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1. CONTRIBUTIONS—SECTION 8623-119 G. C. GRANTS AUTHORITY TO CORPORATION, INCLUDING INSURANCE COMPANIES, STOCK AND MUTUAL, TO CONTRIBUTE CORPORATE FUNDS TO PROJECTS "CONDUCIVE TO PUBLIC WELFARE"—CONTRIBUTIONS MUST BE TO AID COMMUNITY GROWTH OR DEVELOPMENT, CHARITABLE, PHILANTHROPIC OR BENEVOLENT INSTRUMENTALITIES—MUST IN JUDGMENT OF DIRECTORS OF CORPORATION CONTRIBUTE TO PROTECTION OR ADVANCEMENT OF ITS INTERESTS.

2. SHAREHOLDERS OF CORPORATION—MEETING—WHEN ENTITLED TO NOTICE OF EXPENDITURES.

3. DIRECTORS OF CONTRIBUTING CORPORATION—HAVE RESPONSIBILITY TO DETERMINE STATUS OF CONTRIBUTION—SECTION 8623-119 G. C.

SYLLABUS:

1. Authority is contained in Section 8623-119, General Code, for a corporation, including insurance companies, both stock and mutual, to make contributions of corporate funds "conducive to public welfare," in accordance with its provisions. Such contributions must be for aiding either (1) community growth or development, or (2) charitable, philanthropic or benevolent instrumentalities, and must in the judgment of the directors of the corporation contribute to the protection or advancement of its interests. When expenditures or commitments for such purposes during any calendar year equal one percent of the capital and surplus of the corporation, before any additional expenditures or commitments are made, ten days' notice thereof is required to be given to the shareholders of the corporation. If shareholders representing twenty-five percent or more of the voting stock of the corporation object in writing to the expenditure it may not be made until authorized at a shareholders' meeting.

2. Responsibility for determining whether or not a contribution would fall within the purposes prescribed in Section 8623-119, General Code, rests with the directors of the contributing corporation.

Columbus, Ohio, November 29, 1949

Hon. Walter A. Robinson, Superintendent of Insurance
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"A stock life insurance company, a mutual casualty company, and a mutual fire insurance company, all organized under the laws of the State of Ohio and authorized to engage in their appropriate insurance business in this state have been jointly requested to make a contribution of $50,000.00 to the Ohio Council of Churches, a non-profit corporation organized under the laws of Ohio. It has been represented that the solicited fund is to be used to help purchase a site for the erection of what is to be known as the Temple of Good Will in Columbus, Ohio; that the 'Temple' when completed will contain hotel rooms, banquet rooms and auditoriums which may be used not only by the church organizations which are members of the Council, but by other organizations such as the insurance companies referred to.

"In view of the limitations placed upon disbursements of funds by Sections 9357, 9357-1 and 9357-2 with reference to life insurance companies, and Sections 9607-11 and 9519 with reference to mutual casualty and fire insurance companies; and in view of the provisions of Section 8623-119 of the General Code of Ohio, should this office instruct the insurance companies that they may not make such a disbursement of funds under the laws of this state?

"We will appreciate receiving your opinion on this subject."

In connection with the question submitted, you refer to several statutory provisions all but one of which pertain directly to a specified category of insurance companies. The last statutory provision you cite is contained in the General Corporation Act (Sections 8623-1 to 8623-138, General Code,) and concerns the right of a corporation to make public welfare contributions. As I view the matter, none of the sections relating directly to insurance companies is responsive to the question asked. Each of them relates only to permissible investments by a certain category of insurance companies, while your question, as I understand it, involves simply the right of an insurance company to make contributions.

I have not been able to find any provision among the insurance laws of Ohio which would govern this question. In such case, it is reasonably clear that if there exists a provision in the General Corporation Act covering the situation, it should be applied. It has been so pointed out by several Attorneys General. See particularly Opinions of the Attorney General for 1939, Vol. III, Opinion No. 1303, where the following observation is made at page 1932:

"In the past, Attorneys General of this state have advised that the provisions of the General Corporation Act apply to in-

surance companies where the provisions of the insurance laws do not provide for the performance of acts of organization or government which are authorized by the General Corporation Act where there is no conflict between the General Corporation Act and the special provisions. In Volume I of the Opinions of the Attorney General for the year 1932, at page 8, I find the following statement:

'It has been held generally by the Attorney General in the past that the General Corporation Act applies to insurance companies where the special provisions governing insurance companies are inadequate in their authority for the performance of any act of organization or management which is authorized by the General Corporation Act, which laws are not in conflict with the special provisions. See Annual Report of the Attorney General for 1914, Vol. I, pp. 147, 149, 229, 237; Annual Report of the Attorney General for 1912, Vol. I, p. 24.'"

See also Section 8623-132, General Code:

"In cases where special provision is made in the General Code for the incorporation, organization, conduct or government of any class of corporations, such special provision shall govern to the exclusion of the provisions of this act on the same subject, unless it clearly appears that the special provision is cumulative, in which case the provisions of this act also shall apply.

"No banking, safe deposit, trust or insurance corporation shall be authorized to issue shares without par value."

Before proceeding, I should like to make passing reference to the body of common law which has been built up concerning contributions or gifts by private business corporations. In the absence of statutory or charter provision, the traditional view has been that a business corporation exists solely for the purpose of making money for its shareholders. The courts have distinguished between (1) purely gratuitous gifts and donations for which no consideration is received or anticipated, e. g., to charity, and (2) contributions made in expectation of receiving direct and proximate pecuniary benefits at some future time or in the furtherance of the interests of the corporation.

