

OPINION NO. 79-103**Syllabus:**

The Ohio Building Authority has the authority, pursuant to Ohio Const. art. VIII, §2i and R.C. Chapter 152, to issue bonds to be sold publicly for the purpose of financing buildings and facilities to house branches and agencies of the state government where the payment of substantially all of the principal of and interest on such bonds will be derived from lease-rental payments funded by such biennial appropriations as may be made in the discretion of the General Assembly from the general revenue fund of the State.

To: Charles S. Lopeman, Chairman, Ohio Building Authority, Columbus, Ohio
By: William J. Brown, Attorney General, December 20, 1979

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

The Ohio Building Authority ("Authority") is contemplating issuing bonds ("Bonds") to refund a bond of the Authority previously issued and sold to the Industrial Commission of the State of Ohio for the purpose of financing the cost of constructing the James A. Rhodes State Office Tower ("State Office Tower") in Columbus. The proposed bond issue will be sold to the public by a negotiated underwriting. The Bonds will not, however, be general obligation bonds for which the credit of the State is pledged. Rather, the sole security being offered to the potential bondholders is a pledge of rental payments received by the Authority from the lease of the premises and other receipts, insurance proceeds and revenues of the Authority derived from owning and operating the State Office Tower.

The premises are currently leased to the Department of Administrative Services ("Department") of the State of Ohio ("State"). The current lease term ends June 30, 1981. Under the terms of an Amended Lease Agreement (the "Lease") which will become effective upon the issuance of the Bonds, the Lease may be renewed for successive two-year periods until June 30, 2015. The renewal provision of the Lease states:

The Department shall be deemed to have exercised its right to renew the term of this Lease Agreement and this Lease Agreement shall be renewed, upon the effectiveness, prior to the expiration of the Renewal Term then in effect, of legislation enacted by the General Assembly appropriating funds for the purpose of the payment of all Basic Rent, Additional Rent and other sums due hereunder during the next succeeding Renewal Term.

The Lease provides that immediately upon the effectiveness of such legislation, the Director of the Department shall certify, pursuant to Section 131.17 of the Revised Code that, with respect to the Lease, there is a balance in the appropriation, not already obligated to pay existing obligations, available to pay rentals under the Lease during the succeeding renewal term, and the Department shall, within 15 days after the effectiveness of such legislation, deliver to the Authority written evidence of such certification. If the General Assembly chooses not to appropriate sufficient funds for the purpose of paying rentals under the Lease during the succeeding renewal term, the Lease will terminate at the end of the biennium in which the last appropriation for such purpose was made.

The Lease also provides that the amount of rent to be charged during a biennium shall equal the debt service charges on the Bonds which come due during the biennium, the operating and maintenance expenses of the Authority in operating the State Office Tower, and certain other administrative expenses of the Authority. The Lease further provides that whenever all of the Bonds and other obligations and expenses of the Authority in connection with the State Office Tower have been paid in full, the Authority shall convey the State Office Tower to the State by quit-claim deed. The Department may purchase the State Office Tower on behalf of the State at any time for one dollar plus sufficient additional funds to provide for the payment in full of all Bonds and all other obligations incurred and to

be incurred by the Authority in connection with the State Office Tower.

In the event that the General Assembly fails to appropriate sufficient funds to pay rentals during a succeeding biennium and the Lease terminates, the bondholders will have no further claim to compel payments to be made by the State. The bond proceedings will provide, and the Bonds will state on their face, that the Bonds do not represent or constitute a debt of the State or any political subdivision thereof, nor a pledge of the faith and credit of the State or any political subdivision thereof, that the bondholders shall have no right to have excises or taxes levied by the General Assembly for the payment of bond service charges thereon, and that the right of such bondholders to payment of such bond service charges shall be limited to the revenues or receipts pledged thereto in accordance with Chapter 152 of the Ohio Revised Code. No mortgage will be given for the benefit of the bondholders, but the Authority has agreed that it will not sell or encumber the State Office Tower as long as the Lease is in effect.

