July 21, 2008

The Honorable Gary L. Lammers
Putnam County Prosecuting Attorney
336 E. Main Street
Suite B
Ottawa, Ohio 45875

SYLLABUS: 2008-025

1. Under R.C. 3318.36(E)(2), a school district board must use reimbursement moneys received from the Ohio School Facilities Commission under the School Building Assistance Expedited Local Partnership Program (ELPP) to pay off any debt service the district owes for classroom facilities constructed under ELPP before the moneys are applied to any other purpose, except to reimburse local resources withdrawn from the district's general fund or a permanent improvement fund.

2. Construction is performed under ELPP if it is included in the discrete part of the district classroom facilities needs addressed under ELPP. Debt service resulting from a lease-purchase loan agreement under R.C. 3313.375 may be paid with ELPP reimbursement moneys as debt service for ELPP construction under R.C. 3318.36(E)(2) only if construction under the lease-purchase agreement was performed under ELPP.

3. A school district board cannot use ELPP reimbursement moneys to pay off a lease-purchase loan for construction performed under a lease-purchase agreement that is not construction under ELPP unless all debt service owed for construction undertaken under ELPP has been paid.

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OPINION NO. 2008-025

The Honorable Gary L. Lammers
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Dear Prosecutor Lammers:

We have received your request for an opinion concerning the legality of a plan for funding the construction of a school building. The plan has been proposed by a local school district that is a participant in the School Building Assistance Expedited Local Partnership Program (ELPP) of the Ohio School Facilities Commission under R.C. 3318.36. You have described the proposed funding plan and asked if it is lawful in that it provides for the school district to use its ELPP credit reimbursement to pay off a lease-purchase loan.

For the reasons set forth in this opinion, we reach the following conclusions:

1. Under R.C. 3318.36(E)(2), a school district board must use reimbursement moneys received from the Ohio School Facilities Commission under the School Building Assistance Expedited Local Partnership Program (ELPP) to pay off any debt service the district owes for classroom facilities constructed under ELPP before the moneys are applied to any other purpose, except to reimburse local resources withdrawn from the district's general fund or a permanent improvement fund.

2. Construction is performed under ELPP if it is included in the discrete part of the district classroom facilities needs addressed under ELPP. Debt service resulting from a lease-purchase loan agreement under R.C. 3313.375 may be paid with ELPP reimbursement moneys as debt service for ELPP construction under R.C. 3318.36(E)(2) only if construction under the lease-purchase agreement was performed under ELPP.

3. A school district board cannot use ELPP reimbursement moneys to pay off a lease-purchase loan for construction performed under a lease-purchase agreement that is not construction under ELPP unless all debt service owed for construction undertaken under ELPP has been paid.

Background Information

In the situation you have described, the Ohio School Facilities Commission assessed the classroom facility needs of a local school district participating in ELPP and proposed two possible master plans—one for a single building for grades PK-12 at a cost of $18,624,042, and the second for two buildings, one for PK-6 and the other for 7-12, at a cost of $19,680,561. The school district board decided to accept the two-building plan and obtained the Commission's approval. The ELPP agreement between the Commission and the school district identified Phase I of the High School Building as the discrete portion of the district-wide master plan that constituted the part of the needed facilities to be constructed under ELPP.

Consistent with its decision to construct two buildings, the school district submitted to the electors a bond levy for the construction, renovation, and improvement of school buildings and facilities. The levy passed, the district sold bond anticipation notes that were converted into bonds, and construction began. Approximately sixteen months later the students began using the newly constructed high school building.

The following month, the Commission determined the likelihood that the school district would be eligible for state funds in approximately two years. The Commission had an enrollment projection performed and determined that under the updated projections the district did not have sufficient student population to support two buildings. *See* R.C. 3318.03. The Commission informed the district that state funding would be capped at the cost of a new K-12 facility, so that if the district chose to continue with the two-building plan, the remaining costs would constitute a locally funded initiative. The Commission determined that the district was entitled to a reimbursement of a portion of the local share already expended.

You have informed us that the school district board would like to honor its promise to the community and build the two buildings. The board would like to use the ELPP reimbursement moneys to build the second building and proposes to do that in the following manner. Upon receipt of the ELPP credit reimbursement (possibly in March or April of 2008), the district would deposit it into the bond retirement fund. The district would then secure a lease-purchase loan agreement for the amount of the credit reimbursement (possibly in April or May of 2008) and proceed to construct the building (possibly starting in June of 2008). After construction, the district would pay off the lease-purchase loan with the ELPP reimbursement moneys contained in the bond retirement fund (possibly in August or September of 2008).

You have also informed us that the school district in question has received an opinion from its legal counsel that it is permissible for a school district to use a credit reimbursement received from the Ohio School Facilities Commission under ELPP to pay off a lease-purchase

loan. The district seeks assurance that the ELPP credit may lawfully be used to pay its obligations under the lease-purchase agreement in the manner proposed.

We note that we are not able to use this opinion to make findings of fact, and that it is not an appropriate function of a formal opinion of the Attorney General to determine the validity of a particular contract or the rights of specific persons. *See, e.g.*, 2004 Op. Att'y Gen. No. 2004-012, at 2-97 ("[t]he Attorney General may not appropriately use the opinion-rendering function to make findings of fact or determine the rights of parties to a particular agreement; only the judiciary is empowered to ultimately determine the respective rights of the parties to a contract in cases of dispute"). Hence, this opinion does not determine the legality or sufficiency of the specific plan you have described. Instead, we address only general principles surrounding the issue of whether a school district is permitted to use a credit reimbursement received from the Ohio School Facilities Commission under ELPP to pay off a lease-purchase loan.

