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1. FIRE AND WINDSTORM INSURANCE COVERAGE—PUBLIC BUILDING, PUBLIC OFFICER, PUBLIC CORPORATION—STATUTE WHICH CONFERS AUTHORITY TO CONSTRUCT, MAINTAIN AND OPERATE PUBLIC BUILDING—IMPLICATION—AUTHORITY TO EXPEND PUBLIC FUNDS TO DEFRAY COST OF INSURANCE.

2. EDUCATION, BOARD OF—SCHOOL BUILDING IN COURSE OF CONSTRUCTION — CONTRACTOR — PAYMENT OF LOSSES INCURRED—INSURANCE.

3. EDUCATION, BOARD OF—IN ABSENCE OF STATUTORY AUTHORITY NOT LIABLE FOR PERSONAL INJURY OR PROPERTY DAMAGE OR LOSS AS RESULT OF BOARD'S NEGLIGENCE—CONSTRUCTION, MAINTENANCE OR OPERATION OF SCHOOL BUILDING—EXPENDITURE OF PUBLIC FUNDS TO DEFRAY COST OF INSURANCE—INJURY, DAMAGE LOSS—NOT AUTHORIZED BY LAW—EXCEPTION, SPECIAL STATUTE.

4. EDUCATION, BOARD OF—COURSE OF INSTRUCTION IN MOTOR VEHICLE DRIVING—MOTOR VEHICLE EQUIPMENT—PURCHASE OR RENTAL—RENTAL PRICE TO BE PAID FROM PUBLIC FUNDS—INSURANCE ON EQUIPMENT.

SYLLABUS:

1. A statute which confers express authority on a public officer, public corporation, or public organization to construct, maintain, and operate a public building, by implication confers also on such officer, corporation, or organization the authority to protect such public property by the expenditure of public funds to defray the cost of fire and windstorm insurance coverage thereon.

2. A board of education may lawfully expend public funds to defray the cost of fire and windstorm insurance coverage on a school building in the course of construction pursuant to a contract executed by such board; and where such construction contract so provides, the policy evidencing such insurance may properly provide that payment for losses incurred be paid to the board or to the contractor, as their interests shall appear on the date of the loss.

3. In the absence of a statutory provision to the contrary, a board of education is not liable in its corporate capacity for personal injury or property damage or loss resulting from the board's negligence in the discharge of its official duties in the construction, maintenance, or operation of a school building or in the conduct

of a course of instruction prescribed by such board and, as a general rule, the expenditure of public funds to defray the cost of insurance against liability arising from such injury, damage, or loss, unless specially provided for by statute, is not authorized by law.

4. Where a board of education has prescribed a course of instruction in motor vehicle driving, it may properly provide motor vehicle equipment for use in such instruction either by purchase or rental, and where such equipment is provided through a rental agreement, the rental price to be paid by the board from public funds may lawfully include an item to cover the cost of such insurance on such equipment as the owner may insist upon as a condition of the agreement.

Columbus, Ohio, February 29, 1952

Bureau of Inspection and Supervision of Public Offices
Columbus, Ohio

Gentlemen:

Your request for my opinion reads as follows:

"The legal authority of a Board of Education to execute various types of insurance coverage is becoming of increasing importance.

"One form of insurance coverage that many Boards are obtaining is liability and property damage relating to the use of privately owned automobiles in connection with driver education and training courses offered by various schools as a part of its student training courses, or in connection with evening schools attended by persons more than twenty-one years of age.

"In connection with such programs, many Boards obtained public liability and property damage insurance covering the use of such automobiles, designed to protect the Board, the private owners of the automobiles, the instructors, the driver or other users of the car, for any claim for damages resulting from the use of the automobile in such programs, and in some cases providing for accident insurance covering the occupants of the automobile.

"Another type of insurance that is being obtained by several Boards is public liability insurance that is designed to protect the Boards from any claims for accidents or injuries sustained by any person from the use of board owned property, or which may result in connection with the construction, repair, or improvement of board owned property. In connection with the construction of buildings by various Boards, a type of insurance known as 'Owners Risk' is being obtained by the Boards providing fire and windstorm coverage upon school buildings while in the process of construction and still in the hands of the contractor, and

before the building has been accepted by the Board and full payment made to the contractor.

