

**OPINION NO. 80-013****Syllabus:**

1. A "purchase," as that word is used in R.C. 118.25, may be accomplished by executing a binding contract to purchase notes. R.C. 118.25 does not require consummation of the terms of that contract within the ninety-day period described in R.C. 118.25.
2. The "currently prevailing rate of interest for short-term loans" that current revenue notes must bear pursuant to R.C. 118.25(C)(4) is to be determined and certified by the Treasurer of State at the time that the contract for the sale of the notes is to be executed.

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**To: Gertrude W. Donahey, Treasurer of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, April 22, 1980**

I have before me your request for my opinion as to whether the state may purchase current revenue notes that the City of Cleveland is considering issuing pursuant to R.C. 118.23. These notes would be dated July 1, 1980, and mature on December 31, 1980. The proposal envisions the state entering into a contract to purchase these notes on April 23, 1980. The contract would then be performed on or about July 1, 1980, by means of a "closing" at which the actual transfer of the notes and the payment of the purchase price would occur.

In light of the above-described proposal you have presented the following questions:

- (A) Does the above described transaction constitute a "purchase" as that word is used in Section 118.25(B) of the Revised Code?
- (B) If the answer to the above question is in the affirmative, when is the interest rate, that the notes must bear under Section 118.25(C)(4), determined?

I will begin by briefly summarizing R.C. Chapter 118, which was enacted in response to recent concerns regarding the financial instability of certain Ohio municipalities. Am. Sub. H.B. No. 132, 112th Gen. A. (eff. Nov. 29, 1979).

R.C. 118.02 states that it is the "intention of the general assembly under this chapter. . .to enact procedures, provide powers and impose restrictions to assure fiscal integrity of municipal corporations. . . ." The provisions of R.C. Chapter 118 are triggered by a determination by the Auditor of State that a fiscal emergency, as defined in R.C. 118.03, exists with respect to a municipal corporation. Once the Auditor determines that a fiscal emergency exists, a Financial Planning and Supervision Commission (hereafter "Commission") is established. The essential task of the Commission is to oversee the city's development of and adherence to a responsible fiscal plan.

Within ninety days after the first meeting of the Commission, the mayor of the municipality is required to submit to the Commission a detailed financial plan describing how the municipality will restore its fiscal integrity. R.C. 118.06. The specific powers and duties of the Commission are set forth in R.C. 118.07. Generally, the Commission is charged with the responsibility of assuring that all fiscal actions of the municipality are consistent with the financial plan and R.C. Chapter 118. The succeeding sections detail the requirements with which the municipality must comply during the fiscal emergency period. Still other sections delegate various powers to state agencies. The statute is designed to assure the fiscal integrity of the municipality yet leave the principal responsibility for the conduct of the affairs of the municipality to its duly elected officials. R.C. 118.02(B). Two of the statutory sections granting authority to state agencies or officers, R.C. 118.23 and R.C. 118.25, govern the situation that has precipitated your inquiry.

Pursuant to R.C. 118.23 and R.C. 133.30, the municipality may issue current revenue notes when authorized and approved by the Commission. R.C. 118.25(A) provides in pertinent part that the Treasurer of State may purchase these notes in order to help the municipality meet "current expenses" or "short-term cash requirements." R.C. 118.25(B) then states that the Treasurer's purchase of such current revenue notes must be made no later than "the ninetieth day following the first meeting of the [Commission]."

Your first question asks whether the proposed purchase of current revenue notes from the City of Cleveland is a timely purchase within the meaning of R.C. 118.25. In other words, does the execution of a contract to purchase the notes suffice or must there be delivery of, and payment for, the notes prior to the ninetieth day following the first meeting of the Commission?

R.C. Chapter 118 does not define the word "purchase." In such a situation, the primary and paramount rule of statutory construction requires that the legislative intent be ascertained and given effect. Cohrel v. Robinson, 113 Ohio St. 526, 527, 149 N.E. 871, 872 (1925).

The General Assembly has expressly stated its intention in adopting R.C. Chapter 118: "The intention of the general assembly, under this chapter, is to enact procedures, provide powers and impose restrictions to assure fiscal integrity of municipal corporations." R.C. 118.02(B). More to the point, however, R.C. Ch. 118 is not wholly prospective in nature. It does not prescribe means of avoiding municipal fiscal emergencies ab initio. Instead, it provides a specific strategy and procedures for curing an extant fiscal emergency. In so doing, the statute specifically states that to permit municipal fiscal crises to linger would "threaten the health, safety, and welfare of the people of the state within and beyond the municipal corporation." Hence, in construing R.C. 118.25, the polestar should always be the intention of the General Assembly to bring an end to municipal fiscal emergencies.

In order to afford initial monetary relief to a city experiencing a fiscal emergency, the General Assembly specifically provides in R.C. 118.25 that the state may "assist the municipality. . .to meet [its] short-term cash requirements" by the purchase of current revenue notes issued by the city. In light of this clearly expressed intention, the issue raised by your first question is whether the General Assembly intended to restrict state assistance to the situation wherein the entire note purchase transaction would be fully consummated within the first ninety days.

To conclude that the delivery of, and payment for, the notes as well as the contract to purchase must be completed within the ninety-day limit is to severely restrict the ability of the municipality to utilize the curative provisions of the statute. Any such restriction of a municipality's ability to obtain short-term financial assistance could further exacerbate the city's financial woes and make its fiscal salvation all the more difficult. Because the underlying purpose of the statutory mechanism authorizing the Treasurer to purchase current revenue notes is to assist the municipality in meeting short-term cash requirements, I am

convinced that a restrictive interpretation of the term "purchase" in R.C. 118.25 is not warranted.