Implementation of the Expedited Local Partnership Program

To address your question, it is helpful to review the manner in which the Expedited Local Partnership Program is established and implemented. The Ohio School Facilities Commission was created under R.C. 3318.30 for the purpose of providing state funding to assist school districts with the acquisition or construction of school facilities. R.C. 3318.30(A); *see* 2006 Op. Att'y Gen. No. 2006-027, at 2-235. The Commission performs periodic assessments of the classroom facility needs of Ohio's school districts, determines the cost to each district of constructing, acquiring, or renovating facilities, and provides state assistance for meeting those needs. R.C. 3318.02; R.C. 3318.03; *see* R.C. 3318.01(B) (defining "[c]lassroom facilities"). The board of education of a school district (known as a school district board, *see* R.C. 3318.01(E)) is required to pay a portion of the basic project cost. R.C. 3318.032; R.C. 3318.05; *see* R.C. 3318.01(K) ("'[r]equired percentage of the basic project costs' means one per cent of the basic project costs times the percentile in which the school district ranks for the fiscal year preceding the fiscal year in which the controlling board approved the district's project"); R.C. 3318.01(L) (defining "[b]asic project cost").

Because of the number of school districts in the state and the extent of the costs involved, the Ohio School Facilities Commission is directed to address the needs of school districts in a series of rounds, beginning with school districts in the first through fifth percentiles of average adjusted tax valuation per pupil and proceeding to school districts in higher percentiles when eighty percent of the districts in the preceding round have had projects approved or in certain other circumstances. R.C. 3318.02(C); *see also* R.C. 3318.01(Q); R.C. 3318.011. Thus, there will be a delay before all districts can receive financial assistance from the Commission. The School Building Assistance Expedited Local Partnership Program (ELPP) set forth in R.C. 3318.36 provides a method for dealing with the delay factor.

Under ELPP, the Ohio School Facilities Commission is authorized to enter into an agreement with a school district board under which the school district board may proceed with "the new construction or major repairs of *a part of the school district's classroom facilities*

needs" through the expenditure of local resources[1] prior to the time when the school district becomes eligible for state assistance under R.C. 3318.01-.20 (also known as the Classroom Facilities Assistance Program (CFAP)). R.C. 3318.36(B)(1) (emphasis added). ELPP permits a school district board to use that local funding as part of its share of the cost of "the total of the school district's classroom facilities needs" for which state funds eventually become available. R.C. 3318.36(B)(1); *see also* R.C. 3318.032 (district's share of basic project costs).

To participate in ELPP, a school district board must adopt a resolution certifying to the Commission the board's intent to participate and must specify "the approximate date that the board intends to seek elector approval of any bond or tax measures or to apply other local resources to use to pay the cost of classroom facilities to be constructed under [R.C. 3318.36]." R.C. 3318.36(B)(2). The Commission must determine the basic project cost of the classroom facilities needs of the school district and the school district's portion of that cost, and the Controlling Board must provide approval. R.C. 3318.36(B)(2), (D)(1). "Upon approval by the controlling board, the school district board may identify *a discrete part of its classroom facilities needs, which shall include only new construction of or additions or major repairs to a particular building, to address with local resources*." R.C. 3318.36(D)(1) (emphasis added); *see also* R.C. 3318.36(B)(2) ("the board may proceed with a discrete portion of its project under this section as soon as the commission and the controlling board have approved the basic project cost of the district's classroom facilities needs"). The school district board may allocate any available school district moneys (including the proceeds of bonds, if approved by the electorate) to pay the cost of that identified discrete part of its classroom facilities needs. R.C. 3318.36(D)(1). Detailed financial requirements are set forth, including requirements for funding the maintenance of the facilities to be constructed. R.C. 3318.36(D). There is no reference in R.C. 3318.36 to lease-purchase agreements, and there is no indication in the instant case that the ELPP agreement between the Commission and the school district board involved any lease-purchase arrangement. Rather, the information submitted states that the approval of the school district's agreement to participate in ELPP identified the discrete portion of the district-wide master plan that was addressed in ELPP as Phase I of the High School Building.

Under ELPP, a school district's classroom facilities needs are determined initially under R.C. 3318.01-.20 and are recalculated under R.C. 3318.30(E) when the school district becomes eligible for state assistance. R.C. 3318.36(B)(1), (E)(1). If the school district has spent more than its portion of the new basic project cost, it may receive a credit reimbursement from the Ohio School Facilities Commission as set forth in R.C. 3318.36(E):

> (2) If the amount of school district resources applied by the school district board to the school district's portion of the basic project cost under this

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[1] "Local resources" means "any moneys generated in any manner permitted for a school district board to raise the school district portion of a project undertaken with assistance under [R.C. 3318.01-.20]." R.C. 3318.36(A)(1)(c).

> section is more than the total amount of such portion as recalculated under this division, within one year after the school district's portion is recalculated under division (E)(1) of this section the commission may grant to the school district the difference between the two calculated portions, but at no time shall the commission expend any state funds on a project in an amount greater than the state's portion of the basic project cost as recalculated under this division.
>
> Any reimbursement under this division shall be only for local resources the school district has applied toward construction cost expenditures for the classroom facilities approved by the commission, which shall not include any financing costs associated with that construction.
>
> *The school district board shall use any moneys reimbursed to the district under this division to pay off any debt service the district owes for classroom facilities constructed under its project under this section before such moneys are applied to any other purpose.* However, the district board first may deposit moneys reimbursed under this division into the district's general fund or a permanent improvement fund to replace local resources the district withdrew from those funds, as long as, and to the extent that, those local resources were used by the district for constructing classroom facilities included in the district's basic project cost. (Emphasis added.)

R.C. 3318.36(E)(2) thus specifies three purposes for which ELPP reimbursement moneys may be used: first, to be deposited into the district's general fund or a permanent improvement fund to replace local resources used for constructing classroom facilities included in the district's basic project cost; second, to be used to pay off debt service owed for classroom facilities constructed under the district's project under R.C. 3318.36; and finally, to be applied to other purposes. If a school district did not withdraw amounts that may be reimbursed into its general fund or permanent improvement fund (or made the withdrawals but does not choose to make the reimbursement), it must deposit the ELPP reimbursement moneys into a fund that will permit them to be used to pay off any debt service the district owes for classroom facilities constructed under its project under R.C. 3318.36. If any ELPP moneys might remain after all that debt service is paid, the ELPP moneys may be applied to another purpose, within any limits established by law.[2]