"In some cases, the contract between the Board and the contractor does not provide that the Board shall procure owners risk insurance, while in other cases the contract provides that while the building or work is done entirely at the contractor's risk until the same is completed, there is further provision that the Board shall procure fire and windstorm insurance covering such building while in the construction stage, the loss payable to the contractor and the Board as their interests appear.

"In the light of the foregoing, your opinion is respectfully requested as to whether a Board of Education may lawfully expend public funds to pay the premiums on public liability and property damage insurance, covering the use of a privately owned automobile, designed to protect the Board, the owner of the car, the instructor, driver, user, or occupants of the car, while it is being used in a drivers' training course, or in an evening school for adults. Presuming title to the automobile is in the Board, and the automobile is used as above noted, may a Board obtain and pay for the above types of insurance? May a Board obtain and pay for accident insurance protecting the occupants of an automobile while it is being used in such programs?

"Your opinion is also requested as to whether a Board of Education may expend public funds to obtain public liability and property damage insurance to protect itself from claims for accidents or injuries sustained by persons through the use of, or while upon board owned property, or any claims for physical injuries sustained by any person in connection with the construction, repair, or improvement of school buildings?

"Your opinion is also requested as to whether a Board of Education may lawfully expend public funds to pay the premiums on policies of fire and windstorm insurance covering school buildings while in the stage of construction and before complete payment has been made to the contractor, and the building accepted by the Board? May a Board assume a lawful liability in such respect by including a provision in its contract with the builder that the Board will procure and pay for such insurance coverage, any loss ensuing to be payable to the contractor and Board as their interests appear?"

We may first observe, with respect to all of the questions here presented, that boards of education are creatures of statute and possess only such powers as are expressly or impliedly conferred on them by statute. 36 Ohio Jurisprudence, 188, 189, Section 155. Moreover, it must be borne in mind that we are here concerned with the expenditure of public

funds and that expenditure of such funds for any but a public purpose is unlawful. Auditor of Lucas County v. State ex rel Boyles, 75 Ohio St., 114; Miller v. Korns, Auditor, 107 Ohio St., 287, 306; and State ex rel. Dickman v. Defenbacher, 151 Ohio St., 391, 396.

One of the questions here under examination is the legality of expending public funds to procure policies of fire and windstorm insurance covering school buildings under construction and before complete payment has been made to the contractor, and the building accepted by the board. The expenditure of public funds to procure insurance against loss of public buildings or other property is recognized as being lawful, if not impliedly authorized, by the following proviso in Article VIII, Section 6, Ohio Constitution:

> "* * * provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. * * *"

The existence of implied authority to procure insurance against loss of public property despite the lack of any express statutory authority therefor is noted in Opinion No. 787, Opinions of the Attorney General for 1937, p. 1452, in the following language:

> "* * * It is true that with few exceptions there are no express statutory provisions which authorize the political subdivision to insure its buildings or property. However, there are many provisions in the General Code which vest in administrative bodies of political subdivisions the authority to acquire, possess and hold both real and personal property. It is well settled that the express authority extended to political subdivisions to acquire, possess and hold property includes the power to protect such property so as to secure the political subdivision in case of loss. Cooley's Briefs on Insurance, Vol. 1, page 104, citing French v. City of Millville, 67 N. J. Law, 349; Couch on Insurance, Vol. 1, par. 226."

There is, of course, ample statutory authority for the acquisition and construction of school buildings by boards of education, and it is my conclusion that there is an implied authorization in these statutes to protect such buildings by the expenditure of public funds to procure insurance against loss or damage by fire or windstorm.

