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1. PLAYGROUNDS AND OTHER RECREATIONAL ACTIVITIES—MUNICIPAL COUNCIL AUTHORIZED TO RAISE MONEY BY TAXATION AND APPROPRIATE IT TO MAINTAIN AND OPERATE SUCH ACTIVITIES — SECTION 4065-7 G. C.

2. MUNICIPAL CORPORATION MAY MAKE COOPERATIVE AGREEMENT WITH BOARD OF EDUCATION OF SCHOOL DISTRICT TO SUPERVISE RECREATIONAL ACTIVITIES—MAY APPROPRIATE AND PAY TO SUCH BOARD OF EDUCATION A SUM OF MONEY NOT IN EXCESS OF ESTIMATED COST OF SUCH SUPERVISION—SECTION 4065-3 G. C.

3. COOPERATIVE AGREEMENT SANCTIONED BY PROVISIONS SECTIONS 4065-1 TO 4065-7 INCLUSIVE, G. C.—WITHIN POWERS OF HOME RULE GRANTED MUNICIPALITIES BY ARTICLE XVIII, SECTION 3, CONSTITUTION OF OHIO.

SYLLABUS:

1. A municipal council is authorized by Section 4065-7, General Code, to raise money by taxation and appropriate the same for the purpose of maintaining and operating playgrounds and other recreational activities.

2. A municipal corporation, whether it has or has not created a recreation board under the provisions of Section 4065-3, General Code, may, in lieu of employing supervisors for its recreational activities, make a cooperative agreement with the board of education of the school district of such municipality for the supervision of such activities, and may, pursuant to such agreement, appropriate and pay to such board of education a sum of money not in excess of the estimated cost of such supervision.

3. Such cooperative agreement is sanctioned by the provisions of Sections 4065-1 to 4065-7, inclusive, of the General Code, and independent of such statutes, is within the powers of home rule granted to municipalities by Section 3 of Article XVIII of the Constitution.

Columbus, Ohio, May 14, 1945

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"We are inclosing herewith copy of a letter from the City Solicitor of Norwood, in which a question is submitted which we are unable to answer for lack of a ruling or decision of the courts applicable thereto.

As the Solicitor's question is of such nature that the answer thereto would be of general application to all cities in this State, may we request that you examine the inclosure and give us your opinion in answer to the following question:

Is a city council authorized by the provisions of Section 4065-7 or any other section or sections of the General Code to levy a tax and appropriate funds to be turned over to the city Board of Education for the purpose of financing the cost of operating and maintaining recreation activities under control of the Recreation Board?"

From the letter of the City Solicitor of Norwood, attached to your communication, I quote the following:

"On May 3, 1943, the City Council of Norwood, Ohio, passed an ordinance setting up a Recreation Board in conformity with Section 4065-3 of the General Code. The activities of said Recreation Board were then turned over to the Board of Education of the City of Norwood, who supervised and conducted its operation. The Board of Education receives all fees and receipts for recreational activities, and all appropriations for the carrying out of the activities of the Recreation Board are made by the Board of Education of the City of Norwood.

The situation now is that the funds available for the Board of Education to run the Recreation Board are insufficient and the city of Norwood, through its Council in conformity with Section 4065-7 of the General Code, desires to levy a tax and appropriate funds to be used for recreational purposes. Our question, therefore, is this:

Can City Council under the authority of Section 4065-7 of the General Code levy a tax and appropriate money to be paid in a

lump sum to the Board of Education to be used by said Board of Education for recreational purposes, or must the city, if it does appropriate money for recreational purposes, merely pay out against said funds on proper vouchers? It is our desire, if at all possible, merely to appropriate a lump sum for recreational purposes and then turn this over to the Board of Education to be used by them for recreational purposes."