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[2] Debt service for bonds is commonly paid from the school district's bond retirement fund, which is a common debt service fund established under R.C. 5705.09(C) "for the retirement of serial bonds, notes, or certificates of indebtedness." Your opinion request indicates that ELPP reimbursement moneys must as a matter of law be deposited into the school district's bond retirement fund. It may be possible, however, to make use of a different fund or accounting method. For example, if it were anticipated that some ELPP reimbursement moneys would remain after all the debt service owed for classroom facilities constructed under the school district's project under R.C. 3318.36 was paid, the school district might seek to account for the

Lease-Purchase Agreements

A resolution of your question requires an understanding of the provisions governing lease-purchase agreements for school construction under R.C. 3313.375. A school district board is authorized by R.C. 3313.375 to enter into a lease-purchase agreement for the construction, improvement, furnishing, equipping, leasing, and eventual acquisition of a building or improvements to a building. The agreement must provide for a lease for a series of one-year renewable lease terms totaling not more than thirty years, and may also require the payment of a lump sum amount. The agreement must provide that at the end of the series of lease terms the title shall be vested in the school district "if all obligations of the school district . . . provided for in the agreement have been satisfied." R.C. 3313.375. Payments under the agreement "may be deemed to be, and paid as, current operating expenses." *Id.* Obligations under a lease-purchase agreement under R.C. 3313.375 "shall not be considered to be net indebtedness of a school district" under R.C. 133.06, a part of the Uniform Public Securities Law establishing limitations on the net indebtedness of a school district in terms of stated percentages of the district's tax valuation. R.C. 3313.375; *cf.* R.C. 133.01(GG)(2) ("[p]ublic obligations" include "[o]bligations of a public issuer to make payments under installment sale, lease, lease purchase, or similar agreements, which obligations bear interest or interest equivalent"). *See generally* 2004 Op. Att'y Gen. No. 2004-012, at 2-91 (a lease-purchase agreement "is typically considered to be a method of financing the purchase of property, rather than a true lease"); note 5, *infra*.

ELPP moneys in a manner that would allow it to expend those remaining moneys for purposes other than those of the district's bond retirement fund. To the extent that there are concerns about the manner in which the school district should account for the ELPP reimbursement moneys to permit those moneys to be used for the purposes prescribed by R.C. 3318.36(E)(2), it may be appropriate to consult with the Office of the Auditor of State. *See* 2004 Op. Att'y Gen. No. 2004-017, at 2-141 ("it is appropriate for funds and accounts to be structured to enable public officials to expend public moneys in accordance with the provisions of law governing the expenditure of those moneys"); 1986 Op. Att'y Gen. No. 86-054, at 2-296 to 2-297 (the commingling of moneys available for different purposes may restrict the purposes for which particular moneys may be used); 1981 Op. Att'y Gen. No. 81-035, at 2-137 to 2-138 (commingled moneys). *See generally, e.g.*, R.C. 5705.09(B), (C) (each subdivision shall establish a sinking fund when it has outstanding bonds other than serial bonds and a bond retirement fund for the retirement of serial bonds, notes, or certificates of indebtedness); R.C. 5705.09(F) (each subdivision shall establish "[a] special fund for each class of revenues derived from a source other than the general property tax, which the law requires to be used for a particular purpose"); R.C. 5705.10(B)-(F) (bond retirement fund, sinking fund, special fund); R.C. 5705.10(H) ("[m]oney paid into any fund shall be used only for the purposes for which such fund is established"); R.C. 5705.12 (additional special funds approved by Auditor of State); Mary Taylor, CPA, Auditor of State, *Uniform School Accounting System Users Manual* 19 (July 2005) ("[d]ebt service funds are used to account for the accumulation of resources for, and the payment of, general long-term and short-term debt principal and interest").

Notwithstanding the fact that obligations under a lease-purchase agreement are not considered to be net indebtedness for purposes of R.C. 133.06, they are considered part of net bonded indebtedness for purposes of R.C. 3318.01-.20 and R.C. 3318.36[3] under the following definition:

> (F) "Net bonded indebtedness" means the difference between *the sum of the par value of all outstanding and unpaid bonds and notes which a school district board is obligated to pay and any amounts the school district is obligated to pay under lease-purchase agreements entered into under section 3313.375 [3313.37.5] of the Revised Code*,[4] and the amount held in the sinking fund and other indebtedness retirement funds for their redemption. Notes issued for school buses in accordance with section 3327.08 of the Revised Code, notes issued in anticipation of the collection of current revenues, and bonds issued to pay final judgments shall not be considered in calculating the net bonded indebtedness.
>
> "Net bonded indebtedness" does not include indebtedness arising from the acquisition of land to provide a site for classroom facilities constructed, acquired, or added to pursuant to sections 3318.01 to 3318.20 of the Revised Code or the par value of bonds that have been authorized by the electors and the proceeds of which will be used by the district to provide any part of its portion of the basic project cost.

R.C. 3318.01 (emphasis and footnote added). Under this definition, amounts the school district is obligated to pay under lease-purchase agreements under R.C. 3313.375 are included with the amounts of unpaid bonds and notes (and differentiated from the amount held in the sinking fund and other indebtedness retirement funds for their redemption) for purposes of determining the district's net bonded indebtedness in order to calculate the required level of indebtedness that a district must incur to receive state funding under R.C. Chapter 3318, which in turn is used to determine the school district's portion of the basic project cost. R.C. 3318.01(J), (K); R.C. 3318.032.[5]

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[3] *See* R.C. 3318.01(F); R.C. 3318.36(A)(1).

[4] A school district board may also enter into certain types of lease-purchase agreements under other statutory provisions that are not mentioned in R.C. 3318.01(F) and are not addressed in this opinion. *See, e.g.*, R.C. 3313.37(B)(1), (3), (4), (5) (acquisition of land, federal land, office equipment and computer hardware and software for educational purposes, and maintenance equipment); R.C. 3313.373 (acquisition and installation of energy conservation measure); 2004 Op. Att'y Gen. No. 2004-012.

[5] R.C. 3313.375 provides express authorization for a board of education to construct school buildings through a specified lease-purchase procedure. As initially enacted in 1995, R.C. 3313.375 structured lease-purchase agreements formed under its provisions as continuing

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contracts, stating in part: "Contracts governing lease-purchase agreements authorized by this section are continuing contracts under section 5705.41 of the Revised Code." 1995-1996 Ohio Laws, Part I, 900, 1169 (Am. Sub. H.B. 117, eff. June 30, 1995); *accord* Ohio Legislative Service Comm'n, 121-HB117 LSC Final Analysis, Nonappropriation Provisions of Am. Sub. H.B. 117 (1995); *see also, e.g.,* R.C. 5705.41(D); 1987 Op. Att'y Gen. No. 87-069.

