OPINION NO. 77-090

Syllabus:

1. In the absence of express statutory authority to the contrary, a state agency may not directly acquire parking facilities for its employees.

2. A state agency which is in possession of a parking facility cannot offer the free use of such a facility to its employees in the form of a fringe benefit.

3. If parking is provided primarily to benefit the state agency or if the acquisition and operation of the facility does not entail an additional and identifiable cost to the state, the provision of free parking to state employees does not constitute a fringe benefit and is, therefore, permissible.

4. Revenue from the collection of parking fees by a state agency may be deposited in a particular rotary fund or special account if the Office of Budget and Management determines that the deposit of such revenue is one of the intended uses of the fund or account. In the absence of such a determination, revenue from the collection of parking fees by a state agency must, pursuant to R.C. 131.08, revert to the state treasurer to the credit of the general revenue fund.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, December 19, 1977

I have before me your request for my opinion which reads as follows:

(1) May a state department or agency provide their employees with free parking facilities on state owned property?

(2) May a state agency lease private facilities and subsequently provide those facilities, as a fringe benefit to their employees free of charge?

(3) May a state agency operate a parking facility on state owned property and collect a monthly fee from those state employees or private individuals wno park their privately owned vehicles on the lot?

(4) Assuming that a state agency has the authority to operate a parking facility, must the revenue so derived be deposited in the general fund or may it be deposited in the agency's own rotary fund?

The scope of the issues presented in this request is extremely broad. Your inquiry concerns the power of all state agencies to engage in the operation and acquisition of parking facilities. The apparent breadth of the question is accentuated by the fact that many of the terms contained therein are matters of considerable uncertainty. Although I am aware that your concern extends to a number of agencies under varying circumstances, I feel that certain assumptions and limitations are necessary to the proper disposition of these questions.

R.C. 121.02 (A) defines "department" to include the several departments of state administration specifically enumerated in R.C. 121.02. The meaning of "state agency" is, however, not as definitive. The term is generally used to collectively refer to the various offices, boards, commissions, departments, divisions and institutions created by the constitution or laws of the state for the exercise of any function of state government. See e.g., R.C. 121.01; R.C. 127.11; R.C. 154.01 (D). I shall assume that this definition, although very broad, is appropriate since the analysis herein is not confined to a particular statute or chapter of the Ohio Revised Code. Thus, for the purposes of this opinion, the term state agency refers to the departments of state administration enumerated in R.C. 121.01 and the various offices, boards, commissions, divisions, and institutions created by the constitution or laws of the state for the exercise of any function of state government.

Your inquiry concerns the power of any such agency to acquire and operate a parking facility. A facility has been defined as something by which anything is made easier or less difficult, that is, an aid, advantage or convenience. Knoll Golf Club v. U.S., 179 F. Supp. 377 (1959). It is something that is built or installed in order to promote the ease of any action or course of conduct. Raynor v. American Heritage Life Insurance Co., 123 Ga. App. 247, 180 S.E.2d 248 (1971). I shall assume, therefore, that a parking facility is anything that promotes or provides for the convenient parking of automobiles or other vehicles. A parking facility may, therefore, be a covered garage or a vacant lot either appurtenant to or separate from a structure housing a state agency.

Each state agency can, of course, exercise only such powers as are expressly granted to it or such as are necessarily implied from those granted. E.g., State v. Switzer, 22 Ohio St.2d 47 (1970); 1973 Op. Att'y Gen. No. 73-088. Moreover, such agencies are not identical in terms of their authority to acquire and manage buildings and facilities. It is impossible, therefore, to analyze in one opinion the statutory authority of each and every state agency. Thus, I shall analyze certain typical classes that are representative of most state agencies. There are, of necessity, exceptions to the conclusions drawn from this analysis. A careful reading of the specific statutes pertaining to a particular agency will indicate whether such agency qualifies as an exception to the general conclusions stated herein.

Mindful of the foregoing limitations, I shall now seek to resolve the questions you have posed.

Certain instrumentalities of the state, most notably those administered by boards of trustees or commissions, are granted specific powers regarding the acquisition and management of buildings and facilities. A state institution of higher education provides what is perhaps the most easily identifiable example of such an instrumentality. Under the provisions of R.C. 3345.11 each state college or university may acquire by purchase or lease and may construct, equip, furnish, reconstruct, alter, enlarge, renovate, rehabilitate, improve, maintain, repair, and operate auxiliary facilities. Auxiliary facilities are defined by R.C. 3345.12 and include vehicular parking facilities.

