

the option of the municipality be paid either in annual installments for a period within fifty years or in larger amounts as such ordinance shall declare. Bonds may be issued by the municipality for securing funds both for operating such industries and compensating the owner; such bonds may be a lien against only the property so acquired or against all or any other property of the municipality, and shall not be included in any limitation of the bonded indebtedness of such municipality prescribed by law. None of the restrictions of Article XVIII, section 4, of the constitution shall affect this section with regard to the product or service to be supplied by such industries; and it shall be liberally construed in order that municipalities may have wide discretion and immediate power for dealing with such exigency.

I, John G. Price, Attorney-General of the state of Ohio, do hereby certify that the foregoing is a fair and impartial synopsis of the proposed amendment to the Ohio constitution to be designated "Section 1b, Article I" and is a truthful statement of the contents and purpose of such proposed amendment.

Respectfully,

JOHN G. PRICE,
Attorney-General.

1897.

BOARD OF PARK COMMISSIONERS—POWERS AND DUTIES NOT IN CONFLICT WITH THOSE OF BOARD OF PARK TRUSTEES—FUNDS DERIVED FROM SALE OF GRAVEL FROM PARK PROPERTY, HOW USED—SAID BOARD HAS CONTROL OF WATER COURSES WITHIN MUNICIPALITY CONTAINED WITHIN SUCH PARK PROPERTY.

1. *Powers and duties of board of park commissioners as provided by section 4057 G. C. not in conflict with similar powers and duties of boards of park trustees as provided by section 4072 G. C. since said boards have management and control of different classes of park properties and funds.*

2. *A fund derived from the sale of gravel from park property, donated and dedicated to the city, and controlled by the board of park commissioners, may be used and expended as other and similar "park funds" for lawful purposes of said park property, provided that said use or expenditure is not contrary to the terms of the devise, bequest, or trust, by which said park property was acquired by the municipality.*

3. *Board of park commissioners in accordance with the provisions of sections 4057 G. C. and 4325 G. C. have the power of management and control of water courses within the municipality contained within such park property.*

COLUMBUS, OHIO, March 9, 1921.

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

GENTLEMEN:—Receipt is acknowledged of your communication of recent date in which you enclose copy of letter received from the city solicitor of Canton, Ohio, reading as follows:

"I would appreciate your aid in determining a question which we have up with respect to the power and authority of the board of park commissioners.

Under favor of sections 4053 and 4054 General Code, there has been established in this city a board of park commissioners; and the powers of this board are set forth in section 4057 General Code. Now, in General Code section 4066 and following, provision is made in case the city has become the owner or trustee of property for park purposes or of funds to be used in connection therewith, by deed of gift, etc., such property or funds shall be administered in accordance with the provision of such deed, etc., and provision is then made that a board of park trustees shall be appointed who shall have the powers as set forth in section 4069 General Code, and then under section 4072 General Code such trustees are given the entire management and control of such funds and of the improvements, moneys derived from levies for park purposes, etc., and this latter section as amended in 103 O. L. 511 gives such trustees the control and management of parks, play grounds, baths, etc., located therein and provides further that such boards shall exercise exclusively all the powers and perform all the duties in regard to such property vested in and imposed upon the director of public service. By consideration of these sections of the code, it appears that two separate bodies are provided for, namely, the board of park commissioners, which is in fact in existence in this city, and a board of trustees, which is not in existence here. The question has arisen as to whether or not the board of park commissioners has any jurisdiction over the control of the improvement of water courses within the city and in considering the sections with respect to the park commissioners, it would appear that such commissioners did not have any jurisdiction; however, by an examination of General Code section 4076, it would seem that the board of trustees has such jurisdiction. In fact, these statutes are so drawn and put into the code in such form that I confess frankly that I am unable to reconcile them at all.

We have on hand in the city treasurer's possession a fund of about \$11,000 which came from a sale of certain gravel, etc., taken from one of the parks of this city. The park in question was one which was dedicated to the city in a plat duly acknowledged, filed and recorded. And now the question is whether or not the park commissioners can expend and use this money, or whether some board of trustees of which we know of none having ever functioned here, could possibly some time claim this fund. I have been over these sections of the code not only with the assistants in this department, but also with two or three other members of the bar and we are all in a quandary with respect to the whole subject.

