

certain reservoir land lease in triplicate, executed by the Conservation Commissioner on behalf of the State of Ohio, by which there is leased and demised to one H. W. Borchers of Dayton, Ohio, for cottage site and docklanding purposes, and for a term of fifteen years, a certain parcel of certain state reservoir lands which may be described as being that portion of the inner slope and water front and all of the outer slope of the westerly embankment of Lake St. Marys, and the state land in the rear thereof, extending back to the state ditch that is included in the north half of Embankment Lot No. 65, lying south of the center line of Section 12, Town 6 South, Range 2 East, as laid out by H. E. Whitlock under the direction of the Superintendent of Public Works.

Upon examination of said lease, which is one calling for an annual rental of six per cent of the appraised valuation of said parcel, which appraised valuation is the sum of three hundred dollars, I find that said lease has been properly executed by the parties to the same, and that the terms and provisions of said lease are such as to conform with Section 471, General Code, under the authority of which said lease is executed by the Conservation Commissioner. I likewise find that said lease, as to the provisions, reservations and conditions thereof, conforms to other statutory provisions relating to leases of this kind.

Said lease is accordingly, therefore, approved by me as to legality and form, as is evidenced by my written approval endorsed on said lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,

GILBERT BETTMAN,
Attorney General.

2645.

SCHOOL BUILDING—BOARD OF EDUCATION MAY NOT CONSTRUCT
ON LEASED PREMISES WHEN—FAULTY CONSIDERATION.

SYLLABUS:

A board of education is not empowered to construct a school building on leased premises and provide by the terms of the said lease that the lessor shall be permitted to occupy a portion of the building, during the term of the lease, as the main consideration for the rental of said premises.

COLUMBUS, OHIO, December 9, 1930.

HON. ROY E. LAYTON, *Prosecuting Attorney, Wapakoneta, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion which reads as follows:

“The board of education of the Minster Village School District proposes to build a new high school and submit a bond issue to the electors for that purpose. They propose to erect this building on ground belonging to the Roman Catholic Church and have made tentative arrangements to lease this ground for a period of forty-nine (49) years with the privilege of a renewal for a like period.

This village is a Catholic community and practically all the citizens and children, if not all, are members of that church.

Enclosed find a preliminary draft of the proposed lease between the

Archbishop of Cincinnati as Trustee for the congregation of the St. Augustine Roman Catholic Church of Minster, the lessor, and the Board of Education of the Minster Village School District, the lessee, which lease practically explains itself. You will note that there is no cash consideration for said lease, the main consideration being that the lessor is given the exclusive use of four rooms in the basement finished and decorated, and accessible from the outside of the building by private entrance, and the use of the auditorium and gymnasium of the new building, as set forth in Article 3 on page 4 of the enclosed copy.

Before proceeding further, the board of education of the village of Minster would like to have your opinion as to whether the enclosed lease would be legal and in accordance with the laws of the State of Ohio. Taking it for granted that a local board of education has to right to lease ground on which to erect school buildings for a period of 49 or 99 years, and in view of the local conditions from a religious standpoint, as they exist at Minster, I am of the opinion that such lease is legal as well as feasible and practical."

With your communication is enclosed a tentative form of lease and contract which it is proposed will be entered into between the board of education of the Minster Village School District, as lessee, and John T. McNicholas, Archbishop of Cincinnati, as Trustee for the congregation of the St. Augustine Roman Catholic Church, Minster, Auglaize County, Ohio, as lessor, whereby it is agreed that the said lessor lets and leases to the lessee a certain plot of ground located in the village of Minster, for a term of 49 years, for the purposes of erecting thereon a public school building.

No money consideration as rental, is provided for in the said lease. It is provided therein, however, that said premises are leased "at and upon the terms and in consideration of and subject to the covenants, conditions and stipulations herein expressed of and concerning the same."

The covenants, conditions and stipulations referred to consist of nine separate and distinct covenants, recited therein, and numbered from 1 to 9, whereby the lessee covenants and agrees to and with the lessor to perform or to refrain from performing certain named acts, as the case may be, or to suffer the performance or non-performance of certain acts by the lessor.

