COLUMBUS, OHIO, May 27, 1931.

HON. JOHN K. SAWYERS, JR., *Prosecuting Attorney, Woodsfield, Ohio.*

DEAR SIR:—Receipt is acknowledged of your letter inquiring whether section 5360, General Code, extends to every owner of personal property, or just to those who are householders, the tax exemption therein mentioned. Said section provides:

> "A resident of this state may deduct a sum, not exceeding one hundred dollars, to be exempt from taxation, from the aggregate listed value of his taxable personal property of any kind, except dogs, of which he is the actual owner."

Believing that this statute is clear and unambiguous and that the words, in their natural meaning, must, therefore, be held to represent the legislative intent (See *Sipe* vs. *State,* 86 O. S., 80, 87), I am of the opinion that section 5360 extends the tax exemption therein provided, to every person who is a resident of this State, irrespective of whether such person is, or is not a householder.

Respectfully,
GILBERT BETTMAN,
Attorney General.

3265.

CITY COUNCIL—MANSFIELD—POWER TO GRANT REVOCABLE LICENSE TO PRIVATE PARTY TO OPERATE MINIATURE GOLF COURSE IN PUBLIC PARK—CONDITIONS NOTED—DIRECTOR OF PUBLIC SERVICE UNAUTHORIZED TO GRANT PUBLIC PARK CONCESSIONS—EXCEPTION.

SYLLABUS:

1. *The council of the city of Mansfield may lawfully authorize the granting, to private parties, of a revokable license to operate a miniature golf course within "Johns Park" in said city, providing the operation of said golf course does not unreasonably interfere with the rights of the public in the use of said park for park purposes.*
2. *The Director of Public Service of the city of Mansfield does not have authority, as manager of the public parks of said city, to grant concessions within said park, except as he may be authorized to do so by city council.*

COLUMBUS, OHIO, May 27, 1931.

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

GENTLEMEN:—This will acknowledge receipt of your letter in which you inquire whether or not the right to install and operate as a private enterprise, a miniature golf course in a public park belonging to a municipality, may lawfully be granted. If so, whether or not the Director of Public Service in a city operating under general law wherein a park commission has not been created, by authority of sections 4053 et seq., of the General Code, may grant the privilege or must it be done by city council.

Enclosed with your inquiry, is a communication from the City Solicitor of the city of Mansfield, where the question arose, setting forth a short résumé of the situation and his views with respect to the matter.

It appears that the city of Mansfield has never adopted a charter and its government is now operated under and by virtue of general laws enacted by the Legislature; nor has the city of Mansfield provided for the appointment of park commissioners by authority of section 4053 of the General Code. It further appears that certain lands lying within the city of Mansfield were deeded to the said city for park purposes. The deed, which is recorded in Deed Records, Volume 134, p. 81, of Richland County Records of Deeds, contains the following conditions and restrictions:

> "That the said City of Mansfield, shall at all times and forever, keep, protect, maintain, beautify and adorn such park under the exclusive name of 'Johns Park,' and make it an attractive and desirable place of resort as a public park, *opened at all times to the public free of charge,* but under suitable and proper regulations. That no fence shall be erected around said premises of such character as to obstruct the view from the surrounding property. If said City of Mansfield shall fail to reasonably and fairly comply with the above terms, conditions and restrictions, then and in that event the above described premises shall revert to the grantor, her heirs and assigns."

The conditions and restrictions contained in said deed, as quoted above, constitute this property a public park, and its status, as such, under the terms of said deed, is no different, in my opinion, than would be that of any property acquired by a municipality for park purposes, whether the same were acquired by deed, dedication or under the power of eminent domain. It has generally been considered that property acquired by a municipality for park purposes is to be free and open to the public for recreational and amusement purposes, and the courts have consistently held that such property may not be sold or diverted to uses inconsistent with the purpose of the dedication or grant. See *Board of Education of Van Wert* v. *Inhabitants,* 18 O. S., 221; *Louisville and Nashville Railroad Company* v. *Cincinnati,* 76 O. S., 481. The question has sometimes arisen, however, when incidental uses of the property have occurred, as to whether or not those incidental uses are in fact inconsistent with the use of the property as a public park, although no reported decision of the courts in Ohio has directly involved this question, in so far as the use of such property for refreshment stands and amusement devices is concerned.

By the terms of section 4066, General Code, municipal corporations which become owners or trustees of property for park purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, must manage and administer the property so acquired in accordance with the provisions or conditions of such deed of gift, devise or bequest. As I have said before, the conditions of the deed by which the city of Mansfield acquired the property in question are such as to constitute this property to be public park property, in the same sense as the term is understood with reference to any property which might be acquired by a municipality for park purposes. I see nothing in the terms of this grant which is inconsistent with the uses and purposes for which park property of a municipality must be put, regardless of how the property is acquired.

By force of section 4326, General Code, the Director of Public Service is charged with the duty of managing public parks within the city. As such, however, he is a mere administrative officer, and the council of the city, as directed by section 3714, General Code, has the care, supervision and control of public parks, by virtue of the duty imposed on said council by the terms of said section, to care

for, supervise and control "public grounds." In the recent case of *Cleveland* v. *Fernando,* 114 O. S., 207, it is held that municipal parks are "public grounds" within the provisions of said section 3714, General Code. See also *Louisville and Nashville Railroad Company* v. *City of Cincinnati,* supra.

The question of the division of authority between the Director of Public Service and the city council was considered in the case of *City of Columbus* v. *Biederman,* 16 O. N. P. (N. S.) 140, wherein it is held as stated in the syllabus:

> "Authority in a director of public service to manage public parks does not include authority to grant permission to private parties, for a stipulated rental to be paid to the city, to erect booths for the sale of refreshments and articles likely to be called for by visitors to the park. If such authority is to be granted it must be through proper legislation by council."

This case was not carried higher, but has been generally recognized as dispositive of the question with reference to the extent of the authority of a director of public service in his administrative capacity as manager of a public park by authority of section 4326, General Code. It is indicated by this decision that council would have authority to grant concessions within public parks for the sale of refreshments and the like, but the case turned upon other questions and that question is not directly involved in the case.

In an opinion of a former Attorney General, found in Opinions of the Attorney General for 1924, at page 262, it is held that "a municipality can not abandon the right to use a public park duly dedicated to the public, but may permit a use of the same in a manner not inconsistent with the purpose of the dedication." In that opinion concrete instances of what uses were and what were not inconsistent with the purpose of the dedication of a public park were not considered. The Attorney General confined himself to a general statement that any use of park lands was permitted so long as that use was not inconsistent with the purpose of the dedication. In 1915 the Attorney General had under consideration the question of enclosing a part of the lands of a public park for baseball grounds and charging admission thereto. It was held:

> "Park commissioners acting under authority of sections 4053 et seq., General Code, are without authority to grant permission to baseball players or associations to charge an admission fee to enter an enclosure on the public park grounds while games are in progress."

See Opinions of the Attorney General for 1915, page 306. The holding of the Attorney General in the aforesaid opinion is somewhat modified in the body of the opinion wherein he states:

> "The term 'public park' as used in the statutes contemplates grounds under the control of public authorities, set apart as a place of resort for the public, for recreation, exercise and amusement. Being provided at public expense, it is necessarily contemplated that it shall be maintained for the equal use and enjoyment of the inhabitants of the city wherein it is so maintained.
>
> Such use and enjoyment by the public is subject, however, to the authority of the board to prescribe and enforce such reasonable regulations

and limitations as to time and manner of use as tend to promote and enlarge the enjoyment thereof.

The line of demarcation between the proper and reasonable exercise of such discretion and authority by the board, and an abuse thereof which defeats the public enjoyment is dependent upon the facts and circumstances of each particular case, and is essentially a question of fact and not susceptible of definition or determination by general rule."

As stated by the Attorney General in the opinion above referred to, the cases involving questions similar to that here under consideration turn to some extent on questions of fact. That is to say, whether or not a proposed use of a portion of a public park for refreshment stands, amusement devices, etc., constitutes a diversion of the property for park purposes, depends to some extent on circumstances. Thus it is held in *Carstens* v. *City of Wood River* (Ill.), 163 N. E., 816, that the city's appropriation of a large part of the park to be used as a recreational center with a pavilion, concessions and swimming pool, surrounded by a wire fence to prevent the free use thereof by the public constitutes a diversion of the property from park purposes. The general rule is, however, that where only a small portion of a park is to be used for a refreshment stand or an amusement device of some kind such use is not a diversion of the property from park purposes. This rule is stated in Ruling Case Law, Volume 20, page 657, as follows:

"Under a statute authorizing a city to devote a park to any use which tends to promote popular enjoyment and recreation, it is not improper to grant to individuals, for pay, exclusive rights to operate refreshment and lunch stands in the park, and to rent boats and bathing suits and towels and dressing rooms, as that does not constitute a use of the park for other than public purposes nor is it in conflict with provisions of a deed of gift by which the city acquired the property, to the effect that it should be used for the benefit of the public, and should be inalienable by deed, gift, lease or other method. The exclusive character of such a privilege is not the basis of any legitimate objection, for, as no one has a right to engage in the activities referred to except by permission of the city, no one is wronged by the monopoly created. The concessions granted do not amount to the leasing of any part of the park; nor do they involve the loss of control over it by public officers."

See also McQuillan on Municipal Corporations, Second Edition, Volume 3, Section 1257, Corpus Juris, Volume 44, page 1103-4. A leading case wherein this question is involved, and it is cited by all the commentators noted above, is the case of *Bailey* v. *City of Topeka,* 97 Kans. 327; 154 Pac., p. 1014. See also Notes to *Daughters* v. *Riley County,* 27 L. R. A., N. S., 938; *Hopkinsville* v. *Jarrett,* 50 L. R. A., N. S., 465.

An examination of the cases involving this question, shows clearly that in practically all jurisdictions the general rule referred to above, is followed. Even in cases where the right to license a concession or to permit a portion of the park grounds to be used for certain purposes is denied, the general rule, as stated above, is not questioned, but the cases are decided on the reasonableness and the necessity for the concession. Thus, in the case of *Sherburne* v. *Portsmouth,* 72 N. H. 539, it is held that a city has no power to permit individuals to make and maintain a baseball park in a public park, "if it unreasonably interferes with the right of the public to use the park." If, however, the concession, whatever it

may be, does not unreasonably interfere with the use of the park for public purposes the authorities are almost unanimous to the effect that the concession may be granted. In a Nebraska case, *Nebraska City* v. *Nebraska City Speed & Fair Association,* 186 N. W. 374, it was held that a city had power to grant a license or concession to hold in a public park race meets for short periods of time for the enjoyment of the public, and in a Missouri case, *State ex rel. Wood* v. *Schwickhardt,* 109 Mo. 496, it was held that a charter provision empowering the city to regulate its parks authorizes the city to rent the privilege of selling refreshments, including intoxicating liquors, in a public park.

There appear to be no reported cases in Ohio directly in point. The fact, however, that concessions for refreshment stands and amusement devices in public parks, not unreasonably interfering with the right of the public to use the park, but on the other hand, being conducive to the welfare and amusement of the patrons of the parks, have been in many cases granted in Ohio, and apparently without such serious objection as to lead to the question of the right to grant such concessions being passed upon by the courts, is reason to believe that the granting of such concessions does not unreasonably interfere with the rights of the public in park property, and I am of the opinion that such concessions may lawfully be granted when reasonable.

It should be noted, however, that in granting concessions of this kind such grants are mere permits revocable at the instance of the authorities granting them. A lease can not be granted for the exclusive right to exercise any privilege within a public park for a term of years or for any specific time. A revocable license is all that may be granted. See *Williams* v. *Hylan* (N. Y.) 162 N. W., 547, affirming *Williams* v. *Hylan,* 227 N. Y. S. 392.

I am therefore of the opinion, in specific answer to your questions:

First, that the council of the city of Mansfield may lawfully authorize the granting, to private parties, of a revocable license to operate a miniature golf course within "Johns Park" in said city, providing the operation of said golf course does not unreasonably interfere with the rights of the public in the use of said park for park purposes.

Second, the Director of Public Service of the city of Mansfield does not have authority, as manager of the public parks of said city, to grant concessions within said park, except as he may be authorized to do so by city council.

Respectfully,

GILBERT BETTMAN,

Attorney General.

3266.

PARLIAMENTARY LAW—COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES—RIGHT OF PRESIDING OFFICER TO SECOND MOTION.

SYLLABUS:

1. *The presiding officer of a board of county commissioners may second a motion made by one of its members.*

2. *Meetings of boards of township trustees need not be conducted in strict compliance with parliamentary procedure.*