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AUTHORIZED PUBLIC RECREATION MAY LEGALLY COMPETE WITH PRIVATE FACILITIES

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One of the recurrent law-related issues in parks and recreation administration is whether public agencies may legally offer facilities or programs which directly or indirectly compete with similar opportunities offered by private commercial operations. Over the years, I've heard from numerous agency administrators who have been threatened with lawsuits by private commercial operators of recreation facilites claiming "unfair competition", "restraint of trade", "unfair trade practices", or similarly vague allegations with little or no basis in law.

While competition with private commercial facilities may present significant political problems, as illustrated by the *York Township* and *City of Cody* cases presented herein, public park and recreation agencies can legally offer similar facilties, if expressly or impliedly authorized to offer such recreational opportunities under state law. Generally, a broad grant of power to local entities under state law to own and operate public park and recreation facilities will usually include the authority to offer a wide array of public recreation facilities and programs which may compete with the private sector.

GET OFF MY CLOUD

In the case of *Yorktowne Tennis Club, Inc. v. York Township*, 120 Pa.Cmwlth. 13; 548 A.2d 357 (1988), the plaintiff Club sought an injunction against the Township prohibiting the operation of a public recreational facility in direct competition with a private commercial facility. The facts of the case were as follows:

> Yorktowne Tennis Club is a tennis and fitness facility, located in York Township and open to the general public. In April of 1987, the Township purchased a tennis and fitness facility, Wynfield Club, located in the Township which is open to the general public. Mr. Jim Rodkey, manager of the Wynfield Club, testified that he sets the user fees and other fees, such as court time, at the Wynfield Club. Mr. Rodkey also testified that the guidelines for establishing the fees or rates were determined by the York Township Board of Commissioners. The Board of Commissioners instructed Mr. Rodkey to devise a budget for the Wynfield Club in which his expenditures would be met by the income generated through user fees and court fees. Both facilities, for the most part, offer the same services, i.e., indoor and outdoor tennis, aerobics, dance classes, whirlpool, pro shop, tennis lessons and tournaments, and racquetball. The Club and the Township user fees are identical although the Township court fees are on the average about a dollar less.

> The Club and the Township charge the following user fees: a resident, single membership is $50.00, $65.00 for a non-resident; a resident family membership is $125.00, $145.00 for a non-resident; and $25.00 for a resident junior tennis membership, $40.00 for a non-resident.
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> The Club filed a complaint in the trial court to enjoin the Township from providing the described services to nontownship residents in violation of the Code. The trial court sustained the Township's preliminary objections and dismissed the complaint.

Accordingly, the issue before the appeals court was "whether a first class township is authorized to operate a public facility such as the Wynfield Club." As described by the appeals court, state law, specifically the First Class Township Code (53 P.S. § 58001 et seq.), provided as follows that the Townships "may acquire private property for the purpose of making, enlarging and maintaining public parks, recreation areas and facilities."

> Townships may improve, maintain, and regulate public parks, recreation areas and facilities and conduct recreation programs... [T]he township commissioners may equip, operate and maintain the parks, recreation areas and facilities as authorized by this act and shall employ recreation directors, supervisors, superintendents or employees as they deem proper.

Based upon these provisions of state law, the appeals court found that the Township had the legal authority to operate this particular tennis facility. Specifically, the appeals court held that "the Township's operation of the Wynfield Club is not beyond the legislatively permitted uses of 'recreation areas and facilities' without the legislature enacting such limitations."

The Club had also argued on appeal that the Township Code "does not authorize the Township to offer these facilities to non-residents or to compete with private enterprise in the areas of non-essential services." The appeals court also rejected this argument. Once again, the appeals court, found that state law authorized the Township's actions.

> The legislature, by statute, has granted the Township authority to make specific uses of property acquired. None of these sections under the First Class Township Code limit those uses to township residents. Section 3001 of the Code provides: "Townships may likewise acquire private property within the limits of another township, borough or city for the purpose designated in this section, if the other township, borough or city shall by ordinance signify its consent thereto." This section allows a township to acquire land outside of its limits for the purpose of "making, enlarging and maintaining public parks, recreation areas and facilities."

> Therefore an interpretation that the legislature intended to limit recreation facilities to residents only would require a departure from the presumption that the legislature did not intend a result which is absurd or unreasonable.

Further, the appeals court found that "the Club's argument that "the Township lacks the power to operate a recreational facility in direct competition with a Township resident and taxpayer must fail."

> Although there is no specific language in the statute that allows competition, to hold that such competition is not allowed would mean an interpretation contrary to legislative intent. For example, Section 1502 of the Code authorizes the Township to provide parking accommodations without specifically mentioning the Township's right to compete with other parking facilities. Therefore, in the absence of any legislative intent to prohibit such competition, under Section 3001 of the Code we must hold that such competition is permitted.

The appeals court, therefore, affirmed the judgment of the trial court dismissing the Club's claims against the Township.