The power conferred upon state colleges and universities pursuant to R.C. 3345.11, however, is an extraordinary one. As a general rule, individual state departments and most state agencies do not have express authority to acquire, maintain and operate buildings and facilities. The General Assembly has, instead, seen fit to centralize this responsibility primarily in four agencies, the State Underground Parking Commission, the Ohio Building Authority, the Ohio Public Facilities Commission and the Department of Administrative Services.

The powers and duties of the State Underground Parking Commission are set forth in R.C. Chapter 5538. The Commission has the authority, pursuant to R.C. 5538.24, to construct, maintain, repair, police, operate or contract for the operation of underground parking facilities, and to promulgate rules and regulations for the use of such facilities. The Commission is also expressly empowered to fix a charge and collect fees for the use of any facility it constructs.

The Ohio Building Authority may, pursuant to R.C. 152.19, purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, repair, and operate office buildings and related storage and parking facilities for the use of state agencies on one or more sites within the state. R.C. 152.21 (E) empowers the Ohio Building Authority to fix, alter and charge rentals for the use and occupancy of its buildings and facilities. Pursuant to the provisions of R.C. 152.08, the Authority may establish rules and regulations for the use and operation of its buildings, facilities and properties.

The Ohio Public Facilities Commission may, pursuant to R.C. 154.01 (J), issue obligations to pay for capital facilities, including parking facilities. The jurisdiction of the Commission, however, is limited by the provisions of R.C. 154.20, R.C. 514.21 and R.C. 154.22, respectively, to facilities required by the Department of Mental Hygiene and Retardation, facilities for institutions of higher education, and capital facilities for parks and recreation.

The primary statutory responsibility of providing and managing facilities for those state agencies not empowered to act on their own behalf, however, is vested in the Department of Administrative Services. Pursuant to R.C. 123.01, the Department is empowered to acquire all real estate required by the state government or any department, office or institution thereof and to lease office space in buildings for the use of the state or any department, office or institution therof. R.C. 123.09 empowers the Director of the Department of Administrative Services to make rules and regulations for the improvement, maintenance and operation of public works. R.C. 123.10 further empowers the Director to fix all rentals and collect all tolls, rents, fines and revenues arising from any source in the public works.

The effect of the various provisions of R.C. Chapter 123 is to vest in the Department of Administrative Services extensive control over property owned or leased by the state for the use of state agencies. It should be noted, however, that R.C. 123.01 (B) and (C) enumerate various agencies, which are exempt from the Department's general jurisdiction over state office buildings and facilities. These exempted agencies include the Adjutant General, the Departments of Transportation, Public Welfare, Mental Health and Mental Retardation, and Rehabilitation and Correction, and educational and benevolent institutions under the control and management of boards of trustees.

The conclusion to be drawn from the existence of the foregoing statutes is that the General Assembly has seen fit to vest all powers relating to the acquisition and maintenance of parking facilities in certain specified agencies. Where the General Assembly has granted such power, the power expressly conferred is so broad that one cannot reasonably conclude that the power is elsewhere necessarily implied in more general terms. Rather, I must conclude that in the absence of express statutory authority to the contrary, a state agency cannot directly acquire parking facilities for its employees.

If a particular state agency does have the authority to acquire and operate parking facilities, or has acquired possession and control of such facilities through

an agency statutorily empowered to act in this area, the problem then becomes under what circumstances the agency may allow state employees to use the facilities free of charge.

The term "employee" is one of variable import and its meaning often turns upon the context in which it is used. The broadest statutory definition of the term is that set forth in R.C. 124.01, which defines an employee as "any person holding a position subject to appointment, removal, promotion, or reduction by an appointing authority." So that the following discussion may be applied to the greatest possible number of circumstances, I shall use the term "employee" to refer to those individuals described in R.C. 124.01.

You have asked whether a state agency may provide parking to its employees free of charge as a "fringe benefit". An arrangement of this type is clearly inappropriate. It is well settled that fringe benefits are a form of compensation. State, ex rel., Parsons v. Ferguson, 46 Ohio St.2d 389 (1976); 1975 Op. Att'y Gen. No. 75-084. As are all other forms of compensation for state employees, fringe benefits are expressly regulated by statute.

