5581

COUNCIL, CITY — NO AUTHORITY TO APPROPRIATE MONEY FROM GENERAL FUND TO CITY RECREATION BOARD — PURPOSE, PURCHASE FROM OWNERS OF PRIVATELY OWNED POOLS, SWIMMING TICKETS TO DISTRIBUTE TO UNDER PRIVILEGED CHILDREN — SECTION 4065-3 G.C.

SYLLABUS:

The council of a city is not authorized to appropriate from the general fund to the city recreation board, organized under Section 4065-3 of the General Code, a sum of money to be expended by said board for the purchase of swimming tickets from the owners of a privately owned swimming pool, to be distributed to under privileged children.

Columbus, Ohio, November 5, 1942.

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

Gentlemen:

I am in receipt of your letter requesting an opinion, which letter reads as follows:

"We are enclosing herewith a letter from the City Solicitor of Athens, Ohio, in which he requests that we seek your opinion and advice concerning the following question:

Is the council of a city authorized to appropriate from the general fund to the City Recreation Board, organized under Section 4065-3 of the General Code, the sum of $200 to be expended by said Board for the purchase of swimming tickets from the owners of a privately owned swimming pool, to be distributed free to under privileged children?

As this question is of a general nature and one in which other cities may be interested, and as our state examiner would have to pass upon the legality of such an expenditure from the public funds, may we request that you consider this question and give us your opinion in answer thereto at your convenience."

The pertinent sections of the General Code are Sections 4065-1 to 4065-7, inclusive. These sections read as follows:

Section 4065-1:

"The council or other legislative authority of any city, village, or the county commissioners of any county, may designate and set apart for use as playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, any lands or buildings owned by any such city, village or county, and not dedicated or devoted to other public use. Such city, village or county may, in such manner as may be authorized or provided by law for the acquisition of land or buildings for public purposes in such city, village or county, acquire lands or buildings therein for use as playgrounds, playfields, gymnasiums, public baths, swimming pools or indoor recreation centers."

Section 4065-2:

"The authority to supervise and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers, may be vested in any existing body or board, or in a recreation board, as the city or village council or the county commissioners shall determine. The local authorities of any such city, village or county, may equip, operate and maintain, the playgrounds, playfields, gymnasiums, swimming pools, public baths or indoor recreation centers, as authorized by this act. Such local authorities may, for the purpose of carrying out the provisions of this act, employ play leaders, recreation directors, supervisors, superintendents or any other officers or employes as they may deem proper."

Section 4065-3:

"If the city or village council shall determine that the power

to equip, operate, and maintain playgrounds, playfields, gymnasiums, public baths, swimming pools, or recreation centers, shall be exercised by a recreation board, they may establish in said city or village, such recreation board which shall possess all the powers and be subject to all the responsibilities of the respective local authorities under this act (G.C. Secs. 4065-1 to 4065-7). Such board when established shall consist of five persons, and two of the members shall be members of the board of education of the city or village school district. * * * "

Section 4065-4 provides for the organization of the recreation board when established.

Section 4065-5:

"Any two or more cities or villages, or any city or village, or any city or village and county, may jointly acquire property for and operate and maintain any playgrounds, playfields, gymnasiums, public baths, swimming pools, or indoor recreation centers. Any school district shall have power to join with any city, village or county, in equipping, operating and maintaining playgrounds, playfields, gymnasiums, public baths, swimming pools, and indoor recreation centers, and may appropriate money therefor."

Section 4065-6:

"The city or village council, or the county commissioners, may issue bonds for the purpose of acquiring lands or buildings for playgrounds, playfields, gymnasiums, swimming pools, public baths, or indoor recreation centers, and for the equipment thereof."

Section 4065-7:

"All expenses incurred in the operation of such playgrounds, playfields, gymnasiums, swimming pools, public baths, and indoor recreation centers, established as herein provided, shall be payable from the treasury of such city, village, county or school district. The local authorities of such city, village, county or school district, having power to appropriate money therein, may annually appropriate and cause to be raised by taxation an amount for the purpose of maintaining and operating playgrounds, playfields, gymnasiums, public baths, swimming pools and recreation centers."

These and kindred sections of the General Code, providing for the recreation and physical and moral betterment of the citizens, are typical of the general attitude of the laws of Ohio toward those things which go to enhance the public welfare and raise the quality of citizenship. Along with the provisions referred to in the statutes quoted, I find a consider-

able volume of legislation looking to the establishment and improvement of parks and public grounds; providing for public band concerts and like entertainments, for libraries and public lodging houses, and, by somewhat recent amendment to the sections above quoted, providing directly for the organization and maintenance of municipal bands and orchestras.

