



A SELECTED READING

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Municipalities and Recreation

Urban municipalities early recognized the need to provide for the recreational and athletic needs of the public. In earlier times, municipalities provided little more than public parks or, perhaps, places for volunteer bands to entertain. Today, the municipal recreational role has expanded to include swimming pools, golf courses, jogging paths, bike trails, ball fields, tennis courts – almost any activity citizens participate in for enjoyment.

During the summer months, with children out of school and warmer weather, the municipal role in recreation becomes even more important. If municipalities were not willing to open large amounts of land free of charge or at a nominal cost, many citizens would not be able to afford much in the way of entertainment. This article examines the powers of municipalities in fulfilling the recreational needs of their citizens, the liabilities municipalities face and the steps necessary to sell recreational property for another use.

General Powers

All cities and towns in Alabama are given the power to create parks and to provide for the amusement of their citizens by Section 11-47-19, Code of Alabama 1975. This section, which was first passed in 1939, provides municipalities with a broad grant of power to entertain the public.

Sections 11-47-210.1, 11-47-211, 11-47-212 and 11-47-213 of the Code also give municipalities the power to operate entertainment facilities for their citizens either individually or in cooperation with one or more other municipalities.

Section 11-47-210.1, Code of Alabama 1975, states that any municipality may acquire lands and facilities, either inside or outside the municipality, to “acquire, operate, manage, and control parks, playgrounds, and other recreational or athletic facilities” or any other recreational activities and purposes.

The only restrictions under this section are that no municipality may locate a recreational facility within the police jurisdiction of any other municipality unless the governing body of the other municipality consents by passing a resolution. Further, no recreational facility may be located in a county other than where the municipality is located unless the county commission consents by resolution. Section 11-47-211, Code of Alabama 1975.

Section 11-47-212 extends municipal power over recreational facilities located outside municipal limits to the same extent as permitted within the municipal limits. Section 11-47-213 authorizes two or more municipalities to jointly acquire and operate recreational facilities for the benefit of the inhabitants of the participating municipalities.

While these sections authorize municipal governing bodies to directly control recreational facilities, many governing bodies prefer to delegate the power to control recreation to a separate board. Fortunately, Alabama law recognizes this desire by specifically authorizing municipalities to create any of several types of boards for this purpose.

Park and Recreation Authorities

The creation of park and recreation authorities is permitted by Sections 11-47-214 through 11-47-220, Code of Alabama 1975. Park and recreation authorities are incorporated bodies established to operate recreational facilities for two or more municipalities. To create a park and recreation authority, at least three individuals shall file with the governing body of each municipality a written application for permission to incorporate. A proposed form of a certificate of incorporation must be attached to the application. Section 11-47-214, Code of Alabama 1975. The required elements of the certificate are set out in Section 11-47-215. If the governing bodies of the municipalities with which the application is filed approve the application by resolution the applicants may proceed to incorporate by filing with the probate judge a certified copy of the form which was attached to the application. A certified copy of the resolutions of approval must accompany the application. Section 11-47-216, Code of Alabama 1975.

The number of members of the board of directors of the authority should be an odd number not less than three, and the terms of office cannot exceed six years. Section 11-47-215, Code of Alabama 1975. The board consists of directors who

have the qualifications and are elected or appointed for certain terms of office as specified in the certificate of incorporation of the authority. Each director serves without compensation but should be reimbursed for expenses actually incurred in the performance of his or her duties. Directors may be removed from office only by impeachment. Section 11-47-217, Code of Alabama 1975.

At any time when an authority has no bond or other obligations outstanding, its board may adopt a resolution declaring that the authority is dissolved. Section 11-47-219, Code of Alabama 1975.

Public Athletic Boards

Sections 11-59-1 through 11-59-17, Code of Alabama 1975, authorize the creation of public athletic boards. The purpose of these boards is to own and operate recreational facilities as broadly defined in these sections. Public athletic boards are authorized to issue bonds and to mortgage their property. Section 11-59-8, Code of Alabama 1975.

To incorporate, any three qualified electors and taxpayers of the municipality shall file an application with the municipal governing body. The municipality may authorize the formation of the corporation by adopting a resolution to that effect. A copy of this resolution must be attached to the certificate of incorporation which is filed with the probate judge of any county in which any portion of the municipality is located. Once the certificate is approved by the probate judge, the corporation comes into existence. Section 11-59-3, Code of Alabama 1975.