R.C. 124.14 (C) sets forth the manner in which fringe benefits may be granted or altered. Under the provisions of this statute, the Director of the Department of Administrative Services must report to the State Compensation Board whether sick leave, holidays, health insurance, vacation, leave or other fringe benefits should be changed. The Board must then make a recommendation on the proposed changes to the General Assembly and the Governor. The plain meaning of this provision is to reserve in the General Assembly the power to grant or alter fringe benefits for state employees. A state agency does not have the authority to grant additional fringe beiefits to its employees. Thus, a state agency does not have the authority to provide parking to state employees free of charge as a fringe benefit.

This conclusion does not, however, mean that free parking can never be provided to state employees on property owned or leased by the state. There are situations in which the provision of free parking would not constitute a fringe benefit. In order to distinguish such situations, it is necessary to consider the essential characteristics of a fringe benefit. In Madden v. Bower, 20 Ohio St.2d 135 (1969), the Ohio Supreme Court concluded that the payment of health insurance premiums for the benefit of county employees must be considered compensation. The court stated at 137 as follows:

> At the outset, we are compelled to the conclusion that, as to each employee receiving the right to the benefits of insurance, the premium is a part of the cost of the public service performed by such employee.
>
> The purpose of an employer, whether public or private, in extending 'fringe benefits' to an employee is to induce that employee to continue his current employment.

In Parsons v. Ferguson, supra, the court considered payments for group medical and hospital plans for county officers and employees. In holding that such payments constitute compensation for purposes of Ohio Const. art. II, §20, the court in a per curiam opinion noted at 291 as follows:

> Fringe benefits, such as the payments made here, are valuable perquisites of an office, and are as much a part of the compensation of an office as a weekly pay check. It is obvious that an office holder is benefitted and enriched by having his insurance bill paid out of public funds, just as he would be if the payment were made directly to him, and only then transmitted to the insurance company. Such payments for fringe benefits

> may not constitute 'salary' in the strictest sense of that word, but they are compensation.

Although the court has not precisely defined the term "fringe benefit", the foregoing material indicates that a fringe benefit is something provided at the expense of the state and intended to directly benefit the employee. Thus, in order to identify those situations in which the provision or free parking to state employees would not constitute a fringe benefit, one must consider the purpose for which parking is provided and the nature of the cost to the state.

If the primary purpose in providing the facility is the convenience of the state agency rather than an intention to directly benefit its employees, the provision of free parking would not constitute a fringe benefit. A state agency may for example, locate its office or facility in an area where no reasonable alternatives for parking are available. In such cases, parking facilities may be considered a necessary cost of doing business in such a location and the cost may, but need not be, passed on to the employee. The distinguishing characteristic in this situation is that the parking facility is necessary to the efficient operation of the state office and is not merely an added convenience to the employee.

A second situation in which the provision of free parking may be appropriate is where acquisition of a parking facility does not entail an additional direct monetary cost to the state. Included within this exception would be the situation where parking is incidental to the total site and cost of acquisition and a separate fee schedule cannot be realistically ascertained. Also included herein would be the situation where the parking spaces and employees involved are so few that the amount of revenue generated would be disproportionate to the cost of collecting and managing the funds.

In conclusion, a state agency may not provide free parking to state employees as a fringe benefit. A state agency may, however, allow state employees to park free of charge on state property when it is necessary to the efficient operation of the state agency or when the acquisition and operation of the facility does not involve an additional direct monetary cost to the state.

It should be noted, however, that the decision to provide parking to employees free of charge involves the expenditure of public funds. It is a well settled rule in Ohio that public funds may be expended only by clear authority of law, and that all cases of doubt must be resolved against such an expenditure. E.g., State ex rel. Stanton v. Andrews, 105 Ohio St. 489 (1922); 1977 Op. Att'y Gen. No. 77-003. Thus, in a situation where it is not clear that parking is a necessity or that the collection of fees is not feasible, fees sufficient to offset the cost of acquisition and maintenance should be collected.

In your letter you indicate that two factual situations precipitated your request for an opinion on this issue. I believe a comparison of these two situations may help to clarify the factual analysis required to apply the aforementioned tests.

