

The World War Veterans' Act of 1924 contains substantially the same exemption from seizure as is found in the War Risk Insurance Act, and the cases cited which construe the latter act are applicable here. We think the manifest purpose of the legislation making provision for World War veterans was to devote the benefactions there provided to the sole use of the beneficiaries, and that the same should not be subject to the demands of creditors, even after the money had come into their hands, or was held by another for their benefit.

The writ of garnishment was therefore properly quashed, and the judgment of the court so ordering is affirmed."

In view of the express provisions of the World War Veterans' Act, and the authorities herein cited, it is my opinion that estates that have been built up by guardians out of money received as payments under the World War Veterans' Act of 1924, are exempt from taxation under the provisions of Section 22 of said Act, (38 USCA, Section 454), as long as said funds are in their original form in the hands of the beneficiary or on deposit to the credit of his estate.

Respectfully,
EDWARD C. TURNER,
Attorney General

3008.

MUNICIPALITY—POWER TO MAKE LOCAL BOARD OF EDUCATION
PAY FEE AND OBTAIN PERMIT BEFORE ALTERING PLUMBING—
EXERCISED UNDER VALID ORDINANCE.

SYLLABUS:

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.

COLUMBUS, OHIO, December 10, 1928.

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

GENTLEMEN:—This will acknowledge receipt of your recent communication as follows:

"Section 1261-3, General Code, reads:

"It shall be the duty of said inspector of plumbing, as often as instructed by the state board of health, to inspect any and all public or private institutions, sanitariums, hospitals, schools, prisons, factories, workshops, or places where men, women or children are or might be employed, and to condemn any and all unsanitary or defective plumbing that may be found in connection therewith, and to order such changes in the method of construction of the drainage and ventilation, as well as the arrangement of the plumbing appliances, as may be necessary to insure the safety of the public health.

Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted and are being enforced by the proper authorities regulating plumbing or prescribing the character thereof.'

Section 1261-6, General Code, reads:

'No plumbing work shall be done in this state in any building or place coming within the jurisdiction of the state inspector of plumbing, except in cases of repairs or leaks in existing plumbing, until a permit has been issued by the state inspector of plumbing and the executive officer of the state board of health. Before granting such permit, an application shall be made by the owner of the property or by the person, firm or corporation who is to do the work, such application shall be made on blanks prepared for the purpose, and each application shall be accompanied by a fee of one dollar, and an additional fee of fifty cents for each trap or vented fixture up to and including ten fixtures, and for each trap or vented fixture over ten, a fee of twenty-five cents. The fee so collected shall be paid into the state treasury and credited to the general revenue fund. * * *'

The second branch of the syllabus in the case of *Niehaus vs. State, ex rel.*, 111 O. S. 47, reads:

'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: When a city by ordinance provides that no plumbing alterations shall be made until a permit is obtained from the city plumbing inspector and a fee paid into the city treasury, must the local board of education obtain such permit and pay such fee when school house plumbing is to be altered?"

It is true that the Supreme Court in the *Niehaus* case reached the conclusion which is summarized in the second branch of the syllabus which you quote. That conclusion was, however, based upon statutes substantially differing from Sections 1261-3 and 1261-6 of the General Code, quoted in your letter. At the time of the decision of the case, Section 1031 of the General Code provided, so far as pertinent, as follows:

"The chief inspector of workshops and factories shall cause to be inspected all schoolhouses * * * and other buildings used for the assemblage * * * of people. * * * Such inspection shall be made with special reference to precautions for the prevention of fires, the provision of fire escapes, exits, emergency exits, hallways, air space, and such other matters which relate to the health and safety of those occupying, or assembled in, such structures."

Section 1035 of the Code also provided, so far as applicable:

"The plans for the erection of such structure * * * shall be approved by the inspector of workshops and factories, except in municipalities having regularly organized building inspection departments, in which case the plans shall be approved by such department."

It is to be observed further, that there was no provision made in the State Building Code for the payment of any fees for construction, and the provisions of Section 1035 of the Code, supra, constituted a mandatory requirement that the regularly organized building inspection department of municipalities should approve the plans for schoolhouses, etc. 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 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, so far as there may be any existing conflict. The Legislature in the instance of building construction having spoken, it was not within the power of the municipality to enact any local police measure in conflict with general law. As stated by the court in the Niehaus case, on page 55:

"The Legislature is authorized to invest the inspector of workshops and factories, or any other state official within municipalities, as well as without, with power to approve plans and specifications for any public school building. It has the power to require the payment of a fee to such official for the performance of such duty, and it has the power to vest such power in any official of a municipality within the jurisdiction of such municipality, and to provide for the payment of a fee to such official; but it had not so provided. The limit of the power of the municipality in that respect is the power granted by the Legislature."

The conclusion was accordingly reached 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 was without any authority to exact the payment of a fee as a condition to such approval. It therefore becomes necessary to compare the provisions of law relative to building construction with those dealing with plumbing inspection as quoted in your letter, to determine whether the same reasoning will apply to the question you present.

It is my opinion that there exists a substantial difference between these provisions. You will observe that Section 1261-3, General Code, after providing for inspection of plumbing by the Inspector of Plumbing, contains the following language:

"Such inspector shall not exercise any authority in municipalities or other political subdivisions wherein ordinances or resolutions have been adopted and are being enforced by the proper authorities regulating plumbing or prescribing the character thereof."

