

factories, but the latter is not bound by the findings of the city building inspector under existing law.

In your third question you desire to know whether in a municipality having a charter the municipal government has any jurisdiction over the schools, or the board of education. The answer to this is in the negative for the reasons set forth heretofore, as exemplified by the court decisions cited that the municipality having a charter is limited to those things which appear in section 3 of Article XVIII of the Constitution of Ohio; that is, upon "local self government," while on the other hand education is a state function, boards of education are but the agencies of the state and any charter which would attempt to have any jurisdiction over the schools would be in conflict with the home rule provision of the Ohio Constitution. There are, of course, points of contact between the municipality and the board of education of the city school district, of which the municipality is often but a part; thus under 4761 G. C. the city solicitor or city attorney, though a municipal officer, has been given the duties of legal adviser to the city board of education. This official is chosen in various ways, according to the charter of the municipality in question; in a number of charter municipalities he is chosen by a direct vote of the people and is responsible to them, while in a city manager city he is an appointee of the city manager, serving at the will of that official as to the tenure of office and salary received. Another point of contact is that the municipal civil service commission, whether in a charter city or otherwise, is also the civil service commission of the city school district in which the municipality is located, and it is the duty of this municipal civil service commission, under the civil service act of Ohio, to furnish the board of education of the city school district a list of eligibles for the noncertificated employes of the city school district.

In reply to your question, then, you are advised that:

(1) In order that bonds may be issued under 7630-1 G. C., the order creating the emergency described therein must be issued by the Division of Workshops and Factories in the Department of Industrial Relations following an examination by the inspectors of that division, and in a city school district wherein the municipality maintains a city building department, no function is required or authorized to be performed by such city building inspector under the general laws of the state.

(2) Under the provisions of section 7630-1 G. C., there is no finding authorized or required of the city building inspector, and if a finding was made by the city building inspector following a physical examination of a school building, and such finding was different from that of the state building inspector, the finding of the state authorities would govern under the general laws of the state.

(3) In a municipality having a charter, the municipal government has no jurisdiction over the schools of the city school district or the board of education in authority in such school district.

Respectfully,

JOHN G. PRICE,

*Attorney-General.*

3865.

MUNICIPAL CORPORATIONS—BUILDING DEPARTMENT CHARTER—  
WITHOUT AUTHORITY TO REQUIRE PERMIT FEES—WHEN  
FINDINGS SHOULD BE MADE—WHERE BUILDING DEPARTMENT  
CREATED UNDER GENERAL LAWS OF STATE—ITS AUTHORITY.

1. The building department of a municipality governed by city charter or otherwise is without authority to require permit fees to be paid by the school district of which the municipality is a part when new school buildings are erected or additions are made to school buildings.

2. A board of education is without authority of law to expend its funds for building permit fees and where such building permit fees have been charged and collected a recovery may be had by the paying board of education.

3. Under the general laws of the state (1035 G. C. et seq.) in a municipality having a regularly organized building inspection department the building plans of the city school district shall be approved by such local municipal building inspection department and it is the duty of the building inspector to pass upon the plans so submitted to him without charging any fee for his services.

COLUMBUS, OHIO, January 4, 1923.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of the receipt of your request for an opinion upon the following:

"The building department of a certain city in this state charges the board of education the usual permit fees in the erection of school buildings and additions thereto. The said board of education has paid these permit fees under protest and is now asking this department whether or not such fees may be legally collected from boards of education. We are, therefore, respectfully requesting your opinion as follows:

Question 1. May a city building department require permit fees to be paid by boards of education when new school buildings are erected or additions are made to school buildings?

Question 2. In the event that boards of education are not liable for the payment of such permit fees may there be a recovery where such payments have been made under protest?"

In the above inquiry, it is understood that what you mean by the words "usual permit fees" is the building permit fees charged to individuals or private parties. It is understood that these permit fees are charged and collected in the city in question under an ordinance of the city and not by any specific grant of general law. Were the amounts charged and collected but small amounts (as is the case in many licenses or permits granted by a municipality) this question might not be so important, but the official figures in the city school district in question show that between September 30, 1921, and the middle of August, 1922, a period of a little over ten months, there was charged, for eight building permits issued to the board of education of the city school district, an aggregate of \$3,480.62. The largest of these eight permit fees charged to the board of education in the present year was when one building permit furnished to the board of education in question cost \$2,151.32, the same being a building permit issued for a new high school building to be erected by the board of education of the city district.

