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REGARDING THE POWER OF A MUNICIPALITY TO COMPEL A CITY SCHOOL DISTRICT TO COMPLY WITH CITY BUILDING CODE IN CONSTRUCTION ON PROPERTY OF SCHOOL DISTRICT LOCATED IN MUNICIPALITY AND THE REQUIRING OF A PERFORMANCE BOND—ART. XVIII, SEC. 3, OHIO CONSTITUTION—OAG No. 6325—1956.

SYLLABUS:

A municipality has no power under Article XVIII, Section 3, Ohio Constitution, to compel a city school district to comply with the city building code in construction on property belonging to the school district, and located within the limits of the municipality, and a municipality may not require of any person a performance bond conditioned on compliance with the city building code for construction work on such property of a school district.

Columbus, Ohio, June 22, 1960

Hon. James A. Rhodes, Auditor of State
State House, Columbus, Ohio

Dear Sir:

I have before me your request for my opinion, which request reads as follows:

> "The city of Cleveland by the provisions of its codified ordinances under the charter requires that each individual performing either plumbing or sewer work must furnish a personal performance bond to insure the work undertaken and completed to be in accordance with the city ordinances covering such construction. A Cleveland Board of Education employee, who is classified as a Plumber Foreman and who is charged with the supervision of such work, has in the past been personally paying the premium on the aforenoted surety bonds. The bond requirements are based upon the provisions of Sections 5.9716 and 5.972701 of the codified ordinances as hereinafter set forth:
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> " 'Section 5.9716. Bond.
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> Every applicant for registration shall upon approval of the application therefore, furnish and file with the Commissioner of Building and Housing a bond in the penal sum of $5,000 to be approved as to form by the Director of

Finance, guaranteeing full and faithful compliance by the applicant with all the provisions of this Code and with pertinent rules and regulations promulgated by authority of this Code or of the Charter of the City of Cleveland, and binding the surety thereon to correct or abate any violations of this Code or of pertinent rules or regulations promulgated by authority of this Code or of the Charter of the City of Cleveland whenever the applicant for registration named as the principal on such bond, refuses, neglects, or fails to correct or abate such violations within a reasonable time limit set by the Commissioner of Building and Housing.'

" 'Section 5.972701. Master Plumbers Bond.

Any person to whom a Master Plumbers License has been issued by the City of Cleveland, shall before engaging in the business of installing plumbing in buildings or other structures or on premises, by or under the supervision of the licensee, for public hire or otherwise within the City of Cleveland, file a bond with the Commissioner of Licenses and Assessments in the penal sum of five thousand dollars ($5,000.00), to be approved as to form by the Director of Law, and as to sufficiency by the Director of Finance, guaranteeing full and faithful compliance by the Master Plumber with all the provisions of this code and with pertinent rules and regulations promulgated by authority of this Code or of the Charter of the City of Cleveland, and binding the surety thereon to correct or abate any violation of this Code or of pertinent rules or regulations promulgated by authority of this Code or of the Charter of the City of Cleveland whenever the Master Plumber named as the principal on such bond, refuses, neglects, or fails to correct or abate such violation within a reasonable time limit set by the Commissioner of Licenses and Assessments.'

"The question now arises as to whether the premium on such performance bonds may be paid from the funds of the Cleveland Board of Education.

"Giving consideration to the question at hand, reference is made to Niehaus v. State, 111, Ohio State 47, 144 N. E. 433 (G.C. 1035, now R.C. 4107.36) wherein it provides:

" 'The home rule amendment to the State Constitution does not authorize municipalities to charge a fee for the issue of a permit to a school board to erect a public school building nor does it render void Section 1035 requiring the Building Inspection Department of certain municipalities to approve the plans for the erection of such buildings.'

"Reference is also made to Attorney General's Opinion No. 6325 dated March 1, 1956 wherein paragraph 2 of the syllabus provides:

"'The building department of a municipality is unauauthorized to require a fee to be paid by a school district for the inspection and approval of plans submitted for the erection of a school building.'

"Based upon Niehaus v. State 111, Ohio State 47 and Attorney General's Opinion No. 6326 of 1956 wherein a city is without authority under its home rule powers to require a school district to pay a building permit fee. By analogy the question therefore arises as to whether a municipal corporation under its home rule powers may require an employee of the board of education to furnish a personal performance bond which may be forfeited if the work to be performed thereunder is not in accordance with the requirements of the city.

"In accordance with the foregoing information, will you please furnish a formal opinion on the following questions:

"1. May a municipal corporation under its home rule powers require a board of education of a school district to furnish a performance bond covering construction work authorized by said board of education?

"2. May a municipal corporation under its home rule powers require an employee on the payrolls of the board of education of a school district to provide a personal performance bond covering construction authorized by the board of education and erected or constructed by its own employees?

"3. If you rule that the employee is required to furnish the bond, may the board of education pay for such bond out of its funds?"

In examining the question you have presented for my consideration I note that the two sections of the codified ordinances of the City of Cleveland, which sections you have quoted in your request for my opinion, require a performance bond by applicants for registration and by master plumbers in order to guarantee full compliance with the building code of the City of Cleveland. No reference is to be found in these quoted ordinances concerning compliance with the state building code. For this reason it will first be necessary to consider the preliminary question of whether a city school district is required to comply with the building regulations of the city in which its proposed construction or alteration is to be located.

