purpose of controlling and regulating the use of such park, and for the protection of all things therein, but have no authority to permit things to be done which would violate the police, sanitary and other similar ordinances legally adopted by the village, or to make rules or regulations contrary thereto.

Respectfully,
EDWARD C. TURNER,
Attorney General.

569.

ASSESSMENTS—AMENDED SENATE BILL NUMBER 27, AMENDING SECTION 3892, GENERAL CODE—PENALTY THEREIN PROVIDED MAY NOT BE ADDED TO ASSESSMENTS DELINQUENT PRIOR TO EFFECTIVE DATE OF SAID STATUTE.

SYLLABUS:

Under the provisions of Amended Senate Bill No. 27, amending Section 3892, General Code, the penalty therein provided may not be added to assessments delinquent prior to the effective date of said statute, namely, June 16, 1927.

COLUMBUS, OHIO, June 3, 1927.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication which reads as follows:

> "You are respectfully requested to render your opinion to this department upon the following question:
>
> Amended Senate Bill No. 27, passed at the present session of the General Assembly, amending Section 3892 of the General Code with reference to the collection of municipal special assessments, provides that each installment of such assessments remaining unpaid after becoming due and collectible shall be delinquent and bear the same penalty as delinquent taxes. Prior to this amendment, Section 3892 contained no provision for a penalty for nonpayment of assessments.
>
> Question: When installments of such assessments have been delinquent for a period of years prior to the enactment of this provision, may the penalty provided for be added to such delinquent assessments?"

Amended Senate Bill, No. 27, as enacted, amended Section 3892, General Code, to read as follows:

> "When any special assessment is made, has been confirmed by council, and bonds, notes or certificates of indebtedness of the corporation are issued in anticipation of the collection thereof, the clerk of the council, on or before the second Monday in September, each year, shall certify such assessment to the county auditor, stating the amounts and the time of payment. The county auditor shall place the assessment upon the tax list in accordance therewith and the county treasurer shall collect it in the same manner *and at the same time* as other taxes are collected, and when collected, pay such assessment, *together with interest and penalty, if any,* to the treasurer of the corporation, to be by him applied to the payment of such bonds, notes or

certificates of indebtedness and interest thereon, and for no other purpose. For the purpose of enforcing such collection, the county treasurer shall have the same power and authority as allowed by law for the collection of state and county taxes. *Each installment of such assessments, remaining unpaid after becoming due and collectable, shall be delinquent and bear the same penalty as delinquent taxes. The city solicitor or the regular and authorized legal representative of any such municipality is hereby authorized and directed to act as attorney for the county treasurer in actions brought under authority of section twenty-six hundred and sixty-seven of the General Code for the enforcement of the lien of such delinquent assessments.*" (The italics indicates new matter).

Section 28 of Article II of the Ohio Constitution reads:

"The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts. * * *"

In the case of Dixon vs. Mayor, etc., of Jersey City, 37 N. J. L., page 39, it is held in the second paragraph of the syllabus:

"Penalty may be prescribed for future delinquency in the payment of taxes, as part of the machinery by which government is enabled to collect them. The power to impose the forfeiture attached as a necessary incident to the right to levy and collect taxes, and on no other ground can it be supported. The penalty thus provided is not taxation—it is merely a method of enforcing the payment of a tax. The imposition of penalty for past omissions, would be confiscation, in taxation."

It is further held in said opinion that a law may not create a penalty and make the citizens amenable to it for a past omission unpunishable before by any existing law; and that penalties may be prescribed for future delinquencies in the payment of taxes, as part of the machinery by which government is enabled to collect them. The opinion then continues as follows:

"It would not be an aid to the collection of the revenue, but would be arbitrary exaction from which the citizens could in no way escape. I can find in no textbook nor in any adjudicated case, any definition of taxation which will embrace a proceeding like the one involved in this controversy. It would be a confiscation, in taxation.

There would be no limitation of time for which such laws might be made to retroact nor the sum which might be exacted under them, save only the will of the law makers and the public exigencies. Despotism itself could not employ a more arbitrary means in extortion.

Our legislature can exercise no such functions without conflict with that clause of our constitution which is intended to guard private rights against oppression.

Even in the absence of any fundamental guarantee, such a use of legislative authority would be considered as contrary to the correct first principle of the social compact. It is opposed to all reason and justice, and the very nature and spirit of our form of government would forbid us to believe that the people intended to trust the legislature with any such power."

In Gray on Limitations of Taxing Power, Section 1831, page 935, it is stated that:

"A retrospective act which merely creates liabilities in the general na-

ture of the ordinary tax burdens, such, for illustration, as a reassessment of a void assessment, or the like; or which alters, enlarges, or extends the remedy of the state as to liabilities already existing, as in the case of laws for assessment of omitted or undervalued property, is valid, if not unreasonably discriminatorily oppressive in operation. A retrospective act, discriminatory in character, or which creates liabilities in the nature of penalties, financially or otherwise, and which by reason thereof, puts the tax payer into a hard situation which he might have avoided if he had knowledge of the law, is a violation of due process of law.

In considering whether a law is so oppressive or discriminatory as to be a taking of property without due process of law, regard should be had to the fact that the lapse of time always brings about changes in human relations, so that a law which reaches back into a past always has a discriminatory tendency, which tends to increase with the increase of time."

In the case of *Smith vs. Auditor General*, 20 Mich. 398, Judge Cooley said:

"For, although to apply it (the Act) to taxes previously levied would not, so far as the course of official proceedings for the enforcement thereof is concerned, be strictly retrospective, in the proper sense of that term, yet so far as it increased penalties, or in any manner affected the tax payer's rights or interest as they depended upon previous acts or delinquencies, it would be plainly so, and the purpose of the legislation to give it that operation is not to be presumed where the words are ambiguous or reasonably susceptible of a different conclusion."

It is a general and fundamental rule of construction that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, that construction will be adopted which will uphold its validity. See *State ex rel.*, vs. *Hunt*, 84 O. S. 143; *Commercial Co.* vs. *Manufacturing Co.*, 55 O. S. 217; *Burt* vs. *Rattle*, 31 O. S. 116.

The rule is thus stated in 12 C. J. 787:

"When reasonably possible, a statute must be so constructed as to uphold its validity. Indeed, a *statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts on that score.* In other words, in testing the constitutionality of a statute, the language must receive such construction as will conform it to any constitutional limitation or requirement, if it is susceptible of such interpretation; and the statute and constitutional provisions must be read together and so harmonized as to give effect to both when this can be consistently done. If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional, it is the duty of the court to adopt that construction which, without doing violence to the fair meaning of the language, will render it valid. This rule is based on the presumption that the legislature intended to act within the scope of its constitutional powers, and to enact a valid and effective statute. * * *" (Italics the writer's.)

Specifically answering your question, it is my opinion that under the provisions of amended senate bill No. 27, amending section 3892, General Code, the penalty therein provided may not be added to assessments delinquent prior to the effective date of said statute, namely June 16, 1927.

Respectfully,
EDWARD C. TURNER,
Attorney General.