The board is governed by a board of directors consisting of not less than three qualified electors and taxpayers of the municipality. Directors may receive a salary of no more than \$5 per meeting attended, not exceeding one meeting per calendar month. Directors serve staggered terms of six years. No municipal officer or employee may serve as a director. Section 11-59-7, Code of Alabama 1975.

Public athletic boards may condemn property and may mortgage any of their property. They may issue bonds to acquire or operate recreational facilities. Section 11-59-8, Code of Alabama 1975.

Municipalities are not liable for any of the obligations of the board. However, municipalities may convey by ordinance any recreational property to the board. Section 11-59-11, Code of Alabama 1975. The income and property of the board is exempt from all taxation. Section 11-59-16, Code of Alabama 1975.

Public Park and Recreation Boards

Public park and recreation boards are authorized by Sections 11-60-1 through 11-60-20, Code of Alabama 1975. These boards are very similar to public athletic boards. They, too, are authorized to own and operate recreational facilities as defined in the authorizing law. However, the definition used in these sections is much broader than that permitted by public athletic boards.

The sections creating public park and recreation boards were first adopted in 1967 – whereas the sections creating public athletic boards were adopted in 1947 – and reflect changing perceptions of how people spend their leisure time. Section 11-60-1, Code of Alabama 1975 includes the acquisition of properties such as forests, rivers, botanical gardens, bowling alleys, motels and souvenir shops within the permitted sphere of operation of the board.

Public park and recreation boards are created by the same procedure as that used to create a public athletic board. The creation of one public park and recreation board does not preclude the municipality from establishing another, provided that a different name is used. Section 11-60-3, Code of Alabama 1975.

Directors of public park and recreation boards serve without compensation. No officer or employee of the municipality may serve on the board. Section 11-60-7, Code of Alabama 1975.

Like public athletic boards, the property and income of public park and recreation boards are exempt from taxation. Section 11-60-17, Code of Alabama 1975. Additionally, public park and recreation boards are exempt from having to pay any license fees to carry out their functions. Section 11-60-17, Code of Alabama 1975. However, any park and recreation board property are subject to police power ordinances of the municipality within which the facility is located.

Park and recreation boards are also exempt from the bid law and all usury and interest laws. Sections 11-60-18 and 11-60-19, Code of Alabama 1975.

Recreation Boards

Perhaps the most common recreation board is the type authorized by Sections 11-86-1 through 11-86-6, Code of Alabama 1975. Any municipality with a population of 100,000 or less according to the most recent federal census may create a recreation board pursuant to these sections by adopting an ordinance or resolution to that effect. Section 11-86-1, Code of Alabama 1975.

These boards are unincorporated. The board of directors is composed of from five to nine residents of the municipality who serve staggered five-year terms. Board members receive no compensation. Municipal officers or employees may serve

on these boards. Section 11-86-2, Code of Alabama 1975.

Recreation boards are responsible for operating any recreation programs that contribute to the general welfare of the residents of the municipality. The board has control over all property and facilities assigned to it by the municipal governing body and any property it purchases. Section 11-86-3, Code of Alabama 1975.

The board may employ a director of recreation as its executive officer. The director, with board approval, may employ a staff. The salary and tenure of the director and employees are set by the board. Section 11-86-4, Code of Alabama 1975.

Municipalities and counties may jointly form a recreation board. The Attorney General has ruled that recreation boards created pursuant to these sections are given statutory power to direct, supervise and promote city recreation programs. Therefore, while a municipality may elect to abolish the board by ordinance, it cannot rework the purpose of the board to make it simply an advisory board to the city council. AGO to Honorable Johnny Gray, November 13, 1973.

Selling Park Property

Alabama Constitutional Amendment 112 and Section 35-4-410, Code of Alabama 1975, state that no municipality can sell or convey public park or recreational property for another use unless the transfer is approved by the citizens of the municipality at a referendum held for this purpose.

What constitutes park and recreation property? In *Harper v. Birmingham*, 661 F.Supp. 672 (N.D. Ala. 1986), the court held that the provisions governing alienation of recreational property apply only where there has been a clear dedication by the property owner, and subsequent acceptance by the public entity, of the property for recreational uses. To establish a dedication, the clearest intention on the part of the owner to dedicate the property for recreational purposes must be shown. *O'Rorke v. Homewood*, 286 Ala. 99, 237 So.2d 487 (Ala. 1970).

