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BOARD OF PARK COMMISSIONERS, SECTION 2976-6 G.C.: MAY NOT EXPEND PARK DISTRICT FUNDS FOR INSURANCE, PUBLIC LIABILITY AND PROPERTY DAMAGE ON MOTOR VEHICLES USED SOLELY IN PERFORMANCE OF GOVERNMENTAL FUNCTION.

WHERE GOLF COURSE OPERATED AND FEES CHARGED, PROPRIETARY FUNCTION — SUCH INSURANCE ON SUCH MOTOR VEHICLES, WHERE USED ON GOLF COURSE, MAY BE PURCHASED.

BOARD MAY OPERATE UPON ITS LAND, CONCESSIONS TO SELL MERCHANDISE, FOOD AND DRINKS — SUCH USE MAY NOT INTERFERE WITH OPERATION OF PARK FOR PARK PURPOSES.

SYLLABUS:

1. *A Board of Park Commissioners, as the same is constituted under the provisions of Section* 2976-6, *General Code, may not lawfully expend park district funds for the purchase of public liability and property damage insurance on motor vehicles owned and operated by such park district and used solely by the district in the performance of a governmental function.*

2. *The operation of a golf course upon the park district property where fees are charged for the privilege of using such golf course is a proprietary function. If the motor vehicles mentioned above are used in connection with the park district golf course the Board of Park Commissioners may lawfully expend park district funds for the purchase of public liability and property damage insurance on such motor vehicles that are so used.*

3. *The Board of Park Commissioners may lawfully operate concessions upon land owned by the park district for the purpose of selling merchandise, food and drinks. The operation of such concession must not, however, interfere or be inconsistent with the use of the park for park purposes.*

Columbus, Ohio, March 4, 1941.

Bureau of Inspection and Supervision of Public Offices,
Columbus, Ohio.

Gentlemen:

This will acknowledge receipt of your request for my opinion which reads as follows:

> "Your formal opinion is respectfully requested upon the following questions, relating to authority of the Commissioners of a Metropolitan Park Board:
>
> 1. May the Commissioners legally expend public funds for premiums on public liability and property damage insurance on motor vehicles owned and operated by the board?
> Would the fact that the Park Board operates a golf course where fees are charged, put them in the position of a proprietary entity?
>
> 2. May the Commissioners operate concessions in the park grounds, buying and selling merchandise, food, and drinks?"

Section 2976-1, General Code, providing for the creation of park districts reads as follows:

"In order to encourage forestry, to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within a county, and the boundary lines thereof shall be so drawn as not to divide any existing township or municipality within such county."

Section 2976-6, General Code, making the Board of Park Commissioners a body politic and corporate, reads as follows:

"Such commissioners shall constitute the board of park commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and of being sued as in this act provided. Such board may employ a secretary and such other employes as may be necessary in the performance of the powers herein conferred, and shall keep an accurate and permanent record of all its proceedings."

Section 2976-7, General Code, granting authority to the Board of Park Commissioners to acquire lands and prescribing the use to which they may be put, reads as follows:

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve, protect and promote the use of the same in such manner as the board may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation. In furtherance of the use and enjoyment of the lands controlled by it, the board may accept donations of money or other property, or may act as trustees of land, money or other property, and use and administer the same as stipulated by the donor, or as provided in the trust agreement. The terms and conditions of each such donation or trust shall first be approved by the probate court before acceptance by the board.

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations insofar as such proceedings are applicable. Either the fee or any lesser interest may be acquired as the board may deem advisable and the provisions of this section shall apply to districts heretofore created."

It will be observed that Section 2976-6, General Code, grants to the Board of Park Commissioners corporate existence. Section 2976-7,

General Code, bestows upon such Board rather broad powers in the use of the park property when it provides that it may "develop, improve, protect and promote the use of the same in such manner as the board may deem conducive to the general welfare."

In the case of Snyder v. Park Commissioners, 125 O.S. 336, the plaintiff in error was seeking to enjoin the Board of Park Commissioners from appropriating certain of the plaintiff's lands, contending that the park board was without authority to take the land, because there were no natural resources conserved. In regard to this position the court in its opinion at page 339, states:

> " * * * We cannot agree with plaintiff in error as to the limited construction contended for, to wit, that the words 'natural resources' include only timber, gas, oil, coal, minerals, lakes and submerged land, but are of opinion that to the extent to which a given area possesses elements or features which supply a human need and contribute to the health, welfare and benefit of a community, and are essential for the well being of such community and the proper enjoyment of its property devoted to park and recreational purposes, the same constitute natural resources."