R.C. 3313.375 was amended in 1999, *see* 1999-2000, Part I, 1354, 1362 (Sub. H.B. 220, eff. Nov. 2, 1999), to change the structure of the lease-purchase agreements it authorizes, as described in the following analysis:

> Lease-purchase agreements are not continuing contracts. *Under the bill, a lease-purchase agreement is no longer considered to be a continuing contract.* Instead, the agreement must consist of *a series of not more than 30, one-year renewable lease terms.* Thus, for the purpose of the statute requiring that sufficient funds be on hand before a school district may enter into a contract, *the school district apparently must have enough funds on hand each year for the payments due that year in order to renew the lease.*
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> A lump sum payment is still permitted as part of a lease-purchase agreement, but it does not necessarily have to be paid at the end of the lease.
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> Any payments under the agreement can be deemed to be, and paid as, current expenses.
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> Purpose of lease-purchase agreements. The bill permits school districts to enter into lease-purchase agreements not only for the construction of buildings, but for enlarging, improving, furnishing, and equipping buildings.
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> Eventual transfer of ownership conditional on fulfillment of district's obligations. *The bill specifies that under a lease-purchase agreement, the transfer of the land or building to a school district at the end of the agreement is conditional upon the school district satisfying all of its obligations under the agreement.*
>
> Right to cancel agreement not required. The bill eliminates the current requirement that lease-purchase agreements grant school districts the right to cancel the agreement without penalty.

Ohio Legislative Service Comm'n, 123-HB220 LSC Analysis, Sub. H.B. 220 (As Reported by S. Education) (1999) (emphasis added). R.C. 3313.375 has since been amended but the basic financial structure of its lease-purchase agreements remains as set forth in Sub. H.B. 220. A lease-purchase agreement under R.C. 3313.375 thus consists of a series of one-year lease terms

subject to annual appropriations and may also provide for a lump sum payment. The leased property is transferred to the school district upon the satisfaction of all its obligations under the agreement. R.C. 3313.375. The lease-purchase agreement thus imposes obligations upon the school district, and for certain purposes these obligations are included as debt of the school district. *See* R.C. 3318.01(F).

The question of what kind of debt is created under various lease-purchase agreements has been the subject of discussion and debate under Ohio law. Ohio Const. art. XII, § 11 prohibits the state or a political subdivision from incurring "bonded indebtedness" unless the legislation under which the indebtedness is incurred makes provision "for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds" and providing a sinking fund for their final redemption. It has been found that an agreement that formally obligates a subdivision to make specific future payments may constitute a "bond" and create "bonded indebtedness," even though the arrangement is structured as a lease. *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972) (city's purported lease of a swimming pool was actually an installment purchase contract and the entire contract price was a present indebtedness of the city); *see* 2004 Op. Att'y Gen. No. 2004-012, at 2-94 to 2-96 nn.3 & 4; 1993 Op. Att'y Gen. No. 93-039, at 2-208 ("[a] written agreement to make specific future payments of money constitutes a bond, and creates bonded indebtedness for purposes of Ohio Const. art. XII, § 11"); 1985 Op. Att'y Gen. No. 85-008, at 2-31 n.6 ("if the county creates a present indebtedness in entering into a lease/purchase agreement for the county jail, a tax must be levied to retire the debt"); 1980 Op. Att'y Gen. No. 80-042, at 2-178 ("[i]n the event bonded indebtedness is created, the enabling legislation must provide for the levy of a tax for the liquidation of the debt"). *See generally* Kimball H. Carey, *Anderson's Ohio School Law Manual* § 6.03 n.8 (2008 ed.) (describing the long-term lease-purchase transaction structured by R.C. 3313.375 as a "rather unusual arrangement" and stating that it "may represent an attempt by the legislature to avoid having such agreements characterized as 'debt'—which would in turn trigger the tax levy requirement" of Ohio Const. art. XII, § 11); Susan C. Hastings, et al., *Ohio School Law* § 41:2 (2007-2008 ed.) ("[g]enerally, if properly structured, these methods [including leases, lease-purchase agreements, and shared savings agreements] do not constitute debt for purposes of constitutional and statutory debt limitations or 'securities' for purposes of the Uniform Bond Law . . . . However, if improperly structured, they may, in fact, constitute debt and be subject to some or all of these restrictions").

The use of the term "obligations" in R.C. 3313.375 raises some questions. The fact that a lease-purchase arrangement under R.C. 3313.375 is structured as a series of one-year renewable lease terms indicates that if the lease is not renewed for any of those terms, the school district has no "obligation" to make any subsequent payments, a result that is consistent with the position that there is no bonded indebtedness. The ordinary meaning of the term "obligations" suggests to the contrary that there is a commitment to pay the amounts set forth in the lease-purchase agreement.

Meaning of "debt service . . . for classroom facilities constructed under its project under this section" in R.C. 3318.36(E)(2)

To determine the circumstances in which ELPP reimbursement moneys may be used to pay off a lease-purchase loan, it is necessary to determine what is meant by the statutory directive that the school district "shall use any moneys reimbursed to the district under this division *to pay off any debt service* the district owes *for classroom facilities constructed under its project under this section* before such moneys are applied to any other purpose." R.C. 3318.36(E)(2) (emphasis added). It is not clear precisely what is meant by "constructed under its project under this section." R.C. 3318.36(E)(2).

For purposes of R.C. Chapter 3318, "[p]roject" is defined to mean "a project to construct or acquire classroom facilities, or to reconstruct or make additions to existing classroom facilities, to be used for housing the applicable school district and its functions." R.C. 3318.01(C); *see also* 2004 Op. Att'y Gen. No. 2004-002, at 2-14 ("OSFC is authorized to provide a school district only with funds that pertain to projects of the school district approved under R.C. Chapter 3318"). A district's project may include locally funded initiatives. *See, e.g.*, R.C. 133.06(I); R.C. 133.061. The statutory definition of "project" does not, however, explain what is meant by "its project under this section" in R.C. 3318.36(E)(2). *See generally* note 9, *infra*.