In order for the dedication to become effective, the municipality must accept the dedication for park and recreation purposes. *Vestavia Hills Board of Education v. Utz*, 530 So.2d 1378 (Ala. 1988).

There are many ways to accept a dedication. A municipality may adopt an ordinance or resolution to that effect or make improvements to the property which indicate acceptance. The *Vestavia Hills* case also makes clear that a common law acceptance may occur where the public uses the property for recreational purposes. Such an acceptance is determined on a case-by-case basis by examining the extent of the public's use of the property.

Section 35-4-411, Code of Alabama 1975, establishes the procedure for alienating park property. This section requires the municipal governing body to adopt a resolution or ordinance describing the proposed conveyance, the consideration for the conveyance, and the names of the parties involved. This ordinance must be published once a week for four consecutive weeks in a newspaper published in the city or town. If there is no newspaper published in the municipality, it must be published in a newspaper having general circulation in the municipality. The ordinance becomes effective only after being approved by a majority of the qualified electors of the municipality.

A water tower may be erected on park property if the council finds that the tower does not interfere with the recreational use of the property. AGO 1996-212.

Liability Issues

Another common issue concerning recreation is the extent of municipal liability when providing a recreation area. In Alabama, the duty of care a property owner owes to persons using his or her property for sporting or recreational purposes is governed by Sections 35-15-1 through 35-15-5, Code of Alabama 1975.

Sections 35-15-1 and 35-15-2 state that no owner owes a duty of care to keep his or her premises safe for entry and use by others for any recreational purpose, even if the use is at the invitation of the property owner or occupant. Further, Section 35-15-1 states that, with certain exceptions, there is no duty to warn of dangerous conditions, use of structures or activities.

The exceptions are listed in Section 35-15-3. First, a property owner or occupant is liable for willfully or maliciously failing to warn or guard against a dangerous condition, use, structure or activity. Second, if a property owner or occupant grants permission to use his or her property for hunting, fishing, trapping, camping, hiking or sightseeing for a commercial benefit, the owner is responsible for any injuries which result. Finally, the property owner or occupant is liable to third persons to whom he or she owes a duty if someone using the property – with the owner's permission – to hunt, fish, trap, camp, hike or sightsee, damages the third person's property.

In *Wright v. Alabama Power Co.*, 355 So.2d 322 (Ala. 1978), the plaintiff was injured when he struck a fence partially submerged in a lake while he was riding an inner tube being pulled by a power boat. The lake had been created by a dam built by Alabama Power Company. The plaintiff alleged that Alabama Power owed him a duty to warn of the existence of the fence.

The court examined Sections 35-15-1 through 35-15-5 and held that persons upon land with permission or invitation for non-business purposes are considered licensees. Therefore, the landowners owed no duty to warn of potentially dangerous conditions unless they do some positive act which creates a new hidden danger that a person could not avoid by the use of

reasonable care and skill.

Similarly, in *Russell v. TVA*, 564 F.Supp. 1043 (N.D. Ala. 1983), the court construed these sections as requiring only that a landowner refrain from wantonly, maliciously or intentionally injuring someone who uses his land. Licensees, the court stated, assume the risk of whatever they encounter on the property.

In *Glover v. Mobile*, 417 So.2d 175 (Ala. 1982), the City of Mobile operated a city park that bordered on the shoreline of the Dog River. The park was open to the public. No admission fee was charged. Two children drowned while swimming in the Dog River, although the city did not permit swimming at the park. The court found no reason to apply the statutes, holding that since the children were on the property without financially benefiting the city, they were licensees, and the city was not liable for their deaths.

Similarly, in *Edwards v. Birmingham*, 447 So.2d 704 (Ala. 1984), the plaintiff was injured while playing baseball at a city-owned park. Because he did not pay an admission fee, the court found he was a licensee, and the city was not liable.

However, the fact that a municipality or board charges an admission fee does not automatically remove municipalities and recreation board from the protection of these sections. In *Martin v. Gadsden*, 584 So.2d 796 (1991), the Alabama Supreme Court held that these liability limitations shield municipalities from liability even where an admission is charged, provided that the facility is not operated for profit. Thus, the key issue is whether the fee charged is sufficient for the municipality or board to make a profit. These sections merely require that the recreational facility operate on a noncommercial basis. *See also, Cooke v. Guntersville*, 583 So.2d 1340 (Ala. 1991).