An investigation of the files in this department shows that this specific question has never been passed upon, except as appears in opinion 1181, page 1307, volume II, Report of the Attorney General for 1914, reference to which will be made later. It is true there are no specific provisions of the statutes or the state building code itself, exempting boards of education from liability for a building permit charged by a municipality against the city school district of which the municipality is a part; but on the other hand no specific provisions of the statutes or even general provisions of law give to the board of education the right to expend public funds in this manner.

"Boards of education, and other similar governmental bodies are limited in the exercise of their powers to such as are clearly and distinctly granted." (State ex rel. Locher, Pros. Atty. vs. Menning, 95 O. S., 97, approved and followed, State of Ohio ex rel. Clarke vs. Cooke, 103 O. S., 465, Ohio Law Reporter, April 3, 1922.)

It might be contended that a building permit fee was in no sense of the word a tax or an assessment but that it was in part a payment for the services rendered in the examination of plans and inspection work to insure compliance with the provisions of the building code, and thus might be considered as a part of the cost of the construction of the building. However, a permit fee is practically a license fee for a license, and licenses in many respects, if not all, are practically the same as permits (see Ruling Case-Law), and a license fee in many instances is a form of taxation. Boards of education are not taxpayers, but on the other hand, taxes are collected for the support of the schools. It is presumed that these ordinances in question might arise in some cities out of the authority which appears in section 3636 G. C., which reads as follows:

"To regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, and to provide for the inspection of buildings or other structures and for the removal and repair of insecure buildings; to require, regulate and provide for the numbering and renumbering of buildings either by the owners or occupants thereof or at the expense of the municipality; to provide for the construction, erection, operation of and placing of elevators, stairways and fire escapes in and upon buildings."

In the State Building Code itself appears Section 1035 G. C., which reads:

"The plans for the erection of such structure, and for any alterations in or additions to any such structure shall be approved by the inspector of workshops and factories, except in municipalities having regularly organized building inspection departments, in which case the plans shall be approved by such department."

Here it will be noted that in any municipality having regularly organized building construction departments the plans for a building shall be approved by the municipal building inspection department. But when the section says mandatorily that the plans "shall be approved" by the city building inspection department the law stops there and does not provide for the payment of any fee for such approval of plans. Hence no specific authority is found in section 1035 G. C. for the city

building inspection department, required to approve the plans on a building being erected by the board of education, to charge a building permit fee for such services. If a board of education in a city school district in erecting a new high school building was required to pay to the local municipal government a building permit fee (running as high as over \$2,000 as indicated above) its bond issue for building purposes on its contingent fund would become depleted to the extent of the amount of the building permit fee demanded in the city school district while in an adjacent rural school district lying next to the city school district a high school building could be erected by the board of education without any expenditure for a building permit, and this in practice would appear to be a discrimination against the city school district funds when compared with funds of other school districts. In practice the building plans for school buildings to be erected in the state are taken to the state capital and examined carefully in the Division of Workshops and Factories, in the Department of Industrial Relations; they are either approved or disapproved, or suggestions made as to changes which would bring about final approval from that division in order to conform to the state building code. But there is no fee charged for this service since none is provided for in the statutes nor, as indicated above, is there any grant to the board of education to spend public funds for this examination of plans by a state division or department which is supported by other funds. Starting with the constitution itself and running down through all the sections of the General Code, it would appear that the intent was that the city school district should not be assessed or taxed or hampered in its building program *any more than the other school districts* of the state who are not required to pay building permit fees. Some years ago these building permits cost but little but in the case at hand under section 53 of the ordinance in question the fee "shall be fifteen one-hundredths of one per cent of the entire value of such building or structure, except that no permit shall be issued for less than one dollar and fifty cents." At this point it may be said that *if the municipality could charge* the city school district with a building permit fee of fifteen one-hundredths of one per cent *it would appear to have equal authority to charge fifteen per cent of the entire value of such building or structure if it cared to do so.* The effect of all of this (and the possible intent in most cases) is to replenish the city treasury at the expense of the schools, overlooking the fact that from an economical standpoint, in the final analysis the taxpayer in the municipality pays for both. Again it is apparent that this procedure is contrary to the spirit of the constitution itself in the encouragement of education. Education is a state function and the schools are "the public school system of the state" (Constitution, Art. VI, Sec. 3) and not wholly local in their nature. The subject was of sufficient importance that the first constitutional convention, and the people thereafter by their ratification, gave to the subject of education a single article by itself in the constitution, and that in the very earliest part of the State Constitution. Pertinent to this question the constitution of Ohio speaking upon education says in Article VI, to wit:

"Sec. 2. The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; \* \* \* \* \*

Sec. 3. Provision shall be made by the law for the organization, administration and control of the *public school system of the state* supported by public funds; provided, that each school district embraced wholly or in

part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts. (Adopted Sept. 3, 1912).

