OPINION NO. 78-040

Syllabus:

A board of education is prohibited by Ohio Const. art VIII, §4 from entering into a joint venture with a commercial oil company to construct and operate for profit a gas and service station on school property as part of a vocational education program.

To: James R. Unger, Stark County Pros. Atty., Canton, Ohio
By: William J. Brown, Attorney General, June 14, 1978

I have before me your request for my opinion which poses the following questions:

1. Whether a joint vocational school district has the authority under Section 3313.90 of the O.R.C. to enter into a joint venture with a commercial oil company to have constructed on school property, a gas and service station for the purpose of expanding vocational education to its students?

2. If such construction and maintenance of a gas and repair service station is permissible under Section 3313.90 of the O.R.C., would the joint vocational school be required to submit such a project to public bidding under Section 3313.46 of the O.R.C.?

3. Would such a joint venture with a private enterprise alter the school's present right to governmental immunity as it relates to administrators and school employees involving their liability to third party claims?

4. What limitations, if any, would be placed upon the joint vocational school if such a joint venture with a commercial oil company is permissible under Section 3313.90 of the O.R.C.?

As I understand it, the Stark County Area Joint Vocational School would like to enter into a joint venture with an oil and gas company to have the company construct a gas station on school property. The school intends to use students to operate the gas station under vocational staff supervision and with periodic consultation from the oil company's management team. Profits from the operation of the station would be shared by the company and the school on a basis to be negotiated in a future contract.

I have on several prior occasions considered the extent of a school district's authority pursuant to R.C. 3313.90, which requires each school district to establish a vocational education program in accordance with standards adopted by the state board of education. I have concluded on such occasions that R.C. 3313.90 vests in the board of education broad discretion to carry out this legislative mandate provided that any specific statutory limitations on the board's power are not exceeded and that the specific elements of any particular program do not go beyond that which is reasonably necessary to fulfill the requirements of the vocational education curriculum. See 1976 Op. Att'y Gen. No. 76-065 (A joint vocational school may construct and sell single family residences on school land.); 1971 Op. Att'y Gen. No. 71-068 (A school may engage and compete in private

enterprise, even at a profit, so long as the program is reasonably necessary to the vocational education curriculum); 1971 Op. Att'y Gen. No. 71-026 (Use of school facilities for serving meals and banquets to community organizations is justified as part of the vocational education curriculum).

A third limitation on a board of education's power to design and carry out vocational education programs is that such power must be exercised within the limitations set forth in the Ohio Constitution. The proposed joint venture must, therefore, be considered in relation to Ohio Const. art VIII, §4, which provides as follows:

> The credit of the state shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation whatever; nor shall the state ever hereafter become a joint owner, or stockholder, in any company or association in this state, or elsewhere, formed for any purpose whatever.

The prohibitions set forth in art. VIII, §4, supra are binding on the various agencies and instrumentalities of the state. State, ex rel. Saxbe v. Brand, 176 Ohio St. 44, 48 (1964) (The loaning or borrowing of money by the Ohio Development Financing Commission would be the loaning or borrowing of money by the state).

Although there is no case holding that a board of education is an agency or instrumentality of the state for the purpose of Ohio Const. art. VIII, §4, this result may reasonably be inferred from the evident meaning and spirit of the constitutional provision. Walker v. City of Cincinnati, 21 Ohio St. 14, 53 (1871) (The Constitution is to be construed according to its intention; that which clearly falls within the reason of the prohibition may be regarded as embodied in it.) The purpose of art. VIII, §4, supra, and Ohio Const. art VIII, §6, which imposes similar restrictions upon cities, counties, towns, and townships, is to impose a broad prohibition against the intermingling of public and private funds. State, ex rel. Saxbe v. Brand, 176 Ohio St. 44 (1964); Walker v. City of Cincinnati, supra, at 54. School district funds are clearly public funds and are statutorily regulated as such. See e.g. R.C. 135.01(K) (School district is subject to the provisions of the Uniform Depository Act.); R.C. 3313.29 (Bureau of Supervision and Inspection of Public Offices may prescribe manner of accounting for school district funds.) A conclusion that a board of education is not an instrumentality of the state for the purposes of art. VIII, §4, supra, would create a significant exception to the broad restrictions on the use of public funds intended by Ohio Const. art. VIII, §§4, 6. Such result is inconsistent with the evident meaning and spirit of these constitutional provisions and is, therefore, impermissible.

Thus, it is my opinion that a board of education is an instrumentality of the state for purposes of Ohio Const. art. VIII, §4. Cf. Brown v. Board of Education, 20 Ohio St.2d 68 (1969) (A board of education is an arm or agency of the state for the purposes of sovereign immunity.)

I have on two recent occasions had the opportunity to discuss at length the breadth of the prohibitions set forth in art. VIII, §§4, 6, supra, and the various exceptions to these prohibitions. See, 1977 Op. Att'y Gen. No. 77-049; 1977 Op. Att'y Gen. No. 77-047. The situation under consideration is not such that further repetition of or elaboration upon the discussions in my prior opinions is necessary. The difficult questions arising from these constitutional provisions are concerned with what constitutes an impermissible grant or loan of credit. The prohibition against joint ventures set forth in the second clause in art. VIII, §4 and in art. VIII, §6 is more straightforward. In Walker v. City of Cincinnati, 21 Ohio St. 14, 54 (1871), the Ohio Supreme Court discussed the nature of this prohibition in the following terms:

> The mischief which [art. VIII, §6] interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private

> capital or enterprise in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein.

Ohio Const. art. VIII, §§4, 6 are to be interpreted in a like manner and cases construing one section are applicable to the other. State, ex rel. Eichenberger v. Neff, 42 Ohio App.2d 69 (Franklin County, 1974).

In the situation under consideration, the board of education proposes to enter into a formal agreement with a private corporation whereby both parties will contribute property, money, skill and knowledge in the operation of a common enterprise for mutual profit and gain. There can be little doubt that this proposed joint venture constitutes a business partnership or association subject to Ohio Const., art. VIII, §4.

The fact that the board of education proposes this joint venture in furtherance of what might be considered a public purpose mandated by R.C. 3313.90 is insufficient to validate the proposal. As I noted in Opinion No. 77-049, supra, while the public purpose exception to Ohio Const., art. VIII, §§4, 6 may be sufficient to validate the giving or loaning of credit to a non-profit corporation, it is insufficient to permit the extension of credit to a private business enterprise. The public purpose exception depends upon the nature of the recipient or partner as well as the purpose for which the funds are spent or the venture is undertaken.

It is, therefore, my opinion and you are so advised that a board of education is prohibited by Ohio Const., art. VIII, §4 from entering into a joint venture with a commercial oil company to construct and operate for profit a gas and service station on school property as part of a vocational education program.