Limitation of Liability for Noncommercial Public Recreational Use of Land

Further limitations on the liability for the noncommercial recreational use of public land are found in Sections 35-15-20 through 35-15-28, Code of Alabama 1975. The stated policy behind these sections is to encourage the donation of property for noncommercial recreational purposes without exposing the owner to liability. The definition of the word “owner” in Section 35-15-21, specifically includes municipalities and recreational boards.

Section 35-15-24 limits the property owner’s liability to situations in which he or she has actual knowledge of a defect or condition that involves an unreasonable risk of death or serious bodily harm and is not obvious to users of the property. If the owner chooses not to guard or warn against the defect or condition, he or she may be held liable for any injuries that result. *Keenum v. Huntsville*, 575 So.2d 1075 (Ala. 1991).

However, Section 35-15-22 states that the owner owes no duty of care to inspect or keep the land safe for entry or use for any noncommercial recreational purpose, or to give warning of a dangerous condition, use, structure or activity on the land. So, there is a duty to warn only of defects of which the owner has actual knowledge. Constructive knowledge of the defect is not enough.

Also, Section 35-15-23 provides that the property owner makes no assurance that the property is safe by allowing the property to be used for noncommercial recreational purposes. This section goes on to state that the person using the property does not become a licensee or invitee, nor does the property owner incur any legal liability for injuries incurred while on the property. These sections place the users of non-commercial recreational property in the status of trespassers, regardless of the common law distinctions.

In *Grice v. Dothan*, 670 F.Supp. 318 (M.D. Ala. 1987), a child drowned while swimming at a public park owned by the City of Dothan. The property was used for fishing and picnicking and was clearly marked with “No Swimming” signs.

The court pointed out that, in Alabama, the purpose for which property is maintained is the controlling factor. The court said that Chapter 15 of Title 35 limits the city’s liability only to acts which constitute willful or malicious failure to guard or warn against a dangerous condition or activity on the property. The court found no facts to support such a claim.

The plaintiff also alleged the court should consider the minority of the victim as a mitigating circumstance. The court pointed out that Section 35-15-21(4) specifically defines a person to be any individual, regardless of age. Therefore, the exceptions to the general rules of premises liability which protect children do not apply in cases governed by these sections.

And, in *Ex parte Geneva*, 707 So.2d 626 (1997), the Alabama Supreme Court held that Section 36-15-24 did not subject the city to liability. In *Geneva*, the city placed a one-foot high fence around the entrance of the park to allow pedestrians to enter while keeping vehicles out of the park. There was also at the entrance a walk area a few feet wide between the post and another fence that allowed pedestrians to go around the cable. An 11-year-old girl broke her leg when she failed to step over the cable after dark. When the cable was first installed, the city attached a caution sign and white cloth strips to it, but there was some evidence suggesting that warning devices might not have been affixed to the cable when the accident in this case occurred. The trial court awarded the plaintiff \$20,000 and the Court of Civil Appeals upheld the verdict.

The Alabama Supreme Court reversed the decision. The court held that the plaintiff failed to present substantial evidence that the danger presented by the cable was not apparent, and in order to hold the municipality liable for an injury to a licensee,

the danger had to be unavoidable by a person using reasonable skill and care, known to the municipality, which then failed to warn about the danger. The court said:

“... undisputed evidence shows that the cable could be seen by the use of reasonable care, and, therefore, the City had no duty to warn licensees using the park of its presence. Several of the other minors at the park with [the plaintiff] were able to see and jump over the cable only moments before her accident, even as they too were running out of the park. [the plaintiff] admitted that she knew of the cable because she had stepped over it upon entering the park. Finally, there was no evidence that anyone besides [the plaintiff] had ever tripped over the cable, despite the park’s history of nighttime use.”

The fact that the injured person was a minor made no difference. They are held to the same duty of care under the recreational liability statutes. Section 35-15-21, Code of Alabama 1975.