With respect to the first, the general rule has been that an ordinary business corporation has no power in the absence of statutory or charter authorization to make a gift of its property or assets. With respect to the second, power to make the contribution has been generally found to exist where the corporation was seen to receive a direct and proximate

benefit. In making this determination the courts have taken into consideration the nature and kind of corporation concerned and its corporate objects. Contributions by insurance companies, banking corporations, and the like, have been subjected to a stricter test than contributions by ordinary business corporations. See, 6 Fletcher Cyclopedia Corporations, Perm. Ed., Secs. 2938-2940; Davies, Ohio Corporation Law, Vol. I, pp. 1116 and 1117; Note, 31 Col. L. R. 136; and Note, 1 Boston U. L. R. 99.

The reference to the general rule in the absence of applicable statutory provision does not appear to be pertinent to Ohio corporations in view of Section 8623-119, General Code, specifically covering the matter. It is likely, however, that when the Ohio courts are called upon to interpret and apply this section, they will look to the common law for assistance.

Section 8623-119, General Code, provides as follows:

> "Any corporation may cooperate with other corporations and with natural persons in the creation and maintenance of funds or credits for aiding community growth or development or for aiding charitable, philanthropic or benevolent instrumentalities conducive to public welfare, and its directors may appropriate and expend or obligate the corporation to pay or pledge its credit for such purpose or purposes, such sum or sums as they may deem expedient and as, in their judgment, will contribute to the protection or advancement of the corporate interests, provided that whenever the expenditures for such purposes in any calendar year shall be equal in aggregate amount to one per centum of the capital and surplus of the corporation, then, before any further expenditure is made or obligation is incurred during such year for such purposes by the corporation, ten days' notice shall be given to the shareholders in such manner as the directors may specify of the intention to make such further expenditure or to incur such further obligation, specifying the amount thereof, and if written objection be made by shareholders holding twenty-five per centum or more of the total number of voting shares of the corporation, such further expenditures shall not be made nor shall such further obligation be incurred until it shall have been authorized at a shareholders' meeting."

I have not found any instance where the above statutory provision has received the scrutiny of our courts or has been the subject of an opinion of the Attorney General. The section is a clear, though limited, authorization for the use of corporate funds for contributions "conducive to public welfare," in accordance with its provisions. In addition to being conducive to the public welfare, the grant must be either (1) for aiding

community growth or development, or (2) for aiding charitable, philanthropic or benevolent instrumentalities, and must in the judgment of the directors of the corporation "contribute to the protection or advancement of the corporate interests." When expenditures or commitments for such purposes during any calendar year equal one per cent of a corporation's capital and surplus, before any additional expenditure or commitment may be made, the shareholders of the corporation are required to be given ten days' notice thereof. If shareholders representing twenty-five per cent or more of the voting shares of the corporation object in writing to the contribution it shall not be made until authorized at a shareholders' meeting. If no objection is registered after notice is given, the directors may proceed to make the contribution.

Perhaps I should mention at this point that I am of the opinion that Section 8623-119, General Code, applies equally to mutual companies as well as stock companies. (Implied recognition of this is found in Davies, Ohio Corporation Law, p. 136, where each category of insurance represented here is mentioned among the classes of *corporations* which are required to be incorporated under special statutes and not the General Corporation Act.) I percieve no obstacle or special significance arising from the fact that the statute speaks in terms of "directors," "capital" and "shareholders." I believe it is permissible that wherever such terms appear, when applying the section to a mutual company, to substitute therefor the equivalent term used in connection with such companies.

Applying the above statutory provision to the instant inquiry, the first question which presents itself concerns whether or not the proposed contribution falls within any of the specified purposes. I am reluctant to express my views on what would constitute "conducive to public welfare" and would otherwise fall within the qualifying language of Section 8623-119, General Code, in a particular instance, especially in a case such as this where the plan is not fully developed and definite. And I doubt that a general discussion of the meaning and intent of the statutory language would be helpful.

I am inclined to the opinion that the responsibility for determining whether or not a contribution would fall within the prescribed purposes rests with the directors of the contributing corporation. This is clearly the case with respect to determination of whether or not the expenditure "will contribute to the protection or advancement of the corporate inter-

ests," since it is specifically so provided. Application of the remainder of Section 8623-119, General Code, to the present inquiry appears to be sufficiently obvious to warrant not repeating it here.

In view of the preceding, in specific answer to your question I am of the opinion you should instruct the insurance companies concerned to the following effect:

1. Authority is contained in Section 8623-119, General Code, for a corporation, including insurance companies, both stock and mutual, to make contributions of corporate funds "conducive to public welfare," in accordance with its provisions. Such contributions must be for aiding either (1) community growth or development, or (2) charitable, philanthropic or benevolent instrumentalites, and must in the judgment of the directors of the corporation contribute to the protection or advancement of its interests. When expenditures or commitments for such purposes during any calendar year equal one per cent of the capital and surplus of the corporation, before any additional expenditures or commitments are made, ten days' notice thereof is required to be given to the shareholders of the corporation. If shareholders representing twenty-five per cent or more of the voting stock of the corporation object in writing to the expenditure, it may not be made until authorized at a shareholders' meeting.

2. Responsibility for determining whether or not a contribution would fall within the purposes prescribed in Section 8623-119, General Code, rests with the directors of the contributing corporation.

Respectfully,

HERBERT S. DUFFY,
Attorney General.