Articles 1 to 8, inclusive, of the enumerated covenants by which the lessee obligates itself to the lessor, provide in substance, that it will proceed to submit to the electors of the Minster Village School District at the 1930 general election, and again at the general election in 1931, if it fails of passage at the 1930 election, the question of issuing bonds for the erection of a new high school building in the school district; that in the event the bond issue carries, it will forthwith proceed with the erection of a public high school building on these demised premises; that the old buildings on said premises will be razed and the debris removed; that said new building will be constructed in a workmanlike manner and at a fair cost and value of not less than \$-----, that the said building will at all times during the term of the lease be properly maintained and kept in repair, all laws, rules and regulations of any properly constituted authorities will be observed and followed, no waste will be committed on the premises, that the carrying on of no unlawful trade, business or occupation will be permitted on the premises during the term of said lease. It is further agreed by the said lessee that during the construction and maintenance of said building the rights of adjacent property owners and others will be properly respected and that the said lessor shall be saved harmless from any liability to adjacent property owners or anyone else on account of the construction and maintenance of said building or any acts of the lessee in connection therewith.

It is further agreed that the lessee shall, during the term of this lease, or any extension thereof, pay all taxes, assessments, levies, license fees, water rents, excises, franchises, imposts, penalties and charges, general and special ordinary and extraordinary, of whatever name, nature and kind, which may be levied, charged or imposed by any public authority on said premises or on said lease during the term thereof; that the lessor shall be saved harmless from the payment of any inheritance or legacy taxes or income taxes under any existing law or future law of the United States or the State of Ohio on account of the ownership of said premises by the lessor or the leasing of the same by the said lessor to the said lessee. Article IX, of said covenants provides in part as follows:

“As the main consideration for this lease which is expressly conditioned thereon, Lessee covenants to and with the Lessor that if and when a new school building or buildings are erected upon the premises herein described that the Lessor shall be furnished the exclusive use of four rooms in the basement of said building or buildings for the use of the pastor and members of St. Augustine’s congregation, the said rooms to be finished in the same manner as other rooms of the building used for school purposes, and these rooms to represent an aggregate of 2,000 square feet of floor space including corridors, and the Lessee further agrees to divide this space with partitions in such manner as may be reasonably directed by the pastor of St. Augustine’s Parish, Minster, Ohio; further that these rooms shall be made accessible from the outside of the building by a special private entrance. Further that the auditorium and gymnasium of the building or buildings erected by the Lessee herein shall be at the disposal of the members of St. Augustine’s Parish for the usual parish activities and this use shall also include the accessories to said auditorium and gymnasium to-wit: stage, ticket booth, cloak room, baths, lavatories and toilets.”

On consideration of which aforesaid covenants, lessor covenants and agrees to and with the said lessee to do and suffer certain things and acts set forth therein, in seven separate and distinct articles.

Among the covenants by which the lessor secures and guarantees to the lessee certain rights and privileges to and in the use of the demised premises are the usual stipulations as to peaceable possession and quiet enjoyment during the term of the lease. Article III of said covenants, which is highly pertinent to this inquiry, reads as follows:

“Lessor grants to the Lessee the right and privilege to raze, tear down and destroy the present building now located on the premises herein demised and let, the material therefrom be the property of Lessee in return for the expense involved in so tearing down and removing, and gives to Lessee the right to erect on the said premises a new school building for public school purposes on the following conditions:

1st. That Lessor or his agents be given the exclusive use of four basement rooms finished in the same manner as the other rooms of the building which are used for school purposes, that is, the floors, walls, windows, etc., shall be finished and decorated in the same manner as the school rooms, these rooms to represent an aggregate of 2,000 square feet of floor space, including corridors. The said floor space to be partitioned as directed by the pastor of the St. Augustine’s parish of Minster, Ohio. These rooms must be so constructed as to be accessible from the outside of the building by private entrance. The placing of partitions such as may reasonably be demanded shall be done and performed at the cost of the Lessee herein. Lessor to pay for

electricity used by him or his agents in the said four rooms and to furnish his own janitor service therein.

