

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF FAIRFIELD,	:	
CUMBERLAND COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
ROBERT ENCH AND SANDERINA R.	:	DECISION
KASPER, EXECUTRIX OF THE ESTATE	:	
OF BENJAMIN KASPER, PARTNERS	:	
TRADING AS BENCH REALTY,	:	
FREDERICK A. JACOB, AND OLD	:	
REPUBLIC NATIONAL INSURANCE	:	
COMPANY,	:	
	:	
RESPONDENTS.	:	
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SYNOPSIS

Petitioning Board sought determination as to whether land may be acquired by a board of education without submitting the question to voters. The Board and respondent sellers entered into an Agreement of Sale in 1995 for the land on which the Board intended to construct a new school. The Board did not seek voter approval, nor did it include an appropriation for the purchase of the land as a line item in the proposed budget. The Board did request and receive site approval from the County Superintendent.

The ALJ determined that voter authorization was not required, because petitioner did not borrow any money for the property purchase, having effectuated such purchase by using surplus funds. *N.J.S.A. 18A:20-4.2(d)*. Thus, the ALJ concluded that, under the facts and circumstances of this matter, the Board did not violate the School Laws when it determined to purchase the real property for school property without submitting the proposal to its voters. Although the ALJ determined that the Board improperly failed to provide for a line item including the proposed expenditure in its annual school budget, the ALJ found that this procedural defect was not sufficient grounds to warrant overturning the Board's action to purchase the property in question. The ALJ concluded that the sale and purchase was in accordance with the law and ordered the acquisition of the property sustained.

The Commissioner affirmed in part, reversed in part and remanded for further proceedings. The Commissioner concurred with the ALJ that the Board erred in not including a line item appropriation for purchase of the property in the annual school budget submitted to the voters. The Commissioner did *not* concur, however, that the Board was able to purchase land without specific authorization from the voters to do so. Disagreeing with the ALJ's analysis of the history and construction of *N.J.S.A. 18A:20-4.2*, the Commissioner found instead that *N.J.S.A. 18A:20-4.1* and *4.2* must be read in tandem, and that when so read in light of their legislative history, these statutes do *not* permit boards of education to purchase property without prior approval of the voters, regardless of whether or not money is borrowed for such purpose. However, the Commissioner declined to void the transaction in dispute or order other relief on the present record. Because the effect of a holding that the Board was not in substantive compliance with law had not been fully argued or considered at the OAL, the Commissioner remanded the matter for further proceedings on that issue.

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The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties did not file exceptions.

Upon careful and independent review, the Commissioner determines to affirm in part and reverse in part the recommended decision of the Administrative Law Judge (ALJ).

Initially, for the reasons set forth in the Initial Decision, the Commissioner concurs that the Board herein was obligated to submit to the voters of its District a budget which included a line item accounting for purchase of the land in question. *N.J.S.A. 18A:22-1 et seq.*

However, on the question of whether the Board was required to obtain voter approval prior to acquiring the property at issue, the Commissioner does not concur with the ALJ's conclusion that such approval was unnecessary because the Board did not borrow money for the property purchase.

In so concluding, the ALJ accepted the Board's argument that *N.J.S.A. 18A:20-4.1* was not relevant to the instant matter, since the transaction in question was neither a rental

nor an option, and that *N.J.S.A.* 18A:20-4.2(d), which requires voter approval for the borrowing of money, was the controlling provision. (Initial Decision at 13-14, based upon argument at 5-7)

The Commissioner, however, finds that *N.J.S.A.* 18A:20-4.1 cannot be ignored in the present analysis, and that this section must be read in conjunction with *N.J.S.A.* 18A:20-4.2 in order to elicit the meaning and intent of the latter as it pertains to the within dispute. The statutes in question provide as follows:

18A:20-4.1 The board of education of any type II school district may without authority first obtained from the voters of the district:

(a) Rent, on a year-to-year basis, or for a term not to exceed 5 years, in case of emergency, buildings to use for school purposes; and

(b) Take an option not to exceed 1 year in duration, at a cost not to exceed the fair market value of such option, on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters to the purchase thereof, but such option may be exercised by the board only after authority to purchase the property covered by such option has been given at an annual or special school election.

