Section 3 of the Act of 1911 providing for the abandonment of the Ohio Canal from Buckeye Lake to a point on the Ohio River near Portsmouth. This section of the act above referred to authorizes you, as successor to the State Board of Public Works, to lease or sell said abandoned Ohio canal lands subject to the approval of the Governor and the Attorney General, with the provision that the proceedings for the lease or sale of said lands shall be in strict conformity to the various provisions of the statutes relating to the leasing and selling of said canal lands, with the exception that the granting and leasing shall be for a term of not less than fifteen nor more than twenty-five years.

I see no legal objection to the lease of the two parcels of Ohio abandoned canal lands described in said lease. However, I am unable to approve that part of said lease which grants to said named lessee a right of way for a pipe line along the Ohio canal. An examination of the resolution adopted by the directors of The Minamax Gas Company authorizes the president of the company to sign the lease on behalf of said company, but goes no further than to authorize the execution of the lease for the two parcels of abandoned Ohio canal lands above referred to, and confers upon the president of said company who signed said lease no authority with respect to said pipe line, and said lease is, for that reason, disapproved.

In this connection, I may add that there is some question in my mind as to your authority under the provisions of Section 13970, General Code, to grant the right to lay pipe lines along canal or reservoir banks except for the purpose of transporting oil or gas from natural oil or gas fields. How the pipe line here in question is to be used does not appear from the terms of the lease and, for this reason, I am expressing no opinion with respect to this feature of the lease. However, the lease is disapproved for the reason first above stated, and I am returning the same, together with the duplicate and triplicate copies thereof, without endorsing my approval thereon.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1268.

MUNICIPALITY—BUILDING PERMIT FEE FROM STATE AND COUNTY PROHIBITED—ALLOWED ELEVATOR INSPECTION CHARGE AGAINST COUNTY OR SCHOOL DISTRICT BUT NOT AGAINST STATE.

SYLLABUS:

1. *A municipality may not exact a building permit fee from the state or county when a state or county building is to be constructed in such municipality.*

2. *A municipality may not exact a fee for inspection of elevators in buildings belonging to the state which are located in such municipality.*

3. *A municipality may exact a fee for inspection of elevators in buildings belonging to a county or school district which are located in such municipality.*

COLUMBUS, OHIO, December 6, 1929.

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

GENTLEMEN:—This is to acknowledge receipt of your recent communication which reads:

> "The syllabus in the case of *Niehaus* vs. *State ex rel. Board of Education of the City of Dayton*, 111 O. S. 47, reads:
>
> '1. Section 1035, General Code, which requires the building inspection

department of municipalities having a regularly organized building inspection department to approve the plans for the erection of a public school building, is a state police regulation, and the power of the General Assembly to enact such legislation is in no sense abridged by the provisions of Section 3, Article XVIII, of the Constitution of Ohio.

2. The General Assembly of the State having enacted a general law requiring the building inspection departments of municipalities having a regularly organized building inspection department to approve plans for the construction of public school buildings erected within such municipalities, a municipality is without power to thwart the operation of such general law by the enactment of an ordinance requiring the payment of a fee as a condition precedent to compliance therewith.'

Question 1. May a city legally exact a building permit fee from the state or county, when state or county buildings are to be constructed in such city?

Question 2. May a city exact a fee for inspection of elevators in state, county and board of education buildings located in such city?"

In the Niehaus case, the syllabus of which you quote in your inquiry, the building inspector of the City of Dayton was compelled by mandamus to issue without fee or charge a building permit to the board of education of a city school district of the City of Dayton to erect a new school building within the city.

The municipal building department had approved the plans in question, under authority of the power vested in it by Section 1035, General Code, but had declined to issue the permit until the permit fee prescribed by city ordinance was paid.

Recognizing that the system of public education in Ohio is the creature of the Constitution and statutory laws of this state and that the Legislature has full power to regulate public schools, Judge Robinson, in the Niehaus case, said: "the sovereignty of the state extends throughout the municipalities in all matters not clearly surrendered, and that sovereignty may not be defeated by the enactment of an ordinance inconsistent with general laws."