The Authority believes that the aforementioned transaction is well within the directives and requirements of Article VIII, Section 2i of the Ohio Constitution and Chapter 152 of the Ohio Revised Code. A question has arisen, however, as to whether the sole fact that the rental payments pledged for the payment of the debt service on the Bonds will be derived from the State's General Revenue Fund, the principal source of revenue of which is excises and taxes, to the extent that such revenues are appropriated by the General Assembly to the Department for such purpose, places the proposed transaction beyond the permissible limits envisioned in the adoption of Article VIII, Section 2i of the Ohio Constitution. In connection with the proposed transaction, we have been asked to obtain your opinion on the following specific question:

Does the Ohio Building Authority have the authority pursuant to Article VIII, Section 2i of the Ohio Constitution and Chapter 152 of the Ohio Revised Code, to issue bonds which state on their face that the holders or owners thereof are not given the right to have excises or taxes levied by the General Assembly for the payment of principal thereof and interest thereon, to be sold publicly for the purpose of providing financing for the cost of buildings and facilities to house branches and agencies of the State government where the payment of substantially all of the principal of and interest on such bonds will be provided for by a pledge of rental payments by the Department under the Lease funded by such biennial appropriations as may be made in the discretion of the General Assembly from the General Revenue Fund of the State as to which the principal sources of revenue are excises and taxes?

The Ohio Building Authority has the requisite statutory powers under R.C. Chapter 152, as recently amended in Am. Sub. H.B. 546, to issue bonds in the manner and for the purpose outlined in your request. The indebtedness incurred thereby is authorized by Ohio Const. art. VIII, §2i.

R.C. 152.19(A) expressly empowers the Ohio Building Authority to ". . . purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, repair and operate office buildings and related storage and parking facilities for the use of state agencies. . . ." In addition, R.C. 152.21, set forth in pertinent part below, confers upon the Authority various specific powers necessary to carry out the general power conferred by R.C. 152.19(A).

With respect to buildings and facilities described in section 152.19 of the Revised Code, the Ohio building authority may:

. . .

(B) Purchase, construct, reconstruct, equip, furnish, improve, alter, enlarge, maintain, repair, and operate buildings and facilities as provided in section 152.19 of the Revised Code;

(C) Issue obligations to secure funds to accomplish its purposes as more fully set forth in section 152.23 of the Revised Code;

(D) Enter into contracts and execute all instruments necessary in the conduct of its business;

(E) Fix, alter, and charge rentals for the use and occupancy of its buildings and facilities and enter into leases for such use and occupancy as provided in section 152.24 of the Revised Code;

. . .

(G) Manage and have general custodial care and supervision of its buildings and facilities or enter into contracts with the department of administrative services for such purposes;

(H) Pledge, hypothecate, or otherwise encumber such of its rentals or other charges as may be agreed as security for its obligations, and enter into trust agreements or indentures for the benefit of holders of its obligations;

. .

(M) Do all other acts necessary to the fulfillment of its purposes.

To provide funds to carry out the purposes of R.C. 152.19 the Authority may "issue obligations under sections 152.09 to 152.17 of the Revised Code payable from revenues or receipts and funds of the authority." R.C. 152.23. Moreover, R.C. 152.12 authorizes the Authority to issue bonds for the purpose of refunding prior obligations and provides that such bonds ". . . shall be deemed to be issued for those purposes for which such prior obligations were issued. . . ." R.C. 152.09(D) empowers the Authority to sell its bonds in any manner it determines.

The types of bonds that may be issued by the Authority are not, however, unlimited. All bonds issued by the Authority must comport with the limitations imposed by R.C. 152.15, which provides as follows:

Obligations issued by the Ohio building authority do not, and they shall state that they do not, represent or constitute a debt of the state or any political subdivision, nor a pledge of the faith and credit of the state or any political subdivision. Pursuant to Section 2i of Article VIII of the Ohio Constitution, such obligations shall not be deemed to be debts or bonded indebtedness of the state under other provisions of the Ohio Constitution.

The holders or owners of obligations issued by the authority shall have no right to have excises or taxes levied by the general assembly for the payment of the bond service charges thereon. The right of such holders and owners to payment of such bond service charges shall be limited to revenues or receipts and funds pledged thereto in accordance with Chapter 152. of the Revised Code, and each such obligation shall bear on its face a statement to that effect.

You have informed me that the proposed bonds conform with the requirements of R.C. 152.15 and will state on their face that the holders or owners are not given the right to have excises or taxes levied by the General Assembly for the payment of the principal thereof or interest thereon.

Based upon the foregoing analysis, it is, therefore, my opinion that the Ohio Building Authority has the statutory power to issue bonds, which state on their face

that the holders or owners thereof are not given the right to have excises or taxes levied by the General Assembly for the payment of principal thereof or interest thereon, to be sold publicly for the purpose of providing financing for the cost of buildings and facilities to house branches and agencies of the state government.