18A:20-4.2 The board of education of any school district may, for school purposes:

(a) Purchase, take and condemn lands within the district and lands not exceeding 50 acres in extent without the district\*\*\*;

(b) Grade, drain and landscape lands owned or to be acquired by it and improve the same in like manner;

(c) Erect, lease for a term not exceeding 50 years, enlarge, improve, repair or furnish buildings;

(d) Borrow money therefor, with or without mortgage; in the case of a type II district without a board of school estimate, when authorized so to do at any annual or special school election;\*\*\*;

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Considering first the plain language of the statutes, the provision of 18A:20-4.1(b) limiting the availability of options to *only* those pieces of land which the board *could* purchase *after securing voter approval* and permitting the actual exercise of the option *only* after *authority for the purchase* has been given *at an annual or special school election* clearly makes no sense without a concomitant requirement that land purchases must generally be authorized by the voters of the district. Such a requirement may be inferred from the immediately following *N.J.S.A.* 18A:20-4.2, related both by codification and history; otherwise, the segregation of actions which boards

of education may undertake with respect to property into two sections of statute, one expressly dedicated to actions not requiring voter approval, would serve no purpose. That section (d) of *N.J.S.A.* 18A:20-4.2 expressly requires voter approval for the borrowing of money for the purchase of property does not imply that such approval is *not* required when no money is borrowed, or that none of the actions previously enumerated requires voter approval. Rather, the focus of this provision is on the act of *borrowing*, not on the transaction for which the money is borrowed; its purpose is plainly to provide an affirmative authorization for boards *to borrow money* for lawful actions previously enumerated, provided that the voters have expressly authorized the borrowing.

Such interpretation is not only consistent with the facial language and structure of the statutes; it is, more significantly, fully supported by the legislative history of their enactment. As noted by the ALJ, *N.J.S.A.* 18A:20-4.2 originated as *R.S.* 18:7-73. What the Initial Decision fails to take into account, however, is that the history of 18A:20-4.2 may not be considered apart from that of 18A:20-4.1, which *also* originates in *R.S.* 18:7-73. The latter provision, prior to its amendment in 1945, read as follows:

18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase, sell and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage.

In 1945, the section was amended to read:

18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase [, sell] and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage. A board of education may sell or dispose of any of its real estate, or rights or interest therein, which cease to be suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes, in the manner set forth in sections 18:5-25 to 18:5-29, both inclusive, of this Title.

The stated intent, and clear effect, of the 1945 amendment was to remove the requirement for voter approval of *sale* of unneeded or unsuitable real estate. (Assembly, No. 348, Introduced

March 12, 1945; enacted as *P.L.1945, c. 133*) Thus, the statute now differentiated sale of property from purchase, lease and improvement, so that the former no longer required a vote.

In 1948, the statute was amended yet again, to read as follows:

18:7-73. With the previous authority of a vote of the legal voters of the district, a board may purchase and improve school grounds; erect, lease, enlarge, improve, repair or furnish school buildings and borrow money therefor with or without mortgage. Without such previous authority: (a) a board of education may, in case of emergency, rent, on a year-to-year basis, buildings to use for school purposes; and (b) take an option, not to exceed one year in duration at a cost not to exceed one hundred dollars (\$100.00), on the purchase of any land which the board could lawfully purchase after securing the consent of the legal voters as required by this section. Such option may be exercised by a board only after authority to purchase the property covered by such option has been given by a vote of the legal voters of the district.

A board of education may sell or dispose of any of its real estate, or rights or interest therein, which cease to be suitable or convenient for the use for which they were acquired or which are no longer needed for school purposes, in the manner set forth in sections 18:5-25 to 18:5-29, both inclusive, of this Title.

The stated intent, and clear effect, of this amendment was to create the ability for a board to take an option on land which it was seeking the authority to purchase as required elsewhere in the section. (Assembly, No. 227, Introduced February 16, 1948; enacted as *P.L.1948, c. 162*) Thus, the statute retained the distinction between purchase and sale of property, but now also created a specific, limited exception to the general requirement for voter approval.