The case of *Niehaus v. State,* 111 Ohio St., 47 (1924), which you cite in your request, in holding that a municipality was without power to require a fee from a school district for the approval of plans for school construction to be located within such municipality, examined the relationship between a municipal corporation and a city school district. In analyzing the extent of a municipality's authority under Article XVIII, Section 3 of the Constitution of Ohio, known as the "home rule" amendment, it stated as follows at pages 54, 54:

> "* * * While within its own boundaries, within the limits of the grant, it executes the functions and possesses the attributes of sovereignty, and to that extent as against its citizens and all persons within its jurisdiction has the rights and immunities of the sovereign, yet as against the sovereign it is but an agent whose powers may be withdrawn at the will of the sovereign that granted them. Hence, the power to exercise sovereignty in local self-government, and local police power not in conflict with general law, does not confer upon municipalities the power to enact and enforce legislation which will obstruct or hamper the sovereign in the exercise of a sovereignty not granted away."

The court then reviewed the status of school districts as authorized by the Constitution of Ohio and concluded as follows:

> "The only constitutional concession of power to municipalities with reference to public schools is a provision that municipalities that have attained to the classification of a city shall have power to determine by a referendum vote the number of members of the school board of the district situated wholly or partly within such city.
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> "The power, then, of the municipality to approve the plans for the erection of a public school building, is the power granted by the Legislature in Section 1035, General Code."

Necessarily inherent in this conclusion of the Supreme Court is the principle that a municipal corporation has no constitutional authority at all to require a school district located within its confines to submit plans or comply with any local police regulations concerning a building code except as have been dictated to it by the General Assembly. In exercising its powers the General Assembly in Section 4107.36, Revised Code, has required all persons planning construction within the corporate limits of the municipality, including school districts, to submit construction plans for the approval of the building inspection department of the municipality. Section 3791.04, Revised Code, a part of the chapter on building standards,

provides a requirement of submission of plans to the municipal building department identical with that of Section 4107.36, Revised Code. Both of these statutes, when construed in *pari materia* with the state building standards as promulgated in the Revised Code, necessitate the conclusion that such plans are to be approved or disapproved on the basis of conformity with the state building code. No provision is made in the statutes for requiring other political subdivisions within the municipality to conform with building requirements established by the city in addition to those promulgated by the General Assembly.

Aspects of this problem have been considered by previous Attorneys General in two opinions. Opinion No. 6326, Opinions of the Attorney General for 1956, page 166, followed the reasoning of the *Niehaus* case, *supra,* and concluded that for a municipality to be authorized to charge a fee for the approval of construction plans submitted by a city school district, it would be necessary to find express authority in the State code for the exacting of such a fee. While the direct holding of the Attorney General in that opinion was that there was no such express authority and that, therefore, the exacting of such a fee was unlawful, he also examined the nature of school districts and stated:

> "The school districts, whether city, village or rural, are the agencies of the state, established by the state in carrying out the state public school system provided for in the state constitution. The school system, being a matter of general and state-wide concern, is beyond the powers of local self-government made available to municipalities in Article XVIII of the Constitution."

A similar conclusion was reached by a previous Attorney General in Opinion No. 3865, Opinions of the Attorney General for 1922, page 1102. This opinion stated, in part, as follows:

> "It is noted here that the language of the constitution as above, grants the powers of 'local self-government,' that is, the government of the municipality concerned, the same being a distinct and separate entity from the city or village school district as the case may be. Again these powers (as to self-government) are limited to 'local police, sanitary and other similar regulations' within the limits of the municipality whose geographical confines in most instances are less in territory than the school district of the municipality. The school districts, whether city, village or rural, are the agencies of the state, established by the state in carrying out the state public school system provided for in Article VI of the constitution. * * *"

This opinion continued to reason that a city board of education is but an agency of the state and entrusted with public property as such agency of the state. That opinion then cited with approval, Opinion No. 1181, Opinions of the Attorney General for 1914, Vol. 2, page 1307, which held that Ohio State University was exempt from payment of a fee imposed by the City of Columbus for approval of construction plans and also cited with approval and quoted as follows from the case of *Kentucky Institution for Education of the Blind, v. Louisville,* 8 L.R.A., n.s., 553:

> " 'The state will not be presumed to have waived its right to regulate its own property, by ceding to the city the right generally to pass ordinances of a police nature regulating property within its bounds * * *. The principle is, that the state when creating municipal governments, does not cede to them any control of the state's property situated within them, nor over any property which the state has authorized another body or power to control.' "

Based on these authorities I am compelled to arrive at the conclusion that in the same way that a municipality is without power to charge a fee for the approval of construction plans submitted by a school district pursuant to Sections 3791.04 and 4107.36, Revised Code, a municipality has no authority under Article XVIII, Section 3, to require a city school district, which as an independent political subdivision authorized by the Constitution and established by the General Assembly is an agency of the state, to comply with provisions of a city building code which the municipality may have adopted.

Returning to the quoted ordinances of the City of Cleveland, I am constrained to conclude that inasmuch as the stated performance bonds are required to assure compliance with the city building code with which the municipality is without the power to compel a city school district to comply, no person who is engaged in construction or alteration solely on premises owned by a school district may be required by a municipality to supply a performance bond conditioned on compliance with the city building code for such construction. In light of this conclusion, a city board of education may not pay for or reimburse an employee for payment of premiums on such performance bonds.

It is, therefore, my opinion and you are accordingly advised, that a municipality has no power under Article XVIII, Section 3, Ohio Constitution, to compel a city school district to comply with the city building

code in construction on property belonging to the school district, and located within the limits of the municipality, and a municipality may not require of any person a performance bond conditioned on compliance with the city building code for construction work on such property of a school district.

Respectfully,
MARK MCELROY
Attorney General