The Authority must, however, exercise its statutory power to issue bonds in accordance with the provisions of Ohio Const. art. VIII, which limit the powers of state officers and agencies to incur debts. Thus, the issue to be determined with respect to your question is whether the provisions of Ohio Const. art. VIII prohibit the Authority from issuing bonds, in accordance with R.C. Chapter 152, where the payment of substantially all of the debt service on such bonds will be by lease-rental payments derived from biennial appropriations from the State's general revenue fund (i.e., tax-based dollars).

Ohio Const. art. VIII, §1 places a \$750,000 ceiling on state debts. Art. VIII §§2(a) through (j) create specific exceptions to the general ceiling expressed in §1. Art. VIII, §3 absolutely prohibits the creation of any state debts other than those permitted in §1 and 2. Hence the question: does the proposed transaction constitute a "debt" of the state for purposes of the §1 ceiling and, if so, is it within any of the exceptions enumerated in §§2(a) through (j)?

The initial inquiry centers upon the term "debt" as used in art. VIII. However, the inquiry is not simply whether the Authority's bonds create debts. All bonds create debts. The question is whether they create a debt of the state treasury. The Supreme Court has held that revenue bonds payable solely from the revenues generated by the facility financed by the sale of bonds is not a debt of the state treasury so long as the bondholders have no claim upon the state in the event of a default.

In 1919 the General Assembly authorized the Superintendent of Public Works to construct a dam on the Tuscarawas River financed by the sale of bonds. The bonds were to be repaid from revenues collected by the Superintendent from the sale and rental of water and power from the project. The bondholders would acquire a lien on the dam in the event of a default. In *Kasch v. Miller*, 104 Ohio St. 281 (1922), the Supreme Court held that the issuance of the revenue bonds did not violate art. VIII because they did not create a state debt:

An inspection of the act. . .discloses that under no circumstances, and under no possibility, can the state be made to answer for any of the obligations created by the act, by reason of the construction of such improvement. . . . [T]he act itself explicitly provides in Section 412-2, General Code, that said bonds "shall create no liability upon, nor in any way be considered an indebtedness of the state of Ohio, but shall be paid, both principal and interest, solely out of the proceeds arising from the sale or lease of the water impounded and conserved or the power generated by the improvements constructed," etc.

. . . .The debt created under the act is not a state debt; the bonds authorized thereunder entail no obligation upon the state which it is required, either legally or morally, to assume; the mortgage attaches to no property owned by or purchased with the revenues of the state. [104 Ohio St. at 287-88.]

To the extent that funds pledged to the retirement of bonds are not limited to revenues generated by the facility financed by the bond sale but also include other public revenues paid into the state treasury, a debt of the state is created for purposes of art. VIII, §1. *State ex rel. P.I.B.A. v. Griffith*, 135 Ohio St. 604 (1939). Moreover, to the extent that an issuance of revenue bonds creates an ancillary financial responsibility of the state and simultaneously diverts revenues away from the state treasury which would have been used to extinguish that responsibility, a contingent state debt is created. *State ex rel. P.I.B.A. v. Neffner*, 137 Ohio St. 390 (1941). Neither of these problems appears to be present in your proposed transaction.

The proposed transaction has been structured so as to prevent any possibility that the state treasury is legally obligated to pay principal and interest to the bondholders.¹ To be sure, the rental monies which will be used to retire the claims of bondholders are derived from legislative appropriations. However, such appropriations are wholly discretionary on the part of the General Assembly and the bondholders are on clear notice that they have no right against the state treasury should the lease terminate because the legislature refuses to appropriate funds which would be used to make rental payments.

Nor does the obligation to make lease payments create a debt of the state for purposes of art. VIII. Ohio Const. art. II, §22 requires that there be an appropriation by the General Assembly before money may be withdrawn from the state treasury, and reserves to each biennial general assembly the power to make all appropriations for the two year period. If the General Assembly authorizes a state agency to incur a liability, direct or contingent, without making a corresponding appropriation to pay that liability, a debt is created. State v. Medbery, 7 Ohio St. 522 (1857). Ohio Const. art. VIII, §3, however, prohibits the creation of a debt by or on behalf of the State, unless such debt is expressly permitted in the Constitution. The rule deducible from these limitations is that no state officer or agency may enter into a contract requiring a payment of money from the state treasury, except in cases specified in the Constitution, unless an appropriation exists to pay that obligation. See also R.C. 131.17 (No contract or agreement involving the expenditure of money entered into by a state department is valid and enforceable unless the director of administrative services first certifies that there is a balance in the appropriation, not already obligated to pay existing obligations.)