FOOL TO CRY

In the case of *Kautza v. City of Cody*, 812 P.2d 143 (Wyo. 1991), plaintiff Michael Kautza, as co-owner of Putt 'N Around Miniature Golf Course, alleged that the City of Cody, Wyoming "competed unfairly" in operating a miniature golf course. The facts of the case were as follows:

> The City of Cody miniature golf course has been in existence since 1976. The course had been leased to an operator on a year-to-year basis until 1987 when the City entered into a seven-year lease with Richard Roemmich. Rent under the 1987 lease was 20 percent of the gross income from the miniature golf course. In 1990, the City and Roemmich made a new lease for a four-year term that required Roemmich to pay 45.5 percent of the gross income as rent. The new lease was entered into because the City had improved and rebuilt the miniature golf course. Under both leases, the City paid utility expenses. In 1987 and 1988, 18 holes of miniature golf at the City course cost $1.00. The fee increased to $1.50 in 1989.
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> Kautza opened the Putt 'N Around Miniature Golf Course in Cody in June of 1987. Putt 'N Around initially charged $3.00 to play 18 holes of golf, but in its first year of operation lowered the fee to $2.50 and then to $2.00. In 1988, the fee was increased to $2.50 for 18 holes; and in 1989, the charge was $2.50 to play miniature golf all day.
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> Kautza complained to the Cody city council on December 5, 1988, that the City charged "abnormally low rates" to play on the city course. Kautza filed suit against the

> City on June 4, 1990, naming the City, its elected officials, the city parks director, and the lessee of the golf course as defendants.

In his complaint, Kautza alleged, in part, that the City "engaged in unfair trade practices; entered into a conspiracy to restrain trade; and unfairly operated the miniature golf course at a loss to the plaintiff's detriment." The City filed a motion to dismiss the complaint upon the grounds that Kautza had "failed to state a claim upon which relief could be granted." The trial court granted the City's motion to dismiss Kautza's complaint. In the opinion of the trial court, "the City could lawfully operate a miniature golf course and owed Kautza no duty not to compete." Kautza appealed to the state supreme court.

On appeal, Kautza argued that the contract between the City and Roemmich was invalid. Specifically, Kautza argued that "the lease-contract for the miniature golf course is proprietary and, thus, the contract void." The state supreme court described "the governmental-proprietary distinction" as follows:

> This court has recognized that governmental entities perform both governmental and proprietary functions... A governmental function is one where the activity has been undertaken at the direction of the legislature--or involves legislative or judicial discretion. Alternatively, a propriety function is one where the activity has historically been carried on by a private corporation, or it generates fees... Courts relying upon this distinction generally enforce those contracts involving proprietary functions but declare void those contracts concerning governmental functions that extend beyond a term of the governing body...
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> If the contract involves proprietary functions, it is under the law valid and enforceable... An agreement extending beyond the term of the contracting authority may be voidable by the government or void upon attack by a third party if, under the facts and circumstances, the agreement is not reasonably necessary or of a definable advantage to the city or governmental body.. The burden of proof to show the lack of necessity or advantage lies with the party attacking the validity of the contract.

Applying these principles to the facts of the case, the state supreme court found "Kautza's entire complaint lacks any allegation that the lease-contract is unnecessary, nor does it contain an allegation that it is not of advantage to the City."

> The most we can discern from the allegations in the complaint is Kautza's contention that the contract is detrimental to them. That contention, however, is insufficient to mount a third-party challenge to the validity of the contract. Thus, Kautza failed to state a claim for which relief could be granted on this issue.
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> It is within the powers granted the City of Cody to establish and regulate the operation of parks. W.S. 15-1-103(xxii). Included within this power is the discretion to lease its

> recreational facilities to private parties, "provided the public is not excluded and the public use is promoted by the arrangement."
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> There is no claim here that the City lease involved discriminatory or other questionable practices. It appears only that the City owns and leases its miniature golf course for the benefit of its citizens, and by doing so it performs a legitimate municipal function. We find no other facts alleged to conclude that the City is doing other than that specifically authorized by statute in its ownership and leasing of a golf course. Municipal golf courses are too common and accepted for us to so hold otherwise.

The state supreme court also addressed Kautza's contention that his constitutional right to due process was denied because "the City competed with their golf course, diverting profits from them, and that they were denied equal protection." As described by the state supreme court, "[u]nder the 14th Amendment of the United States Constitution and Art. 1, § 6 of the Wyoming Constitution, the state cannot deprive a citizen of his property without due process of law." In the opinion of the supreme court, Kautza' complaint "failed to allege that the City deprived them of a protected property interest."

> The "property" which Kautza alleged as being taken were possible profits to be realized from the operation of their miniature golf course. The complaint alleges that Kautza' expectancy of a profit was defeated by the operation of a similar venture under control of the City. The hope to earn a profit amounts to nothing more than a "mere unilateral expectation" and does not rise to a property interest to which due process rights attach.
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> An interest in avoiding competition also is not a property interest to which due process rights attach. It is not stated in the complaint whether the Kautza' course continued to operate after the complaint was filed nor that Kautza lost any other property--real, personal or intangible--connected with the golf course.

Further, the state supreme court failed to find any equal protection claim sufficiently stated in the Kautza' complaint. As described by the supreme court, "[a]n equal protection violation requires a showing that the state has made a classification that treats similarly situated people differently and that the classification is not rationally related to a legitimate state end."

> When a "suspect class"[i.e., race, creed, color, religion, national origin] or a "fundamental right" [e.g., freedom of speech, religion] is involved in the classification, we apply a strict scrutiny test which requires a showing that the classification is necessary to achieve a compelling state interest. Kautza' complaint makes a blanket statement that their equal protection rights were denied. The complaint fails to allege any type of classification, suspect or otherwise, nor any type of fundamental right involved in the City's operation of the golf course.

The state supreme court, therefore, affirmed the judgment of the trial court dismissing Kautza's claims against the City of Cody.