Entirely independent of these and kindred acts of the Legislature expressly authorizing municipalities to provide such entertainment and recreation, it seems clear that under the broad powers of home rule conferred upon municipalities by Article XVIII of the Constitution, they probably could furnish all of these facilities, even in the absence of the legislation above referred to. However, it is not necessary for the purpose of this opinion to follow that question to its limits. I note, however, the case of State ex rel vs. Lynch, 88 O.S. 71, the first case reaching the Supreme Court involving the home rule amendment, wherein the court, by a divided vote, held that under the powers granted by the home rule amendment to municipalities they could not spend municipal funds for the construction and maintenance of a municipal moving picture theater. One of the concurring judges, Donahue, in a separate opinion, took occasion to point out at length the growing policy in this country and in this state of fostering and encouraging as legitimate features of self government a large number of cultural and recreational activities for the benefit of the citizens, and pointed out that during a long period of time such institutions and practices had prevailed in England even to a greater extent than this country had reached.

Similar statements were made with considerable force by one of the dissenting judges.

However, the general policy of the state in carrying out such laudable purposes as I have been discussing, and such as are referred to in your letter, must be exercised in the manner laid down by the law of the state, where it involves an expenditure of public funds. The Legislature, as is evident from the sections of the General Code hereinabove quoted, has made ample and generous provision for swimming pools, which presumably are to be made available to the under privileged children of the community as well as to other citizens. This provision takes the form of authority to acquire lands and construct buildings and other necessary improvements so as to provide playgrounds, swimming pools and other recreational centers, and further makes provision for their supervision

either by placing such supervision in the hands of any existing body or board or by the creation of a special recreation board provided for by Section 4065-3. The statutes, it will be noted, make further provision for joint action by two or more municipalities or by a municipality with the county or with the school district, so that the greatest possible flexibility and extension of such facilities may be provided. But the law stops there and does not permit public funds to be used for subsidizing in any way private recreational centers or swimming pools. It must be evident that to permit the municipal authorities to take care of the comfort and pleasure of its under privileged children by purchasing for them tickets to some private swimming pool or other like enterprise, would open the door to an unlimited and uncontrolled expenditure of public funds for all kinds of entertainments and excursions for which tickets might be purchased and would be wholly beyond the purview of either the statutes or the legitimate powers of a self governing municipality.

The question of the legality of expenditure of public moneys for purposes admittedly cultural and beneficial in their nature has frequently arisen, and this department has had numerous occasions to hold that there is a limit even to the broad powers of local self government conferred by Article XVIII of the Constitution in the matter of indiscriminate expenditure of public funds.

In my opinion found in 1940 Opinions Attorney General, p. 1061, I stated:

> "It is the general rule of law that municipal expenditures may be made only for a purpose expressly authorized by law or when the expenditure can be necessarily implied from express powers given by law. The rule is stated in McQuillin Municipal Corporations, Second Edition, Vol. 5, page 933, as follows:
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> 'Indebtedness incurred by the municipality and expenditures made must be for an authorized purpose. If no express power exists as mentioned, it must arise from necessary implication and unless the municipality may be fairly implied to have the power to make the expenditure involved for the purpose and in the mode adopted, the power will be denied.'
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> In giving effect to the rule last quoted, the Supreme Court of Ohio, in the case of State, ex rel. Thomas vs. Semple, 112 O.S. 559, denied the right of a city to join and pay dues to a league of municipalities saying that since no express provision of the charter of the city concerned authorized the expenditure and since the expenditure was not necessary to carry into oper-

ation a thing expressly authorized, the expenditure could not be allowed."

One of my predecessors had occasion to pass on a question quite similar to the one involved in your inquiry in an opinion found in 1924 Opinions Attorney General, p. 436, where it was held:

> "A city cannot pay part of the expense of a playground to a group of private citizens equipping such place, in the form of a donation. A city may not pay the salary of a supervisor unless the supervision, operation and maintenance of the playground is under the jurisdiction of the local authorities."

The same principle would apply to a contribution by way of purchasing tickets from privately owned institutions to be donated to citizens of the municipality.

Specifically answering your question, it is my opinion that the council of a city is not authorized to appropriate from the general fund to the city recreation board, organized under Section 4065-3 of the General Code, a sum of money to be expended by said board for the purchase of swimming tickets from the owners of a privately owned swimming pool, to be distributed free to under privileged children.

Respectfully,

THOMAS J. HERBERT
Attorney General.