As was said by Judge Allen in *State, ex rel.* vs. *Commissioners*, 119 O. S. 630, "a county is a subdivision of a state, subject to the legislative control of the state."

In *Civic Federation* vs. *Salt Lake County*, 22 Utah 6, it was held:

"The same power which it (the Legislature) may exercise over the revenues of the state, it may exercise over the revenues of a county or city for any purpose connected with its present or past conditions not repugnant to organic law."

As was said in *Dall* vs. *Building Commission*, 14 N. P. (N. S.) 209,"counties are subject to the control and direction of the Legislature, through which the sovereignty of the state is represented and exercised."

In 1860 the Ohio Supreme Court held in the case of *Hunter et al.* vs. *Commissioners of Mercer County*, 10 O. S. 520, that, "a county is not a corporation, but a mere political organization of certain territory within the state, particularly defined by the geographical limits for the more convenient administration of the laws and police power of the state and for the convenience of the inhabitants."

Thus we see that counties are agencies of the state for governmental purposes and that the Legislature has full power to regulate them, a power much the same as it exercises over school districts.

In *State of Ohio* vs. *Board of Public Works*, 36 O. S. 409, it was stated in the syllabus, "The state is not bound by the terms of a general statute unless it be so expressly enacted." In the opinion Judge McIlvaine stated:

"The doctrine seems to be that a sovereign state, which can make and unmake laws, in prescribing general laws intends thereby to regulate the conduct of subjects only, and not its own conduct."

In discussing the respective powers of the state and its political subdivisions, the Court of Appeals of the State of Kentucky (*Ky. Institute for Blind* vs. *Louisville*, 8 L. R. A. [N. S.] 553), said:

"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. The municipal government is but an agency of the state, not an independent body. It governs in the limited manner and territory that is expressly or by necessary implication granted to it by the state. It is competent for the state to retain to itself some part of government even within municipalities which it will exercise directly or through the medium of other selected and more suitable instrumentalities."

The above language was employed in holding that a municipality was without power to compel the erection and maintenance of fire escapes on state buildings located within the corporate limits of a city, but it was remarked that the city undoubtedly had the power to legislate generally upon the subject of fire escapes upon buildings. Continuing, the court said:

"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."

It is to be observed further that there is no provision made in the state building code for the payment of any fees for construction permits, although the provisions of Section 1035, General Code, constitute a mandatory requirement that the regularly organized building inspection department of a municipality shall approve the plans for school houses, etc. Section 1035, reads as follows:

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

The state building code was enacted by the Legislature in the exercise of the police power which is one of the attributes of sovereignty. It is true that a municipality is granted the right to exercise local police power, but it is subject to the limitation that such local power must not be "in conflict with general law." In effect, the provisions of the Constitution require that provisions of state law enacted in the exercise of police power shall take precedence over any local municipal regulation in so far as there may be any existing conflict. The Legislature in the instance of building construction having spoken, it is not within the power of the municipality to enact any local police measure in conflict with general law.

This leads to the conclusion that since the state law did not authorize the exaction of a fee but did impose the duty of approval of the plans, a municipality is without authority to exact the payment of a fee by the county or school district as a condition to such approval. The state being sovereign, need not however, submit its plans to

the building inspection department of a municipality and in no event would be required to pay a fee for approval of such plans.

Coming now to your second question, it becomes necessary to compare the provisions of law relative to building construction with those dealing with elevator inspection in order to determine whether the same reasoning will apply.

It will be observed that the same Section—3636 of the General Code—which authorizes municipalities to "regulate the erection of buildings" authorizes municipalities to "provide for the construction, erection, operation of and placing of elevators."

There is, however, no section analogous to Section 1035, supra, imposing upon municipalities having building inspection departments, the duty of inspecting elevators. Section 3636, supra, does not, as did Section 1035, supra, impose any duty whatsoever upon the municipal authorities, but it grants the power to enact ordinances relative to inspection of elevators; and also to exact a reasonable fee to cover the cost of proper inspection for the reason that the courts have uniformly held that the power to enact a police regulatory ordinance carries with it authority to exact the payment of an inspection fee commensurate with the services performed.