2nd. That the auditorium and gymnasium of the new building or buildings be at the disposal of the members of the St. Augustine's Parish for the usual and customary parish activities and this shall include the usual accessories to the auditorium and gymnasium such as stage, ticket booth, cloak rooms, lavatories, baths and toilet rooms."

It is provided by the terms of Article VIII of the covenants of said lessor that all other covenants are made contingent upon the ability of said lessee to procure the funds for the erection of said high school building by the issuance of bonds or otherwise. Said contract of lease further provides:

"All the covenants, agreements, stipulations, provisions, conditions and obligations herein expressed and set forth shall be considered as running with the land and shall extend to, bind and inure to the benefit of, as the case may require, the heirs, executors, administrators, successors and assigns of the Lessor and the Lessee respectively, as fully as if such words were written whenever reference to Lessor and Lessee occurred in this lease."

Boards of education in Ohio are governmental agencies created by the Legislature, and as such, charged with the duty of administering, within the limits of their several jurisdictions, the laws relating to public schools. Being creatures of statute, their powers are limited to those granted by law. The limited authority vested in boards of education has been noted in a large number of cases not only by the courts of Ohio but those of other states as well. Two comparatively late cases decided by the Supreme Court of Ohio may be cited, *State ex rel. Clarke vs. Cook, Auditor*, 103 O. S. 465, and *Schwing vs. McClure*, 120 O. S. 335, in support of this principle, although it has been applied in a large number of other cases. In the case of *Schwing vs. McClure*, supra, the first branch of the syllabus reads as follows:

"Members of a board of education of a school district are public officers, whose duties are prescribed by law. Their contractual powers are defined by the statutory limitations existing thereon, and they have no power except such as is expressly given or such as is necessarily implied from the powers that are expressly given."

By the terms of Section 7620, General Code, a district board of school education is authorized to "build, enlarge, repair and furnish the necessary schoolhouses, purchase or lease sites therefor * * * or rent suitable schoolrooms."

Section 2293-2, General Code, extends authority to a board of education to issue bonds for the purpose of acquiring or constructing any permanent improvement. It follows therefrom that a board of education may, in its discretion, lease a site for a school building in lieu of purchasing the same, and may, after leasing the same, issue bonds for the purpose of erecting on said leased premises a necessary school building, and erect said building.

The lessor of property to a public officer or agency is bound to take cognizance of the limited powers of the said public officer, board or agency and, while there may be some question whether the authority extended to a school board to lease a site for the school building extends to that school discretionary power to lease a site for a school building for a long term of years and thus bind future boards of education for the term of the lease, in lieu of purchasing a site for the school building when such a site could well be purchased, I do not deem it necessary for the pur-

poses of this opinion, to pass upon that question as there are other considerations which, in my opinion, are fully dispositive of the questions presented by your inquiry.

In any event, a board of education is not empowered to acquire property by lease or otherwise for commercial purposes or for any other than school purposes. It sometimes happens that a board of education constructs a school building larger and more commodious than is necessary for its immediate needs. It no doubt is within the lawful range of a school board's discretion to provide for what may be reasonably anticipated to be the immediate future needs of the schools of the district. That is to say the board of education may undoubtedly provide school facilities sufficiently great to care for the future growth of the school, within reasonable limits. It is not within the power of the board of education, however, to acquire by purchase or lease more lands or a larger building than are needed for school purposes unless such excess property may reasonably be anticipated to be needed for school purposes in the immediate future. Such action would clearly in my opinion be ultra vires even though the excess property were income bearing property and would, if the transaction were between private parties, be regarded as a good investment and sound business.

By the terms of the tentative contract submitted with your inquiry and upon which the inquiry is based, the board of education of Minster Village School District proposes to acquire lands by virtue of a lease for forty-nine years, with the privilege of renewal for a like period, for the purpose of constructing thereon a district high school building, and agrees thereby, in the event funds are made available by a vote of the people, to construct that building larger than is needed for public high school purposes, not only at present and in the immediate future but for the full term of the lease and any extension thereof, and in the same instrument to alienate and grant the exclusive use of the excess room in said building for the full term of the lease and any extension thereof to the lessor under the lease as the main consideration for the use of the premises by the school board for school purposes.

