



2011-080

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July 21, 2011

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Honorable Scooter Howell, Chairman
Cherokee County Parks and Recreation Board
Administration Building
104 Northwood Drive, Suite B
Centre, Alabama 35960

Park and Recreation Boards – Liability –
Parks – Fees

If the Cherokee County Parks and Recreation Board (“Board”) creates a park entrance fee, activity fee, or fee for permits for various activities in the park, the Board will remain insulated from liability pursuant to sections 35-15-20 through 35-15-28 of the Code of Alabama.

Dear Mr. Howell:

This opinion of the Attorney General is issued in response to your request on behalf of the Cherokee County Parks and Recreation Board.

QUESTION

If the Cherokee County Parks and Recreation Board charges visitors to Lookout Mountain an entrance fee, activity fee, or permit fee for various activities that are available at the park, will those charges, if used only for the costs of operating and maintaining the park, remove the liability protection for the Parks and Recreation Board that is afforded to the Board under Alabama’s Recreational Use statute, which is found in sections 35-15-1 through 35-15-28 of the Code of Alabama?

FACTS AND ANALYSIS

The Cherokee County Parks and Recreation Board is a nonprofit public corporation created pursuant to sections 11-22-3 and 11-22-5 of the Code of Alabama. The Board seeks to improve the park in which Lookout Mountain sits, perform a park expansion, and install utilities such as water and electricity. The Board intends to hire a park manager and other employees who would assist in the park's operation and maintenance. Moreover, as part of the planned park upgrades, the Board is contemplating charging a park entrance fee, activity fee, or fee for permits for various park activities, which would support the park's operating and maintenance costs. Your question is whether the particular provisions within the Alabama Recreational Use statute, which insulate owners of noncommercial public recreational land from liability and which are located in sections 35-15-20 through 35-15-28 of the Code, would still apply with the creation of such fees.

Chapter 22 of title 11 of the Code grants public parks and recreation boards the power to "fix, prescribe and collect rates, fees, tolls, charges, or rentals for the use of any of its facilities and for services, facilities, and accommodations furnished by it or any of its facilities." ALA. CODE § 11-22-8(5) (2008). Under this language, the Cherokee County Board of Parks and Recreation may institute the fees currently under consideration. Your inquiry questions the effect these fees will have upon the Board's liability protections.

Section 35-15-27 of the Code states that nothing in article 2 of title 35 should be construed as altering or repealing the governmental immunity to which the State and its political subdivisions, agencies, or instrumentalities are potentially entitled. ALA. CODE § 35-15-27 (1991). Section 14 of article I of the Alabama Constitution provides that "the state shall never be made a defendant in any court of law or equity." ALA. CONST. art. I, § 14 (2005).

The Alabama Supreme Court has distinguished counties and municipalities from "the State" for the purposes of establishing governmental immunity. In contrast to the State, counties may be subject to liability for the negligence of employees under a set of circumstances, which includes fraud and bad-faith. *See Ex Parte Cranman*, 792 So. 2d 392, 405 (Ala. 2000). The Alabama Supreme Court explained that, prior to imposing liability upon a governmental entity for negligence, the entity must have breached a legal duty. *Payne v. Shelby County Comm'n*, 12 So. 3d 71, 77 (Ala. Civ. App. 2008). Owners of land used for noncommercial public recreation have no duty to inspect or keep land safe for entry or use, or to give any warning of dangerous

condition, use, structure, or activity and must instead have actual knowledge of a particular risk for liability to arise. *Id.*; ALA. CODE § 35-15-25 (1991).

Sections 35-15-20 through 35-15-28 of the Code limit liability for the noncommercial, public recreational use of land. *See* ALA. CODE §§ 35-15-20 to 35-15-28 (1991). Thus, whether fees created by the Parks and Recreation Board will affect the Board's protection from liability depends on whether land use is for noncommercial, public recreation. Section 35-15-21(5) defines "commercial recreational use" as "any use of land for the purpose of receiving consideration for opening such land to recreational use where such use or activity is *profit-motivated*. . . ." ALA. CODE § 35-15-21(5) (1991) (emphasis added). If the motivation underlying the land's recreational use is profit-motivated, the immunity provisions contained in sections 35-15-20 through 35-15-28 of the Code are not applicable.

In *Owens v. Grant*, the Alabama Supreme Court specifically noted that simply because the owner of land used for public recreation charged entry fees did not necessarily mean use of the land was "profit-motivated." 569 So. 2d 707, 711 (Ala. 1990). Instead, the determinative factor is the motivation for such fees. The Court explained that, "[i]f, after a trial, the factfinder determines that the appellant intended to derive a profit from the recreational use . . . then the recreational use statute would not protect him. If, however, the factfinder determines that he did not intend to derive a profit, then the immunity provisions of the statute would apply." *Id.* at 712.

In *Martin v. City of Gadsden*, the city charged admission fees to the users of Noccalula Falls Park, in addition to thirteen other income-generating attractions or concessions. 584 So. 2d 796, 798 (Ala. 1991). Despite the function of the fees in generating money, the motivation of the fees was never to accrue a profit and, indeed, the Court noted that the charged fees "only partially defrayed the cost of operating the park." *Id.* The Court therefore refused to disturb the jury's finding that the park fees were not profit-motivated and, because the fees were found not to have been profit-motivated, the city was still protected from liability. *Id.* As the Court clarified in *Owens*, "[w]hether actual profit is derived from the acts imputed to the defendant . . . is not a material inquiry. The inquiry is, was it the *purpose* to derive profit?" *Owens*, 569 So. 2d at 712.

The nonprofit status of the Cherokee County Board of Parks and Recreation is provided for in section 11-22-15 of the Code of Alabama. It states as follows:

The corporation shall be a nonprofit corporation, and *no part of its net earnings remaining after payment of its expenses shall inure to the benefit of any individual, firm or corporation; except*, that in the event the board of directors of the corporation shall determine that sufficient provision has been made for the full payment of expenses, bonds and other obligations of the corporation, then any net earnings of the corporation thereafter accruing shall, at the option of the board of directors, be *used to pay the cost of extensions and improvements to any of its projects* or paid to the county with respect to which the corporation was organized.

ALA. CODE § 11-22-15 (2008) (emphasis added). This section prohibits the Board from earning profit, merely permitting the retention of net earnings after expenses for project improvements. Because the Board is, by definition, "nonprofit," the charging of fees would not affect its immunity.

CONCLUSION

If the Cherokee County Parks and Recreation Board creates a park entrance fee, activity fee, or fee for permits for various activities in the park, the Board will remain insulated from liability pursuant to sections 35-15-20 through 35-15-28 of the Code.

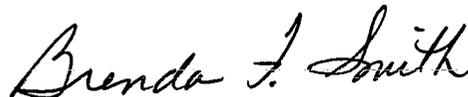
I hope this opinion answers your question. If this Office can be of further assistance, please contact Monet Gaines of my staff.

Sincerely,

LUTHER STRANGE

Attorney General

By:



BRENDA F. SMITH

Chief, Opinions Division