As discussed above, a school district entering into an ELPP agreement has a district-wide master plan that is approved by the Commission and the Controlling Board. However, the district also selects a discrete part of the needed construction to undertake in accordance with ELPP. An initial reading of the language in question suggests that "constructed under its project under this section" refers to a limited part of the district-wide master plan—specifically, to *construction under the discrete part of the master plan that was selected as the district's ELPP project under R.C. 3318.36*. *See* R.C. 3318.36(B)(3) ("[a]ny project under this section shall comply with [R.C. 3318.03] and with any specifications for plans and materials for classroom facilities adopted by the commission under [R.C. 3318.04]"); R.C. 3381.36(B)(4) (if a school district that enters into an ELPP agreement "has not begun a project applying local resources as provided for under that agreement" when the district is notified that it is eligible for state assistance under R.C. 3318.01-.20, the ELPP assessment and agreement documents are void).

It might, however, be argued as an alternative that a broader interpretation is appropriate, encompassing as the "project" *all construction performed under the district-wide master plan approved when the district participated in ELPP*. This broader interpretation would reflect the

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The manner in which a particular lease-purchase agreement is structured may affect the analysis as to whether it creates bonded indebtedness. However, no issue of bonded indebtedness under Ohio Const. art. XII, § 11 arises if moneys necessary to pay all obligations under a contract are available in the treasury of the subdivision and appropriated for payment of the contract when the contract is executed.

position that "constructed under its project under this section" refers to all construction undertaken under the entire master plan as that plan was approved under R.C. 3318.36 at the time of participation in ELPP. *See* R.C. 3318.36(B)(2) ("the board may proceed with a discrete portion of its project under this section as soon as the commission and the controlling board have approved the basic project cost of the district's classroom facilities needs").

In construing a statute, the goal is to determine the intent of the legislature. *Henry v. Central Nat'l Bank*, 16 Ohio St. 2d 16, 242 N.E.2d 342 (1968) (syllabus, paragraph 2) ("[t]he primary purpose of the judiciary in the interpretation or construction of statutes is to give effect to the intention of the General Assembly, as gathered from the provisions enacted, by the application of well-settled rules of interpretation, the ultimate function being to ascertain the legislative will"). If statutory language is ambiguous, it is appropriate to consider various factors that aid in its construction. As designated in R.C. 1.49, these factors include the object sought to be attained, the circumstances under which the statute was enacted, the legislative history of the statute, other laws upon the same or similar subjects, the consequences of a particular construction, and the administrative construction of the statute. *See also* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: . . . (C) A just and reasonable result is intended"); *Northwestern Ohio Bldg. & Constr. Trades Council v. Conrad*, 92 Ohio St. 3d 282, 287, 750 N.E.2d 130 (2001) ("[a] court must give due deference to the agency's reasonable interpretation of the legislative scheme").

In the instant case, the history and enactment of the statute, together with the administrative construction of the language in question, indicate that the narrower construction was intended. As discussed below, these factors support the conclusion that "constructed under its project under this section" means *constructed under the discrete part of the master plan selected as an ELPP project under R.C. 3318.36*.

When the language of R.C. 3318.36(E)(2) here under consideration was before the General Assembly, the Ohio Legislative Service Commission analyzed it as follows:

> The bill . . . states that if a district has spent more than its share of the total basic project cost as recalculated at the time it is eligible for assistance under the Classroom Facilities Assistance Program, the Commission has up to one year to "grant" a reimbursement to the district. The bill also requires that *any moneys reimbursed to the district be spent first to pay off any debt service the district has incurred under the "Expedited" program.*

Ohio Legislative Service Comm'n, Analysis, 123-SB272 LSC Analysis, Am. Sub. S.B. 272 (As Passed by the Senate) (2000) (emphasis added). This analysis states that ELPP reimbursement moneys must be spent first to pay off debt service incurred under ELPP—that is, to pay off the debt for construction that was part of ELPP, and not for debt attributable to any other part of the district-wide master plan.

This analysis expresses the intent that, before use for other purposes is permitted, the ELPP reimbursement moneys must be used by the district to pay off any debt remaining from the

construction from which the reimbursement resulted. Thus, the expenditures allowed under this provision are not for debt service on the district-wide master plan that received state approval, but for debt service on the classroom facilities actually constructed under ELPP—that is, debt service on the discrete part of the district's needs that the district addressed with local funding under ELPP, which is the construction upon which the ELPP reimbursement is based. *See* R.C. 3318.36(B)(2), (D)(1).

Although an analysis made by the Ohio Legislative Service Commission is not binding or determinative, it may be reflective of the intent behind particular legislation and may be helpful as an aid to statutory construction. *See, e.g.*, *Meeks v. Papadopulos*, 62 Ohio St. 2d 187, 191, 404 N.E.2d 159 (1980) (although an analysis by the Legislative Service Commission is not binding, it may assist statutory construction); *Weiss v. Porterfield*, 27 Ohio St. 2d 117, 120, 271 N.E.2d 792 (1971) (interpretations by the Legislative Service Commission are not decisive but do provide evidence of legislative intent); 2007 Op. Att'y Gen. No. 2007-003, at 2-26. In the instant case, the LSC analysis provides a reasonable interpretation of the statutory language and appears to be reflective of the intent behind the legislation.

Further, guidelines adopted by the Ohio School Facilities Commission indicate that the Commission has adopted the same statutory interpretation as that set forth by the Ohio Legislative Service Commission. In 2003 the Ohio School Facilities Commission prepared *Revisions to Expedited Local Partnership Program Guidelines* (Sept. 2003), a publication that currently appears on the website established by the Ohio School Facilities Commission. *See* http://www.osfc.state.oh.us. In the section entitled PHASE THREE – Project Agreement / Discrete Portion / Funding the publication speaks of "the ELPP Project Agreement" for the execution of the school district's "Expedited Local Partnership Program project." Ohio School Facilities Comm'n, *ELPP Guidelines – Rev September 2003* at 5. The agreement must include the "Scope of the Project" and the "Discrete Portion description (ELPP project scope)." *Id.* The publication states further: "The 'credit' amount will be recalculated and conditionally approved at the completion of *the district's ELPP project* and will be finalized upon entry into CFAP." *Id.* (emphasis added). The nature of the discrete portion is described as follows: "The discrete portion will reflect the total scope of work that the district intends to pursue as a part of their ELPP project, including any locally funded initiatives" Ohio School Facilities Comm'n, *ELPP Guidelines – Rev September 2003* at 6.

