

one hundred and fifty dollars per month for each assistant clerk employed in the manner set out in section 4877 G. C. (Sec. 4802 G. C.)

3. The county board of elections, of its own motion, may make those employments which it is permitted to make under specific sections of the law, without any other board or person passing thereon.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3885.

BOARD OF EDUCATION—MAY CONSTRUCT AT ITS OWN EXPENSE
 SIDEWALKS—SAID BOARD MAY NOT COMPEL CITY TO MAKE
 IMPROVEMENT.

1. *Under the provisions of section 7620 G. C., the board of education of a city school district, may construct at its own expense cement sidewalks on the streets abutting school premises used exclusively for school purposes.*

2. *In the absence of facts imposing a duty upon the municipality to construct or improve sidewalks upon streets abutting upon school property, a board of education may not compel the city to exercise its discretion to proceed to such an improvement.*

COLUMBUS, OHIO, January 6, 1923.

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

GENTLEMEN:—Receipt is acknowledged of your letter of recent date which reads as follows:

“We respectfully request that you furnish this department with your written opinion upon the questions contained in the enclosed letter from M. Ray Weikart, City Solicitor of the City of Springfield, Ohio.”

The letter from Mr. Weikart reads as follows:

“Will you kindly secure for me the opinion of the Attorney General upon the following questions, to-wit:

Question No. 1. Can the board of education of a city school district lawfully construct cement sidewalks, at its own expense, on the streets abutting school premises used exclusively for school purposes?

Question No. 2. Can the board of education of a city school district compel the city corporation to construct cement sidewalks on streets abutting school premises used exclusively for school purposes?

(a) When the city corporation has, by ordinance, required all property owners on said street to construct such sidewalks within a time specified, and has stipulated that if said sidewalks are not so constructed within such time specified, that same will be constructed by the city and the cost and

expense thereof charged to the respective owners and be assessed against the property.

(b) When no such order as mentioned in (a) has been made by the city."

Pertinent to the first question submitted by the City Solicitor of Springfield, Ohio, to your department, section 7620 G. C. provides in part as follows:

"The board of education of a district may build, enlarge, repair and furnish the necessary school houses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real estate to be used as playgrounds for children or rent suitable schoolrooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control."

It is noted that this section vests very broad powers in the board of education; especially does this seem true when consideration is directed to the last sentence of the first paragraph which reads "and provide the necessary apparatus, and make all other necessary provisions for the schools under its control." Such language manifestly discloses the legislative intent to vest boards of education with ample authority to do those things requisite and necessary for the general welfare of the schools under their jurisdiction. Under such a construction then, it would seem clearly evident, that a board of education would be lawfully authorized to construct at its own expense cement sidewalks or those of other material, on streets abutting upon school property, and such authority apparently is limited only by the requirement of the necessity and the proper exercise of the board's discretion. It is to be borne in mind, however, that such an improvement, must conform to the curb line, and other regulations provided by the city in respect to sidewalks, since under section 3714 G. C. the control of the streets and sidewalks of the municipality is vested in council. Subject then to the limitation noted, it follows that an affirmative answer may be given to your first question.

Passing to the second question, as to the authority of the board of education to compel the city to construct at city expense cement sidewalks on streets abutting upon school premises under the conditions indicated under (a) of the inquiry, it is believed that a board of education in such an instance has no greater right or power in this respect than that possessed by any other abutting property owner. That is to say, it is believed that the proprietary interest of the board of education in the sidewalks and streets abutting upon school property under its control is identical with that of any other abutting property owner, and while any abutting property owner may improve or construct his own sidewalks at his own expense or the city may compel him to do so by performing that duty for him and assessing the cost of the improvement against his property, yet there is no authority of law which vests a right in the abutting owner to compel the city to proceed to such an improvement, since as previously stated the control of the streets and sidewalks is vested absolutely in council under section 3714 G. C., and such authority and control is seemingly in its nature purely judicial and discretionary.

It is true that a municipality is required by the provisions of section 3714 G. C. to keep its streets and sidewalks in a condition safe for public travel, and it would follow that a failure or neglect to do so under certain conditions might render the city liable in damages to persons injured by reason of the city's dereliction of duty

in this respect; however, such liability creates no obligation in the first instance on the part of the city, to construct sidewalks as a purely ministerial duty apart from and regardless of its discretion in such matters.

It would seem evident then that section 3714 G. C. vests the control of the streets and sidewalks of a municipality in council, and since that authority is discretionary, it is not believed that the exercise thereof may be controlled by legal action.