The statutes to which you refer, are part of an act of the legislature found in 109 O. L. page 609, comprising Sections 4065-1 to 4065-7 inclusive, of the General Code. Section 4065-1 provides that the council or other legislative authority of any city or village, or the county commissioners of any county may set apart for use as playgrounds, gymnasiums, public baths, swimming pools, etc., any land or buildings owned by the subdivision, and may acquire lands or buildings for such purposes. Section 4065-2 provides as follows:

"The authority to supervise and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, *may be vested in any existing body or board, or in a recreation board,* as the city or village council or the county commissioners shall determine. The local authorities of any such city, village or county, may equip, operate and maintain, the playgrounds, playfields, gymnasiums, swimming pools, public baths or indoor recreation centers, as authorized by this act. *Such local authorities may,* for the purpose of carrying out the provisions of this act, *employ play leaders, recreation directors,* supervisors, superintendents or any other officers or employes as they may deem proper."

Section 4065-3 reads:

"If the city or village council shall determine that the power to equip, operate, and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or recreation centers, shall be exercised by a recreation board, they may establish in said city or village, such recreation board which shall possess all the powers and be subject to all the responsibilities of the respective local authorities under this act (G. C. Secs. 4065-1 to 4065-7). Such board when established shall consist of five persons, *and two of the members shall be members of the board of education of the city or village school district.* * * * " (Emphasis added.)

Section 4065-4 provides for the organization of the recreation board so established and authorizes the board to employ such persons as may be

needed, and to adopt rules and regulations for the conduct of all business within its jurisdiction. Section 4065-5 reads as follows:

> "Any two or more cities or villages, or any city or village, or any city or village and county, may jointly acquire property for and operate and maintain any playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers. *Any school district shall have power to join with any city, village or county, in equipping, operating and maintaining playgrounds, playfields, gymnasiums, public baths, swimming pools, and indoor recreation centers,* and may appropriate money therefor."
>
> (Emphasis added.)

Section 4065-6 reads:

> "The city or village council, or the county commissioners, may issue bonds for the purpose of acquiring lands or buildings for playgrounds, playfields, gymnasiums, swimming pools, public baths, or indoor recreation centers, and for the equipment thereof."

Section 4065-7 reads as follows:

> "All expenses incurred in the operation of such playgrounds, playfields, gymnasiums, swimming pools, public baths, and indoor recreation centers, established as herein provided, shall be payable from the treasury of such city, village, county or school district. The local authorities of such city, village, county or school district, having power to appropriate money therein, may annually appropriate and cause to be raised by taxation an amount for the purpose of maintaining and operating playgrounds, playfields, gymnasiums, public baths, swimming pools and recreation centers."

It will be noted that by the provisions of the above statutes the municipalities and county authorities are authorized to acquire land for the recreational purposes indicated. Nothing is said in these statutes about acquisition of land for similar purposes by the board of education. But, as will be pointed out later, such boards do have that power under statutes relating directly to school management. Section 4065-5 supra, however, does introduce the idea of cooperation and joint action between a municipality and the authorities of a school district, in "equipping, operating and maintaining such playgrounds and recreation centers." That the legislature had in mind the closest cooperation between the municipality and the school district is further evidenced by the provision of Section 4065-3

supra, that a recreation board, if one is provided, shall have in its membership, two members of the school board.

It would appear to me, therefore, very clear that the legislature intended that the municipality might enter into some arrangement with the school district for cooperation in equipping, operating and maintaining the same and for centralizing the actual supervision in one or the other. It would be most absurd to argue that both must take a hand in the control and supervision of playgrounds merely because each had the power so to do. It is true that in the language used the express authority *to join* in equipping, operating and maintaining such facilities is conferred upon the school district and there are no words used which expressly provide that the municipality shall have power *to join* with the school district. I do not, however, regard this as any evidence of a lack of authority on the part of the municipality to join in such arrangement. It is inconceivable that the leigslature could give to one political subdivision the right to *join with* or *contract with* another political subdivision without by necessary implication giving or recognizing the right of the other subdivision also to join or contract. Joint action necessarily presupposes action by two parties just as the making of a contract necessarily contemplates at least two parties to the agreement.

I quote from 28 Oh. Jur. page 899:

> "It is said that the power to contract is inherent in every municipal corporation with respect to any subject-matter within its corporate powers. Power to contract in particular instances is also expressly conferred by various statutory and constitutional provisions."

Citing 19 Ruling Case Law, page 1061; Columbus vs. Public Utilities Commission, 103 O. S. page 79.