The following part of section 3 speaking of the city school district is significant in that it gives to the city school district (including territory outside of the municipality) the right to determine by referendum vote of the electors in the whole district the organization of the district board of education *so that that right might never be disturbed by a demand to have the city school district organization fit into any of the governmental plans of the municipality itself.* The powers of municipalities as to their own local self-government appear in Article XVIII of the constitution, as follows:

"Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

"Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, *subject to the provisions of section 3 of this article,* exercise thereunder all powers of local self-government."

It is noted here that the language of the constitution as above, grants the powers of "local self-government," that is, the government of the municipality concerned; the same being a distinct and separate entity from the city or village school district as the case may be. Again these powers (as to self-government) are limited to "local police, sanitary and other similar regulations" within the limits of the municipality whose geographical confines in most instances are less in territory than the school district of the municipality. The school districts, whether city, village or rural, are the agencies of the state, established by the state in carrying out the state public school system provided for in Article VI of the constitution. Among many decisions of the courts along this line, attention is invited to the following:

"The common schools of the state are the fruit of the Constitution, constituting a general educational system."

Finch vs. Board of Education,  
30 O. S. 37  
Diehm vs. The City of Cincinnati,  
25 O. S., 305.

"The boards of education of the state hold the property intrusted to their custody only as a public agency of the state."

Atty. Gen. ex rel. Kies vs.  
Lowrey, 199 U. S., 233, 239.

"The school districts are organized as mere agencies of the state in maintaining its public schools."

State vs. Powers, 38 O. S., 54, 61.

"The board is simply the custodian of what the Legislature sees fit to intrust to it and is bound to use what is thus intrusted to it *in the manner directed by the Legislature and not otherwise*, and to deliver it up when directed. It holds property, but only for carrying out the policy of the state. It constitutes an agency by which the state carries out its policy and purposes in educating the youth of the state.

The board of education is only a quasi corporation (30 O. S., 37; 38 O. S., 54; 10 O. S., 515; 20 O. S., 18), an organization subject to the control of the Legislature. It constitutes the instrument by which the Legislature administers the department of the civil administration of the state which relates to education and the schools."

Akron Board of Education vs.  
Sawyer, 7 O. N. P., 416.

Having thus established that the city board of education is but the agency of the state, intrusted with public property as such agency of the state, we come to a carefully prepared opinion of this department issued by a former attorney general, and appearing at page 1307, volume II, Opinions of the Attorney General for 1914, the same being addressed to the Secretary of the Board of Trustees of the Ohio State University at Columbus. The question passed upon in that opinion is whether an ordinance of the city of Columbus, requiring the issuance to the owner or his agent of a permit for the construction of a building would apply to construction work at the Ohio State University. The section of the General Code under which the Ohio State University was placed in this opinion was section 12600-44 G. C., which section says in part:

"Under the classification of school buildings are included all public, parochial and private schools, colleges, academies \*\*\*\*\*"

A careful reading of this opinion, (covering eleven closely printed pages) brings us to the conclusion that the arguments which apply in the case of the Ohio State University being charged a building permit fee would also apply to the question of the board of education of a city school district being charged a building permit fee, although this opinion of 1914 was not directly upon the question of the charging by a municipality of a building permit fee against a city board of education, the charge in the University case being made against the University or its board of trustees. The syllabus of this opinion in 1914 reads in part as follows:

"An ordinance of the City of Columbus requiring the issuance to the owner or his agent of a permit for the construction of a building involving the installation of sanitary plumbing is not applicable to construction work at the Ohio state university. It is the power and duty of the inspector of buildings in the city of Columbus to approve the plans of buildings of the Ohio State University, and to enforce the state building code with respect thereto."