As to the power of municipalities to determine when and how streets and sidewalks may be improved, Elliott on Streets and Roads, says at section 506:

"The right of the judiciary to interfere can only exist where there has been fraud or oppression, or some such wrong constituting a plain abuse of discretion."

In *Railroad Company vs. Defiance*, 52 O. S., 262, a similar doctrine is announced wherein it was decided as to the discretionary power of city councils over the subject of street improvements, that their decision when not transcending their powers nor induced by fraud is not subject to judicial revision." Again, Elliott says at section 477:

"The question whether a road or street shall be improved is generally committed to the local authorities for decision and, cannot as a rule be controlled by the courts."

Upon such considerations then, and in direct answer to your second question as limited by the provisions indicated by (b), it is the opinion of this department, that the city cannot be compelled by the board of education to construct cement sidewalks upon streets abutting on school property. As to the same question under the conditions prescribed by (a) of the communication, opinion may not be definitely passed, it being fairly concluded that local questions of fact enter largely into the determination of such a question; however, it is generally believed that unless the facts in the particular case impose upon the city the obligation of exercising a ministerial duty, it would seem obvious for the same reasons as advanced in (b) that the discretion of council in such a matter could not be controlled by law.

Although direct inquiry is not made by the communication of the City Solicitor as to the authority of the city to levy assessments for street improvements against school property under the control of the board of education, attention, nevertheless, is directed to this feature of the situation, as having an important bearing upon the questions submitted.

It has been held in at least two previous opinions of this department that school property used exclusively for public school purposes is not liable for assessment for street improvement. One of these is Opinion No. 1473. The following paragraph from this opinion appears in Opinion No. 1462; under date of July 24, 1920, and which reads:

"No part of the cost of the improvement of a street on which school property, used exclusively for public school purposes, abuts, can be assessed against such property, and the board of education of the school district in which such property is located is neither required nor authorized to pay

any part of the cost of said improvement out of its contingent fund or to levy a tax for said purposes."

Since the sidewalk in legal contemplation is deemed a part or portion of the street and the term "streets" includes sidewalks, it is obvious that the conclusion of the opinion equally affects the sidewalks of such streets as abut upon public school property, exempting them against special assessment by the city for purposes of improvement. It is true, section 3866 G. C. provides that when deemed necessary by a municipal corporation to build or repair sidewalks, curbing or gutters along that portion of a street, alley or public highway which passes by or through public wharves, market spaces, parks, cemeteries, public grounds or buildings, the proper proportion of the estimated expenses thereof shall be, by the council of such corporation levied, certified and collected in the manner provided for street improvements. It is doubtful, however, if school property may be said to come within the provisions of this section, since the public ground or property referred to by this section, seemingly is such as is controlled by the corporation as an entity. However, if school property may be termed public grounds within the meaning of this section, the same difficulty remains, since the school property is exempt from execution under the provisions of section 4759 G. C. and there apparently would be no way for the city to collect such an assessment. Thus it would seem that by reason of the exemption of school property from assessment, and the discretionary authority of council over the sidewalks of the corporation, the peculiar situation arises wherein the board of education may not compel the city to construct sidewalks at city expense, neither can the city compel the board of education to construct the same at school expense, since it is obvious that the city could not enforce collection of assessment by reason of said exemption. It would seem then under such circumstances that practical solution to such a difficulty may only be had by mutual agreement between the city and the board of education for the payment of the cost of the sidewalk improvement, either jointly or separately as they may agree, since the law unquestionably vests in either the authority to proceed to such an improvement.

Respectfully,
 JOHN G. PRICE,
Attorney-General.

3886.

GRISWOLD ACT—A NUMBER OF QUESTIONS ANSWERED RELATIVE
 TO SINKING FUND TRUSTEES' AUTHORITY UNDER SAID ACT.

1. *Sinking fund trustees may administer the general sinking fund under their control at their absolute discretion, applying the money in securities in their possession to the discharge of any obligations which it is their duty to discharge or for expenses, unless the withdrawal of such moneys will cause an overdraft in a fund produced by the receipt of premiums and accrued interest in the sale of assessment bonds or unexpended balances of the proceeds of any bonds issued prior to January 1, 1922.*

2. *There can be no "surplus" in a fund devoted to the retirement of particular bonds and available for no other purpose, until the fund equals the amount required to pay accrued interest and fully to retire the principal.*