It is, however, my opinion that the Lease in question does not conflict with the rule announced in State v. Medbery, *supra*. Nor does it impair the Department's ability to comply with the requirements of R.C. 131.17. The Lease and any subsequent renewal of the Lease are expressly made contingent upon the discretionary decision of the General Assembly to appropriate funds to perform the Lease. In the absence of such an appropriation, the Lease will terminate at the end of the fiscal biennium in which the last appropriation for such purpose was made, and the Department will have no further liability under the terms of the Lease.

The Ohio Supreme Court has held that its decision in the Medbery case does not prevent a state agency from entering into a lease, if under the terms of the lease it is expressly provided that the lease is subject to an appropriation by the General Assembly. In State ex rel. Ross v. Donahay, 93 Ohio St. 414 (1916), the Industrial Commission executed on December 31, 1914 a lease of office space from January 1, 1915 to December 31, 1916. When the Commission issued a voucher to pay the rental for the period January, 1916-March, 1916, the Auditor of State refused to issue a warrant for payment. The lessor brought an original mandamus action in the Supreme Court seeking issuance of the warrant. The court held that a lease contract entered into by a state agency for office space does not create a debt if 1) the lease by its own terms is contingent upon the appropriation of funds for payment of rent by the General Assembly, and 2) the lease is for a period of two years, contemporaneous with the life of the General Assembly responsible for appropriating funds to pay the rent. If the lease cannot become binding until an appropriation has been made, then no debt is ever created because the act of appropriating money constitutes both the creation of an obligation and the simultaneous provision of funds for its discharge.

The Ross court also indicated that a state agency does not create a debt within the meaning of art. VIII by incurring ordinary and necessary daily operating expenses:

¹The only obligation on the state treasury is to make lease-rental payments in the event that there is a legislative appropriation for such purpose and the rental sums are properly due and owing under the terms of the lease.

The sovereign powers of government cannot be exercised unless suitable quarters are provided for the various governmental departments in the performance of public duty and service. This is axiomatic.

Manifestly, it is within the sovereign power of the state, and particularly if it is a legislative function under that sovereignty, for the general assembly to appropriately legislate so as to furnish the government and its various departments with suitable quarters.

. . . .

In construing the word "debt", as used in . . . Sections 1, 2, and 3, Article VIII, we hold that it has no reference whatsoever to the necessary and every-day current expenses of the sovereign government itself. [93 Ohio St. at 419-20.]

The lease in the Ross case did not contain a renewal clause similar to that in the agreement under consideration. The Court, however, upheld a similar renewal provision in State ex rel. Preston v. Ferguson, 170 Ohio St. 450 (1960). At issue in that case was a statute that authorized the Director of Highways to enter into agreements with the School Employees Retirement Board for the purpose of acquiring land necessary for the improvement of the state highway system. Pursuant to the statute, no such agreement could extend beyond the then current two year period for which an appropriation for such purpose had been made. The statute provided, however, that any such agreement could contain options for the renewal of the agreement for an additional period or periods, not exceeding two years each, provided that no such agreement was renewed to extend beyond five years from the date of the original agreement. The Court upheld the validity of the statute and the agreement, and summarized its reasons for its holding at p. 460-461 as follows:

In summary, the statute and the agreement here in issue do not create or authorize the creation of a debt of the state for the following reasons: (1) An appropriation is in existence to support the original agreement, (2) a new appropriation is made a necessary prerequisite to a renewal of the agreement, as is compliance with Section 131.17, Revised Code, (3) only contracts not exceeding two years duration are authorized by this statute and by the agreement, and (4) subsequent General Assemblies are in no way bound by this agreement or the renewals thereof.

Since the Lease you describe meets all of the criteria approved in the Ross case, and the renewal provision meets all of the criteria approved in the Preston case, it is my opinion that the Lease may lawfully be executed by the Authority and would not create a debt of the State.

As I indicated previously, the analysis under art. VIII, §3, supra, is two-fold. First, does the proposed transaction constitute a debt of the State? Second, if it is such a debt, is it expressly authorized in the Constitution? Even assuming that a court would disagree with me and find that your proposed bond issuance constitutes a "debt" of the State (see State ex rel. Gordon v. Rhodes, 158 Ohio St. 129, 135, Syllabus 2 (1952); State ex rel. Allen v. Ferguson, 155 Ohio St. 26, 38 (1951)), it is my opinion that any debt incurred is fully authorized pursuant to Ohio Const. art. VIII, §2i, adopted November 5, 1968.