In this connection you present the specific question of the authority of a board of education to procure such insurance where the building

concerned is under construction and where payment for losses will be made to the board and to the contractor as their interests may appear. Here we may first properly inquire whether in such a case the board has an insurable interest in such building. The general rule as to insurable interests in buildings under construction is stated in 29 American Jurisprudence, 296, Section 325, as follows:

> "The authorities are in harmony in holding that a contractor who has agreed to construct a building for a stipulated price, payable as the work progresses, has an insurable interest to the extent of the entire contract price where there is nothing in the contract exempting him from liability to complete the building in the event of its destruction before completion.
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> "Persons furnishing materials for use in the construction of a building have an insurable interest therein.
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> "The owner of the building also has an insurable interest to the extent of its value, although the loss, in the absence of insurance, would fall on the contractor, and not on the owner. This is because the title to the land carries with it title to the building as completed. Especially may the full value of the building be recovered by the owner where the facts are fully known to the insurer at the time of issuing a policy; and the fact that after a loss the builder has reconstructed the building does not affect the right of the owner to recover on a policy issued to him."

In view of the rule as above stated, I readily conclude that a board of education may properly insure a building under construction where the board itself is the sole beneficiary under such policy. Nor is there any real difficulty involved in the case of a policy covering the interest of the contractor. It is assumed for the purpose of this discussion that in every such case the duty of the board to procure and pay for such insurance is stated as one of the conditions of the construction contract. In the absence of such insurance coverage we may readily perceive that the contractor is assuming a greater risk than he otherwise would, since he is normally bound absolutely to complete the structure despite any construction losses or damage. It must follow, therefore, that the price agreed to be paid for the completed building would, theoretically at least, be proportionately less where the contractor is relieved of such risk. For this reason I conclude that the cost of such coverage, if agreed upon as a condition of the construction contract, may be regarded as a part of the construction cost and may, therefore, properly be paid by a board of education by the expenditure of public funds.

Your remaining questions all concern the legality of the expenditure of public funds by a board of education to defray the cost of policies of "public liability and property damage" insurance, and these questions, for reasons which will presently appear, will be considered together.

The terms "public liability and property damage" are both descriptive of so-called "liability insurance," a form of insurance in which the insurer undertakes to reimburse the assured, within stated limits, for losses incurred in the successful prosecution of claims against the assured based on personal injury or property damage sustained through the fault of the assured. The insurable interest of the assured in such cases is stated in 29 American Jurisprudence, 326, Section 376, as follows:

> "Liability insurance, like other forms of insurance, must be supported by an insurable interest in the insured. This rule is applicable to automobile, employers', elevator, horse and vehicle, and other kinds of liability insurance. The insurable interest in such cases is to be found in the interest that the insured has in the safety of those persons who may maintain, or the freedom from damage of property which may become the basis of, suits against him in case of their injury or destruction. The interest does not depend upon whether the insured has a legal or equitable interest in property, but upon whether he may be charged at law or in equity with the liability against which the insurance is taken out. An 'omnibus' coverage clause in a liability policy covers a group of persons who may or may not have an insurable interest at the time the policy is written; if a person is within the defined group, it is sufficient that at the time of the accident such person is in a position to become legally liable for injury to others."

From the foregoing it is quite clear that unless there is a liability, or, more precisely speaking, a potential liability on the part of the assured, no loss could ever occur and the insurer would assume no risk. In such case it is obvious that any premiums paid to the insurer would be without a proper consideration and such payments could not, therefore, be deemed a lawful expenditure of public funds. Accordingly, it is essential first to ascertain whether any potential liability exists in the case of a board of education for personal injury or property damage incurred either in the construction, repair, improvement or operation of a school building or in the use or operation of a motor vehicle in the conduct of a driver training class.

In Finch v. Board of Education, 30 Ohio St., 37, the court was concerned with the liability of a board of education for injuries sustained by

a pupil in falling into a well or excavation constructed for the purpose of admitting light to the basement windows of a school building. The court in the syllabus held:

> "A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability."

A later case involving a hazard incident to the construction of a school building is Board of Education v. Volk, 72 Ohio St., 469, the first paragraph of the syllabus of which is:

> "A board of education is not liable in its corporate capacity for damages, where, in excavating on its own lots for the erection of a school building, it wrongfully and negligently carries the excavation below the statutory depth of nine feet, thereby undermining and injuring the foundation and walls of a building of an adjoining owner."

