

N.D.A.G. Letter to Odegard (Aug. 15, 1990)

August 15, 1990

Mr. James T. Odegard
Grand Forks County
State's Attorney
P.O. Box 607
Grand Forks, ND 58206-0607

Dear Mr. Odegard:

Thank you for your letter of June 14, 1990, in which you requested my opinion regarding the responsibility and/or liability of the Grand Forks County Park and Recreation Commission and the Grand Forks County Board of Commissioners as to real property owned by the county and leased to a nonprofit corporation for the purpose of establishing a park and recreation area.

N.D.C.C. ch. 32-12.1 addresses the liability of political subdivisions. Counties, park districts, and other units of local government created by statute are all considered "political subdivisions." N.D.C.C. § 32-12.1-02(5)(a). N.D.C.C. § 32-12.1-03(1) establishes that political subdivisions will be liable for injuries caused from some condition or use of property under circumstances where the political subdivision, if a private person, would be liable. Liability is limited to a total of \$250,000 per person and \$500,000 for injury to three or more persons during a single occurrence. N.D.C.C. § 32-12.1-03(2). Private landowners who permit their property to be used for recreational use without charge are not liable for ordinary negligence. N.D.C.C. ch. 53-08. The North Dakota Supreme Court has held that N.D.C.C. ch. 53-08 applies to political subdivisions. Fastow v. Burleigh County Water Resource District, 415 N.W.2d 505 (N.D. 1987). Thus, in your case, if the recreational users are not charged for using the area, the political subdivision (the county or commission) will not be liable for injuries caused by an employee's ordinary acts of negligence. Nonetheless, the county or commission may be liable for injuries caused by intentional acts or omissions. Additionally, if liability insurance coverage is purchased, the "defense of governmental immunity is waived." Fastow, 415 N.W.2d at 509.

Although the \$250,000 and \$500,000 limits apply, an injured person could recover in excess of those amounts from insurance proceeds. Id at 510.

N.D.C.C. § 11-08-05 states that a board of county park commissioners has the power to sue and be sued in the name of the board. Thus, the commissioners could be sued in their official capacity and in effect the suit would be against the board. However, N.D.C.C. § 32-12.1-04 provides the commissioners will not be held personally liable for money damages for injuries when the injuries are proximately caused by the negligence, wrongful act or omission of the commissioners acting within the scope of their

employment.

It is my suggestion that in the lease made with the nonprofit corporation, the park commission include a clause requiring the nonprofit corporation to indemnify the commission. This indemnity clause should be drafted to cover any loss the county would incur as a result of the nonprofit corporation's operation of the area. In this instance, the commission should consider requiring the nonprofit corporation to carry liability insurance to insure that a fund is available to indemnify the county if it is needed.

I hope this discussion has been helpful to you.

Sincerely,

Nicholas J. Spaeth

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