

This contract pertains to the elimination of the grade crossing over the tracks of the Pennsylvania Railroad Company and The Wheeling and Lake Erie Railway Company, known as Gaylord Grade Crossing, located on Inter-County Highway No. 7, and Main Market Road No. 27, at a point about one mile north of the north corporation line of Martins Ferry, Belmont County, Ohio.

I have carefully examined said contract and finding it in proper legal form, I hereby approve and return the same to you.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

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823.

APPROVAL, BONDS OF BOTKINS VILLAGE SCHOOL DISTRICT, SHELBY COUNTY, OHIO—\$3,700.00.

COLUMBUS, OHIO, August 3, 1927.

*Retirement Board, State Teachers Retirement System, Columbus, Ohio.*

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824.

TRANSFER OF FUNDS—CONCERNING AUTHORITY OF BOARD OF CONTROL AND EMERGENCY BOARD—FISH AND GAME BUILDING AT OHIO STATE FAIR GROUNDS.

**SYLLABUS:**

1. *Neither the Controlling Board nor the Emergency Board is vested with any legislative power and neither can appropriate money nor amend a statute so as to provide that moneys appropriated by the legislature can be spent for a purpose other than that authorized by law.*

2. *The Emergency Board is empowered to make an allotment of funds only (a) in case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period, or (b) in case of an emergency requiring the expenditure of money not specifically provided by law, i. e., in case of a sudden or unexpected happening or unforeseen occurrence or condition.*

3. *The power and duty of determining whether or not a case of an emergency exists is primarily vested in the Emergency Board, which is to be guided by legal principles and not by questions of policy, any abuse of discretion being reviewable by the courts.*

4. *In so far as the transfer of funds is concerned, subject to the limitation that the Controlling Board may not consent to the transfer of funds for the sole purpose of increasing an appropriation for a single salary (Opinion No. 687, 1927) such board is empowered to authorize a transfer of moneys from one detailed classification to an-*

other under the general heading "Personal Service" and from one detailed classification to another under the general heading "Maintenance." The board is without power to authorize a transfer from one detailed classification to another in the group "Additions and Betterments," or from a detailed classification in one group to a classification in another group.

5. Since such action would circumvent the Governor's constitutional prerogative to veto any item or items in an appropriation bill, the Controlling Board is without authority to set up a classification for any department when the General Assembly has not provided such a classification in the appropriation act.

6. Since such action would have the effect of nullifying the Governor's veto power where, by vetoing an entire appropriation item, a classification in an appropriation bill has been entirely wiped out, the Controlling Board is without authority to restore such classification or to authorize a transfer of funds thereto.

7. The Controlling Board is without authority to authorize a transfer of moneys appropriated by the legislature to the Fish and Game Division of the Department of Agriculture as "F 9, Uses and Purposes" under the heading "Maintenance" to any detailed classification within the group "Additions and Betterments" for the purpose of covering the cost of raw material to be used in erecting a building on the Ohio State Fair Grounds to house an exhibit of wild animal life at the Ohio State Fair.

8. If, under the broad powers vested in the Director of Agriculture by Sections 1344, 1438 and related sections of the General Code, the Director of Agriculture should determine that moneys in the "Uses and Purposes" fund should be expended for the purpose of purchasing cages to exhibit wild animal life at the Ohio State Fair in furtherance of the laws relating to the protection, preservation and propagation of wild animals and the Board of Control should approve a transfer of moneys in the classification "Uses and Purposes," appropriated to the Division of Fish and Game under the heading "Maintenance," to the classification "E 8, Educational" under the same heading for such purpose, such determination would probably not be disturbed by the courts.

COLUMBUS, OHIO, August 3, 1927.

HON. D. O. THOMPSON, Chief, Division of Fish and Game, Columbus, Ohio.

DEAR SIR:—I acknowledge receipt of your letter of July 27, 1927, reading as follows:

"The Division of Fish and Game is contemplating the erecting of a building for educational and exhibitional purposes at the State Fair Grounds.

In the past few years, our exhibit at the State Fair has been shown under a tent which has been very unsatisfactory. Each year the department has been expanding this feature, and we are now compelled to erect a rustic effect shelter house at an approximate cost of \$2500.00. We have asked the Honorable Board of Control to transfer this money in order that we may proceed with the completion of our plans. Had we known there was a question as to whether this fund could be transferred or not, we would not have undertaken this project. In the past projects of this kind have been taken up with the Board of Control, and they have passed favorably on them.