If you can give us any information as to what action we should take along the lines mentioned we will greatly appreciate indeed any favors; and it may just be possible that this matter has in the past been brought to the attention of the Attorney-General and that you can, if you think necessary, obtain his views."

The question as submitted in the communication above relative to the apparent conflict of the statutes pertaining to the powers and duties of the board of park commissioners, and those of the board of park trustees, as well as certain other questions raised by implication, can best be answered by a review of the statutes, which in such cases provide for the appointment, as well as the powers and duties of such boards.

Section 4053 G. C. provides for the submission of the question to an election. The section is as follows:

"When five per cent of the qualified electors of a city petition the

board of deputy state supervisors of elections of the county for the privilege of determining by ballot whether there shall be a board of park commissioners with the powers hereinafter provided for, such board shall submit at the next general election held within such city, or at a special election, if the petition requests a special election, the questions presented in the petition, to the electors of the municipality. Such special election shall be held at the usual place or places for holding municipal elections and shall be governed by the same rules, regulations and laws as govern the holding of municipal elections."

Section 4054 G. C. provides for the appointment, term, etc., and is as follows:

"If a majority of the electors voting at such election on the questions vote in favor of the appointment of a board of park commissioners, the mayor shall immediately appoint three electors of the city as members of such board, to be known as the board of park commissioners. Such members shall be appointed for terms of one, two and three years, respectively, and their successors shall be appointed for terms of three years. In case of the death or resignation of a member of such board, the mayor shall immediately appoint a successor to fill the vacancy for the unexpired term. The members of the board shall serve without compensation. The mayor may remove, with the consent of the city council, a majority of the members elected thereto concurring, any member of such board for incompetency or official misconduct."

Section 4057 G. C. provides for the control and management of parks, as well as powers and duties of park commissioners. The section reads as follows:

"The board of park commissioners shall have the control and management of parks, park entrances, parkways, boulevards and connecting viaducts and subways, children's playgrounds, public baths and stations of public comfort located in such parks, of all improvements thereon and the acquisition, construction, repair and maintenance thereof. The board shall exercise exclusively all the powers and perform all the duties, in regard to such property, vested in and imposed upon the director of public service."

Thus it will be seen that by the provisions of these statutes there is created a board of park commissioners which is to have custody and control over the public parks of the municipality in general, and whose powers and duties relative to the same are definitely fixed and prescribed by law.

As to the question which your communication raises in regard to the apparent conflict of the powers and duties of the board of park commissioners and those of the board of park trustees as provided for by section 4066 G. C., the following sections of the statutes are quoted as they seem to be applicable to a solution of the difficulty:

Sections 4066 and 4067 G. C. provide as follows:

"Section 4066. In any municipal corporation which has become or may hereafter become the owner or trustee of property for park purposes, or of funds to be used in connection therewith, by deed of gift, devise or bequest, such property or funds shall be managed and administered in accordance with the provisions or conditions of such deed of gift, devise or bequest."

"Section 4067. When such deed of gift, devise or bequest requires the investment, or change of investment of the principal of such property or funds, or any part thereof, to be made upon the approval of an advisory committee appointed by a court or judge, then such property or funds, and any park property for the care or management of which in whole or in part such fund is used, shall be managed, controlled and administered by a board of park trustees."

These sections would seem to make a distinction as to park property ordinarily acquired, and such property acquired by bequest, devise, or other method in which the relation of a trust is created. In other words, it would seem to be the intention of the statutes to make separate and distinct provisions for the custody and control of park property acquired by the municipality in the capacity of a trustee.

In this connection, it will also be noted that section 4067 G. C. supra providing for the appointment of the board of park trustees, does not contemplate the appointment of said trustees until the trust property or fund relative to such park requires *the investment, or change of investment of the principal* of such property or funds. Thus it would appear that the appointment of the board of park trustees contemplated by the provisions of section 4067 depends upon the contingency expressed in the statute, "when such deed of gift, devise or bequest, requires the investment or change of investment of the principal of such property or funds, or any part thereof, to be made upon the approval of an advisory committee appointed by a court or judge," etc., whereupon such a condition arising, it would seem that such park property or parks (as there may be more than one), as well as the entire park or parks to which the devise or bequest pertains, passes from the control of the municipality and vests in the board of park trustees. Thus it may readily be seen that several public parks of a municipal corporation may be under the general supervision of the board of park commissioners and conditions such as are contemplated by the provisions of section 4067 G. C. might arise which would take the particular park or parks, as well as the property and funds thereof from the control of the board of park commissioners and vest the same under the control and management of the board of park trustees, by reason of the necessity of the investment or re-investment of the particular funds or property arising from the terms of the trust, bequest or devise. So it would appear that the statutes relating to the power, duties, management and control of public parks which by the same are vested in the board of park commissioners apply only to that class of public parks which are ordinarily and generally owned or acquired by the municipality, and do not apply to such park or parks donated to or acquired by the municipality by deed of trust, bequest, or devise and under the control of the board of park trustees, by reason of the appointment thereof under the provisions of section 4067 G. C. So it would likewise appear that the statutes relative to powers, duties, etc., of the board of park trustees apply only to the particular class of parks acquired by the municipality by the terms of a trust, devise or bequest.

Reconciling these statutes, therefore, it would seem that so long as there was no necessity for the investment or change of investment of the funds or property relative to the park in question, as indicated by your communication, there would be no occasion for the appointment of a board of trustees under the provisions of section 4067 G. C., and the custody and control of said park and "park funds" would still remain under the management and control of the regularly appointed board of park commissioners.

In this connection, it is asked by the above communication if the aforesaid board of park commissioners who have control of the certain donated and dedicated park property and also a certain fund of \$11,000 derived from the sale of gravel

from said dedicated park would be justified or have the legal right to expend or use this fund. Statement is not made for what purposes the expenditures are desired, so it is presumed for the purpose of this opinion that said expenditure or use of fund by the board of park commissioners is a just and lawful one, within the scope and power of the board to expend, and one which is not contrary to the express or implied conditions of the devise or bequest of said trust property, then it would be the opinion of this department that said sum could be expended for such park purposes by the board of park commissioners in a like manner as other funds under their control for park purposes, and in the same manner as such are by law authorized to be expended.

The question is also asked as to whether the board of park commissioners has any jurisdiction over the control and improvement of water courses within the city.

Upon examination of section 4057 G. C. quoted above, it would appear that the board of park commissioners were empowered with all the powers and duties formerly exercised by the director of public service in regard to public parks.

Section 4325 G. C. also provides:

“The director of public service shall supervise the improvement and repair of streets, avenues, alleys, lands, lanes, squares, wharves, docks, landings, market houses, bridges, viaducts, aqueducts, sidewalks, play grounds, sewers, drains, ditches, culverts, ship channels, streams and water courses, the lighting, sprinkling and cleaning of public places, the construction of public improvements and public works, except those having reference to the department of public safety, or as otherwise provided in this title.”

Since by the provisions of this section it would seem that the director of public service had control over streams and water courses, and by the provisions of section 4057 G. C. that the board of park commissioners are endowed with all the powers and duties of the director of public service in regard to said park property, it would seem to logically follow that the board of park commissioners would have control over streams and water courses within said municipality contained within such park property.

Section 4076 provides:

“The board shall have entire management and control of all work of straightening, cleaning, deepening, or otherwise improving any natural water-course, whether partly or wholly used for sewer purposes or not, within such city, and may purchase, acquire or condemn any water rights, easements or privileges in connection with any natural water-course through such city, and may acquire or condemn such real estate necessary for such purposes.”

By the provisions of this section it would appear that the board of park trustees would also have supervision over the water courses within the municipality, thus creating an apparent conflict with the powers in regard to such as are vested in the board of park commissioners by the provisions of sections 4057 and 4325 G. C.

Such a conflict of powers conferred by statute in the event of two existing boards would be dissolved by accepting the latest statute to control and govern the matter under consideration, which in this case is sections 4057 and 4325 G. C. Thus it would appear that the board of park commissioners would have control over the water courses of the municipality contained within such park or parks.

Respectfully,

JOHN G. PRICE,
Attorney-General.