The fact that the school board proposes by the terms of this tentative contract, to erect a building with sufficient room that it will have in addition to the room needed for public high school purposes enough room to grant "the exclusive use of four rooms in the basement of said building or buildings for the use of the pastor and members of St. Augustine's congregation, the said rooms to be finished in the same manner as other rooms of the building used for school purposes," for the full term of the lease and any extension thereof is conclusive proof that the board intends to erect a building larger than necessary for school purposes, either present school purposes or future needs of the school during the time the premises will be occupied.

The fact that the board of education proposes by the terms of the tentative contract submitted by you, to erect a building with public funds, larger than is necessary for school purposes is sufficient, in and of itself, in my opinion, to preclude the school board from lawfully entering into the proposed contract. It is clearly, as I view it, an attempt on the part of public officers to do by indirection that which they could not do directly. No one would contend that a school board could issue bonds for the purpose of constructing a building or a part of a building to be leased to private parties or for constructing a school building which admittedly was larger than was necessary for the immediate or future needs of the school with a view to leasing a part of the same no matter how advantageous such a lease might be.

In fact there has never been any holding by the courts of Ohio, or by this office, that a board of education possesses the power to lease property held by it for school purposes. Authority is extended to a board of education to sell property held by it, if the same is not needed for school purposes, but no clear statutory authority exists for leasing the same. It was held by a former Attorney General that real estate owned by a board of education could not be leased for oil or gas purposes, *Opinions of the Attorney General, 1918, Volume 2, page 1352.*

Provision is made for the leasing of school and ministerial lands, that is, state school and ministerial lands, but that authority does not cover the property which is held by local boards of education.

It was held by the Attorney General in an opinion which is published in the Opinions of the Attorney General for 1913 at page 1508:

"Section 4749, General Code, which enumerates the power of a board of education with reference to acquiring, holding, possessing and disposing of real and personal property, does not include any provision for the leasing of such property by the board and as the statutes nowhere prescribe the manner of executing such a lease the board cannot be held to possess such power."

In *Weir vs. Day*, 35 O. S. 143, it was held as stated in the first branch of the syllabus:

"Under the act of May 1, 1873, entitled 'An Act for the reorganization and maintenance of common schools' (70 O. L. 195), boards of education are invested with the title to the property of their respective districts in trust for the use of the public schools and the appropriation of such property to any other use is unauthorized."

From the foregoing, it seems clear that if the board of education of Minster Village School District should enter into the proposed contract about which you inquire it would be an attempt to construct a school building with public money larger than was necessary for school purposes and lease the same for the full time of its existence to private parties and thus be an attempt to do by indirection what the board is clearly precluded from doing directly.

It seems to be the universal rule followed by the courts of Ohio, and by this office, that school property cannot be used for other than strictly school purposes, unless specific authority to the contrary is granted by statute. To this end the Legislature made provision in Sections 7622 to 7622-6, General Code, that schoolhouses might be used as recreation centers and for civic, social and grange meeting purposes and for political meetings, under proper rules and regulations.

In addition to the foregoing, I am of the opinion that if it were to be said the Minster Village School Board is authorized by statute, to enter into the proposed contract, there would be violated that portion of Section 6 of Article VIII of the Constitution of Ohio, which provides:

"No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit, to or in aid of, any such company, corporation, or association."

In the case of *Walker vs. City of Cincinnati*, 21 O. S. 15, the court said:

"The mischief which this section interdicts, is a business partnership between a municipality, or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

In the case of *Alter vs. City of Cincinnati, et al.*, 56 O. S. 47, it is held, as stated in the syllabus:

"1. Under section six of article eight of the constitution, a city is prohibited from raising money for, or loaning its credit to, or in aid of, any company, corporation, or association; and thereby a city is prohibited from owning part of a property which is owned in part by another, so that the parts owned by both, when taken together, constitute but one property.