Standing out in the body of this opinion the following language occurs:

"\*\*\*\*\* I am of the opinion that in so far as the Columbus ordinance adds requirements to those of the state legislation and in part requires the issuance of a permit and the payment of a fee, the application of such pro-

visions and requirements to construction work at the Ohio state university is to be tested by principles operating without reference to the state building code. That is to say upon the question, as to the right of the city of Columbus to require the trustees of the Ohio state university, or any state officer to take out a building permit, the state building code exerts no influence whatever. This question then must be answered in the light of statutes and principles which have not yet been cited or discussed.

\* \* \* \* \*

I am of the opinion that under the statutes as they exist, the city has no authority, or at least had none when this ordinance was passed in 1907, to license the construction of state buildings within its corporate limits.

\* \* \* \* \*

It is the duty of the building inspector to pass upon the plans so submitted to him without charging any fee for his services. It seems to me that these provisions are inconsistent with the idea that the municipality under its power to regulate the construction of buildings may authorize the building inspector to charge a fee for the inspection of plans and the issuance of the permit, when his duty to inspect the plans is fixed by statute and when he is required to approve or disapprove of them without issuing any license or permit.

\* \* \* \* \*

It is sufficient to state that where the evil sought to be remedied is dealt with by direct legislation of the state, the city may not under the guise of exercising the police power condition the action of the state officers by requiring them to take out a license.

It is not even necessary, therefore, to go to the extent of holding that the municipal regulations involved here are inconsistent with those of the general law governing the state officers. If they were so, the question would be plain; but even if they are not inconsistent, the license requirements of the city ordinance must fail of application to the state officers and the property under their custody, because the license not being necessary to enforce as to the state officers and buildings, any substantive requirement of law, becomes *simply an unwarranted interference* by the city with the state officers in the discharge of their duties."

In the case of *Kentucky Institution for Education of the Blind vs. Louisville*, 8 L. R. A., n. s., 553, the Court of Appeals of the State of Kentucky spoke as follows:

"The state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds \* \* \*. The principle is, that the state when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control."

In 1919 this department held that:

"\*\*\*\*\* the state, while granting wide powers to charter cities in other matters, has ever kept control of the public school system and all boards of education are operating under the laws of the state, \*\*\*\*"

(Opinion 396, Vol. 1, Opinions of the Atty. Gen'l. 1919 p. 653).

As a matter of practical information, this department is officially advised by the Department of Law of the city of Columbus, which city was involved in the building permit question in the opinion of the attorney general in 1914 supra, that "the city of Columbus does not collect fees for building permits where new schools are being erected by the board of education in the Columbus City School District."

Space will not be taken here to quote the familiar sections of the statutes which establish the fact that a board of education cannot be taxed or assessed for local matters or on local matters by other local subdivisions. For these sections and discussion thereon, see opinion number 3842, issued by this department on December 30, 1922, upon the question of assessing a board of education for boulevard lighting in front of abutting school property.

A board of education is permitted to spend public funds only for those things for which there is a clear or implied authority and a search of the statutes reveals that nowhere in the General Code is there any authority for a board of education to expend the funds (of which it is a mere trustee for the public) in the purchase of building permits where such charge has been made by a municipality.

In reply to your question, then, you are advised that it is the opinion of this department that:

1. The building department of a municipality governed by city charter or otherwise is without authority to require permit fees to be paid by the school district of which the municipality is a part when new school buildings are erected or additions are made to school buildings.

2. A board of education is without authority of law to expend its funds for building permit fees and where such building permit fees have been charged and collected, a recovery may be had by the paying board of education.

3. Under the general laws of the State (1035 G. C. et seq.) in a municipality having a regularly organized building inspection department the building plans of the city school district shall be approved by such local municipal building inspection department and it is the duty of the building inspector to pass upon the plans so submitted to him, without charging any fee for his services.

Respectfully,

JOHN G. PRICE,

Attorney-General.

3866.

MUNICIPAL CORPORATIONS—WATERWORKS DEPARTMENT MAY ENTER INTO AGREEMENT WITH CITY TO PAY OFFICE RENT FOR SPACE IN PUBLIC BUILDING.

*Under the provisions of sections 3958 and 3713 G. C., the waterworks department of a municipality may enter into an agreement with the city, to pay rental for office space occupied by said department in a public building under the control of the city.*

COLUMBUS, OHIO, January 4, 1923.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Receipt is acknowledged of your recent requests reading as follows: