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A NON-PROFIT ORGANIZATION WHICH OPERATES A LIBRARY PURSUANT TO THE LAW IS ENTITLED TO SHARE IN THE DISTRIBUTION OF CLASSIFIED PROPERTY TAXES OF A COUNTY—THE EXPENDITURE OF TAX MONEY BY A NON-PROFIT CORPORATION FOR THE ERECTION OF A FREE PUBLIC LIBRARY MENTIONED IN THE STATUTES, SAID CONSTRUCTION SHALL PROCEED IN ACCORDANCE WITH THE RULES OF SUCH A CORPORATION—OPINION 4271 OAG 1935—§§507.28, 5705.32, 1713.28 R.C., ARTICLE VIII, SECTION 6, OHIO CONSTITUTION.

SYLLABUS:

1. A non-profit corporation which has as its purpose the operation of a library and has adopted its articles of incorporation in accordance with Chapter 1702., Revised Code, and Section 1713.28, Revised Code, and which has qualified as a "public library" in accordance with Section 5705.28, Revised Code, is entitled to share in the distribution of classified property taxes of a county made pursuant to Section 5705.32, Revised Code. (Opinion No. 4271, Opinions of the Attorney General for 1935, Volume I, page 586, approved and followed.)

2. The expenditure of tax moneys received pursuant to Sections 5705.28 and 5705.32, Revised Code, by a board of trustees of such non-profit corporation operating such public library, for the purchase of land and the construction of a building to be operated as a free public library for all residents of the county, is an expenditure for a public purpose and the statutes being silent as to the method to be followed in bidding on and the construction of a library building to be constructed by such non-profit corporation with tax money so received, said construction should proceed in accordance with the rules of such corporation adopted pursuant to section 1713.28, Revised Code, and such expenditures as well as all other acts of said board of trustees are subject to scrutiny and review in accordance with sections 1713.29 and 1713.31, Revised Code.

Columbus, Ohio, April 23, 1962

Hon. John S. Ballard, Prosecuting Attorney  
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

"Our attention has been directed, and your opinion is requested in connection with the following situation which has arisen and which will arise in at least two library operations in our County, and may exist in other Counties throughout the State.

"A non-profit corporation has been organized about fifteen years ago pursuant to Section 1713.28, Revised Code, which was formerly Section 9972 and 9973, General Code. This association elects trustees and has adopted its own bylaws and regulations and conducts its own affairs, including the hiring of its own employees. None of the trustees are appointed by any governmental body such as County Commissioners, Township Trustees, or School Boards. This non-profit corporation furnishes public library service free to all persons who wish to avail themselves of that service under general rules and regulations adopted by the non-profit corporation. They do not operate under any contract with any School, County or Township pursuant to Section 3375.42; R.C., but, on the contrary, operate entirely independently.

"This association is presently sharing in the distribution of the proceeds of classified property taxes pursuant to 5705.28, R.C., and is planning to construct a new building on a site purchased with funds from the classified tax, pursuant to Section 5705.32, R.C., which authorizes the County Budget Commission to distribute to each Board of Public Library Trustees proceeds of such taxes for construction of new buildings, improvements, and other operations. The source of public funds involved are from the distribution of undivided classified property tax fund (See Section 5705.05, R.C.).

"The above matters will apply rather generally to all associations in a similar position. However, we are informed by information dated 1961 that this particular association consists of only fifteen members, all of whom are officers or trustees, and further, an examination of their 1961 financial statement does not disclose any income whatever from dues from members.

"Apparently under Attorney General's Opinion, No. 4271, on Page 586, Volume I, for 1935, the day to day operations of this association may be supported from distribution of the proceeds

of classified property taxes. In view of the extensive provisions for library operations contained in Chapter 3375 and of the supervision of such operations by different public bodies who appoint their trustees, we request that, as the first question of your opinion, you review the former opinion from 1935 to see if it should presently be followed in connection with ordinary day to day operations of a library association as defined above.

“Our second question is whether or not public funds derived from taxation should be expended for the purchase of property and for the erection of buildings and improvements on property which is in the name of a non-profit corporation. We have in mind the general rule that public funds shall not be spent for improvement of private property.

“Assuming that your answer to the second question above is that such expenditures are proper, the next question is whether or not such trustees of a non-profit organization may follow their own rules and regulations in the erection of buildings with public funds, or whether they are required to follow general statutory provisions for erection of public buildings. We have in mind the requirements for preparation of plans, specifications and estimates by architects, for competitive bidding, and for acceptance of the lowest and best bid, and for requirement of contractors to post bonds. We are referring to general requirements contained in Section 153, Revised Code.”

After receipt of your request, quoted above, I received a letter from an attorney in your county engaged in the private practice of law which states that the corporation in question also has as one of its purposes the operation of a historical society, and that such purpose is carried out in conjunction with its library activities.

In connection with your first question, the syllabus of Opinion No. 4271, Opinions of the Attorney General for 1935, page 586, reads as follows:

“Library associations or organizations established by will or otherwise, that maintain free public library service to all the inhabitants of a county or which by resolution extend that service to all the inhabitants of a county in pursuance of Section 5625-20, may share in the distribution of the proceeds of classified property taxes as provided by Sections 5625-24 and 5639, General Code, provided the library in question has in the past received public aid in the maintenance of its library service or is eligible to or becomes eligible to be granted such aid either directly under laws authorizing the same or by reason of contracts made by virtue of Sections 2455 or 7632 of the General Code of Ohio.”

While the statutes referred to by my predecessor in Opinion No. 4271, *supra*, have, in the nearly twenty-seven years which have elapsed since its writing, been changed in varying degrees, the basic provisions of Sections 5625-20 and 5625-24, General Code, have remained intact.

The last paragraph of Section 5625-20, General Code, as it read in May, 1935, 115 Ohio Laws, Part 2, 412 at page 418, was almost identical to the language presently found in the last paragraph of Section 5705.28, Revised Code, which reads as follows:

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“The board of trustees of any public library, desiring to participate in the proceeds of classified property taxes collected in the county, shall adopt appropriate rules and regulations extending the benefits of the library service of such library to all the inhabitants of the county on equal terms, unless such library service is by law available to all such inhabitants, and shall certify a copy of such rules and regulations to the taxing authority with its estimate of contemplated revenue and expenditures. Where such rules and regulations have been so certified or where the adoption of such rules and regulations is not required, the taxing authority shall include in its budget of receipts such amounts as are specified by such board as contemplated revenue from classified property taxes, and in its budget of expenditures the full amounts requested therefrom by such board.”

The pertinent 1935 provisions of Section 5625-24, General Code, 115 Ohio Laws, 548, at page 591, are now found in Section 5705.32, Revised Code. Said section reads in pertinent part as follows:

“\* \* \* The commission may fix the amount of proceeds of classified property taxes, collected within the county, to be distributed to each board of public library trustees which has qualified under section 5705.28 of the Revised Code for participation in the proceeds of such taxes based on the needs of such library for the construction of new library buildings, parts of buildings, improvements, operation, maintenance, or otherwise, and notwithstanding the fact that alternative methods of financing such needs are available, the amount of proceeds of such taxes, collected within the county, to be distributed to each board of township park commissioners, the amount of proceeds of such taxes originating outside the limits of municipal corporations, to be distributed to the county, and the amount of proceeds of taxes originating within each municipal corporation, to be distributed to each municipal corporation and shall separately set forth the amount so fixed and determined in the ‘official certificate of estimated resources,’ as provided in section 5705.35 of the Revised Code,

and separately certify such amount to the county auditor who shall be guided thereby in the distribution of the undivided classified property tax fund for and during the fiscal year. In determining such amounts, the commission shall be guided by the estimate of the auditor under section 5705.31 of the Revised Code as to the total amount of such undivided classified property taxes to be collected in the county during such fiscal year, and as to the shares thereof distributable to municipal corporations and the county, pursuant to section 5705.05 of the Revised Code.

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“If any public library receives and expends any funds allocated to it under this section for the construction of new library buildings or parts of buildings, such library shall be free and open to the inhabitants of the county in which it is located.”

The provisions of Section 5705.32, Revised Code, pertaining to the basis upon which the budget commission may make its determination for distribution of the classified property tax to the qualified boards of public library trustees were not contained in Section 5625-24, General Code, in 1935, however, the language granting to the budget commission the authority to make such determination was contained in said statute at that time.

Since the basic statutory authority which, in 1935, permitted a distribution of part of the undivided classified property tax fund to be made to a board of trustees of a qualified public library is still part of our statutory law, I am of the opinion that the reasoning and conclusions expressed in Opinion No. 4271, *supra*, are still applicable and that such distributions, in accordance with the present requirements of law, must be made to such an organization. I should point out, however, that I do not believe that Opinion No. 4271, *supra*, should be construed as a ruling on the “ordinary day to day operations of a library association” as stated in your letter, except insofar as such operations had a bearing upon its qualification and continuance as a “public library” under the then existing statutes.

The facts referred to earlier which were supplied subsequent to your letter raise a question of whether the particular library in question can in the first instance qualify as a “public library” under the provisions of Section 5705.28, Revised Code. You have pointed out in your letter that the non-profit corporation in question was organized “pursuant to

Section 1713.28, Revised Code.” By this I am certain that you mean that such corporation was organized as a non-profit corporation and since it had as one of its purposes, a purpose enumerated in Section 1713.28, Revised Code, it prescribed in its articles of incorporation that matter permitted to such corporation by said statute.

Section 1713.28, Revised Code, reads in pertinent part as follows:

“An association incorporated for the purpose of receiving gifts, devices, or trust funds to erect, establish, or maintain \* \* \* a museum of natural or other curiosities or specimens of art or nature promotive of knowledge, a law or other library, \* \* \* and to open them to the public on reasonable terms, \* \* \* may prescribe in its articles of incorporation the tenure of office of the trustees or directors, the mode of appointing or electing successors, the administration and management of the property, trust, and other funds of the corporation, and such other organic rules as are deemed expedient or acceptable to donors, which shall be the permanent organic law of the corporation.

“By certificate duly acknowledge by the trustees or directors and filed in the office of the secretary of state, such association may add to the original objects and purposes thereof any of the objects and purposes mentioned in this section and not provided for by the articles of incorporation.”

Under the provisions of paragraph (B) of Section 1702.58, Revised Code, the provisions of the foregoing section would govern to the exclusion of the provisions of the non-profit corporation act, Chapter 1702., Revised Code, only to the extent that they were on the same subject. Thus, the corporation in question, while a non-profit corporation of a special type, is still subject generally to the non-profit corporation act, including Section 1702.04, Revised Code, which permits such corporations to be formed for more than one purpose. Even if the exclusion of Section 1702.58 (B), Revised Code, were to prohibit a corporation organized for a purpose set forth in Section 1713.28, *supra*, from engaging in any purpose other than those enumerated in the latter section, I believe that the language, “a museum of nature or other curiosities or specimens of art or nature promotive of knowledge” found in Section 1713.28, *supra*, would include the operation of a historical society. Therefore, the fact that the particular corporation in question operates both a public library and a historical society could not prevent it from qualifying as a public library under Section 5705.28, Revised Code.

It should be pointed out, however, that the funds made available to such corporation pursuant to Section 5705.28 and 5705.32, *supra*, are for the operation of a public library. The trustees of the corporation receiving such funds are required by Section 1713.29, Revised Code, to file an annual account of the use thereof, and if such report shows a use for other than library purposes, an action may be instituted under Section 1713.31, Revised Code.

Your second question is whether the funds received by the corporation in question may be used for purchasing property and constructing buildings thereon when such property is in the name of the non-profit corporation. Under the express terms of Section 5705.32, *supra*, the county budget commission must consider the need for new library buildings in its determination of the amount of the proceeds of the taxes to be distributed to a "public library" and any new library building constructed with such funds must be open to the inhabitants of the county. You point out in your letter that the corporation in question does not operate under a contract with any governmental unit enumerated in Section 3375.42, Revised Code, however, Section 5705.28, *supra*, does not require a "public library" to so operate. Thus, the express terms of these statutes do not prohibit the library trustees in question from using the funds so received to construct buildings for library purposes. Furthermore, under the general authority of Chapter 1702., Revised Code, the trustees of such corporation have the power to use its funds for the purchase of land and the construction of buildings and I assume that there is nothing in its articles to the contrary. As to the purchase of property with tax funds received by such board of trustees, Section 5705.32, *supra*, says that such funds can be distributed according to need for "buildings, improvements, \* \* \* or otherwise" and I believe that this language would include land. Therefore, it is my opinion that the boards of trustees of the libraries involved herein have the authority to spend tax funds received pursuant to statute for property and buildings.