The case of Columbus vs. Public Utilities Commission, supra, related to the right of a city, in giving its consent to the occupation of its streets, to make a contract with a telephone company embodying the conditions upon which it should enjoy that privilege. The court upheld the city's rights. No general opinion was rendered but concurring opinions were rendered by several judges. Quoting from the opinion by Marshall, C. J. at page 94:

"The city of Columbus has of course inherent and common-law power to make contracts generally, * * *"

Wanamaker, J. in his concurring opinion said at page 140:

"Under the old common law, for centuries, when a community became a public corporation, agreeable to law, one of the first powers with which it became endowed was the power of contract. Indeed it would not be a corporate entity to any purpose without that power."

Citing Case vs. Dillion, 2 O. S., page 607.

The question then arises, what is to prevent the City of Norwood from making the arrangement which it proposes with the Board of Education of that city, if it considers that the best way to provide supervision for the recreational activities?

It is true that by the terms of the statute the management of recreational facilities of the city may be committed to a recreation board appointed under Section 4065-3, General Code, and that that board so appointed has authority to employ play leaders and directors and other employes as it may deem proper. It is also true that the board of education of any school district is authorized by Section 4834-10 et seq. (formerly sec. 7620 et seq.), General Code, to purchase or lease real estate to be used as playgrounds and to employ persons to supervise and direct social and recreational work in the school district. Section 4836-10, General Code, which is a successor to Section 7622-4, General Code, provides in part as follows:

"Boards of education of city, exempted village or local school districts may, upon nomination of the superintendent of schools, employ a person or persons to supervise, organize, direct and conduct social and recreational work in such school district. * * *"

Section 4836-11, formerly Section 7622-6, General Code, reads as follows:

"Boards of education of city, exempted village or local school districts *may cooperate* with commissioners, boards or *other public officials* having the custody and management of public parks, libraries, museums and public buildings and grounds of whatever kind in *providing for* education, social, civic and *recreational activities,* in buildings and upon grounds in the custody and under

the management of such commissioners, boards or other public officials." (Emphasis added.)

Several of my predecessors have had occasion to consider the provisions of Section 4065-1 et seq. in connection with former Section 7620 et seq. of the General Code. In 1929 Opinions Attorney General, page 1975, it was held:

"The *manner by which* a school district may *cooperate* with other public officials in the maintenance of recreational activities as authorized by Sections 4065-5 and 7622-6, General Code, is *within the discretion* of *the authorities so cooperating*, and *may lawfully be the subject of agreement between them.*"
(Emphasis added.)

In the course of the opinion, at page 1977, it was said:

"The law, as you will note, is rather indefinite as to just how a board of education may cooperate with a municipality in the maintenance of recreational activities. Apparently, *the manner of cooperation is left to the discretion of the authorities.* I quite agree with the solicitor in Canton that the Board of Education might cooperate with the recreation board, by turning over the moneys for recreational work to the recreation board or might lawfully keep it in its treasury and pay it out upon orders of the board, as seems to have been done in this case."
(Emphasis added.)

Note that it was the opinion of the Attorney General that the manner of cooperation was to be left entirely to the discretion of the local authorities. In that particular case the board of education proceeded to cooperate by turning over its moneys for recreational work to the recreation board of the city, whereas, in the case you present the contrary is proposed, to wit, that the city turn over its money to the board of education. In my opinion the one procedure is just as clearly within the contemplation and intention of the legislature as the other. The outstanding idea through all this legislation is the proposition that cooperation between these two authorities in conducting recreational work is approved and encouraged.

In 1933 Opinions Attorney General, page 695, Attorney General Bricker again discussed the statutory provisions to which reference has been made, and said:

> "Upon consideration of the powers extended to boards of education by virtue of the statutes noted above, it will be seen that those powers are very broad, both as to the conduct of recreational activities independently, and in cooperation with other officials, Boards of Education do not have the power to join with the local authorities of a city or village or county in acquiring playgrounds and similar property for recreational purposes, but the power to cooperate in the equipping, maintaining and operating of these properties is practically unlimited, nor is this power limited as to time so as to prevent its exercise during the time school is not in session."