We expect to erect this building mostly with our own help and have already started operations.

This exhibit in the past years has been one of the biggest features of our State Fair, and it brings thousands of sportsmen to this educational exhibition. We have experienced sportsmen there who are familiar with fish and

game and who explain to the public the open seasons on the various game, and the Game Laws in general, and we are satisfied that thousands of people become more educated after they have visited our display of outdoor life.

I trust that you will act upon this request at once in order that we may either continue or cease operations at once."

Your request for an opinion was engendered by the disapproval by the Controlling Board upon legal grounds on July 26, 1927, of two certain "Applications for Transfer" submitted by the Director of Agriculture. In the first of these applications for transfer, application was made to transfer twenty-five hundred and fifty dollars "from Classification Uses and Purposes to Classification G-31, Exhibition Building at Fair Grounds, House Bill 502, first yr. General Assembly." As a reason why the classification to which the transfer was desired was inadequate, it was stated:

"To cover the cost of raw material to build a rustic effect building at Fair Grounds for the exhibition of wild life."

In the second application for transfer, application was made to transfer the sum of one thousand dollars "from Classification Uses and Purposes to Classification E-8, House Bill 502, first yr. General Assembly," it being stated as a reason why the classification to which the transfer was desired was inadequate:

"To purchase cages to exhibit wild life in the building at Fair Grounds."

You do not state in your letter exactly upon what question you desire my opinion. However, since I was represented on the Controlling Board by the First Assistant Attorney General, the department has knowledge that the two applications for transfer above set forth were disapproved by the Controlling Board for the reason that it was the opinion of such board that the transfers requested were unauthorized and the board was without authority of law to approve the same, the board being of the opinion that the moneys in the fund classified as "Uses and Purposes" could not legally be expended to cover the cost of erecting a building on the State Fair Grounds or the cost of purchasing cages for the purpose of providing an exhibit of wild animal life at the Ohio State Fair.

In an oral conference had with you shortly prior to the submission of the above letter, this department was advised that in view of the action of the Controlling Board, it was your desire that an opinion be rendered on the question as to whether or not moneys in the "Uses and Purposes" fund could be transferred to the classifications desired, in order that such moneys might be expended to erect a building on the State Fair Grounds and to purchase certain cages for the exhibit described in your communication.

Section 1433 of the General Code provides that the moneys received as license fees for the issuance of hunters' and trappers' licenses, other than the amounts paid to the clerks as their fees, shall be paid into the state treasury "to the credit of a fund which is hereby appropriated for the use of the director in the preservation and protection of birds, game birds, game and furbearing animals." This fund has for convenience been designated "Uses and Purposes." The section in question, which was enacted as Section 43 of "An Act—To codify fish and game laws of Ohio, and to repeal sections of the General Code relating thereto," passed May 10, 1919 (108 v. Pt. 1, p. 577) reads in part as follows:

"Clerks and deputies authorized to issue licenses \* \* \* shall transmit with such report to the director, the moneys received as license fees, other

than the amounts paid to the clerks as their fees, which shall be paid into the state treasury to the credit of a fund which is *hereby appropriated for the use of the director in the preservation and protection of birds, game birds, game and furbearing animals. At least fifty per cent of the money arising from all such licenses shall be expended by the director for the purchase and propagation of game birds and game animals to be used in restocking sections where a scarcity of such birds and game animals exist, for establishing and purchasing or otherwise acquiring title to lands for game preserves, and the director is hereby empowered to organize such lands into state game preserves under rules and regulations to be adopted by said director, and employ on such preserves one or more keepers or protectors at such salary and with such duties as may be prescribed by the director. \* \* \**”

Section 1438, General Code, enacted as Section 48 of the same act, provides :

“The Secretary of Agriculture shall have authority and control in all matters pertaining to the protection, preservation and propagation of song and insectivorous and game birds, wild animals and fish within the state and in and upon the waters thereof. He shall enforce by proper legal action or proceeding the laws of the state for the protection, preservation, and propagation of such birds, animals and havens for the propagation of fish and game, and, so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties.”

In the Administrative Code it is provided by Section 154-42, General Code, that the “Department of Agriculture shall have all powers and perform all duties vested by law in \* \* \* the Secretary of Agriculture.”

Certain parts of the general appropriation act passed by the 87th General Assembly (H. B. 502) are pertinent to the question here under discussion, and your attention is directed to Section 1 of such act which provides, *inter alia*, that :

“ \* \* \* Appropriations for departments, commissions, bureaus, institutions and offices, for the uses and purposes of which, or of any activity or function thereof, specific funds in the state treasury are provided by law, are hereby made from such specific funds, insofar as such funds are subject by law to appropriation and expenditure for the purposes herein mentioned, and to the extent that the monies to the credit of such specific funds on July 1, 1927, or which may be credited thereto prior to December 31, 1928, shall be sufficient to satisfy such appropriations. Any sums necessary to supply the balance of such appropriations are hereby appropriated out of any monies in the state treasury to the credit of the general revenue fund, but no monies shall be taken from the general revenue fund to support the activities of the fish and game division of the Department of Agriculture. \* \* \* ”

Among the various appropriations to the Fish and Game Division of the Department of Agriculture, is an item under “E Equipment—Replacement” classification, as follows :

	Six months	Year
“E 8. Educational -----	\$500.00	\$1,000.00” (p. 62),

while under “F Contract and Open Order Service” classification, in addition to the item

	Six months	Year
“F. 9. General Plant -----	\$500.00	\$1,000.00” (p. 62)

and certain others, appears a blanket appropriation, with no amount specified, of the moneys in the "Uses and Purposes" fund, not otherwise specifically appropriated, reading as follows:

"Uses and Purposes—For purchase of Lands, etc., Minimum Per Cent of License Fees, etc. Provided by law." (p. 63)

Like blanket appropriations have been made by the legislature for the past several years.

There is no "G-31" classification among the several appropriations to the Fish and Game Division, but included in the appropriations made to the Department of Agriculture, proper, are items under the classification "G Additions and Betterments—" as follows:

"G 31.	
Capital Equipment -----	\$ 400.00
Trucks, Tractor and Grader -----	8,000.00"
(p. 58)	

In so far as appropriations for other than current expenses are concerned, the various appropriations made by the 87th General Assembly in the general appropriation act above referred to, will not become available until August 9, 1927, the effective date of such act. See Opinion No. 725, rendered under date of July 11, 1927.

In view of the seeming wide-spread misconception entertained by certain of the state departments and officials as to the powers and duties not only of the Controlling Board, but of the Emergency Board as well, it is deemed advisable in this opinion to point out the powers and duties of both of these boards and the limits thereof.

The Emergency Board is created by Section 3212, General Code, which reads in part as follows:

"There shall be an emergency board to consist of the governor, or a designated officer or employee, auditor of state, attorney general, chairman of the senate finance committee, and chairman of the house finance committee.  
 \* \* \* The approval of four members of the board evidenced by their signatures shall be necessary in all cases in which the board is authorized to act.  
 \* \* \* "

As to the powers and duties of the Emergency Board, it is provided *inter alia* by Section 2313, General Code, that:

"In case of *any deficiency in any of the appropriations* for the expenses of an institution, department or commission of the state for any biennial period, or in case of an *emergency requiring the expenditure of money not specifically provided by law*, the trustees, managers, directors or superintendent of such institution, or the officers of such department or commission may make application to the emergency board for authority to create obligations within the scope of the purpose for which such appropriations were made or to expend money not specifically provided for by law. \* \* \* " (Italics the writer's.)

The board known as the Controlling Board has been created from time to time in the various appropriation acts, in which acts the powers and duties of such board are expressly provided and limited.

In so far as the transfer of funds is concerned, Section 3 of the General Appropriation Act above referred to provides, *inter alia*, as follows:

"Authority to expend the moneys appropriated for 'Total Personal Service' and 'Total Maintenance' in Section 1 of this act otherwise than *in accordance with such classification of detailed purposes, but within the purpose for which appropriation is made*, may be granted to any department, institution, board or commission for which appropriations are made in said section, by a board to be known as the 'controlling board,' consisting of the governor, or a designated officer or employe, if appointed by the governor for such purpose, the chairman of the finance committee of the house of representatives and of the senate respectively, the attorney general and the auditor of state.

\* \* \* \* \*

Said board may authorize the expenditure of moneys appropriated in said Section 1 of this act *within the purpose for which the appropriation is made*, whether included in the detailed purpose for which such appropriations are distributed in said section or not. \* \* \* " (Italics the writer's.)

A similar provision is found on page 47 of the appropriation act, where it is provided that transfers from one of several classifications of appropriations under "F Contract and Open Order Service," made to the Department of Highways and Public Works, Division of Highways, "to another may be authorized with the consent of the Controlling Board."

Concerning the functions of the Controlling Board as contrasted with powers and duties of the Emergency Board, in an opinion of this department rendered under date of September 9, 1921, Opinions Attorney General, 1921, page 815, it was held as follows:

"The Controlling Board, as such, has no control over the Emergency Board, nor over the funds of the latter. The effect of the action of the Controlling Board approving an application made to it, is to authorize the expenditure of moneys appropriated for 'total personal service' and 'total maintenance' *otherwise than in accordance with the interior classification of detailed purposes, but within the main purpose for which such appropriations are made.*" (Italics the writer's.)

In the opinion the then Attorney General said:

"In other words, the controlling board is resorted to when a state department, institution, board or commission seeks, *not more money, but the authority to spend money differently than the legislative schedule or classification of detailed purposes calls for*; whereas the emergency board is resorted to when more money is needed—either (a) to take care of a *deficiency in running expenses*, or (b) to take care of an *emergency* requiring the expenditure of money not specifically provided by law.

\* \* \* \* \*

Your sixth question is therefore answered by saying that the effect of the action of the controlling board approving an application made to it is to authorize the expenditure of moneys appropriated for 'total personal service' and 'total maintenance' otherwise than in accordance with the interior classification of detailed purposes, *but within the main purpose for which such appropriations are made.*" (Italics the writer's.)

Neither of these boards is vested with any *legislative power* and neither is a miniature legislature empowered to sit when the General Assembly has adjourned, it being provided by Section 1 of Article II of the Constitution of Ohio that subject to the initiative and referendum powers reserved by the people, "*the legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives.*" Section 22 of the same Article provides that, "No money shall be drawn from the treasury, except in pursuance of a specific appropriation made by law."

Not only is neither of these boards clothed with any legislative power, but any statute attempting to vest any legislative power whatsoever in such a board would clearly be unconstitutional. Neither board can appropriate money in the state treasury and neither can *amend a statute* so as to provide that moneys appropriated by the General Assembly can be spent for a purpose other than that authorized by law.

It should be remembered that, adopting the language of Chief Justice Marshall in the case of *Marbury vs. Madison*, 1 Cranch, 137, we are living under a "government of laws and not of men." Regardless, therefore, of how advantageous it may be to spend public moneys for the construction of buildings or other public improvements deemed to be necessary, unless the legislature has authorized such expenditure by a duly enacted statute, it is illegal. The wisdom of certain improvements, and the expenditure by one of the state departments of public moneys therefor, is often apparent not only to the department itself but to the Controlling Board, or the Emergency Board, as the case may be, and to all who have knowledge thereof as well, yet under the constitution the power and discretion to determine the advisability of an expenditure of public funds for such a purpose is vested *only* in the General Assembly, subject to the veto power of the Governor.

The Controlling Board and the Emergency Board are both creatures of statute, and it is fundamental that statutory departments, boards or officers have only such powers as are expressly conferred by statute and those necessarily implied to carry into effect the powers expressly granted. This has been so often held by the various courts of the state, including the Supreme Court, and by this department, that the citation of authority is deemed unnecessary. And it is equally well settled that the powers granted to such administrative departments, boards or officers with reference to financial affairs, must be construed strictly, and that authority to expend public moneys cannot be exercised unless clearly conferred by statute.

In the case of *State ex rel vs. Pierce, Auditor*, 96 O. S., 44, it was held by the Supreme Court of Ohio that:

"In case of doubt as to the right of any administrative board to expend public monies under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power." (Syllabus 3.)

Like any other agency of government, these boards must act according to law and they have no discretion *other than the discretion that the law authorizes them to exercise*. The discretion is a *legal discretion* and any abuse thereof is, of course, reviewable by the courts.

In so far as the Emergency Board is concerned, as above pointed out, an allowance may be made only, (1) in case of any deficiency in any of the appropriations for the expenses of a state institution, department or commission and (2) in case of an *emergency* requiring the expenditure of money not specifically provided by law.