In view of the above pronouncement by the Supreme Court of Ohio it is evident that a park board is not limited in its powers solely to acquiring lands for the purpose of conserving natural resources, but that such authority is much broader and would probably include within its scope a right in the park board to acquire property for, and establish thereon, a golf course, to be operated by such board as a recreational facility. Such a project, open to all, would certainly contribute to the health, welfare and benefit of the park district inhabitants who availed themselves of it.

The authority of the Board of Park Commissioners to expend park funds for public liability and property damage insurance on motor vehicles owned and operated by the Board is dependent upon whether the Board is immune from action being taken against it for damages resulting to another, arising out of a negligent act occurring in the performance of an official function of the park district.

The tort liability of a park district has never been before the courts of this state. Since, however, a park district is a creature of the Legislature, deriving its existence and powers from that body, it would appear that an analogy could be fairly drawn between the tort liability of a board of park commissioners and a board of county commissioners.

The law of Ohio is well settled that a county is not liable in tort in the absence of an express statute creating such liability. In the case of Weiher vs. Phillips, et al., 103 O.S. 249, it was held as disclosed by the first branch of the syllabus:

> "A board of county commissioners is not liable in its official capacity for damages for negligent discharge of its official duties except in so far as such liability is created by statute, and such liability shall not be extended beyond the clear import of the terms of the statutes."

For the reason that the standard policy of public liability and property damage insurance is a contract to indemnify the insured in case a loss is suffered, in the event the Board of Park Commissioners was clothed with such immunity that no loss could occur to it such a contract would be of no value, and hence its purchase by the Board would be an improper expenditure.

The authority of a board of county commissioners to expend public funds for the purchase of public liability and property damage insurance on county cars was for consideration by one of my predecessors in Opinions of the Attorney General for 1934, Vol. II, page 1120. The syllabus of that opinion reads as follows:

> "1. A board of county commissioners cannot legally enter into a contract and expend public monies for the payment of premiums on 'public liability' or 'property damage' insurance covering damages to property and injury to persons caused by the negligent operation of county owned motor vehicles.
>
> 2. In the event a county does take out such insurance, there could be no liability against the insurance company in favor of a third person who was injured, as a result of the negligent operation of a county owned motor vehicle."

A further question is now presented as to whether any potential liability is created upon the Board of Park Commissioners if the motor vehicles mentioned in your inquiry are used in connection with the golf course on the park property.

In this connection it must first be ascertained as to whether the operation of a golf course by a park district constitutes a proprietary or governmental function. If such function is proprietary common law liability for negligence would be existent upon the district, however, if it is the latter function, the immunity of sovereignty would prevail.

As to what functions on the part of a unit of government are proprietary or governmental, has been the subject of much discussion in cases before the courts and among text writers. In the case of Wooster vs. Arbenz, 116 O.S. 281, Marshall, C.J. lays down several tests that may be utilized in determining such questions. At page 284 of that opinion it is stated:

> "First of all, let us ascertain the tests whereby these distinctions are made. In performing those duties which are imposed upon the state as obligations of sovereignty, such as protection from crime, or fires, or contagion, or preserving the peace and health of citizens and protecting their property, it is settled that the function is governmental, and if the municipality undertakes the performance of those functions, whether voluntarily or by legislative imposition, the municipality becomes an arm of sovereignty and a governmental agency and is entitled to that immunity from liability which is enjoyed by the state itself. If, on the other hand, there is no obligation on the part of the municipality to perform them, but it does in fact do so for the comfort and convenience of its citizens, for which the city is directly compensated by levying assessments upon property, or where it is indirectly benefited by growth and prosperity of the city and its inhabitants, and the city has an election whether to do or omit to do those acts, the function is private and proprietary.
>
> Another familiar test is whether the act is for the common good of all the people of the state, or whether it relates to special corporate benefit or profit. In the former class may be mentioned the police, fire, and health departments, and in the latter class utilities to supply water, light, and public markets. * * * "

In the case of City of Toledo v. Cone, 41 O.S. 149, at page 165, the court stated:

> " * * * The doctrine seems to be well sustained that where a municipal corporation owns property, and for its own benefit derives pecuniary emolument or advantage therefrom in the same way a private owner might, it is liable to the same extent as he would be for the negligent management thereof to the injury of others. * * * "

In view of the tests laid down and the doctrine announced in the foregoing cases, the conclusion is compelled that the operation of a golf course by a park district is a proprietary function which gives rise to potential common law liability. It may, therefore, be concluded that the purchase of public liability and property damage insurance on such motor vehicles as are used in connection with the operation of the park district golf course would be an expedient and lawful expenditure.

