of the Uniform Airports Act, grants authority to lease for a term not to exceed 30 years real property set apart for airports to private parties, provided that "the public is not deprived of its rightful, equal and uniform use thereof." Id.

We believe the Opinion must be understood not only as assuming that the lease would protect the public's interests, but also that the airport itself served the public recreation and public health purposes contained in the State's deed because those are central themes in the two cases cited.

It should be noted that both of the cases from the 1946 Opinion to which we are referring - Schmoldt v. Oklahoma City, 291 P. 119 (1930) (hereinafter Schmoldt) and Wichita v. Clapp, 263 P. 12 (1928) (hereinafter Clapp) - dealt with the issue of whether lands set aside for park purposes could be used for an airport. The Schmoldt court held that it was entirely proper for Oklahoma City to construct a municipal airport with all necessary and proper equipment, buildings, and appurtenances, upon park lands because the airport constituted a park improvement. The court clearly viewed the airport as a type of recreational activity. The Clapp court ruled similarly: "[W]e are of opinion that the airport or landing field is as properly included within park purposes as tourist camps and other named recreational objects . . ." 263 P. at 15. As a general proposition, we believe that lands set aside for park purposes would be viewed as lands with a more restricted permissible use than lands set aside for public recreation and health purposes. See, e. g., Annotation, Uses to Which Park Property May Be Devoted, supra. Thus, we believe that the Schmoldt and Clapp cases are relevant to your question. See also In re Haas Hill Property Owners' Assn. v. Zoning Bd. of Appeals of New Baltimore, 609 N.Y.S.2d 416 (N.Y. App. Div. 1994) (proposed private airport open to public use with landings limited to 45 per month and having only four to five planes maintained on the field and no scheduled commercial flights qualified as a recreational use under the local zoning ordinance.)

In summary, we believe the key factor is not simply whether only a portion of the premises is being used for an airport, but whether the airport itself is being operated consistent with the deed conditions. If it is not being operated as a "public recreation/public health/facilities open upon equal terms to all persons" airport, then it would appear to breach the deed under the principles expressed in the Kronschnabel, Headley, and Zumbrota cases cited above. However, the answer to this question is ultimately a question of fact upon which we do not express an opinion. See Op. Atty. Gen. 629-a (May 9, 1975).

Implied in your first question are these additional questions:

- 1) Would an airport expansion violate the reverter clause?
- 2) Would the building of a hangar with an attached residence on airport grounds violate the reverter clause?

As to the first, the 1946 Opinion pointed out that it was not considering the question whether a reversion would take place if a greater area were leased. The City of Duluth, through its city council, appears to have the authority to determine the airport's boundaries. See 1969 Minn. Laws ch. 577, § 4, subd. 5. We do not believe that the expansion would automatically breach the deed conditions. As stated above, we do not think the Opinion should be understood as holding that the key factor is what proportion of the premises are used for an airport, but, rather, whether, after expansion, the premises continue to serve the purposes of public recreation and public health with facilities open upon equal terms to all persons. Again, this is a fact question on which we express no opinion.

As to the second question, there does not appear to be any Minnesota or other case law directly on point. Neither the deed nor the Opinion addresses hangars or residences as part of airport use, but one might argue that a hangar, by itself, even if privately owned, would be understood as a necessary part of an airport operation. The Uniform Airports Act authorizes a municipality

... to lease ground area for a term not exceeding 99 years to private persons for the construction of structures which in its opinion are essential and necessary to serve aircraft, persons and things engaged in or incidental to aeronautics, including but not limited to shops, hangars, offices, restaurants, hotels, motels, factories, storage space, and any and all other structures necessary or essential to and consistent with the purposes of sections 360.011 to 360.076 ...

Minn. Stat. § 360.038, subd. 4 (1996). The Duluth airport authority also has broad leasing authority. 1969 Minn. Laws ch. 577, § 5, subd. 2e.

The significance of the attached private residence is difficult to determine. The general rule is "[O]rdinarily, a municipality cannot, by lease or license permit its property . . . held or acquired for public use, to be wholly or partly diverted to a possession or use exclusively private, without specific legislative authority." 10 McQuillin § 28.42 at n. 14. The Minnesota Supreme Court held that it was proper for the Minneapolis Park Board to construct a residence and office on park lands for use by the park superintendent and family as necessary for park management. State ex rel. Johnson v. Brown, 111 Minn. 80, 126 N.W. 408 (1910). In a somewhat analogous North Carolina case, Brevard v. Ritter, 188 S.E.2d 41 (N.C. App. 1972) the court ruled that a 3,000 square foot building, to be constructed on a small, private airport, for use as a pilot clubhouse with a lounge, recreation area, and hangar space would not qualify as a permitted recreational use under the City's zoning ordinance. The private residence seems to run afoul of the deed conditions because it does not appear to be a public recreation use nor a facility open to all persons upon equal terms. Whether the premises for the hangar/residence are leased from the authority through a public process may also affect the application of the deed language.

Your second inquiry concerns the constitutionality of the 1969 legislation establishing the Duluth Airport Authority. We do not generally comment on the constitutionality of statutes. see Op. Atty. Gen. 629-a (May 9, 1975), especially when it is not clear what constitutional concerns are being raised. We presume that all statutes are constitutional. See, e.g., Minn. Stat. §645.17(3) (" In ascertaining the intention of the legislature the courts may be guided by the following presumptions . . . (3) The legislature does not intend to violate the constitution of the United States or of this state . . ."). The Courts follow this same presumption. See, e.g., In re Cold Spring Granite Co., 271 Minn. 460, 136 N.W.2d 782 (1965). The legislature generally has broad discretion to establish how an entity like the Duluth Airport Authority is subject or not subject to oversight by other units of government. See, e.g., State ex rel. Anoka Co. Airport Protest Committee v. Mpls - St. Paul Metropolitan Airports Comm., 248 Minn. 134, 143, 78 N.W.2d 722, 728 (1956) (hereinafter Anoka Co. Airport Protest Committee) (noting that the law applicable to the Metropolitan Airports Commission gave it jurisdiction over any airport within 25 miles of the Minneapolis or St. Paul city halls). In this case the Court stated:

In the absence of constitutional restrictions, the legislature has power to modify, alter, or withdraw any power entrusted to a municipality It may also vest in a public or quasi municipal corporation, such as [MAC] . . . certain functions even though the territory involved in the exercise of such functions overlaps territory of other municipalities.


The legislature chose to exempt both the Authority and the City from other state, county, or municipal controls such as various city permit requirements. This was pointed out by City Attorney Dinan in his November 16, 1983 memo to the Duluth City Council. It should be noted that this 1969 law stated that it would become effective only after a majority of the Duluth city council approved it and the filing requirements of Minn. Stat. § 645.021 were complied with. See 1969 Minn. Laws ch. 577, § 17. If it is now felt that the Authority's powers need to be readdressed, that would seem to be a matter for the legislature to undertake as the Court

suggested in the Anoka Co. Airport Protest Committee case, 248 Minn. at 143, 78 N.W.2d at 728.

The main concern of your letter appears to be harvesting the old forest. We would point out that there may be other laws such as laws protecting natural resources or environmental review laws that may be relevant to the harvest. For example, timber is included as a "natural resource" under the Minnesota Environmental Rights Act and, as such, may be protected, under certain circumstances, from pollution, impairment, or destruction. Minn. Stat. §§ 116B.02, subd. 4 & 116B.03, subd. 1 (1996). See People for Environmental Enlightenment and Responsibility (PEER), Inc. v. Minn. Environmental Quality Bd., 266 N.W.2d 858 (1978) (holding that 130 acre virgin oak woods containing trees thought to be over 100 years old were a protected natural resource). See also, State ex rel. Wacouta Tp. v. Brunkow Hardwood Corp., 510 N.W.2d 27 (Minn. App. 1993) (affirming that large eagle roost trees are a protectible natural resource). One consideration in matters where development threatens protectible natural resources is whether there is any feasible and prudent alternative. Minn. Stat. § 116B.04 (1996). There may also be a need for environmental review of the proposed airport expansion under the Environmental Policy Act, Minn. Stat. ch. 116D (1996) and rules adopted thereunder. See Minn. Rules 4410, subp. 21 (1995) (requiring mandatory environmental assessment worksheet for certain airport runway extension projects).

I hope this provides some assistance to you.

Sincerely,


ANDREW J. TOURVILLE, JR.
Assistant Attorney General

cc: Hubert H. Humphrey III
Lee Sheehy
Scott Strand
Eric Johnson
Kenneth Raschke

MINNESOTA STATUTES SECTION 8.05-8.07 (1996)

8.05 FORMS PREPARED; OPINIONS.

The attorney general shall prepare forms for bonds and other contracts and instruments for the use of state officials, boards, and commissions and give legal advice in all matters relating to their official duties, whenever required by the governor, auditor, treasurer, or secretary of state, or any board or commission created by law. When required by either house of the legislature the attorney general shall give a written opinion upon any question of law. The attorney general similarly shall give a written opinion upon any question of law submitted by a permanent or interim committee or commission of the legislature or of either house of the legislature, including but not limited to an interim committee of the legislature created by law for a county containing a city of the first class.

History: (113) 1905 c 227 s 5; 1967 c 43 s 1; 1986 c 444

8.06 ATTORNEY FOR STATE OFFICERS, BOARDS, OR COMMISSIONS; EMPLOY COUNSEL.

The attorney general shall act as the attorney for all state officers and all boards or commissions created by law in all matters pertaining to their official duties. When requested by the attorney general, it shall be the duty of any county attorney of the state to appear within the county and act as attorney for any such board, commission, or officer in any court of such county. The attorney general may, upon request in writing, employ, and fix the compensation of, a special attorney for any such board, commission, or officer when, in the attorney general's judgment, the public welfare will be promoted thereby. Such special attorney's fees or salary shall be paid from the appropriation made for such board, commission, or officer. Except as herein provided, no board, commission, or officer shall hereafter employ any attorney at the expense of the state.

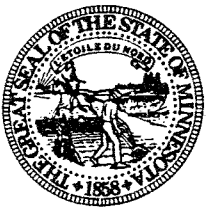
Whenever the attorney general, the governor, and the chief justice of the supreme court shall certify, in writing, filed in the office of the secretary of state, that it is necessary, in the proper conduct of the legal business of the state, either civil or criminal, that the state employ additional counsel, the attorney general shall thereupon be authorized to employ such counsel and, with the governor and the chief justice, fix the additional counsel's compensation. Except as herein stated, no additional counsel shall be employed and the legal business of the state shall be performed exclusively by the attorney general and the attorney general's assistants.

History: (114) 1905 c 227 s 6; 1911 c 56 s 2; 1955 c 861 s 1; 1986 c 444; 1991 c 345 art 1 s 42; 1994 c 636 art 10 s 1

8.07 OPINIONS; COUNTY, CITY, TOWN, PUBLIC PENSION FUND, SCHOOL ATTORNEYS, COMMISSIONER OF CHILDREN, FAMILIES, AND LEARNING.

The attorney general on application shall give an opinion, in writing, to county, city, town, public pension fund attorneys, or the attorneys for the board of a school district or unorganized territory on questions of public importance; and on application of the commissioner of children, families, and learning shall give an opinion, in writing, upon any question arising under the laws relating to public schools. On all school matters such opinion shall be decisive until the question involved shall be decided otherwise by a court of competent jurisdiction.

History: (115) 1905 c 227 s 7; 1971 c 67 s 1; 1973 c 123 art 5 s 7; 1986 c 444; 1987 c 372 art 10 s 1; 1Sp1995 c 3 art 16 s 13



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1002
TELEPHONE: (612) 296-6196

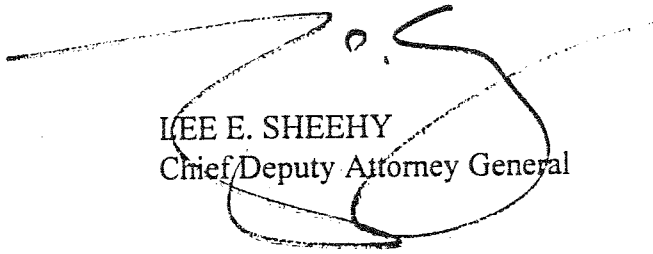
October 3, 1996

Representative Willard Munger
Minnesota House of Representatives
State Office Building
100 Constitution Avenue
St. Paul, MN 55155-1298

Dear Representative Munger:

This is to acknowledge receipt of your September 26, 1996 letter addressed to Attorney General Humphrey regarding your concerns surrounding Minnesota (Park) Point in Duluth. I have forwarded your correspondence with attachments to Assistant Attorney General LeRoy Paddock of our Natural Resources/Agriculture Division. I am sure that he will provide you with a timely response. Thank you for contacting our Office.

Very truly yours,


LEE E. SHEEHY
Chief/Deputy Attorney General

LES:gmm

c: Deputy Attorney General Beverly Jones Heydinger (w/Copy of Ltr. only)
Assistant Attorney General LeRoy Paddock (w/Original Documents)

Facsimile: (612) 297-4193 • TDD: (612) 297-7206 • Toll Free Line: (800) 657-3787 (TDD or voice)

Willard Munger
State Representative

District 7A
St. Louis County



Minnesota House of Representatives

Irv Anderson, Speaker

CHAIR, ENVIRONMENT & NATURAL RESOURCES COMMITTEE

COMMITTEES: ENVIRONMENT AND NATURAL RESOURCES FINANCE; RULES AND LEGISLATIVE ADMINISTRATION;
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LEGISLATIVE COMMISSION ON MINNESOTA RESOURCES;
LEGISLATIVE COMMISSION ON WASTE MANAGEMENT; LEGISLATIVE WATER COMMISSION

September 26, 1996

The Honorable Hubert H. Humphrey
Attorney General
State of Minnesota
Room 102 Capitol
St. Paul, MN 55155

Elizabeth Goihl
Committee Administrator

Norma Christensen
Legislative Assistant

Dear Attorney General:

I request your help on several legal questions that have arisen concerning the protection or destruction of an old growth forest (200 year old trees) on Minnesota Point in Duluth. As you may know, Minnesota (Park) Point is the longest freshwater sand bar in the world.

The first question concerns conditions of a conveyance from the State of Minnesota in 1939 to the City of Duluth of approximately 300 acres of land on Minnesota Point (Deed #697, page 181, see attached copy). Several people, including some of my colleagues in the House and Senate, contend that these conditions have been breached (Memo dated 4/12/96, see attached copy).

The second question concerns an opinion written by Attorney General J.A. Burnquist in 1946 to Duluth City Attorney Harry Weinberg (Letter dated 4/8/46 attached) regarding the legality of a lease for location of an airport from the City of Duluth to Sky Harbor Airport. Members of the Park Point Community Club contend that the Duluth Airport Authority has violated the conditions stipulated in Burnquist's letter of opinion.

The third question concerns the Constitutionality of Laws of Minnesota 1969, Chapter 577, Section 13 (copy enclosed). Mr. Darrell Lewis, Duluth City Planning Manager, recently quoted City Attorney William P. Dinan's memo of 11/16/83 as understanding that the Airport Authority is exempt from the City's land use controls or any other regulations (Letter dated 9/4/96 with memo attached, see attached copy).

- continued

Humphrey
9/26/96
P. 2

We also have additional information which may be relevant. If you have any questions or would like to meet with me or other concerned citizens, please do not hesitate to call or write.

Sincerely,

A handwritten signature in cursive script that reads "Willard Munger".

Willard Munger
State Representative

Attachments: Deed #697, page 181
Memo dated 4/12/96 from Knudson and Glass
Letter of 4/8/46 from Attorney General Burnquist
MN Statutes, Chapter 577
Letter dated 9/4/96 from Darrell Lewis with Dinan's memo attached