While the power and duty of determining whether or not "a case of an emergency" exists is primarily vested in the board itself, the board is to be guided by legal principles in determining what is an emergency and not by questions of policy. The

word emergency has been defined many times and its meaning is not difficult to ascertain. The definition given by the Century Dictionary, quoted with approval by the Supreme Court of Ohio, in the case of *State ex rel vs. Zangerle, Auditor*, 95 O. S. 1, 8, is readily understandable and is as follows:

“(1) A *sudden or unexpected* happening; an *unforeseen* occurrence or condition; specifically, a perplexing contingency or complication of circumstances.

(2) A sudden or unexpected occasion for action; *exigency; pressing necessity.*” (Italics the writer’s.)

Only is the board empowered to act, when an emergency, as that term is *legally* defined, exists. Any attempt to exercise a discretion in the absence of an emergency *under the law* is clearly unwarranted.

With reference to the power of the Controlling Board in so far as the transfer of funds is concerned, it will be observed that by Section 3 of the Appropriation Act, *supra*, authority is given only to transfer moneys appropriated for “‘Total Personal Service’ and ‘Total Maintenance,’” from one classification to another under the same heading. No authority whatever is given to transfer from and to the different classifications under the general head “Additions and Betterments.”

In Bulletin No. 7, Budget Classifications and Rules of Procedure, issued in 1922 by the Finance Department, which sets forth the three general groups and the classifications thereunder upon which all the budgets of the state and appropriation acts are based, at page 9 it is said as follows:

“Expenditures are made for two main purposes:

1. Operation and Maintenance.
2. Additions and Betterments.

For reasons of expediency Operation and Maintenance is divided into two general groups:

1. Personal Service.
2. Maintenance.

\* \* \* \* \*

Maintenance is subdivided into

1. Supplies.
2. Materials.
3. Equipment.
4. Contract and Open Order Service.
5. Fixed Charges and Contributions.

Additions and Betterments:

1. Purchase of land.
2. Buildings.
3. Miscellaneous.
31. Capital Equipment.
32. Other Capital Outlay.

The scope of the subclassifications is indicated by the following suggestions and examples:

Definitions.

\* \* \* \* \*

Here follow the various code numbers and classifications with an indication as to what should be included under each classification. On page eighteen appears:

"E 8. Educational—

Do not include new books to enlarge libraries. Ask for them under G 31. Include books for departments and institutions and those which are needed to take the place of worn-out or obsolete books in library."

and as examples of what properly belongs under such classification a number of items are enumerated, as for example, apparatus for school laboratory, laboratory fixtures, school apparatus, moving picture screens, teachers' desks, chairs, waste baskets, etc.

On page 21, under the code number and classification "G, Additions and Betterments," it is said:

"This title means *permanent investments which will increase the permanent assets of the state*. Land and its improvements represent either the ownership in fee or the enjoyment under lease of real estate. \* \* \*

"G 2. Buildings" is said to include "all new buildings, additions and all contemplated remodeling of buildings, which will leave them in better condition than before," and all "alterations to capital assets which result in an increase of capacity or a reduction of expense, or both."

Under "G 31. Capital Equipment" is included, "all equipment for new buildings and offices" and "also books for enlarging library and new equipment which represents a capital outlay."

Since the application for transfer first above set forth was for permission to transfer the sum of twenty-five hundred fifty dollars to cover the cost of raw material in a new building, it is clear that the request should have asked for a transfer to the classification "G 2. Buildings" rather than the classification "G 31. Capital Equipment." However, in view of the conclusions herein reached, this failure properly to classify is not important.

As above pointed out, the Controlling Board is only authorized to make transfers from one detailed classification to another under the general heading "Personal Service" and from one detailed classification to another under the general heading "Maintenance." No authority is given to transfer from one detailed classification to another under the heading "Additions and Betterments," nor is any authority whatsoever given to transfer from a detailed classification under one general heading to a classification under another general heading.

It is obvious, therefore, that since the legislature has limited the power of the Controlling Board in this respect, in no event could the Controlling Board authorize a transfer of money from the appropriation "Uses and Purposes" classified as "F 9." under "Maintenance" to the classification "G 2. Buildings" or the classification "G 31. Capital Equipment," under the general heading "Additions and Betterments." Such a transfer clearly would not be "*within the purpose for which the appropriation is made,*" as provided in Section 3 of the Appropriation Act, supra.

