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WHETHER IT IS MANDATORY FOR LOCAL SCHOOL BOARD  
TO BUILD AND MAINTAIN FENCES ON ITS PROPERTY—  
§§3313.37, 971.01, ET SEQ., OAG No. 2650—1934.

## SYLLABUS:

Section 3313.37, Revised Code, does not make it mandatory on a local board of education to build and maintain fences on its property but it may do so in the exercise of its general powers if it deems fences desirable, and such a board is subject to the requirement of Section 971.01, *et seq.*, regarding the construction of partition fences unless the construction of such fences would be of no benefit to the board.

Columbus, Ohio, June 21, 1960

Hon. Richard F. Liggett, Prosecuting Attorney  
Brown County, Georgetown, Ohio

Dear Sir:

I have before me your request for my opinion which request reads as follows:

“I respectfully request your opinion to the following question on behalf of the Board of Education of a local school district of Brown County, Ohio;

“1. Under the present law, does the Board of Education of a local rural school district have a duty to build or repair fences?

“In Volume 1 Opinions of Attorney General, 1934, No. 2650, the then Attorney General held that under General Code Section 7620 which stated, ‘it (Board of Education of a district) also, shall provide fuel for school, build and keep in good repair fences enclosing such school houses—’, that it was a mandatory duty of a Board of Education to build and keep in good repair fences enclosing school lots. General Code Section 7620 was amended by General Code Section 4834-10 which contained a like provision relating to fences. However, the amendment to General Code Section 4834-10, which is Section 3313.37 of the Ohio Revised Code, contains no such like protection, and it would therefore seem that the intent of the Legislature was to relieve the Board of Education of school districts of this duty.

“2. If the Board of Education of a local rural school district does not have a duty under Section 3313.37 of the

Ohio Revised Code to build or repair fences enclosing school lots, are they amenable to Section 971.01, et seq., of the Ohio Revised Code relating to the building of partition fences?

"In this regard, may I call your attention to the cases of *Alma Coal Company vs. Cozad*, 75 OS 348 and *Beach vs. Roth*, 18 CC (NS) 579, holding that the fence sections cannot be so construed and administered as to charge an owner of lands which are, and which are to remain unenclosed, with any part of the expense of construction and maintaining the fence for the sole benefit of the adjoining proprietor. In the situation in Brown County, the owner adjoining the school lands is desirous of having the fence erected so that he may pasture cattle in the lands adjoining to the school ground.

"3. If the Board of Education of a local rural school district has no duty under Section 313.37 of the Ohio Revised Code to build a fence and does not have a duty under the provisions of Section 971.01 et seq. of the Ohio Revised Code to build a partition fence, may such Board of Education build or help build a fence under its general powers and duties?"

As you have noted in your request, Section 7620, General Code, originally provided as follows:

"The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control. It also, shall provide fuel for schools, build and keep in good repair fences enclosing such school houses, when deemed desirable plant shade and ornamental trees on the school grounds, and make all other provisions necessary for the convenience and prosperity of the schools within the subdistricts."

This statute was repealed in 1943 at which time Section 4843-10, General Code, was enacted. Section 4834-10, General Code, read as follows:

"The board of education of any school district, except a county school district, may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either

within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control.”

This section is identical with the present Section 3313.07, Revised Code. It will be noted that when this statute was changed in 1943 the final sentence of Section 7620, General Code, was deleted. A close examination of that sentence reveals that it provided for only such matters as might reasonably be included within the more general provisions of the first sentence of Section 7620, General Code, which first sentence has been carried over and forms the basis of present Section 3313.07, Revised Code. This latter section makes no express reference to the building and keeping in good repair of school house fences. For this reason the basis of Opinion No. 2650, Opinions of the Attorney General for 1934, page 617, no longer exists in Ohio law and, while it would appear that it would still be permissible for a district board of education to construct fences around its schools, it would also seem to be no longer mandatory that it do so. For this reason I am constrained expressly to overrule the first branch of the syllabus of Opinion No. 2650, Opinions of the Attorney General for 1934, which I find no longer applicable.

The next question relates to the duty of a local board of education to participate in the building of partition fences pursuant to Section 971.01, *et seq.* Section 971.02, Revised Code, requires owners of adjoining lands to build, keep up and maintain in good repair in equal shares partition fences between them unless otherwise mutually agreed upon. This statute was interpreted in the case of *Alma Coal Co., v. Cozad*, 75 Ohio St., 348, not to charge the owner of lands with the duty of assisting in the construction and maintenance of partition fences when his property was so barren and unusable that the fences would prove to be of no value to him. It would appear that Section 971.01, *et seq.*, does apply to property owned by a local board of education unless the property is of such a nature that fencing would be of no value to the board of education under which circumstance the board would not be obliged to participate in the mutual construction of such partition fences.

In answer to your third query it should be pointed out that the provisions of Section 3313.37, Revised Code, are sufficiently broad to authorize a local board of education to construct and maintain whatever fencing it deems desirable to effectuate school purposes.

It is, therefore, my opinion and you are accordingly advised that Section 3313.37, Revised Code, does not make it mandatory on a local board of education to build and maintain fences on its property but it may do so in the exercise of its general powers if it deems fences desirable, and such a board is subject to the requirement of Section 971.01, *et seq.*, regarding the construction of partition fences unless the construction of such fences would be of no benefit to the board.

Respectfully,

MARK MCELROY

Attorney General