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LGIT

CLAIMS BRIEF

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Rental of Public Recreational Facilities: What are the Consequences for Local Governments?

Introduction

A recent LGIT case[1] involved the City of Hagerstown's municipal pool, which is operated as part of the city's parks program. At issue was whether the city's rental of its municipal pool for private events caused it to lose its governmental immunity, thereby exposing it to liability for a personal injury sustained during a private event. During a private party at the pool, Robert Reed, a guest, was injured by an allegedly defective ladder in the pool. He sued for damages and the City asserted the defense of governmental immunity. Reed countered, arguing that a local government's rental of a municipal pool for a private event is not a "governmental" function. Instead, he argued, such activity is proprietary, or corporate in nature, and not governmental. Consequently, he urged that the city not be allowed to shield itself with governmental immunity. Who prevailed and why?

Governmental Immunity: An Overview

Generally, local governments are entitled to governmental immunity (from tort liability) if they are acting in a "governmental" as opposed to a "private" or "proprietary" capacity. Historically, courts have defined a governmental function as one that is sanctioned by legislative authority, is solely for the public benefit, and results in no profit to the government. These functions are seen as ones that benefit public health and safety and promote the welfare of the whole public. So, then, what is the definition of a "private" or "proprietary" function to which governmental immunity does not apply? The answer is there is no single definition. Instead, courts look to see if the government activity under review was undertaken primarily to generate revenue for the jurisdiction. So, if the local government is operating a certain activity as a profit-making business, it is unlikely that it can hide behind the defense of immunity.

Charging Fees, Profit-Making, and Governmental Immunity: Can They Co-Exist?

Many local governments charge fees for certain activities. Charging fees alone does not necessarily convert a governmental function into a private one. The function only becomes private, or proprietary, if the income derived from the charges is in an amount substantially in excess of the government's operation costs. In other words, is the activity engaged in by the government really little more than a "moneymaking proposition"? But is "moneymaking" alone enough to cause the loss of governmental immunity? A case from 1992, *Town of Brunswick v. Hyatt*, which also concerned a municipal pool, seems to suggest not. In that case, the local government did realize a modest profit from the operation of its public swimming pool. Regardless, the Court of Special Appeals held that the

[1] *Robert Reed v. City of Hagerstown*, Court of Special Appeals of Maryland, No. 1362, September Term, 2012 (unreported), decided September 23, 2014.

fact of some profit making alone, did not result in the loss of governmental immunity. Instead, the court focused on the purpose of the activity---and whether it tended to benefit the public as a whole---as the determining factor. Still, and as a word of caution, the greater the difference between income generated and operating expenses, the more likely a court will be to find that governmental immunity does not apply.

The Fees Related to the City of Hagerstown's Municipal Pool

The City of Hagerstown allows people to rent its municipal pool for private parties during times when the pool is not open to the public. One who wishes to rent the pool for a private party must submit an application, sign an agreement, and pay a fee based on the size of the event. To reserve the main pool for a private event, Hagerstown, at the time of the event in this case, charged (i) $80 per hour for 1-50 guests; (ii) $90 per hour for 51-75 guests; and (iii) $125 per hour for 76-100 guests. The money collected for private events has never covered the pool's operating expenses, and no profit has ever been made. The city's parks are funded by the taxpayers.

The Outcome

The circuit court ruled in the city's favor, finding that the operation of the municipal pool was a governmental activity, and that the governmental nature of the activity was not lost by charging rental fees for private, after-hour events. On appeal, the Court of Special Appeals affirmed, stating:

> Managing recreational facilities for the public benefit often involves reserving a facility for the exclusive use of a private party. Picnic pavilions and camp sites are typically set aside for those who wish to reserve them. This sort of routine scheduling falls within the concept of 'operation and management' of a recreational facility.

In other words, what the city did here was "nothing more than a commonsense (and commonplace) practice to defray operating expenses in a period of fiscal restraint."

Conclusion

By renting a municipal pool for private functions, local governments can provide an opportunity for individuals to host or attend pool parties even though they could not afford membership at a private pool, country club, or similar facility. Akin to a family renting a park pavilion for a picnic, a community group reserving a meeting in a public library for a book club, or youth athletic teams reserving playing fields in a public park, local governments can provide an unquestionable social benefit and promote the welfare of the whole when they provide a venue wherein, in the words of the court, "people may gather together to swim safely." In sum, the rental of certain public recreational facilities in a way that does not adversely effect the public as a whole, is just one way for local governments to better serve their communities.

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