The state inspects elevators in county, municipality and school buildings, this authority being derived under the general sections dealing with powers of the Department of Industrial Relations, Sections 871-1 to 871-28, General Code, inclusive.

It is to be observed that Section 871-28, General Code, reserves to municipalities concurrent jurisdiction. This section reads in part as follows:

> "Nothing contained in this act shall be construed to deprive the council of any city or village or any board of trustees or officer of any city or village of any power or jurisdiction over or relative to any place of employment, provided that whenever the industrial commission of Ohio shall, by an order fix a standard of safety or any hygienic condition for employments or places of employment, such order shall, upon the filing by the commission of a copy thereof with the clerk of the village or city to which it may apply, be held to amend or modify any similar conflicting local order in any particular matters governed by said order. Thereafter no local officer shall make or enforce any order contrary thereto. * * *"

Further provisions of Section 871-28, supra, provide for a hearing where an order of a municipal department is in conflict with a state order.

Since a municipality has a right to enact an ordinance regulating inspection of elevators and to charge an inspection fee in connection therewith, the sole remaining question is whether the municipality is authorized to enforce the provisions of its ordinance in the case of state property, county property and school property, and to require the payment of a fee for such inspection into the city treasury.

As to state property, it is clear that under the rule laid down in *Ohio* vs. *Public Works*, *supra*, and *Kentucky Institute for Blind*, vs. *Louisville*, *supra*, no fee could be exacted from the state for such inspection.

In my opinion, however, the answer to this question as to county and school districts is controlled by the decision of the Supreme Court in the case of *Jackson* vs. *Board of Education*, 115 O. S. 368, the first branch of the syllabus of which is as follows:

> "Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority."

My predecessor upon the authority of the Jackson case supra, ruled (Opinions of the Attorney General for 1928, Vol. IV, page 2827):

"A city which has and is enforcing an ordinance providing that no plumbing alterations shall be made until a permit is obtained from a city plumbing inspector, and a fee paid into the city treasury, may require the local board of education to obtain a permit, and pay the fee prescribed, in the event that schoolhouse plumbing is to be altered."

The court in the Jackson case had little difficulty with the authority of the board of education to pay the assessment. In substance the conclusion was reached that the levy of the assessment created a debt against the owner of the property which was the board of education.

In the present instance the county commissioners and the boards of education undoubtedly have authority properly to maintain their buildings, and if as an incident to proper maintenance it becomes necessary to pay a fee to the municipality in compliance with the ordinance relative to the regulation of elevators, there should be no hesitancy in saying that the authority to expend funds for that purpose exists.

Accordingly, by way of specific answer to your inquiry, I am of the opinion that:

1. A municipality may not exact a building permit fee from the state or county when a state or county building is to be constructed in such municipality.

2. A municipality may not exact a fee for inspection of elevators in buildings belonging to the state which are located in such municipality.

3. A municipality may exact a fee for inspection of elevators in buildings belonging to a county or school district which are located in such municipality.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1269.

VILLAGE CLERK—ALLOWANCE OF NECESSARY EXPENSES FOR PRIVATE AUTOMOBILE LEGAL—NOT A CHANGE IN COMPENSATION DURING HIS TERM.

SYLLABUS:

1. *The council of a village may lawfully provide by ordinance for an allowance to the village clerk for necessary expenses incurred in the use of his private automobile, based on the mileage covered while such automobile is being used by the clerk in the performance of his official duties.*

2. *An allowance to a village clerk, for expenses, in an amount not greater than will reasonably cover the actual expenses incurred, does not constitute a change in the compensation of the clerk in violation of Section* 4219, *General Code.*

COLUMBUS, OHIO, December 7, 1929.

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

GENTLEMEN:—This will acknowledge receipt of your request for my opinion which reads as follows:

"Section 4219 G. C. provides in part that council in a village shall fix the compensation of all officers, clerks and employes except as otherwise provided by law and that the compensation so fixed shall not be increased or diminished during the term for which any officer, clerk or employe may have been elected or appointed.