You indicate that you would like the authority of such boards of trustees to so spend these tax dollars to be considered in light of the general rule that tax dollars can be spent only for a public purpose. In this regard, 44 Ohio Jurisprudence 2d, 383, Public Funds, Section 19, reads as follows:

"The expenditure of public funds is limited to the furtherance of certain specific public purposes, and cannot be used to assist any private enterprise.

“The test of a public use is not based upon the function or capacity in which or by which the use is furnished. The right of the public to receive and enjoy the benefits of the use determines whether the use is public or private. Illustrative decisions by the courts as to funds appropriated for public purposes include: those used by agricultural societies for the holding of annual fairs and exhibits which aid the advancement of learning and the cause of agriculture; those used for acquisition of land by a municipality for the construction of off-street parking facilities; those used for the purchase of land by a municipality in aid of urban redevelopment where such land would ultimately be resold to private investors; and those granted to veterans’ organizations for the rehabilitation of war veterans and the promotion of patriotism.”

Article VIII, Section 6 of the Ohio Constitution, dealing directly with this subject is the primary source of Ohio law which must be considered. It reads, in part, as follows:

“No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies.  
\* \* \*

I have been unable to find any case which deals directly on the subject of the use of tax funds for the maintenance or development of a “public library” operated by a private non-profit corporation. However, in the case of *The State, ex rel. Pugh, et al., Trustees v. Sayre, County Auditor, et al.*, 90 Ohio St., 215, (Decided May 5, 1914) the Supreme Court had before it a question dealing with the use of fines and penalties from police court by the board of trustees of the Franklin County Law Library, a private corporation. The Syllabus of the *Sayre* case, *supra*, reads as follows:

“Section 6 of Article VIII of the Constitution is applicable to the taxing power of the state and designed for the protection of moneys resulting from its exercise, and it does not prohibit the devotion of ‘fines and penalties assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state’ to the aid of a law library association, whose library is subject to use by all officers exercising judicial functions in the county in which such police court sits, such library being a corporation not for profit.”



The court said at page 218 of the *Sayre* case :

“Counsel for the defendant has alleged in the answer that the law library is a private corporation and that the granting of the writ in this case would cause a part of the public revenues to be diverted to private uses and purposes, and in argument he relies upon Section 6 of Article VIII of the Constitution, the pertinent provisions being, that no law shall be passed authorizing any county ‘to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association.’ The terms of this section on the case of *Walker v. City of Cincinnati*, 21 Ohio St., 14, relied upon by counsel for defendants, show that it is for the protection or safeguarding of revenues raised by taxation. \* \* \*

While the above quotation does not rule on the issue at hand, it is dispositive of the question of the nature of the funds which are within the purview of Article VIII, Section 6 of the Ohio Constitution.

In the more recent case of *State, ex rel. Dickman v. Defenbacher, Dir., et al.*, 164 Ohio St., 142 (1955), the Supreme Court had before it a question dealing with the constitutionality of a statute which made direct grants of public funds to private veterans organizations. The provisions of Article VIII, Section 4 of the Ohio Constitution, which were brought into play in the *Defenbacher* case by the aforementioned statute, prohibit the giving of the credit of the state in similar language to that found in Article VIII, Section 6, *supra*.

The first paragraph of the syllabus of the *Defenbacher* case, *supra*, reads as follows :

“1. An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”

Your attention is also called to the following statements of the court beginning at page 150 of the *Defenbacher* case, *supra* :

“In the case of *State, ex rel. Lenverton, v. Kerns, Aud.*, 104 Ohio St., 550, 554, 136 N.E., 217, the same issue was raised as to state aid to another private association, to wit, a county agricultural society. The court said :

“The sections of the Constitution above referred to forbidding financial aid, or the loan of the credit of the state, relate to private business enterprises, and, while they would forbid

furnishing financial aid to any agricultural *business*, an agricultural fair is upon an entirely different basis, being a public institution designed for public instruction, and advancement of learning and the dissemination of useful knowledge.'

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"In *State, ex rel. Pugh, et al., Trustees, v. Sayre, Aud.*, 90 Ohio St., 215, 107 N.E., 512, the Supreme Court again approved an allocation of public money to a private corporation for disbursement by it. The case arose from an action in mandamus instituted by the Franklin County Law Library Association to compel the county auditor to issue warrants or orders for the payment of certain sums to the law library association. The Supreme Court held that the order should issue and that funds arising from fines, etc., should be paid by the county treasurer to said private corporation to maintain the law library which was used by all officers exercising judicial functions in the county.

