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OHIO UNIVERSITY—BOARD OF TRUSTEES—MAY GRANT TO CITY OF ATHENS EASEMENT FOR RIGHT-OF-WAY FOR INSTALLATION AND CONSTRUCTION OF STORM AND SANITARY SEWERS ACROSS UNIVERSITY PROPERTY—DIRECT BENEFIT TO UNIVERSITY.

SYLLABUS:

The Board of Trustees of Ohio University, upon determining, as a matter of fact, that the installation and maintenance by the City of Athens of storm and sanitary sewers across University property will be of direct benefit to the University itself and thus reasonably incidental to the main purpose of the University, and upon entering into an agreement with such city by which the University will receive such benefits, may grant to such city an easement for right-of-way for installation and construction of such storm and sanitary sewers across University property.

Columbus, Ohio, June 26, 1952

Hon. Joseph T. Ferguson, Auditor of State  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Your opinion is respectfully requested as to whether or not the Board of Trustees of Ohio University have legal authority to grant to the City of Athens, Ohio, easements for rights-of-way over and across University property for the installation and maintenance of storm and sanitary sewers.

"In connection with this request, we are transmitting various documents received from the city solicitor of Athens, respecting this matter, and upon the preparation and release of your opinion, we would appreciate return of such material."

The Ohio University was instituted and established by special act of the General Assembly on February 18, 1804, 2 Ohio Laws 193. Within such University there was created a body politic and corporate to consist of the Governor and certain trustees. (Ibid., Section 2)

Although there is express provision in Section 10 of this act that such corporation "shall be capable of having, holding and taking, in fee simple, or any less estate, by gift, grant, devise or otherwise, any lands or other estate, real or personal," it does not appear that any specific authority was granted the corporation to alienate real property or interests therein, except as to certain designated lands conveyed to the corporation in trust by other provisions of such special act. As to certain of these lands, the corporation was authorized, under the provisions of Section 12 of such act, to make leases for a period of ninety years at a yearly rent of six per centum of the value of the tract involved. As to certain other lands, consisting of commons and out-lots in the town of Athens, a limited authority to convey was granted under the provisions of Section 13 of this act, which read as follows:

*"And be it further enacted.* That the trustees shall lay off the aforesaid town of Athens, conformably to a plan made out by Rufus Putnam and others, in pursuance of a resolution of the territorial legislature of the eighteenth of December, one thousand seven hundred and ninety-nine, with such variations, however,

as they may find it expedient to make; and the same being thus laid off and a plat of the same, with a designation of the uses of the several parts recorded in the office of the recorder of the proper county, and six weeks previous notice given, in at least two of the newspapers of this state, may proceed to sell, from time to time, at public auction, such of the house and out-lots as they may think proper, for which lots, on payment being made or satisfactory security given according to the conditions of such sale, they shall execute to the purchasers respectively, leases for the term of ninety years, renewable forever on an annual rent, equal to and not exceeding, six per centum of the amount of the purchase money, which lots, with the improvements which may be made on the same, shall be subject to such further yearly rent as may be equal to the tax imposed from time to time, on property of like value and description by the state; and they are likewise authorized, to deliver a reasonable compensation for the improvements which have been made on land within the town of Athens, to be paid out of the funds of the university."

In construing the authority thus reposed in the corporation, the court in *Crippen v. The Ohio University*, 12 Ohio, 97, 1843, held:

"The board of trustees of the Ohio University have power to lay out into lots the portion of land marked as 'commons,' on the town plat of the town of Athens, and dispose thereof for the benefit of the University."

Here it should be observed that although these statutory provisions have not been expressly repealed, they have fallen into a state of almost total disuse by reason of the enactment of Sections 4859-1 and 4859-2, General Code, which read:

Section 4859-1, General Code:

"The owners of land or town lots held under leases from the president and trustees of the Ohio University, or held under sale-leases or assignments by or under the original lessees, may pay to the treasurer of the university, such sum of money, as, placed at interest at six per cent, will yield the amount of rent reserved in the original lease, or in case of a division of the original tract or parcel leased, will equal the proper aliquot part thereof, or the part agreed upon by the several owners. But a person so surrendering and releasing to such corporation must pay the necessary expenses incident to such change of tenure, and procure the services of an agent to perform the necessary labor thereof. Upon payment of such sum and of all rents due

upon the land, on demand of such owner, the treasurer shall give him a certificate of such payment.”

Section 4859-2, General Code:

“Upon such payment, such owner shall be entitled to receive a deed of conveyance for such land by him owned, to be signed by the president of such corporation, countersigned by its secretary, and sealed with the corporate seal of the university, conveying the premises in fee simple to him, or such owner at his option, may demand and receive a certificate as aforesaid. The governor of Ohio, upon presentation thereof, shall execute and deliver to such owner, a deed conveying the premises in fee simple to him.”

Other sections of the Ohio General Code relative to the powers and duties of the Board of Trustees of Ohio University are Sections 4859, 4859-3, 4859-4, 4859-5 and 4859-6. None of these sections specifically confers upon said Board of Trustees the power to convey any of the real property of Ohio University. It, therefore, appears that such power either must be found to be an implied power reasonably necessary to the exercise of the specific powers granted, or that such power does not exist. This rule is stated in 14 Corpus Juris Secundum, page 1336, as follows:

“The charter under the statutes, measures the power of a college or university to the exclusion of all others not expressed or fairly implied, and an incorporated university or college, or an incorporated board of regents or board of trustees of a university, as in the case of any other corporation, can do no act for which authority is not expressly or impliedly granted in its charter or act of incorporation; but they have such powers as are expressly given to them by their charters, or such as by fair implication are necessary to the execution of their object.”