Thus, under the guidelines of the Ohio School Facilities Commission, an ELPP agreement defines the scope of the ELPP project, and that project is the discrete portion constituting the part to be undertaken under ELPP. Accordingly, the ELPP project is a portion of the district-wide master plan. Under this analysis, the words "constructed under its project under this section" (appearing in R.C. 3318.36(E)(2)) refer to *construction under the discrete part of the master plan that was selected as the district's ELPP project under R.C. 3318.36.*

To the extent that there is ambiguity, the history and administrative interpretation of the R.C. 3318.36(E)(2) thus support the conclusion that ELPP reimbursement moneys must be applied first to debt resulting from ELPP construction. The authorities discussed above indicate

that the General Assembly has authorized the Ohio School Facilities Commission to pay to a school district amounts of school construction costs that exceeded the district's share, but has imposed the requirement that reimbursement moneys be used to pay off any debt remaining from the construction that was the source of the reimbursement. We conclude, therefore, that under R.C. 3318.36(E)(2), a school district board must use reimbursement moneys received from the Ohio School Facilities Commission under ELPP to pay off any debt service the district owes for classroom facilities constructed under ELPP before the moneys are applied to any other purpose, except to reimburse local resources withdrawn from the district's general fund or a permanent improvement fund.

Question Whether Obligations Under a Lease-Purchase Agreement May Be Considered Debt Service Under R.C. 3318.36

As previously discussed, obligations under lease-purchase agreements under R.C. 3313.375 are included as part of the debt of the school district under the definition in R.C. 3318.01(F). It thus may be argued that obligations under lease-purchase agreements for classroom facilities constructed as part of the school district's project under R.C. Chapter 3318 may appropriately be included in the debt service to be paid with ELPP reimbursement moneys under R.C. 3318.36(E)(2).[6]

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[6] Concerns pertaining to the state's ownership of or interest in a project have arisen in connection with the question whether a lease-purchase agreement may ever be used for construction under R.C. Chapter 3318. R.C. 3318.08 states, in part:

> Except in the case of a joint vocational school district . . . , if the requisite favorable vote on the election is obtained, or if the school district board has resolved to apply the proceeds of a property tax levy or the proceeds of an income tax, or a combination of proceeds from such taxes, as authorized in [R.C. 3318.052], the Ohio school facilities commission, upon certification to it of either the results of the election or the resolution under [R.C. 3318.052], shall enter into a written agreement with the school district board for the construction and sale of the project. . . . [T]he agreement shall include, but need not be limited to, the following provisions:
>
> . . . .
>
> (F) *Ownership of or interest in the project during the period of construction, which shall be divided between the commission and the school district board in proportion to their respective contributions to the school district's project construction fund*; . . . . (Emphasis added.)

Under R.C. 3318.36(D)(1), all local resources utilized under ELPP must first be deposited in the project construction account required under R.C. 3318.08. It is common in lease-purchase transactions for the lender to hold the land and buildings until the purchase price

The term "debt service" is commonly used to refer to "funds needed to meet a long-term debt's annual interest expenses, principal payments, and sinking-fund contributions," but may also refer simply to "[p]ayments due on a debt, including interest and principal." *Black's Law Dictionary* 412 (7th ed. 1999); *see also* R.C. 5705.01(G) ("'[d]ebt charges' means interest, sinking fund, and retirement charges on bonds, notes, or certificates of indebtedness"); Mary Taylor, CPA, Auditor of State, *Uniform School Accounting System Users Manual* 118 (July 2005) (debt service transactions are "primarily for the purpose of discharging the school district's commitment for interest and principal on debt"). For purposes of R.C. 3318.36(E)(2), therefore, the payment of the debt service of the school district may include the payment of lease-purchase obligations under R.C. 3313.375 for classroom facilities constructed as part of the district's project under ELPP.[7]

It is important to emphasize that the ability to use ELPP reimbursement moneys to pay obligations under lease-purchase agreements is limited by the provisions of R.C. 3318.36(E)(2) that require ELPP reimbursement moneys to be used to pay off any debt service for ELPP construction before the moneys may be used for any other purpose. Therefore, if obligations under a lease-purchase agreement are not incurred as part of ELPP construction, they cannot be

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is fully paid. A lease-purchase agreement under R.C. 3313.375 must provide that at the end of the series of lease terms the title will be vested in the school district if all obligations have been satisfied, and that a lump-sum payment may be required as a condition of obtaining title. Thus, there may be an issue as to whether the ownership/interest provision of R.C. 3318.08(F) can be satisfied in a lease-purchase situation. Further, because ELPP construction is funded by local resources before any state funds have been made available, it is not clear to what extent the property allocation requirements of R.C. 3318.08(F) would affect a lease-purchase agreement pertaining to ELPP construction. *See* note 8, *infra*.

Another provision governing ownership of school property appears in R.C. 3318.16, as follows:

> The Ohio school facilities commission shall have an interest in real property purchased with moneys in the school district's project construction fund.
>
> Once obligations issued to finance a project under [R.C. 3318.26] are no longer outstanding, any interest held by the commission shall be transferred to the school district.

By its terms, R.C. 3318.26 applies only to "obligations issued by the issuing authority prior to December 1, 1999," R.C. 3318.26(A), and thus does not appear to be relevant to the project here under consideration.

