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1. EDUCATION, BOARD OF — PROPERTY OWNED, NOT NEEDED FOR SCHOOL PURPOSES—BOARD MAY LAWFULLY PERMIT TEMPORARY USE OF PROPERTY FOR PURPOSE OTHER THAN SCHOOL USE AND ACCEPT MONEY FOR USE — AGREEMENT SHOULD CONTAIN LIMITATION ANY TIME PROPERTY NEEDED FOR SCHOOL PURPOSES, OR IF IT SHOULD BE SOLD, THE RIGHT TO THE USE OF THE PREMISES BY THIRD PARTIES WOULD TERMINATE.
2. TEMPORARY USE OF PROPERTY UNDER REVOCABLE LICENSE—MAY INCLUDE CONSTRUCTION AND OPERATION OF SWIMMING POOL—BY AGREEMENT FACILITIES TO BECOME PROPERTY OF BOARD BY WAY OF GIFT UPON UNILATERAL TERMINATION OF LICENSE BY BOARD.

SYLLABUS:

1. Except as the power may be implied as being necessary to carry into effect some expressly granted power a board of education is not authorized to rent or lease property held by it for the public school purposes of its district; but where a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may lawfully permit the temporary use of said property for some purpose other than a school purpose, and it may lawfully accept money for such use. Any agreement whereby third parties are permitted to use said premises under circumstances as mentioned, should contain a limitation to the effect that at any time the school board might determine that the property was needed for school purposes, or that it should be sold, the right to the use of the premises by said third parties would terminate. Opinion No. 4588, Opinions of the Attorney General for 1932, p. 1006, approved and followed.

2. Such temporary use under such revocable license may properly include the construction and operation of swimming pool facilities by the licensee, which facilities, by agreement of the parties, are to become the property of the board by way of gift upon the unilateral termination of such license by the board.

Columbus, Ohio, April 24, 1953

Hon. Frank H. Karns, Prosecuting Attorney
Franklin County, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“I have been requested by members of the Worthington School Board to request your opinion as to the authority of the

Worthington Board of Education leasing a portion of an eighty-acre school farm, located on the north side of State Route 161, to the Worthington Cardinal Booster's Association to be used by said group under the incorporated name of Swimmic, a corporation not for profit, for the construction and operation of a swimming pool and allied parking and play areas.

"I have examined the Opinions of the Attorney General for 1927, page 101; Opinions of the Attorney General for 1929, page 1403; Opinions of the Attorney General for 1930, page 1871; Opinions of the Attorney General for 1931, page 127, and Opinions of the Attorney General for 1932, page 1006."

The general question of the power of a board of education in acquiring, holding and disposing of real and personal property was discussed in Opinion No. 4588, Opinions of the Attorney General for 1932, p. 1006, the syllabus of which is as follows:

"1. Except as the power may be implied as being necessary to carry into effect some expressly granted power a board of education is not authorized to rent or lease property held by it for the public school purposes of its district.

"2. When a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may lawfully permit the temporary use of said property for some purpose other than a school purpose, and it may lawfully accept money for such use. Any agreement whereby third parties are permitted to use said premises under circumstances as mentioned, should contain a limitation to the effect that at any time the school board might determine that the property was needed for school purposes, or that it should be sold, the right to the use of the premises by said third parties would terminate."

The conclusion stated in paragraph one of the syllabus of this opinion is based primarily upon the rule that the boards of education possess only statutory powers, the writer being unable to find any such power in the then existing statutes, either by expression or by necessary implication. The statutes do not appear in the meantime to have been broadened to any extent with respect to such power, and I am inclined, therefore, to conclude that the general rule thus stated is still declarative of the law.

In support of the conclusion stated in paragraph two of the 1932 opinion, supra, we find the following statement in the opinion, pp. 1007, 1008:

“There are circumstances, however, which in my opinion, justify a board of education in leasing property where such leasing is a mere incident to the ownership of such property. When a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may be said, in my opinion, that the power to lease that property temporarily, until it may be advantageously sold, is an incident to the possession of the property. If such property cannot be advantageously sold, and may be leased so that the school district receives some benefit from the ownership of the property which it would not receive if it lay idle, it certainly cannot be said that the board exceeds its power in so leasing the property. This often happens where a new school building is erected on a new location, leaving the board in possession of a school lot and building which are not needed at that time for school purposes and which, on account of business conditions, may not at that time be advantageously sold. This often happens, especially in city school districts. Any such lease should, in my opinion, be limited so that it would terminate at any time the school board might determine that the property was needed for school purposes, or that it should be sold.