"It has been held on numerous occasions by the courts of this state and by the courts of other states that Section 4, Article VIII of our state Constitution and similar provisions of the Constitutions of other states enjoin the making of appropriations for private enterprises, but that the appropriation of public money to a private corporation to be expended for a public purpose is a valid act of the legislative body.

"The ultimate question then is, as was presented to the Court of Appeals, whether the enactment by the General Assembly of Ohio of legislation appropriating funds for the named veterans organizations provides for the expenditure of the funds for a public purpose.

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"Thus the appropriations bill itself contains the public purpose, for which the appropriations were made to the veterans associations, in the words, '*for the rehabilitation of war veterans and for the promotion of patriotism.*'"

As pointed out in the statement quoted earlier herein from 44 Ohio Jurisprudence 2d, 383, the court in recent years has taken the position that where the public receives or enjoys the benefits of use which results from an expenditure of public funds the expenditure is public in nature.

There can be no doubt that the use of the library in question, being required to be open to the public, is public in nature, and no citation of authority is needed to support the public benefits which have been received and continue to be received as a result of free public libraries. Furthermore, unlike the expenditure in the *Defenbacher* case, *supra*, the direct

benefits of which were limited primarily to rehabilitate war veterans, the direct benefits of the expenditure involved here are available to all who reside within the county. Since the requirements which are necessary to create a public expenditure of tax funds, as such expenditure has been defined by the court, are clearly present in the instant case, I am of the opinion that the funds distributed pursuant to Sections 5705.28 and 5705.32, *supra*, if expended for a new public library building to be open to the public, will be expended for a public purpose.

Your third question deals with the method to be followed in expending the funds received by the library board in question in constructing a new library building. As to boards of library trustees appointed pursuant to statute, the provisions of Section 3375.41, Revised Code, set forth a detailed procedure which must be followed in expending funds in excess of \$5000.00 for the purposes set forth therein. However, that statute, by its express terms, relates to boards of trustees appointed in accordance with the statutes enumerated therein and the board of trustees in question here was not so appointed.

I have been unable to find any other express statutory provisions which would govern the funds involved herein or which would supersede the rules of the corporation adopted in accordance with Section 1713.28, *supra*. Accordingly, since the funds are to be expended by a non-profit corporation which has adopted such rules for the expenditure of its funds, I must conclude that those rules must govern in expending the funds in question. Such expenditures, however, as well as all other acts taken by such board are subject to scrutiny and review in accordance with Sections 1713.29 and 1713.31, Revised Code.

It may be worthy of note that the above conclusion is similar to that which was reached prior to the enactment of Section 3375.41, Revised Code, by the 99th General Assembly, in 1951, when the Common Pleas Court of Summit County decided in *Miller v. Akron Public Library*, 60 Ohio Law Abs., 364 (Feb. 9, 1951) that public library boards appointed pursuant to statute were not subject to the rules of law governing bidding on and building of county buildings.

In accordance with the above, I am of the opinion and you are advised:

1. A non-profit corporation which has as its purpose the operation of a library and has adopted its articles of incorporation in accordance

with Chapter 1702., Revised Code, and Section 1713.28, Revised Code, and which has qualified as a "public library" in accordance with Section 5705.28, Revised Code, is entitled to share in the distribution of classified property taxes of a county made pursuant to Section 5705.32, Revised Code. (Opinion No. 4271, Opinions of the Attorney General for 1935, Volume 1, page 586, approved and followed.)

2. The expenditure of tax moneys received pursuant to Sections 5705.28 and 5705.32, Revised Code, by a board of trustees of such non-profit corporation operating such public library, for the purchase of land and the construction of a building to be operated as a free public library for all residents of the county, is an expenditure for a public purpose and the statutes being silent as to the method to be followed in bidding on and the construction of a library building to be constructed by such non-profit corporation with tax money so received, said construction should proceed in accordance with the rules of such corporation adopted pursuant to Section 1713.28, Revised Code, and such expenditures as well as all other acts of said board of trustees are subject to scrutiny and review in accordance with sections 1713.29 and 1713.31, Revised Code.

Respectfully,

MARK McELROY

Attorney General