In *Ex parte Town of Dauphin Island*, 274 So.3d 237 (2018), the Alabama Supreme Court held that pursuant to the recreational-use statutes, the Town was immune from a lawsuit to recover from a daughter’s injuries suffered in a park on land leased by the town when the daughter was on a swing suspended from a tree branch and the branch fell. In *Town of Dauphin Island*, the court held that while it was undisputed the Town had knowledge of the existence of the swing suspended from the tree, there was no evidence, much less substantial evidence, indicating that the Town had actual knowledge that the swing presented an “unreasonable risk of death or serious bodily harm” to the public.

Skateboard Parks

Section 6-5-342 of the Code of Alabama 1975 outlines requirements for skateboard parks and roller skating parks and rinks. This law requires every operator of a skateboard or roller skating park to post and maintain a warning sign in a clearly visible location at the entrance of the park or rink and any other conspicuous location within the park or rink as specified in this section. The sign shall serve as a warning to the roller skaters, skateboarders, assistants, spectators, and any others involved in this activity that the operator of the park or rink has limited civil liability under Alabama law for skateboarding and roller skating activities occurring at the park or rink. Failure to comply with the requirements concerning warning signs provided in this section shall prevent an operator of a park or rink from invoking the privileges of immunity provided by this section. The warning notice shall appear on the sign in black letters with each letter to be a minimum of one inch in height and shall contain the following notice:

“WARNING: Under Alabama law, a skateboard or roller skating park or rink operator is not liable for injury, damages, or death of a participant, assistant, or spectator in skateboarding or roller skating activities in the park or rink resulting from the inherent risks of skateboarding or roller skating activities. If skateboarding is permitted in this facility, any person skateboarding in this facility must wear appropriate protective equipment including a helmet, elbow pads, and knee pads.”

Attorney General’s Opinions and Cases

- Where municipal funds are transferred to a publicly incorporated parks and recreation board, Section 11-43-12, Code of Alabama 1975, prohibits a municipal law enforcement officer from contracting with the board to provide security work. AGO 2000-191.
- Under Section 11-86-3 of the Code of Alabama 1975, a park and recreation board is autonomous to the extent that it has the final authority to direct, supervise and promote recreational facilities and programs that will contribute to the general welfare of the residents of the municipality. The board, however, is required to cooperate with local agencies for the purpose of maintaining and improving recreational services and facilities for the municipality. AGO 2007-076.
- A Park Board, formed and operating pursuant to section 11-86-1, et seq., of the Code of Alabama may create an expense account to pay travel and other expenses incurred by the director and staff of the Board while in performance of their official duties if the expense allowance bears a reasonable and substantially accurate relationship to the expenses incurred. To the extent an expense allowance exceeds actual expenses, however, it is an unauthorized increase in salary and violates sections 68 and 281 and Amendment 92 of the Constitution of Alabama. AGO 2008-016
- A municipality may charge a higher fee to nonresidents for the use of municipally owned parks and other municipal recreation facilities. AGO 2008-026.
- A municipal lodging tax imposed by ordinance without a specific exemption, would be applicable to a Park and Recreation Board created under section 11-18-1, et seq., Code of Alabama 1975. Section 11-22-13 of the Code of Alabama does not exempt such a Park and Recreation Board from collecting and remitting the lodging tax established by a lodging tax ordinance. AGO 2013-050.

- Genuine issues of material fact, as to whether county park and recreation authority officials knew that bleachers on recreational land were in need of repair, knew that someone was likely to fall as result of condition of the bleachers, knew that a fall onto concrete from bleachers presented an unreasonable risk of death or serious bodily harm, and failed to guard the bleachers or warn the persons using the bleachers, precluded summary judgment in action under provision of recreational use statute, which permitted owner to be held liable when, despite having knowledge of recreational use and a danger which was not apparent to recreational users, owner chose not to guard or warn. *Shirley v. Tuscaloosa County Park and Recreation Authority*, 163 So.3d 352 (Ala.Civ.App.2014).
- A city may enter into an agreement with the YMCA of a county for the YMCA to provide services to its citizens in exchange for the use of city property. Whether the property has been dedicated as a public park is a factual determination to be made by the city. AGO 2017-024.
- City was entitled to municipal immunity in negligence action brought by invitee after the invitee fell through a broken drain gate in a city-owned park. *Ex parte City of Muscle Shoals*, 257 So.3d 850 (Ala. 2018).
- Recreational-use statutes precluded town from being liable for park user's injuries suffered while using a swing connected to a tree branch that fell. *Ex parte Town of Dauphin Island*, 274 So.3d 237 (Ala. 2018).

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