

STATE OF MICHIGAN
IN THE SUPREME COURT

CAROL DRAKE and CLELLEN BURY,

Plaintiffs-Appellants,

v

CITY OF BENTON HARBOR and HARBOR
SHORES COMMUNITY REDEVELOPMENT
CORPORATION,

Defendants-Appellees.

Supreme Court No. 140685

Court of Appeals No. 287502

Berrien Circuit Court No. 2008-000247-CE

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

**BRIEF OF AMICUS CURIAE ATTORNEY GENERAL BILL SCHUETTE
IN OPPOSITION TO THE APPLICATION FOR LEAVE TO APPEAL
(IN SUPPORT OF THE CITY OF BENTON HARBOR AND
HARBOR SHORES COMMUNITY REDEVELOPMENT CORPORATION)**

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Dated: January 20, 2011

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STATEMENT OF QUESTION¹

May the City of Benton Harbor lease a portion of Jean Klock Park to Harbor Shores Community Redevelopment Corporation to develop 3 holes of a proposed 18-hole championship Jack Nicklaus golf course, without violating the restrictions set forth in the 1917 deed?

Appellants' answer: "No."

Appellees' answer: "Yes."

Attorney General's answer: "Yes."

¹ The Attorney General was not a party to this litigation or the January 27, 2004, Consent Judgment and, therefore, addresses only the first issue identified by the Court in its Order of September 15, 2010.

INTRODUCTION

The Attorney General submits this *Amicus Curiae* Brief in support of Defendants-Appellees.

The Attorney General is the state official responsible for oversight of charitable gifts and trusts and carries out this role through his Charitable Trust Section.² In particular, the Charitable Gifts Act authorizes the Attorney General to initiate legal proceedings to enforce the terms of charitable gifts, devises, and trusts "so that the intentions of the creator thereof shall be carried out whenever possible."³ In addition, the Supervision of Trustees for Charitable Purposes Act authorizes the Attorney General to conduct investigations of transactions involving charitable assets⁴ and to enforce charitable trusts by appropriate proceedings.⁵

The Attorney General, in his capacity as Michigan's charity official, was not a party to the litigation below regarding the compatibility of the proposed uses of Jean Klock Park (Park) with restrictions contained in the 1917 Deed of Gift (Deed) to Benton Harbor and its assigns from donors J.N. and Carrie Klock (Donors). The Attorney General's Charitable Trust Section had extensive non-judicial involvement, including discussions with many parties and close review of Park use proposals submitted by Defendants-Appellees City of Benton Harbor (Benton Harbor) and Harbor Shores Community Redevelopment, Inc. (Harbor Shores). Thus, the Attorney General is familiar with the issues before this Court.

² The Attorney General's Charitable Trust Section administers or enforces several acts designed to protect charitable assets and the intentions of charitable donors. These include the Supervision of Trustees for Charitable Purposes Act, MCL 14.251 *et seq*; the Charitable Organizations and Solicitations Act, MCL 400.271 *et seq*; the Charitable Gifts Act, MCL 554.351 *et seq*; the Charitable Trustees Powers Act, MCL 14.271 *et seq*; and the Uniform Prudent Management of Institutional Funds Act, MCL 451.921 *et seq*.

³ MCL 554.352.

⁴ MCL 14.258; 14.259; 14.261.

⁵ MCL 14.261.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General adopts the counter-statements of facts contained in the Response Briefs of Defendants-Appellees Benton Harbor and Harbor Shores and supplements those statements with the following additional facts.

The Charitable Trust Section reviewed the planned use of municipal parkland to determine whether Benton Harbor's proposal was consistent with the intentions expressed by the Donors in their 1917 Deed to Benton Harbor.

The Charitable Trust Section held extensive discussions with representatives of Harbor Shores and the City, as well as representatives of groups opposing the proposed lease of a portion of Jean Klock Park for use as part of a public golf course. After reviewing the terms of the Deed and two lease agreements – the Lease Agreement and Park Improvements and Maintenance Agreement (Agreements) between Benton Harbor and Harbor Shores – the Charitable Trust Section concluded that the final version of the Agreements were consistent with, and protective of, the Donors' intentions. The Charitable Trust Section's reasoning is explained in the Charitable Trust Section's letter of June 4, 2008, to Don Schmidt, counsel for Benton Harbor (Exhibit 1).

ARGUMENT

I. The City of Benton Harbor did not violate the restrictions in the 1917 Deed conveying the property comprising Jean Klock Park to Benton Harbor when it leased a portion of Park property to Harbor Shores Community Redevelopment Corporation to develop 3 holes of a proposed public golf course.

A. Standard for Granting Leave to Appeal

The Attorney General adopts the positions contained in the Response Briefs of Benton Harbor and Harbor Shores.

B. Analysis

The narrow concern of the Charitable Trust Section in this matter was to determine whether the planned use of municipal parkland was consistent with the expressed intentions of the Donors. Upon review, the Charitable Trust Section concluded that the final proposal was consistent with the Donors' intentions as expressed in the Deed.

The Charitable Trust Section's observations and conclusions are set forth in two letters (Exhibit 1).⁶ In the Charitable Trust Section's letter of June 4, 2008, to counsel for Benton Harbor, the Charitable Trust Section emphasized certain aspects of the final proposal and concluded that the proposed use was consistent with the Donors' restrictions; in its prior letter of September 14, 2007, to the City Manager of Benton Harbor, the Charitable Trust Section concluded that the proposed use would serve a public purpose as a public park.

The Attorney General agrees with Benton Harbor and Harbor Shores that the final proposal, including the Agreements, comports with the Donors' directives. The Attorney General places particular emphasis on the following factors:

⁶ The Charitable Trust Section's letter of June 4, 2008, attached the prior letter of September 14, 2007, as an attachment. The complete correspondence of June 4, 2008, thus contains both letters and is therefore included with this Brief as a single exhibit.

- The City has established reasonable rules and regulations concerning the use of the Park area in question that promote public use both during golf season and in the off-season;
- The lease provides for revenue from the golf course to be used for public purposes;
- The City has retained substantial oversight authority, ownership, and ultimate control of the property; and
- The parties have committed themselves to adhere to the Donors' restrictions.

Finally, it is important to note that not only Benton Harbor, but also the Attorney General, may undertake legal action if Harbor Shores fails to observe its commitment to observe the Donors' restrictions on the use of the property.

RELIEF SOUGHT

The Court of Appeals' unpublished opinion was correct in both analysis and result. While this case does present a significant issue in litigation against a state subdivision, MCR 7.302(B), there is no compelling reason for this Court to devote its resources to a full review of an unpublished Court of Appeals opinion that is manifestly sound.

Therefore, this Court should deny the application for leave to appeal.

Respectfully submitted,

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