Ohio Const. art. VIII, §2i provides in pertinent part as follows:

The general assembly also may authorize the issuance of revenue obligations and other obligations, the owners or holders of which are not given the right to have excises or taxes levied by the general assembly for the payment of principal thereof or interest thereon, for such capital improvements for mental hygiene and retardation, parks and recreation, state supported and state assisted institutions of higher education, including those for technical education, water

pollution control and abatement, water management, and housing of branches and agencies of state government, which obligations shall not be deemed to be debts or bonded indebtedness of the state under other provisions of this Constitution. Such obligations may be secured by a pledge under law, without necessity for further appropriation, of all or such portion as the general assembly authorizes of charges for the treatment or care of mental hygiene and retardation patients, receipts with respect to parks and recreational facilities, receipts of or on behalf of state supported and state assisted institutions of higher education, or other revenues or receipts specified by law for such purpose, of the state or its officers, departments, divisions, institutions, boards, commissions, authorities, or other state agencies or instrumentalities. . . . (Emphasis added.)

What funds may be committed (or made available to bondholders) for the retirement of revenue obligations authorized by art. VIII, §2i? Are tax-based funds appropriated by the General Assembly excluded? The express wording of the constitutional provision provides a great deal of insight.

Four forms of "income" received by bond issuing agencies are expressly authorized in §2(i) for use in retiring bonds. The first three authorizations permit pledges of income which some of the facilities enumerated in §2i receive from the public. Thus, "charges" for the treatment and care of mental patients may be pledged in the case of capital improvements for mental hygiene and retardation, "receipts" from parks and recreational facilities may be pledged in the case of capital improvements for parks and recreation, and "receipts" from state supported and state assisted institutions of higher education may be pledged in the case of capital improvements for educational institutions.

The fourth authorization is more general in nature and applies to all bond-issuing agencies under §2(i), to wit: "other revenues or receipts, specified by law." It is clear that bonds issued to finance facilities to house state agencies cannot be backed by the first three forms of income (e.g., charges for mental patients, charges to campers at state parks, etc.). Hence, bonds issued to finance facilities to house state agencies must be backed by the only remaining form of income—"other revenues or receipts specified by law."

If, in the case of facilities to house state agencies, tax-based appropriations are not contemplated by §2(i), then what does the term "other revenues or receipts specified by law" mean? And more importantly, by what means would such facilities be financed? Surely the framers of this constitutional provision did not intend to authorize the issuance of obligations to finance facilities to house state agencies without providing a practical means to repay the obligations.

It is indisputable that one express purpose of §2i was to authorize the financing of state office facilities. The courts are obligated to effectuate this purpose by a liberal construction of §2i to this end. County of Miami v. City of Dayton, 92 Ohio St. 215, 223 (1915). Art. VIII, §2(i) authorizes the issuance of revenue obligations and other obligations to finance facilities to house state government. The only revenues or receipts of a state office facility are space charges paid from legislative appropriations by tenant state agencies. The framers of this constitutional provision had to be aware that, in the vast majority of cases, the ultimate derivation of any "revenue" produced by a facility to house tenant state agencies must be tax-based dollars appropriated by the legislature, and explicitly recognized this fact by authorizing the issuance of "revenue obligations and other obligations."

To be sure, art. VIII, §2i states that bondholders "shall not be given the right to have excises or taxes levied by the general assembly" for retirement of the bonds. But the key word is "right." The drafters did not say (as they easily could) that the obligations "shall not be repaid from revenues raised by taxation." Cf. Ohio Const. art. VIII, §13. Instead, the Constitution merely says that the bondholders can be given no "right" to require the General Assembly to appropriate

monies to retire the bonds. In the proposed transaction, the bondholders have no such right. They are clearly on notice that appropriations, if any, to the Department of Administrative Services are solely discretionary.

Upon the basis of the foregoing analysis, it is my opinion that the Authority may issue bonds in accordance with the provisions of R.C. Chapter 152 for the purpose of financing the cost of facilities to house state agencies, notwithstanding the fact that substantially all of the debt service charges on such bonds will be indirectly funded from the State's general revenue fund through rental payments under the Lease.

In summary and in specific response to your question, it is, therefore, my opinion, and you are advised, that the Ohio Building Authority has the authority, pursuant to Ohio Const. art. VIII, §21 and R.C. Chapter 152, to issue bonds to be sold publicly for the purpose of financing buildings and facilities to house branches and agencies of the state government where the payment of substantially all of the principal of and interest on such bonds will be derived from lease-rental payments funded by such biennial appropriations as may be made in the discretion of the General Assembly from the general revenue fund of the State.