2. A city must be the sole proprietor of property in which it invests its public funds, and it cannot unite its property with the property of individuals or corporations, so that when united, both together form one property."

In the course of the opinion, the court, after quoting from the case of *Walker vs. Cincinnati*, supra, and *Taylor vs. Commissioners*, 23 O. S. 22, said, with reference to the above section of the Constitution:

"This section of the constitution not only prohibits a 'business partnership,' which carries the idea of a joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds or credit, each in aid of the other, is forbidden by the constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit.

The whole ownership and control must be in the public. The city may lease from an individual or corporation any property of which it may need the use, or having property the use of which it does not need, it may lease the same to others, but it cannot engage in an enterprise with an individual or corporation for the construction or erection of a property which, as a completed whole, is to be owned and controlled in part by the city, and in part by an individual or corporation."

In a later case, *City of Cincinnati, et al. vs. Harth*, a taxpayer, 101 O. S. 344, it is said as stated in the syllabus:

"Sections 3812-2 and 3812-3, General Code, passed April 17, 1919 (108 O. L., pt. 1, 215), in so far as they authorize a municipality to renew, replace, repair or reconstruct the rails, ties, roadbeds or tracks of a street railway company, with public money raised by the sale of the bonds of the municipality, are in violation of Section 6, Article VIII of the Constitution, and invalid."

By the terms of the contract which it is proposed shall be entered into by the parties in question, I am impressed that a proper analogy may be drawn between the proposed arrangement and that passed upon by the Supreme Court in the *Walker* and *Alter* cases, supra, and that the proposed arrangement would therefore be unlawful.

I am, therefore, of the opinion, in specific answer to your question that it would be unlawful and not in accordance with the laws of the State of Ohio, for the Minster village board of education to enter into the proposed contract a draft of which is enclosed with your inquiry.

While I do not have before me the form in which the proposed bond issue was submitted to the electors at the recent election, I assume that it was in the usual form, that is "to issue bonds to acquire a site and erect thereon a high school building." If that be true, and the proposition carried, there is nothing to prevent the

school board from proceeding to acquire such a site and erect such a building although it cannot lawfully in my opinion proceed in the manner set forth in the tentative form of contract submitted.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2646.

APPROVAL, CONTRACTS FOR ROAD IMPROVEMENTS IN HAMILTON
AND CUYAHOGA COUNTIES.

COLUMBUS, OHIO, December 9, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

2647.

DISAPPROVAL, BONDS OF VILLAGE OF CEDARVILLE, GREENE
COUNTY, OHIO—\$50,000.00.

COLUMBUS, OHIO, December 9, 1930.

Re: Bonds of Village of Cedarville, Greene County, Ohio, \$50,000.00.

Industrial Commission of Ohio, Columbus, Ohio.

GENTLEMEN :—The ordinance authorizing the above issue of bonds as contained in the transcript relative thereto provides that these bonds are issued for the purpose of "acquiring property and erecting a waterworks system, to lay water pipes for the supplying of water to the corporation and inhabitants thereof, and in anticipation of the collection of special assessments for the improvement of all of the streets in said village for said purpose in accordance with ordinance No. 137 passed the 7th day of October, 1929, determining to proceed with said improvement. This transcript discloses that council has attempted to establish "a special assessment district comprising all the streets and territory within the corporate limits of the village of Cedarville, Ohio". The resolution declaring the necessity of the improvement in question recites that the whole cost of the improvement, which includes main works, less one-fiftieth thereof, the cost of intersections and less fifty per cent of the cost of obtaining the necessary real estate upon which the waterworks is to be erected, shall be assessed upon all the lots and lands in the village bounding and abutting upon all the streets therein. The assessments have been levied to extend over a period of fifteen years.

For the reason that there are no provisions in the Ohio General Code authorizing municipal authorities to establish water districts within municipalities, and for the further reason that a part of the cost of the main waterworks plant is sought to be assessed, it is my opinion that these bonds are not a valid and binding obligation of the municipality and I accordingly advise against their purchase.

Respectfully,
GILBERT BETTMAN,
Attorney General.