In Board of Education v. McHenry, 106 Ohio St., 357, the per curiam opinion reads:

> "This action was brought to recover damages claimed to have been sustained by a pupil in the public schools of the city of Cincinnati from the extraction of a tooth by a dentist, in the employment of the board of education of the city of Cincinnati, to whom the principal of one of the public schools of the city required the pupil to submit himself for examination and treatment without the consent or knowledge of his parents.
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> "The petition averred 'that said dentist, or pretended dentist who was in the employ of defendant and authorized by defendant to operate upon said William McHenry, Jr., was negligent in fracturing the jaw bone of said William McHenry, Jr.; that said dentist or pretended dentist, was incompetent to operate * * * and that he was incompetent to determine whether or not the jaw bone of his patient had been fractured or to treat the same if fractured, and that defendant was negligent in employing for such work an unfit and incompetent person.'
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> "The court of common pleas sustained a demurrer to the petition, and upon proceeding in error that judgment was reversed by the court of appeals. Thereupon error was prosecuted to this court.
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> "It was conceded by counsel for defendant in error upon the argument in this court, that unless the recent decision of the

supreme court of Ohio, in Fowler, Admx., v. City of Cleveland, 100 Ohio St., 158, changes the rule of law prevailing in this state prior to such decision, no recovery can be had in this cause against the board of education, and the action of the court of appeals was based upon the decision of this court in that case.

"The decision of this court in the case of Aldrich v. City of Youngstown, ante, 342, wherein the decision in the Fowler case, supra, was overruled, requires in the instant case a reversal of the judgment of the court of appeals and an affirmance of that of the court of common pleas."

In Conrad v. Board of Education, 29 Ohio App., 317, the court held:

"In the absence of a statute specifically creating a civil liability, a board of education is not liable in damages to a pupil who is taking a manual training course in its mechanical department, and who suffers injury as a result of the board's failure to properly protect, as required by law, the machinery used by said pupil."

In view of these decisions, we must regard the law as well settled in Ohio that, in the absence of statute imposing such, no liability exists on the part of the board of education, in its corporate capacity, with respect to personal injuries or property losses sustained by reason of negligence of such board either in the construction and operation of school buildings or in the conduct of courses of instruction prescribed by such board. In the absence of such liability, it is clear that there is no eventuality against which the board may properly insure itself, and it must necessarily follow, as a general rule, that the expenditure of public funds in payment of the cost of insurance or purported insurance of the so-called liability type in such instances is not authorized by law.

It cannot be said, however, that the general rule will be applicable in all circumstances. With respect to the motor vehicle driver training classes mentioned in your inquiry, it is noted that these vehicles are privately owned. You have referred, in a supplemental communication on this subject, to "the dealer lending the car to the school" and to the participation in the training program of "the local automobile club." This use of privately owned motor vehicles under a lending arrangement may well constitute a circumstance which would require an exception to the general rule.

If, in the exercise of its discretion, a board of education should choose to rent or lease equipment necessary and proper for use in a

particular course of instruction, lawfully prescribed by the board, I perceive no reason why the cost of insurance on such equipment, of whatever kind, if insisted upon by the owner or lessor as a condition of the agreement, should not be considered a proper item in the rental price and so paid from public funds. In such a case there can be no objection to the expenditure on the ground that there is an absence of consideration received by the board, as is the case ordinarily where liability insurance is involved. Rather, in such a case, the use of the equipment for a purpose beneficial to the educational program prescribed by the board is a consideration sufficient in law to support such expenditure.

Nor can there be any objection to an expenditure of this kind on the ground that the board is thereby indirectly assuming an expense which it would not be authorized directly to incur. We have only to recall that the board, itself exempt, as a public agency, from taxation in many respects, nevertheless pays such exactions indirectly in the scores of "hidden" taxes which are incorporated in the price of supplies, equipment, and services which the board must procure through the expenditure of public funds in order to operate the public schools. Accordingly, I conclude that the cost of liability and other insurance on equipment rented or leased to a board of education for use in a course of instruction prescribed by the board may, if included in the rental price by the owner or lessor, be paid by such board from public funds.

Respectfully,

C. WILLIAM O'NEILL
Attorney General