This section does not, as did Section 1035 of the Code, supra, impose any duty whatsoever upon the municipal authorities. Its effect is simply to deny to the State Inspector any jurisdiction whatsoever within municipalities having and enforcing ordinances regulating plumbing. Accordingly, the police power of the State, by express language, has been withheld as to such municipality and is in no respect applicable insofar as the regulation of plumbing is concerned. This constitutes, in my opinion, the fundamental distinction between the laws relating to plumbing regulation and those governing building inspection. With respect to building inspection, the State has seen fit to impose certain police duties upon the municipal officials, whereas with respect to plumbing, all jurisdiction of the State is withheld, so long as regulatory ordinances are in effect and enforced.

Aside from the implied authority to enact regulatory ordinances contained in Section 1261-3 of the Code, supra, and without giving any consideration to the subject of home rule, it is apparent from general laws relating to municipalities, that ample power is conferred upon them to adopt ordinances relative to the regulation of plumbing.

Sections 3636, 3639 and 3647 of the Code, are as follows :

Sec. 3636. "To regulate the erection of buildings and the sanitary condition thereof, the repair of, alteration in and addition to buildings, and to provide for the inspection of buildings or other structures and for the removal and repair of insecure buildings; to require, regulate and provide for the numbering and renumbering of buildings either by the owners or occupants thereof or at the expense of the municipality; to provide for the construction, erection, operation of and placing of elevators, stairways and fire escapes in and upon buildings."

Sec. 3639. "To regulate by ordinance, the use, control, repair and maintenance of buildings used for human occupancy or habitation, the number of occupants, and the mode and manner of occupance, for the purposes of insuring the healthful, safe and sanitary environment of the occupants thereof; to compel the owners of such buildings to alter, reconstruct or modify them, or any room, store, compartment or part thereof, for the purpose of insuring the healthful, safe and sanitary environment of the occupants thereof, and to prohibit the use and occupancy of such building or buildings until such rules, regulations and provisions have been complied with."

Sec. 3647. "To open, construct and keep in repair sewage disposal works, sewers, drains and ditches, and to establish, repair and regulate water-closets and privies."

These sections are clear authority for the adoption of ordinances regulating plumbing for the protection of public health. These sections also authorize the exaction of 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.

Since the municipality has the right to enact an ordinance regulating plumbing, and to charge an inspection fee in connection therewith, and the Legislature has expressly refused to make any provision with respect to such subject matter, where such an ordinance is in effect and being enforced, the sole remaining question is whether a municipality is authorized to enforce the provisions of its ordinance in the case of school property and require that the board of education secure a permit before making plumbing alterations and pay a fee therefor into the city treasury.

This question is not without difficulty, in view of the fact that the powers of a board of education are limited in character and the general rule has been that its expenditures are limited to such as are expressly authorized or those necessarily incident to the exercise of powers granted. In my opinion, however, the answer to this question 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 being 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 the general authority."

This case reversed what had been believed to be the rule for a long period of time, and held as stated in the syllabus, that the express authority conferred on municipalities to make assessments against property granted the power to assess school property as well as private property in the absence of any express statutory exemption of school property. The situation accordingly is analogous to that presented by your inquiry. As I have before stated, express authority is conferred on a municipality to adopt ordinances regulating plumbing and the right to exact an inspection fee is incident thereto. There is no provision of law exempting school property from the requirements of the municipal ordinance and I feel that, by a process of reasoning similar to that adopted by the court in the Jackson case, the conclusion must be reached that the municipality has the right to exact, and the board of education must pay, the fee prescribed by ordinance in the case of alterations in plumbing in school buildings.

The court in the Jackson case had little difficulty with the question of 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 board of education undoubtedly has authority properly to maintain its school 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 plumbing, there should be no hesitancy in saying that the authority to expend the funds of the board for that purpose exists.

I may further suggest that there is an additional distinction between the question you present and the one under consideration in the Niehaus case. There, no authority existed, by state law, for the exaction of any fee whatsoever. With respect to the inspection of plumbing, however, it should be noted that Section 1261-6, General Code, authorizes the state inspector to collect fees for permits issued for changes in plumbing. You do not advise me as to the amount of the fees prescribed by the municipal ordinance, but if they were in the same sums as those prescribed by state law, an additional reason would exist for my conclusion. I prefer, however, to base the answer to your inquiry upon the reasoning hereinbefore set forth.

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

Respectfully,
EDWARD C. TURNER,
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3009.

ELECTION—CANDIDATE REFUSED PRIMARY DECLARATION BY
ELECTION BOARD—ELECTED WHEN VOTERS AT A GENERAL
ELECTION PLACE NAME ON BALLOT IN BLANK SPACE PRO-
VIDED FOR A DESIGNATED OFFICE.

SYLLABUS:

A person whose declaration of candidacy for nomination at a primary election, has been rejected by the election board, may, nevertheless, be elected by having his name written in by the voters upon the ballot at the general election, as provided by Section 5025, General Code, if provision is made therefor by printing the designation of the office and providing a space as provided by Section 5025, General Code.