“To acquire property, however, which the board does not intend to utilize for school purposes, and which is not needed for school purposes, merely for the purpose of renting or leasing the same is, in my opinion, wholly unauthorized, and beyond the powers of the board.”

In the instant case, I am informed, the land in question is a portion of an “80 acre school farm” and is a part of a tract which was conveyed nearly one hundred fifty years ago by way of gift in a partition deed to the local school authorities for school purposes. I am further informed that the portion of the tract involved is not presently needed for school purposes and that the board does not deem it advantageous to sell it. This being the case, I perceive no reason why the rule stated in the second paragraph of the syllabus of the 1932 opinion should not be deemed applicable.

In the application of such rule to the facts in the case at hand, I note the following statement in a letter from counsel for the proposed lessee :

“I enclose proposed articles of incorporation of the corporation not for profit, the proposed lessee.

“The lease would be for a portion of the lot, the use of which for the purposes of the lessee would in no way interfere with school activities and would be terminable by the Board of Education upon a reasonable notice. It would provide for only nominal rental or other consideration.”

The purpose clause in the proposed corporation not for profit, the proposed lessee, is as follows:

“The purpose or purposes for which said corporation is formed are:

“To lease from the Board of Education of the Worthington School District ground required for the construction of a swimming pool and related facilities; to construct and operate a swimming pool and related facilities; to borrow and pledge assets and revenues of the corporation to secure the repayment of funds borrowed; to receive and accept donations and contributions for the accomplishment of the foregoing purposes and to perform all acts and engage in all activities necessary or desirable in connection with the foregoing.

“To transfer, convey and turn over to the Board of Education of the Worthington School District or its nominee, all property and assets of the corporation if, as and when requested so to do by said Board of Education of the Worthington School District.”

Assuming that the proposed instrument of conveyance to the proposed corporation is drawn in such a way as to give the board a legal right to terminate the arrangement at such time as it is determined that the land involved is needed for school purposes, or that it can be sold to advantage, I perceive no objection to the proposed arrangement, for it would appear that such a provision in the conveyance would be sufficient notice to the lessee, and to parties claiming under the lessee, to estop the assertion of any claim against the board on the basis of fixed improvements installed on the premises while the lessee is in possession. In passing, it may be observed that such a conveyance may more properly be deemed a mere license revocable at the option of the grantor, rather than a lease in the ordinary sense.

When the proposed arrangement is viewed as a whole, it becomes apparent as a device whereby funds will be raised by a civic group to finance the construction of a swimming pool which will eventually become the property of the board by way of gift. Boards of education are, of course, authorized by statute to accept gifts of property. See Section 4834-9, General Code. Nor is it necessary to anticipate any difficulty in connection with the power of the board to operate such swimming pool facility when the gift is consummated, since the board is required, under the provisions of Section 4837, General Code, to prescribe courses in physical education,

and it has become common practice, in those districts where funds are available to provide the proper facilities, for such physical education programs to include instructions in swimming.

For these reasons I conclude, in specific answer to your inquiry, that:

1. Except as the power may be implied as being necessary to carry into effect some expressly granted power a board of education is not authorized to rent or lease property held by it for the public school purposes of its district; but where a board of education finds itself in possession of property which is not needed for school purposes and which it cannot advantageously dispose of by sale, it may lawfully permit the temporary use of said property for some purpose other than a school purpose, and it may lawfully accept money for such use. Any agreement whereby third parties are permitted to use said premises under circumstances as mentioned, should contain a limitation to the effect that at any time the school board might determine that the property was needed for school purposes, or that it should be sold, the right to the use of the premises by said third parties would terminate. Opinion No. 4588, Opinions of the Attorney General for 1932, p. 1006, approved and followed.

2. Such temporary use under such revocable license may properly include the construction and operation of swimming pool facilities by the licensee, which facilities, by agreement of the parties, are to become the property of the board by way of gift upon the unilateral termination of such license by the board.

Respectfully,

C. WILLIAM O'NEILL
Attorney General