*R.S.* 18:7-73 was not amended again until 1967, when, as noted by the ALJ, the language “with the previous authority of a vote of the legal voters of the district” was omitted from the newly enacted 18A:20-4.2. That amendment, however, did not arise from a deliberate, substantive consideration of the section. Rather, as part of its comprehensive revision of Title 18A, effectuated through *P.L.1967, c. 271*, the Legislature recodified *R.S.* 18:7-73 into three distinct sections, each dealing with one of the three aspects of the original statute: 18A:20-4.1, dealing with emergency leasing and option without voter approval, i.e., with the substance of the 1948 amendment; 18A:20-4.2, dealing with the remaining then-legislated aspects of purchase, lease and construction, including those formerly found in *R.S.* 18:7-74 (acquisition of land in

adjoining municipalities) and 18:7-75 (condemnation of land) as well as those found in 18:7-73;<sup>1</sup> and 18A:20-5, dealing with sale and disposal, i.e., with the substance of the 1945 amendment to 18:7-73, plus other related sections. (Title 18A, Schedule A, Allocation of Source Material at 334) Indeed, in enacting *P.L. 1967, c. 271*, the Legislature expressly stated that the law was “a revision law” and that its provisions “not inconsistent with prior laws, shall be construed as a continuation of such prior laws.” (*N.J.S.A. 18A:76-1*) In accordance with this view, the treatment of the source material for *N.J.S.A. 18A:20-4.1* is identified in the New Jersey Statutes Annotated as “Editorial,” and that of 18A:20-4.2 as “Revised to consolidate source sections.” (Title 18A, Schedule B, Treatment of Source Material at 381). Clearly, it cannot be said under these circumstances that omission of the words “with the previous authority of a vote of the legal voters of the district” from *N.J.S.A. 18A:20-4.2* may be construed as a deliberate legislative action intended to alter a statutory requirement dating to at least the turn of the century; rather, such omission is clearly nothing more than a consequence, unfortunate in hindsight, of revisory legislative drafting that left implicit through the structuring of sections a distinction which had previously been explicitly stated. The confusion inherent in this situation has been compounded over the years by the addition of discrete sections to *N.J.S.A. 18A: 20-4.2*, dealing with board actions for which the Legislature clearly did not intend to require separate voter authorization. The fact remains, however, that at no time did the Legislature take specific action to remove the requirement for purchase of land to be authorized by the voters of the district; therefore, the Board in this instance acted outside the scope of its lawful authority in effectuating the purchase of the Buckshutem Road tract without such approval.

Notwithstanding the holding above, however, the Commissioner declines on the present record to void the transaction at issue, as requested by the Board in the event of a finding

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<sup>1</sup>Significant in this context, *R.S. 18:7-75* expressly requires voter approval prior to initiating condemnation proceedings, while 18:7-74 states that all proceedings to acquire land in adjoining municipalities “shall be in accordance with the provisions of this Title.”

that applicable statutory provisions were not followed. Because he found that the Board's action was in substantive compliance with law, the ALJ did not reach, nor did the parties have an opportunity to fully argue, the question of what the effect of a holding to the contrary would be. This is particularly significant herein, where petitioner's request for judgment specifically sought, if the Board's action were found to be *ultra vires*, a directive from the Commissioner for reconveyance of land to the sellers, return of the purchase price to the Board, and reimbursement of costs from the respondent attorney and title insurance company.

Accordingly, the Initial Decision of the ALJ is affirmed in part, and reversed in part, as set forth herein, and is, moreover, remanded to the OAL for further proceedings on the question of whether the transaction at issue should be voided as a result of the Commissioner's holding. Additionally, the Commissioner directs the petitioning Board and all boards to henceforth comply with the requirement that express voter approval be obtained prior to the purchase of any land.

IT IS SO ORDERED.<sup>2</sup>

COMMISSIONER OF EDUCATION

Date of Decision: February 17, 2000

Date of Mailing: \_\_\_\_\_

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<sup>2</sup> This decision, as the Commissioner's final determination, may be appealed to the State Board of Education pursuant to *N.J.S.A. 18A:6-27 et seq.* and *N.J.A.C. 6:2-1.1 et seq.*, within 30 days of its filing. Commissioner decisions are deemed filed three days after the date of mailing to the parties.