In one instance, the Department of Highway Safety, Bureau of Motor Vehicles has acquired, by lease from a private corporation, additional off street parking spaces adjacent to its present offices. I shall assume that the facilities were acquired by the Bureau through one of the state agencies expressly authorized to make such acquisitions. The parking facilities have been made available to employees to the Bureau, free of charge, for the purpose of parking their privately owned vehicles. Since the facilities were acquired through a distinct transaction separate from the acquisition of the office and main site, there is a direct and readily identifiable monetary cost to the state. The agency could, therefore, easily develop a fee schedule that is realistically calculated to offset the expense of acquisition and maintenance of the facility. If one were to assume that the number of employees involved warrants the collection of fees, the decision to allow employees to park free of charge must turn on the character of the area, and in particular, on whether reasonable alternatives for parking are available.

The offices of the Bureau of Motor Vehicles are located on a main thoroughfare in a commercially developed suburban area. On street parking is highly restricted and there is an absence of private parking facilities not restricted to the use of employees, clients and patrons of specific offices or commercial establishments. Thus, it would appear that the provision of parking facilities is necessary to the efficient operation of the office site and is an appropriate cost of doing business in this particular area. Given these facts, the cost of these facilities need not be passed on to the employees.

The second example cited in your letter is that of a state owned parking facility located in the Columbus central business district and controlled by the Department of Administrative Services. Employees of the Department of Health who park their privately owned vehicles on this lot are required to pay a monthly fee of $5.00. In the average month 487 vehicles are parked on the lot, which yields a monthly income of $2435.00. The number of employees involved clearly warrants the collection of fees. Furthermore, since the lot was acquired and is operated as an independent facility, there is a direct monetary cost to the state and in all likelihood there is no difficulty in ascertaining an appropriate fee schedule to offset the cost of acquisition and maintenance. Since there are numerous private parking facilities in the vicinity of the Department of Health location, this particular lot is not necessary to the efficient operation of the Department. Therefore, the cost of acquiring and maintaining the lot cannot be considered an appropriate cost of doing business. Since this particular parking facility is merely an added convenience for the employees to use at their option, the provision of free parking at this facility would constitute a fringe benefit. Consequently, the state agency must charge reasonable parking fees designed to offset the cost of acquiring and maintaining the facility.

In conclusion, it will be noted that the foregoing discussion does not extend to vehicles that are owned by the state. It is quite clear that employees can park such vehicles free of charge on property controlled by the state. State cars are kept for the convenience of the agency to which they are assigned and their maintenance and storage is the responsibility of that agency. The conclusions stated herein are, therefore, strictly limited to privately owned vehicles.

Your last question concerns the disposition of parking fees collected by a state agency. Specifically, you have asked whether revenues so derived must be deposited in the general fund or may be deposited in the agency's own rotary fund.

R.C. 311.01, which requires the weekly deposit of all fees and monies, provides in part as follows:

> On or before Monday of each week, every state officer, state institution, department, board, and commission shall pay to the treasurer of the state all monies, checks, and drafts received for the state, or for the use of any state officer, state institution, department, board or commission, during the preceding week from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise, and file with the auditor of state a detailed verified statement of such receipts.

R.C. 131.01 is a general statute which applies to all monies collected or received by every state department, institution or agency from any transaction not otherwise expressly exempted by statute. State, ex rel. Tracy v. State Board of Accountancy, 129 Ohio St. 66 (1934); 1957 Op. Att'y Gen. No. 1230 p. 631. A situation analogous to that presently under consideration appears in 1956 Op. Att'y Gen. No. 7137 p. 699. One of my predecessors concluded therein that monies collected in the operation of cafeterias established by the Department of Mental Hygiene and Correction are public funds and must, under the provisions of R.C. 131.01, be paid over to the treasurer of the state.

R.C. 131.08, which speaks to the disposition of fees, provides as follows:

> Except as otherwise provided by law all fees collected by each department shall revert to the state treasurer to the credit of the general revenue fund.

The meaning of the statute is plain and unambiguous. Its application to the facts herein under consideration necessarily results in the conclusion that parking fees collected by a state agency must be deposited with the treasurer of state to the credit of the general revenue fund, except as otherwise provided by law. It is therefore necessary to consider the statutory framework concerning the nature and use of rotary fund accounts in order to determine if the situation you described constitutes an exception to the general rule set forth in R.C. 131.08.