Moreover, as above pointed out, the legislature in the appropriation act under consideration did not provide any "G 31. Capital Equipment" classification in the appropriation to the Fish and Game Division, nor any classification "G 2. Buildings." As hereinbefore stated, the Controlling Board has no legislative power and such board is wholly without authority to set up a classification for any department where the General Assembly has not seen fit to provide such a classification. To hold otherwise would not only be tantamount to saying that the Controlling Board was vested with legislative powers, but in addition would have the effect of effectively impairing the Governor's veto power conferred by the constitution.

Section 16 of Article II of the Constitution provides in part that:

"The governor may disapprove any item or items in any bill making an appropriation of money and the item or items, so disapproved, shall be void, unless repassed in the manner herein prescribed for the repassage of a bill."

Had the legislature seen fit to appropriate funds to the Fish and Game Division for a building, or for other capital equipment, the Governor would have had the constitutional power to veto such an item or items. If, therefore, it were to be held that the Controlling Board has the power to set up such a classification and transfer thereto funds from another classification, it would have the effect of circumventing the Governor's constitutional prerogative to veto such an item.

As a corollary it seems clear that where the Governor has exercised the power conferred upon him by the constitution and, by vetoing an entire item of the appropriation act, has entirely wiped out a certain classification, the Controlling Board is without authority to restore such classification, or to authorize a transfer of funds thereto. To restore such classification would have the effect of nullifying the Governor's veto power. In addition, if after a certain classification has been wiped out by a veto of the entire item a division of the funds in a classification not vetoed could be authorized by the Controlling Board between such classification and the one vetoed, the effect would be that the Governor, with the concurrence of the Controlling Board, could reduce the amount of an appropriation item, while under the constitution the Governor is only empowered to veto an appropriation item *in toto*. The Governor is not empowered to reduce the amount of an appropriation item and such a result cannot be accomplished by the concurrent action of the Governor and the Controlling Board.

From the above discussion, the conclusion seems inescapable that the Controlling Board is without power to authorize a transfer of moneys appropriated by the legislature for maintenance under the classification "F 9. Uses and Purposes," to either the classification "G 2. Buildings" or "G 31. Capital Equipment," under the heading "Additions and Betterments" for the purpose of paying the cost of erecting a building on the State Fair Grounds.

Coming now to consider the second application for transfer above described, by which authority is sought to transfer one thousand dollars from the classification "Uses and Purposes" to the classification "E 8. Educational," since each of such classifications is included in the same group designated "Maintenance," by the terms of Section 3 of the Appropriation Act, *supra*, the Controlling Board has the power to authorize such a transfer, unless there be some lawful inhibition on such action.

By the terms of Section 1433, *supra*, the moneys in the fund derived from the issuance of hunters' and trappers' licenses is appropriated for the use of the director "*in the preservation and protection of birds, game birds, game and furbearing animals,*" the section further providing that at least fifty per cent of the money arising from the issuance of such licenses shall be used for (1) the purchase and propagation of game birds and game animals to be used in re-stocking sections where a scarcity of such birds and game animals exists and (2) for establishing and purchasing or otherwise acquiring title to lands for game preserves. While neither this section, nor the entire act, contains any express provision as to for what purposes the balance of the fund must be spent, other than the general direction above italicized, other sections of the same act authorize the employment of game protectors and other employes necessary to carry into effect the provisions of the law with reference to the protection and preservation of wild animal life and fish within the state.

It is at once apparent that the entire "Uses and Purposes" fund can only be spent for *the preservation and protection of birds, game and furbearing animals*. And by

the terms of the section under consideration and the related sections of the General Code, it is equally apparent that the legislature has indicated the methods by which this preservation and protection shall be accomplished. The act provides that moneys may be spent for the purchase and propagation of game birds and game animals; that moneys may be spent for purchasing or otherwise acquiring title to lands for game preserves; and that moneys may be spent to pay the salaries of those employed as game protectors. It seems clear, therefore, that the moneys in this fund can only be spent for the several purposes *expressly indicated* and for such other purposes of a like nature, so clearly related thereto, that it may be said that the power to make such expenditures is necessarily implied from the wording of Section 1433, *supra*, and the other sections enacted in the act of May 10, 1919, *supra*.

