

N.D.A.G. Letter to Eiken (March 12, 1986)

March 12, 1986

Mr. Doug Eiken, Director
North Dakota Parks and
Recreation Department
Pinehurst Office Park
1424 West Century Avenue
Suite 202
Bismarck, ND 58501

Dear Mr. Eiken:

Thank you for your letter of January 16, 1986, concerning the establishment of rules and regulations for the management and use of nature preserves.

N.D.C.C. § 55-11-11 provides that nature preserves shall be managed and protected in the manner approved by, and subject to the rules and regulations established by, the Department of Parks and Recreation. Further, N.D.C.C. § 55-11-09 gives the Department of Parks and Recreation the power and the duty to formulate policies for the selection, use, management, and protection of nature preserves (subsection 1); to determine, supervise, and control the management of nature preserves, and to adopt reasonable rules necessary or advisable for the use and protection of nature preserves and for the business of the Department (subsection 2); and to cooperate and contract with any agency, organization, or individual (subsection 5).

However, N.D.C.C. Ch. 55-11 provides no civil or criminal penalty nor administrative sanction for a violation of its provisions or rules adopted pursuant to its provisions. Furthermore, N.D.C.C. Ch. 55-11 does not provide any means or mechanism for administrative enforcement of rules relating to management, use, and protection of nature preserves.

N.D.C.C. § 55-08-04, however, provides that the director may appoint department personnel to peace officer status and that their police powers are limited to lands or waters administered by the department. N.D.C.C. § 55-08-04.1 provides that department peace officers may serve warrants and legal process and call to their aid sheriffs, deputy sheriffs, constables, police officers, or other persons, but only to enforce N.D.C.C. Ch. 55-08.

Alternatively, N.D.C.C. § 55-11-07 states that articles of dedication may contain restrictions and other provisions relating to management, use, development, transfer, and public access of nature preserves. These articles may define the respective rights and duties of the owner or operating agency in the Department. They may provide a procedure to be applied in case of a violation of their restrictions and other provisions.

Finally, they may recognize and create reversionary rights and transfers upon conditions or with limitations.

Although the Department of Parks and Recreation certainly has the authority by rule to prescribe what is appropriate for management, use, and protection of nature preserves, the statutes do not provide specific penalties for enforcement or a mechanism for enforcement on nature preserve lands. Rules could be adopted to provide a mechanism for enforcement-discovering violations of the rules (i.e. Department of Parks and Recreation personnel could be authorized to patrol areas within a nature preserve, see N.D.C.C. 55-08-04), but rules could not provide for penalties or administrative sanctions for violations specific to nature preserve lands without some standards or prescribed norms being set by the Legislative Assembly. See Sutherland, Statutory Construction 4.26 (1985). Pursuant to N.D.C.C. § 55-08-04, department personnel in peace officer status could probably enforce general criminal statutes on nature preserve lands since they are administered by the department. However, new legislation would be necessary to provide for penalties or administrative sanctions for enforcement related to specific violations on nature preserve lands and would be desirable to provide for a specific mechanism for enforcement and obtaining enforcement assistance on nature preserve lands.

Nevertheless, rules could be incorporated by reference in articles of dedication which may be enforceable by provisions of the articles of dedication providing for the procedures to be applied in case of violation of the rules. The exact procedures to be applied in case of a violation of the rules should be spelled out in each dedication, taking into consideration the differences in the characteristics and conditions of the natural area which is the subject of the nature preserve in each dedication.

In short, you may wish to consider legislation which would provide enforcement authority, penalties (civil and/or criminal) and administrative sanctions. It may be possible to provide sufficient protection of nature preserves, at least in regard to the owners and operators of the preserves, by careful drafting of articles of dedication. Without specific statutory provisions concerning enforcement, however, enforcement of specific rules regarding management, use, and protection of nature preserves as to individuals not a party to the articles of dedication may not be possible, except by means of a civil action for damages and/or injunction.

Sincerely,

Nicholas J. Spaeth

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