Proceeding in the opinion he quoted the language which I have above quoted from the 1929 opinion, to the effect that the manner of cooperation between these subdivisions is within the discretion of the authorities so cooperating and may lawfully be the subject of agreement between them.

If, therefore, we were wholly dependent upon the statutes for the authority of the municipality to enter into an arrangement with the board of education such as is contemplated by the City of Norwood, we would in my opinion find abundant authority for the proposed plan. The fact that a recreation board has been organized by the city under the provisions of the statute would not limit the power of the city in determining, either through that board or by some other method to make an agreement with the board of education whereby the latter should undertake the task of supervision. I see no reason why the recreation board could not if authorized by the council make such an arrangement with the board of education. Whether the money provided for the supervision of recreation is paid out in a lump sum or piecemeal seems to me to be immaterial.

I do not, however, consider that the city must look to the statutes in question for its power to plan and carry out provisions for public recreation. By the terms of Section 3, Article XVIII of the Constitution, adopted in 1912, it is provided:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Along with this provision, the Constitution has reserved to the legislature certain powers, to wit, the right to "restrict" or "limit" the power of

municipalities in levying taxes and incurring debts. Subject to these limitations the municipality's power in matters of local self-government appears to be unlimited. It is true that under the decisions of our Supreme Court this broad power does not extend to matters which are of state wide concern, such as the establishment of courts, the maintenance and operation of police and fire departments and the safeguarding of the public health, but there can be no question that the matters with which we are here concerned are purely of local concern and the powers reserved to the legislature have therefore no possible application. The effect of this constitutional amendment has been set forth in a large number of cases. The first decision by the Supreme ourt was State, ex rel. vs. Lynch, 88 O. S., page 71. From that I quote the language of Judge Shauck at page 93 of the opinion:

> "But the amended article authorizes the electors of a municipality to secure some *immunity from the uniform government* which it perpetuates as the *primary status* of all municipalities, and to entitle their municipality 'to exercise all powers of local self-government.'" (Emphasis added.)

Shortly thereafter the case of Fitzgerald vs. Cleveland, 88 O. S. page 338, was decided. In the opinion by Judge Johnson the following strong language was used:

> "The method of electing municipal officers would seem to be a matter peculiarly belonging to the municipality itself. The very idea of local self-government, the generating spirit which caused the adoption of what was called the home-rule amendment to the constitution, was the desire of the people to confer upon the cities of the state *the authority to exercise this and kindred powers without any outside interference.*" (Emphasis added.)

Again, at page 349, after referring to the powers that were expressly reserved to the legislature, Judge Johnson said:

> "The inclusion of these limitations in Article XVIII is a conclusive indication that the convention which framed it was conscious of the wide scope of the powers which they were conferring upon the cities of the state with reference to their local self-government.
>
> Not alone this, but in connection with the comprehensive grant *they disclose the intention to confer on municipalities all*

other powers of local self-government which are not included in the limitations specified. Expressio unius exclusio alterius est."
(Emphasis added.)

In Perrysburg vs. Ridgeway, 108 O. S. page 245, it was held:

"1. Since the Constitution of 1912 became operative, all municipalities derive all their 'powers of local self-government' from the Constitution direct, by virtue of Section 3, Article XVIII, thereof. * **

5. The grant of power in Section 3, Article XVIII, is equally to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution."

Accordingly, in specific answer to your question, it is my opinion:

1. A municipal council is authorized by Section 4065-7, General Code, to raise money by taxation and appropriate the same for the purpose of maintaining and operating playgrounds and other recreational activities.

2. A municipal corporation, whether it has or has not created a recreation board under the provisions of Section 4065-3, General Code, may, in lieu of employing supervisors for its recreational activities, make a cooperative agreement with the board of education of the school district of such municipality for the supervision of such activities, and may, pursuant to such agreement, appropriate and pay to such board of education a sum of money not in excess of the estimated cost of such supervision.

3. Such cooperative agreement is sanctioned by the provisions of Sections 4065-1 to 4065-7 inclusive, of the General Code, and independent of such statutes, is within the powers of home rule granted to municipalities by Section 3 of Article XVIII of the Constitution.

Respectfully,

HUGH S. JENKINS,

Attorney General