Under the broad provisions of Section 1433, *supra*, and especially by virtue of that part of Section 1438, *supra*, to the effect that the director shall enforce by proper proceedings the laws of the state for the protection, preservation and propagation of birds, animals and havens for fish and game and "so far as funds are provided therefor, shall adopt and carry into effect such measures as he deems necessary in the performance of his duties," I am of the opinion that moneys in the "Uses and Purposes" fund may lawfully be spent for proper educational purposes. Indeed, the legislature by the inclusion of the appropriation item classified as "E 8. Educational" has indicated that the "Uses and Purposes" money may be expended for *proper* educational purposes.

While whether or not the expenditure of moneys in the "Uses and Purposes" fund for cages to be used for the purpose described in your letter is a proper expenditure, is a close question, I am of the opinion that should the Director of Agriculture, under the broad powers conferred by Sections 1433 and 1438, *supra*, determine that such an expenditure is necessary and proper to carry into effect the laws relating to the protection, preservation and propagation of wild animal life and should the Controlling Board approve the transfer requested, the determination of the Director and the Controlling Board would not be disturbed by the courts.

I am of the opinion, therefore, that the Controlling Board has the legal power to approve the transfer to the classification "E 8. Educational" as requested, if it sees fit so to do.

From the above discussion I reach the following conclusions :

1. Neither the Controlling Board nor the Emergency Board is vested with any legislative power and neither can appropriate money nor amend a statute so as to provide that moneys appropriated by the legislature can be spent for a purpose other than that authorized by law.

2. The Emergency Board is empowered to make an allotment of funds only (1) in case of any deficiency in any of the appropriations for the expenses of an institution, department or commission of the state for any biennial period or (2) in case of an emergency requiring the expenditure of money not specifically provided by law, i. e., in case of a sudden or unexpected happening or unforeseen occurrence or condition.

3. The power and duty of determining whether or not a case of an emergency exists is primarily vested in the Emergency Board, which is to be guided by legal principles and not by questions of policy, any abuse of discretion being reviewable by the courts.

4. In so far as the transfer of funds is concerned, subject to the limitation that the Controlling Board may not consent to the transfer of funds for such purpose of increasing an appropriation for a single salary (Opinion No. 687, 1927) such board is

empowered to authorize a transfer of moneys from one detailed classification to another under the general heading "Personal Service" and from one detailed classification to another under the general heading "Maintenance." The board is without power to authorize a transfer from one detailed classification to another in the group "Additions and Betterments," or from a detailed classification in one group to a classification in another group.

5. Since such action would circumvent the Governor's constitutional prerogative to veto any item or items in an appropriation bill, the Controlling Board is without authority to set up a classification for any department when the General Assembly has not provided such a classification in the appropriation act.

6. Since such action would have the effect of nullifying the Governor's veto power where, by vetoing an entire appropriation item a classification in an appropriation bill has been entirely wiped out, the Controlling Board is without authority to restore such classification or to authorize a transfer of funds thereto.

In view of the foregoing, specifically answering your questions, it is my opinion that:

1. The Controlling Board is without authority to authorize a transfer of moneys appropriated by the Legislature to the Fish and Game Division of the Department of Agriculture as "F 9, Uses and Purposes" under the heading "Maintenance" to any detailed classification within the group "Additions and Betterments" for the purpose of covering the cost of raw material to be used in erecting a building on the Ohio State Fair Grounds to house an exhibit of wild animal life at the Ohio State Fair.

2. If, under the broad powers vested in the Director of Agriculture by Sections 1433, 1438 and related sections of the General Code, the Director of Agriculture should determine that moneys in the "Uses and Purposes" fund should be expended for the purpose of purchasing cages to exhibit wild animal life at the Ohio State Fair in furtherance of the laws relating to the protection, preservation and propagation of wild animals and the Board of Control should approve a transfer of moneys in the classification "Uses and Purposes," appropriated to the Division of Fish and Game under the heading "Maintenance," to the classification "E 8. Educational" under the same heading for such purpose, such determination would probably not be disturbed by the courts.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

825.

OFFICES—MEMBER OF CITY BOARD OF EDUCATION AND BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS ARE INCOMPATIBLE—MEMBER OF BOARD OF DEPUTY STATE SUPERVISORS OF ELECTIONS MAY SERVE AS CLERK OF A BOARD OF EDUCATION.

SYLLABUS:

1. *The offices of member of a city board of education and member of the board of deputy state supervisors of elections are incompatible.*