A rotary fund is a fund set aside to enable a state agency to carry on a function or activity with receipts from a particular source. These receipts are to be used solely for the function or activity for which the fund is established. The establishment of a rotary fund may be authorized in the permanent statutes, the appropriation acts or by action of the Director of the Office of Budget and Management or the state Controlling Board. See R.C. 127.11 (F). Although it is obvious that a rotary fund would be conceptually well suited to a situation where fees are collected in order to offset the costs of acquiring and operating a parking facility, such a fund must be created expressly for this purpose in order to qualify as an exception to the general rule set forth in R.C. 131.08.

Rotary funds established by specific statutes generally have a limited and clearly defined purpose. Rotary funds established by the biennial appropriations acts or by the Office of Budget and Management or Controlling Board, on the other hand, generally pertain to a number of purposes. An agency operating rotary falls within this latter category. For obvious reasons having to do with the manageability of the state budget, the General Assembly cannot enumerate each and every separate item to be handled through the agency's operating rotary. Thus, it has delegated to the Office of Budget and Management the authority to review and supervise those various funds.

R.C. 126.02 authorizes the Office of Budget and Management to control the financial transactions of all departments, offices, and institutions, except the judicial and legislative departments. R.C. 126.02 (D) provides that the Office may exercise this control by "reviewing accounts and the disposition and use of public property, and by supervising and examining the expenditures and receipts of public money in connection with the administration of the state budget."

The authority of the Office of Budget and Management to oversee the financial transactions of state agencies is further defined in the biennial appropriation acts. For example, in Section 12 (D) of the 1975 Appropriation Act, H.B. 155, the General Assembly outlined the procedures for supervision of rotary funds as follows:

> The director of budget and management shall after consultation with the legislative budget office, the director of administrative services, and the auditor of state, develop guidelines for the classification of rotary funds according to sources of income, and the rotary funds listed in this act shall be reclassified according to these guidelines. The director of budget and management shall review the use of the revenue in each rotary fund to ensure compliance with the purpose for which the rotary was created . . .

Thus, in answer to your question, revenue derived from the collection of parking fees by a state agency may be deposited in the agency's rotary fund if such revenue was one of the purposes for which the fund exists. Such a determination is factual

in nature and is to be made by the Office of Budget and Management under the authority granted it by R.C. 126.02 and in accordance with any applicable procedural requirements set forth in the appropriate biennial appropriations acts.

It should be noted, however, that S.B. No. 221, the 1977 Appropriations Act, has made substantial revisions to the codified budgeting, accounting and financial procedures to be followed in the administration of the state budget. It is my understanding that the 1977 Appropriations Act has replaced the concept of "rotary funds" with that of "special accounts". Under R.C. 131.31 (N) a special account is an account which is credited with certain designated receipts which must be expended for a specific purpose. Section 4 of the Act provides as follows:

> Within 90 days from the effective date of this Act, all departmental rotary fund appropriations shall be classified by the Office of Budget and Management pursuant to the fund structure set forth in R.C. 131.32.

The fund structure set forth in R.C. 131.32 may be further augmented by additional special accounts to be created by the Controlling Board. R.C. 131.34 (B) (3).

Thus, the 1977 Appropriations Act appears to have mandated an extensive analysis and restructuring of the accounting procedures which were implicit in your last question. Although the new procedures are not yet fully operational, it is sufficient to note for the purposes of this opinion that special accounts, established in response to the Act, are still limited to specifically designated uses and are subject to the oversight of the Office of Budget and Management.

Thus, in response to your questions, it is my opinion and you are so advised that:

> 1. In the absence of express statutory authority to the contrary, a state agency may not directly acquire parking facilities for its employees.
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> 2. A state agency which is in possession of a parking facility cannot offer the free use of such a facility to its employees in the form of a fringe benefit.
>
> 3. If parking is provided primarily to benefit the state agency or if the acquisition and operation of the facility does not entail an additional and identifiable cost to the State, the provision of free parking to state employees does not constitute a fringe benefit and is, therefore, permissible.
>
> 4. Revenue from the collection of parking fees by a state agency may be deposited in a particular rotary fund or special account if the Office of Budget and Management determines that the deposit of such revenue is one of the intended uses of the fund or account. In the absence of such a determination, revenue from the collection of parking fees by a state agency must, pursuant to R.C. 131.08, revert to the state treasurer to the credit of the general revenue fund.