20 August 1943

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

Mr. H. G. Bank,
Deputy State Land Commissioner,
Capitol Building Annex,
Phoenix, Arizona

Dear Mr. Bank:

In your letter of 12 August 1943, you ask our opinion as to whether the State Land Department may enter into commercial leases for concessions in Papago Park. You ask further whether it is necessary to appraise and advertise for bids.

Papago Park is a portion of an area granted to the State of Arizona by Act of Congress of 1930.-- Chapter 187, Laws of 71st Congress, 46 Statutes at Large, p. 142. According to the terms of the act, the land was "hereby granted for park, recreation, or public convenience purposes. . .". It added: "that the lands hereby granted shall be used by the State of Arizona . . . "only for the purposes herein indicated".

Assuming for the moment the State Land Department has the power to lease state lands, the lease of a site in the Park to a concessionaire for the sale of soft drinks, sandwiches and picnic devices would be for a "park and public purpose" within the terms of the Federal grant set forth above.

Williams v. City of New York, 162 N. E. 547,
Blank v. Brown, 216 N. Y. Supp. 614,
Bailey v. City of Topeka, 154 p. 1014.

On the question of the public character of a lease to a concessionaire, the court in the Bailey case had this to say:

> "Clearly it is not inconsistent with the conditions imposed by the donor of the property that visitors to the park should be afforded facilities for obtaining refreshments, for boating and for bathing. No reason exists why they should not pay a fair price for what they eat or drink, or for the boating or bathing equipment they use. The city might through its employes furnish those conveniences directly, collecting reasonable charges therefor. The fact that a profit resulted would not render the transaction objectionable. The incidental revenue would not characterize the transaction as commercial rather than governmental. Substantially the same result is accomplished by authorizing certain individuals to attend to the business of supplying the wants of the

46-1062

public with respect to the matters referred to, retaining so much of the proceeds as will fairly compensate them for their services and investment, and turning the residue over to the city. The following test, and the cases supporting it, are in point at least to the extent of indicating that the facilities undertaken to be supplied are appropriate to the conduct of a public park:

"Under a power to control and regulate parks the municipal authorities may provide for the pleasure, amusement, comfort, and refreshment of persons frequenting them, which in their discretion they may do by granting privileges to private persons to furnish food or refreshments, or means of innocent entertainment, with the right to erect necessary structures incident thereto which will not interfere with the rights of the public, and may give a license to use a building in a park for the purpose of a restaurant, which rights and privileges may be made exclusive, the municipality in all cases retaining the right of regulation and control over the manner of conducting the business." 20 Cyc 983.

As to the power of the Land Department to make the lease, there seems to be no question. Section 11-301, A.C.A. 1939, states that "All state lands shall be subject to lease as herein provided. . ." That Papago Park is "state land" is apparent from a reading of Section 11-101, defining state land as "any land owned or held in trust, or otherwise, by the state".

Finally, as to the manner of negotiating a lease for this purpose, Section 11-302 controls. It specifically provides that where there are two or more applicants for a lease, the Commissioner shall approve the one who, after investigation or hearing, appears to have the best right; and if their claims are approximately equal, may receive sealed bids after due notice to all applicants. To avoid a chance of injustice, it is suggested that the latter is the preferable method in practically all cases.

It is further the opinion of this office that commercial leases of five years' or less duration may be entered into by the State Land Commissioner without advertising, - Section 3, Article 10, Arizona Constitution. By Section 4, of Article 10, they are subject to appraisal. And, under the unamended portion of Section 11-301, A.C.A.1939, the lease may be for as long as twenty years, although at the end of each five-year period there must be a provision for reappraisal and readjustment.

Hoping this satisfies your inquiries, we remain,

Very truly yours, 46-1069

JOHN L. SULLIVAN, Attorney General
WILLIAM P. MAHONEY, Jr., Ass't. Atty. Genl.