[7] For other purposes, the obligations incurred under a lease-purchase agreement under R.C. 3313.375 "may be deemed to be, and paid as, current operating expenses." R.C. 3313.375.

paid with ELPP reimbursement moneys until all debt service owed for ELPP construction is paid off.[8]

We conclude, accordingly, that construction is performed under ELPP if it is included in the discrete part of the district classroom facilities needs addressed under ELPP. Debt service resulting from a lease-purchase loan agreement under R.C. 3313.375 may be paid with ELPP reimbursement moneys as debt service for ELPP construction under R.C. 3318.36(E)(2) only if construction under the lease-purchase agreement was performed under ELPP. Further, a school district board cannot use ELPP reimbursement moneys to pay off a lease-purchase loan for construction performed under a lease-purchase agreement that is not construction under ELPP unless all debt service owed for construction undertaken under ELPP has been paid.

Restrictions upon the Use of Reimbursement Moneys in Particular Circumstances

Under R.C. 3318.36(B), ELPP is described as a program for expedited construction and is designed to permit a school district board to proceed with local resources prior to such time as state funding becomes available. R.C. 3318.36(B)(1) states plainly that "[a]ny school district that is reasonably expected to receive assistance under [R.C. 3318.01-.20] within two fiscal

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[8] R.C. 3318.36 does not directly address lease-purchase agreements, and it is not clear precisely how a lease-purchase agreement may be part of a district's ELPP. See R.C. 3318.36 (authorizing a school district board to use various sources of funding for an ELPP project). With regard to the funding of an ELPP project, the Ohio School Facilities Commission's *Revisions to Expedited Local Partnership Program Guidelines* (Sept. 2003) states, in part:

> School districts may fund their ELPP project through a variety of options that are outlined in Ohio Revised Code section 3318 [sic]. They include:
>
> - Bond levy
> - Permanent Improvement Tax
> - School District Income Tax
> - Local donated contribution, including an irrevocable letter of credit and cash-on-hand
>
> The method of funding is a local decision but must comply with all applicable laws. For this reason the OSFC recommends that school districts seek the counsel of a qualified bond attorney in determining the most appropriate way to fund their ELPP project.

Ohio School Facilities Comm'n, *ELPP Guidelines – Rev September 2003* at 6. For purposes of this opinion, we do not discount the possibility that a school district may in some circumstances enter into a lease-purchase agreement in connection with its ELPP construction.

years" from the date of adoption of its resolution is not eligible to participate in ELPP. R.C. 3318.36 specifies that if the Commission notifies a school district that it is eligible to receive state assistance under R.C. 3318.01-.20 before the district has begun a project under ELPP, all assessment and agreement documents under ELPP are void. R.C. 3318.36(B)(4).

Governing provisions of statute indicate that an ELPP project must be completed before any reimbursement moneys may be provided. Under R.C. 3318.36(E)(1), the recalculation of the district's portion of the basic project cost that may result in an ELPP reimbursement begins when the school district becomes eligible for state assistance under R.C. 3318.01-.20. That recalculation is based upon "the amount of expenditures made by the school district board under division (D)(1)," encompassing the amounts of local resources the district expended in constructing the discrete part of the district's needs addressed under ELPP. R.C. 3318.36(E)(1); *see also* R.C. 3318.36(D)(1).

Because the recalculation upon which ELPP reimbursement is based includes the amount expended by the district under ELPP, it appears that the recalculation cannot be made until the ELPP construction is finished. Accordingly, a district will not receive ELPP reimbursement moneys until it has concluded its participation in ELPP. At the time of receipt of its reimbursement, the district is without authority to expand the scope of its ELPP project or redefine the discrete part of its needs to be addressed under ELPP. *See* Ohio School Facilities Comm'n, *Expedited Local Partnership Program Guidelines* 5 (revised Sept. 2003) ("[t]he 'credit' amount [of the discrete portion addressed under ELPP] will be recalculated and conditionally approved at the completion of the district's ELPP project and will be finalized upon entry into [Classroom Facilities Assistance Program]"); Ohio School Facilities Comm'n, *Expedited Local Partnership Program Guidelines* 8 (revised Sept. 2003) ("[f]inal determination of any amount to be credited [under ELPP] against the school district local share of the basic project cost will be made by the Commission upon the school district's participation in the Classroom Facilities Assistance Program").

The method under which ELPP reimbursement moneys are provided thus casts serious doubt upon any proposal to use ELPP reimbursement moneys to fund a lease-purchase agreement under R.C. 3313.375. The reimbursement moneys are to be used first to pay off debt incurred for the ELPP construction. It does not appear that a lease-purchase agreement entered into after the ELPP reimbursement moneys are received could be part of the construction upon which the reimbursement was based.

As previously discussed, this opinion cannot be used to make findings of fact or legal determinations concerning the rights of particular parties or validity of particular agreements. We can, however, address the principles applicable to the situation you have described, with the understanding that the relevant principles must be applied with care to each situation.

On the facts set forth above, the district's first building constituted the part of its classroom facilities needs constructed under ELPP. It was identified as the discrete part of the

district's classroom facilities needs to be addressed with local resources under ELPP, and it was financed through a voted bond levy in accordance with R.C. 3318.36.

The second building that the district now proposes to build was part of the two-building project initially proposed and approved by the Commission and was part of the district's project when it obtained voter approval of the bond issue. However, the second building apparently was not included in the discrete part of the needs to be addressed under ELPP and thus does not appear to be part of the district's project under ELPP. Hence, it does not appear that the second building was constructed under ELPP or that it may be constructed under ELPP at this time.

The district-wide master plan approved by the Commission has changed. The second building is now a locally funded part of the school district's project under R.C. Chapter 3318. It appears that the district's participation in ELPP has terminated and the second building cannot now be constructed under ELPP. Therefore, ELPP reimbursement moneys may be used to pay costs associated with the second building only after all debt service for ELPP construction (in this case, debt service for the first building) is paid off.

It might be argued that because the second building was part of the project approved by the Commission and the Controlling Board, it may be constructed as a sort of second phase of ELPP and, therefore, that debt service on the second building is eligible to be paid with ELPP reimbursement moneys. As discussed above, however, the statutory scheme provides for ELPP to terminate before any reimbursement moneys may be provided.

It might also be argued that equitable principles dictate that the district be permitted to use the reimbursement moneys to construct the second school building. After all, the district promised the building to the voters, and the money coming back to the district is money that the taxpayers have already committed to school construction purposes.