In reaching the conclusion that the operation of a golf course by a park district is a proprietary rather than a governmental function, I am not unmindful of the holding of the Supreme Court of Ohio in the case of Selden vs. Cuyahoga Falls, 132 O.S. 223, wherein the court stated in the first branch of the syllabus:

> "In the construction and maintenance of a park and swimming pool for the use and benefit of the general public, a municipality acts in a governmental rather than a proprietary capacity."

I do not believe that the rule laid down in the Selden case is controlling in the question you present for the reason that the plaintiff in that case conceded that the operation of a swimming pool by a municipal corporation is a governmental function. Thus no issue was presented to the court upon that question. In this connection your attention is directed to page 224 of the opinion in the Selden case, wherein in the course of the courts opinion it is stated:

> "To simplify and shorten this discussion, it should be noted that the defendant municipality here acted in a governmental rather than a proprietary capacity in the construction and maintenance of its park with a swimming pool for the use and benefit of the general public. *City of Mingo Junction v. Sheline, Admx.*, 130 Ohio St., 34, 196 N.E., 897; 57 A.L.R., 402. This seems to be conceded by the plaintiff. * * * "

Passing now to the second question you present concerning the authority of the Board of Park Commissioners to operate concessions on the park grounds for the purpose of selling merchandise, food and drinks. In this connection it should be remembered that Section 2976-7, supra, grants to the Board the authority to use the park property in such manner as the Board may deem conducive to the general welfare. This discretionary power, however, must necessarily be confined to the purpose for which the park district is created and all functions of the Board must be reasonably incidental thereto.

In an opinion rendered by one of my predecessors appearing in Opinions of the Attorney General for 1932, Vol. I, at page 81, the then Attorney General had for consideration a question concerning the authority of The Ohio State Archaelogical and Historical Society to enter into a contract with private parties to erect and use refreshment booths in certain state parks under the control of the society and apply the profits arising from the rentals of the same for the upkeep of the park. At page 84 in the course of that opinion, it is stated:

> " * * * Generally, it may be stated that the Society has the power to grant only such concessions as are necessary, customary or incidental to *park purposes,* and that it can not grant even those if they are inconsistent with the purpose for which a particular park is created, or if they would unreasonably interfere with the right of the public to use the premises. For example, the Society would have no right to grant the privilege of selling automobiles or of conducting a shoe factory, for such enterprises are wholly foreign to the conduct of a park."

Inasmuch as there are no express statutory inhibitions that would prevent the Board of Park Commissioners from operating concessions on the park property wherein merchandise, food and drinks are sold, and since there appears to be nothing in such operation that would be inconsistent with the use of the park lands for park purposes, together with the fact that a concession selling food, drinks and certain merchandise might be materially conducive to the general welfare, and since the presence of such an enterprise could be of distinct service to persons who visit and utilize the park facilities, the operation of such an enterprise would appear proper.

It is, therefore, my opinion in specific answer to your inquiry that:

1. A Board of Park Commissioners, as the same is constituted under the provisions of Section 2976-6, General Code, may not lawfully expend park district funds for the purchase of public liability and property damage insurance on motor vehicles owned and operated by such park district and used solely by the district in the performance of a governmental function.

2. The operation of a golf course upon the park district property where fees are charged for the privilege of using such golf course is a proprietary function. If the motor vehicles mentioned above are used in connection with the park district golf course, the Board of Park Commissioners may lawfully expend park district funds for the purchase of public liability and property damage insurance on such motor vehicles that are so used.

3. The Board of Park Commissioners may lawfully operate concessions upon land owned by the park district for the purpose of selling merchandise, food and drinks. The operation of such concession must not, however, interfere or be inconsistent with the use of the park for park purposes.

Respectfully,

THOMAS J. HERBERT,

Attorney General.