The power of Ohio University to lease real property was considered in Opinion No. 593, Opinions of the Attorney General for 1949, page 286, the syllabus of which reads:

“It is not within the power of ‘The President and Trustees of the Ohio University’ either to enter into a contract with a private corporation engaged in an enterprise for profit for the use of property belonging to the university or to lease property to such corporation while such property is presently used in carrying on its educational program *where the enterprise to be*

*carried on by the private corporation is not incidental to the maintenance of the university.*" (Emphasis added.)

In that opinion the then Attorney General found, as I now find, no specific statutory authority granted to the Board of Trustees of Ohio University to alienate or convey any interest in real property, except that property referred to in Section 13 of the act incorporating Ohio University and that property referred to in Sections 4859-1 and 4859-2 of the Ohio General Code, such authority not being applicable in the question under consideration. He pointed out that all real property held by the Board of Trustees of Ohio University was held in trust to be applied to educational uses and expressed the opinion that the lease then under consideration would have the effect of alienating certain real property in derogation of educational trusts for which it was held. However, he stated at page 293:

"\* \* \* However, I am of the opinion that it would be within the power of the President and Trustees, would violate no trust of the corporate body, and would be in furtherance of the objectives of the university, to lease such property of the university not presently used for instructional purposes, as may be determined by its governing body to be presently unnecessary for its proper functioning."

I construe the above quoted statement as the expression of an opinion that the Board of Trustees of the Ohio University, having the duty to maintain an educational institution, would have the implied power to convey an interest in real property where such conveyance would be in furtherance of and not in derogation of its duty to properly maintain such educational institution. As so construed, I am in agreement with such expression of opinion. In the last analysis, this question would be one for a factual determination of the Board of Trustees as to whether such a conveyance would result in direct benefit to the University itself and the use of the real property conveyed would not interfere with, but instead aid its use for educational purposes.

The above view, I believe, is given support by the cases of Long, et al. v. Board of Trustees of Ohio State University, et al., 24 O. App. 261 (appeal dismissed by the Supreme Court, 116 Ohio St. 738,) and State, ex rel. Gordon v. Taylor, 149 Ohio St., 427.

In the Long case, although there existed no statutory authority permitting the Board of Trustees of Ohio State University to establish and maintain on its campus a store for the purpose of selling and furnishing books and other student supplies to students and professors of the University upon a cost basis, it was held that :

“2. Such enterprise, being incidental to the main objects and purposes of the University, is not forbidden to the University as an agency of the state by any provision of the state Constitution.”

With reference to the general power of the board of trustees of a state university, I also quote from the Long case the following statement appearing on page 266 :

“The State University, by its board of trustees, has been given a general authority by statute to maintain a University and to provide for the control and government thereof, and that authority would include an enterprise reasonably incidental to the main purpose of the University. \* \* \*”

In the Taylor case the Board of Trustees of Ohio State University, on July 8, 1919, had granted to the City of Columbus a perpetual easement for the construction and maintenance of a sewer across the University campus. The construction of the sewer by the City of Columbus required that it be installed either around or through the premises owned and occupied by the Ohio State University. A request was made by the city to the Board of Trustees of Ohio State University for the granting of a perpetual easement for the construction and maintenance of the same. This was granted, including, as a consideration thereof, the right and privilege of Ohio State University “to use the city sewers on the campus of said university without cost or expense to said university, or its board of trustees.” After the enactment by the City of Columbus in 1937 of a “sewer rental charge,” a dispute arose as to whether, under the terms of the easement, Ohio State University was thereby excused from the payment of any sewer rental. I quote from the opinion of Mathias, J., at pages 437 and 438 :

“It is our conclusion that, so far as the agreement in question grants to The Ohio State University the right to connect with and use the sewers of the campus without cost and relieves the university from any assessment for the construction of the sewer, it is valid, but that the city is not thereby obligated to per-

petually treat the sewage emptied into the sewer from the campus of The Ohio State University without cost or expense to the university and at the cost and expense of other users of the sewerage system.”

It should be noted that the right of Ohio State University to receive certain benefits from the installation and maintenance of the sewer was guaranteed by the terms of the agreement with the City of Columbus, as contained in the deed of easement.

Attached to your inquiry I find certain documents indicating that the construction and maintenance of the sewers here in question would be of benefit to Ohio University in that the installation and maintenance of the storm sewer would result in the drainage of certain university land, now in a swampy condition, and the installation and maintenance of a sanitary sewer will connect with and serve Ohio University football stadium and the R. O. T. C. Rifle Range and Storeroom. As heretofore indicated, the question of whether such installation and maintenance will be of a direct benefit to the University itself is a question of fact to be determined by the Board of Trustees of Ohio University, acting within its sound discretion. It would also seem that the right of the University to continue to receive such direct benefits, if direct benefits there be, should be guaranteed to the University by agreement made prior to or coincidental with any easement granted by the University to the city.

In specific answer to your question, therefore, it is my opinion that the Board of Trustees of Ohio University, upon determining, as a matter of fact, that the installation and maintenance by the City of Athens of storm and sanitary sewers across University property will be of direct benefit to the University itself and thus reasonably incidental to the main purpose of the University, and upon entering into an agreement with such city by which the University will receive such benefits, may grant to such city an easement for right-of-way for installation and construction of such storm and sanitary sewers across University property.

Respectfully,

C. WILLIAM O'NEILL  
Attorney General