Although this argument is appealing, it is not consistent with the interpretation of R.C. 3318.36(E)(2) adopted above on the basis of the history and administrative construction of the statute. *See State v. Jordan*, 89 Ohio St. 3d 488, 492, 733 N.E.2d 601 (2000) ("[i]f a statute is ambiguous, the court, in determining the intent of the General Assembly, may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects"). The interpretation set forth by the Ohio Legislative Service Commission and described in guidelines of the Ohio Facilities Commission is a fiscally conservative interpretation that provides limits upon the manner in which ELPP reimbursement moneys may be spent. Under this interpretation, ELPP reimbursement moneys (constituting a reimbursement of amounts committed to school construction by residents of the district) will be applied to debt already assumed by the district for school construction under ELPP.

In the instant case, this will result in reducing the amount of additional taxes that must be collected under the levy passed to pay for the construction of the first building under ELPP. The state has determined that two buildings are not needed at this time. If the district chooses to provide more classroom facilities than the state finds necessary, it may do so, but it must provide funding for that purpose either through another levy (providing electors with the opportunity to

consider under current projections if two buildings are desirable) or through a lease-purchase agreement financed by other assets of the district.

It is apparent that the statutory interpretation adopted in this opinion operates to prevent a school district from undertaking construction that it would like to undertake and that was at one time part of its district-wide master plan. It does not follow, however, that the result is necessarily inequitable. Rather, the statutory interpretation adopted in this opinion requires a school district to apply ELPP reimbursement moneys to the reduction of existing debt, rather than to expenditures for new construction, reflecting a reasonable use of public funds. *See* R.C. 1.47(C). If a different result is desired, a legislative remedy may be sought. *See, e.g., State ex rel. Nimberger v. Bushnell*, 95 Ohio St. 203, 116 N.E. 464 (1917) (syllabus, paragraph 4).[9]

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[9] There was a recent attempt by the General Assembly to expand the statutory definition of "project" to expressly include a segment of a master plan in some circumstances. *See* Am. Sub. H.B. 562, 127th Gen. A. (passed June 10, 2008) (appropriation provisions eff. June 24, 2008; referendum period expires Sept. 22, 2008). In Am. Sub. H.B. 562, the General Assembly amended R.C. Chapter 3318 to permit any school district to implement a classroom facilities project under the Classroom Facilities Assistance Program (R.C. 3318.01-.20) in parts or "segments," while defining each segment as a separate project, thereby requiring the Ohio School Facilities Commission to recalculate a district's local share upon the implementation of each segment. Governor Strickland vetoed the proposed amendment of "project" in R.C. 3318.01(C) and also vetoed related language that defined each segment of CFAP as a separate project, stating in his Veto Message of June 24, 2008:

> This language would enable a school district to implement a classroom facilities project in parts or "segments," which is currently allowed for large urban districts served through the Ohio School Facilities Commission's Accelerated Urban Initiative. Unlike the Accelerated Urban Initiative, this provision *defines each segment as a separate project* and, consequently, requires the OSFC to recalculate a district's local share each time it implements a new segment.
>
> Recalculating a district's local share means that a district can receive a reduced local share if its wealth, as captured by the OSFC's equity list, declines in relation to other school districts throughout the state. *Implementing this language would result in inequitable treatment between Ohio's urban districts and the districts that use this segmenting language.*
>
> For this reason, this veto is in the public interest. (Emphasis added.)

The Governor thus rejected the idea that each segment should be treated as a separate project for purposes of recalculating the district's local share. The veto was based upon distinctions between the treatment of urban districts and the treatment of other districts in Am. Sub. H.B. 562

In the circumstances you have described, we discern no impediment to the use by the school district of a lease-purchase arrangement to construct the second school building in accordance with the provisions of R.C. 3313.375. However, it does not appear that the construction of the second building will be part of ELPP. Therefore, ELPP reimbursement moneys may not be used to pay expenses of the lease-purchase arrangement until all debt service owed for the ELPP construction has been paid.

Conclusions

For the reasons discussed above, it is my opinion and you are advised, as follows:

1. Under R.C. 3318.36(E)(2), a school district board must use reimbursement moneys received from the Ohio School Facilities Commission under the School Building Assistance Expedited Local Partnership Program (ELPP) to pay off any debt service the district owes for classroom facilities constructed under ELPP before the moneys are applied to any other purpose, except to reimburse local resources withdrawn from the district's general fund or a permanent improvement fund.

2. Construction is performed under ELPP if it is included in the discrete part of the district classroom facilities needs addressed under ELPP. Debt service resulting from a lease-purchase loan agreement under R.C. 3313.375 may be paid with ELPP reimbursement moneys as debt service

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for purposes of state funding under CFAP and did not address the merits of recalculating the local share in the circumstances addressed by the newly-enacted legislation.

Further, Am. Sub. H.B. 562 did not amend R.C. 3318.36, which prescribes in division (E) the manner for calculating the local share of a school district under CFAP when the district has previously participated in ELPP. Thus, the veto could not affect the provisions of R.C. 3318.36(E) that pertain to the construction of a discrete part of a master plan as a project under ELPP. *Cf.* R.C. 3318.034 (as enacted by Am. Sub. H.B. 562, extending authority to divide facilities needs into segments to any school district participating in CFAP on or after the effective date of Am. Sub. H.B. 562).

The existence of the veto does, however, indicate that the Governor and the General Assembly are capable of distinguishing between language that treats action pertaining to a portion of a master plan as a separate project and language that includes it as part of a single project. Which language is used in a particular instance is a matter for legislative determination. The statutory language should be crafted to bring about the desired result and, if it does not, more suitable language may be enacted. *See, e.g., Lake Shore Elec. Ry. Co. v. P.U.C.O.,* 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (if the General Assembly intended a particular meaning, "it would not have been difficult to find language which would express that purpose").

for ELPP construction under R.C. 3318.36(E)(2) only if construction under the lease-purchase agreement was performed under ELPP.

3. A school district board cannot use ELPP reimbursement moneys to pay off a lease-purchase loan for construction performed under a lease-purchase agreement that is not construction under ELPP unless all debt service owed for construction undertaken under ELPP has been paid.

Respectfully,

Nancy H. Rogers

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