It is noteworthy that the statute does not expressly require actual delivery of the notes and payment of the purchase price within the ninety-day period. If the framers of the statute had desired to compel consummation of the entire purchase transaction within this ninety-day period, the statute could have been drafted to provide for the municipality's "cash requirements during the ninety-day period following the first meeting of the commission." That, of course, is not what the statute says. No such restriction should be engrafted upon the "short-term, cash requirements" language when to do so would fly in the face of the legislative intent to provide early financial assistance to the municipality.

In addition to the fact that the statute contains no express requirement that the entire purchase transaction be fully consummated within the ninety-day period, I can find no apparent purpose for any such requirement. Moreover, it might stretch a municipality's capacity to the breaking point to require it to both negotiate and consummate a note purchase arrangement within the same ninety-day period during which it is expected to adopt and approve a detailed long-range financial plan. Finally, consummation of the purchase within this ninety-day period may be somewhat inconsistent with the timing of the municipality's actual "short-term cash requirements."

The position that it is sufficient to enter into a purchase contract within the ninety-day period is further supported by the fact that in the financial community the normal procedure for the sale of bonds and notes includes entering into a contract to purchase such bonds and notes with the actual delivery of the bonds or notes and payment occurring at a later date. This delivery and payment is commonly referred to as the "closing." This two-step procedure is a product of necessity; it would prove wasteful to pass enabling legislation, print the notes, and obtain the requisite approvals prior to reaching a binding agreement with the purchaser of the notes. After all, the purchase negotiations may fail and there may never be an agreement. Thus, as a practical matter, it is necessary for the closing to occur subsequent to the execution of the contract. Presumably the General Assembly was well aware of the nature of the financial transactions attending municipal bond and note sales when it authored R.C. 118.25.

The ninety-day question is admittedly a close one. In opining that the execution of a contract to purchase satisfies the requirements of R.C. 118.25, I am not unmindful that Ohio courts have in other contexts defined the meaning of "purchase" to mean an actual acquisition of property. See, e.g., Sterkel v. Board of Education, 172 Ohio St. 231, 234, 175 N.E. 2d 64, 66 (1961); Shepard Paint Co. v. Board of Trustees, 88 Ohio App. 319, 100 N.E. 2d 248 (Franklin County 1950). However, it is fundamental that if the application of the ordinary meaning of a word used in a statute would frustrate the intent of the legislature, the ordinary meaning must yield to a construction of the word that supports the legislative intent. Lake County National Bank v. Kosydar, 36 Ohio St. 2d 189, 305 N.E. 2d 799 (1973). See also Levitz Furniture Co. v. Safeway Stores, Inc., 105 Ariz. 329, 331, 464 P. 2d 612, 614-615 (1970), in which the Arizona Supreme Court noted that how "purchase" is to be construed depends upon the intention of the drafters. It is equally fundamental that statutes enacted for the purpose of advancing the public welfare are to be liberally construed to effectuate their purposes. Hall v. Union Light, Heat & Power Co., 53 F. Supp. 817, 819 (E.D. Ky. 1944). Hence, it is my opinion that a liberal construction of the statutory term "purchase" is not only warranted but, in fact, the only construction which would advance the clear legislative intent to assist a troubled city.

However, the note purchase contract may not defer the closing (i.e., performance of the contract) indefinitely. The purpose of R.C. 118.25 is not to put the state in any permanent "deep pocket" role. No long range state "bail-out" was envisioned or authorized. The state may only assist the financially troubled city with its "short-term cash requirements." The statutory scheme of R.C. Chapter 118 makes it clear that the city's long-range borrowing power is dependent upon

developing, implementing, and adhering to a financial plan which is sufficiently sound to attract investment dollars from the private sector.

Accordingly, I am of the opinion that it is appropriate to view the execution of a contract to purchase notes as satisfying the ninety-day requirement of the statute, provided that the contract creates binding obligations on both parties and requires consummation of the contract (i.e., the exchange of the notes for the purchase price) within a time frame that corresponds to the city's "short-term cash requirements."<sup>1</sup> In such a situation, the purchase of current revenue notes would constitute a lawful investment by the Treasurer.

Your second question asks when the interest rate for these notes is to be determined.

R.C. 118.25(C)(4) provides that "notes purchased by the treasurer of state under this division shall bear interest at the rate currently prevailing for short-term loans as determined and certified by the treasurer of state." It is clear that any "notes purchased" must bear interest at a rate "currently prevailing for short-term loans." Since I have concluded that under R.C. 118.25 a "purchase" may be accomplished by execution of a binding contract, the words "rate currently prevailing" must refer to that rate that exists at the time that the notes are purchased (i.e., at the time the contract is executed). Hence, the Treasurer must determine the interest rate in accordance with R.C. 118.25(C)(4) as of the date that the contract for the sale of the notes is to be executed.

Accordingly, it is my opinion, and you are advised, that:

1. A "purchase," as that word is used in R.C. 118.25, may be accomplished by executing a binding contract to purchase notes. R.C. 118.25 does not require consummation of the terms of that contract within the ninety-day period described in R.C. 118.25.
2. The "currently prevailing rate of interest for short-term loans" that current revenue notes must bear pursuant to R.C. 118.25(C)(4) is to be determined and certified by the Treasurer of State at the time that the contract for the sale of the notes is to be executed.

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1 The proposed note purchase agreement involving the City of Cleveland recites that the proceeds of the notes are, indeed, for the short-term cash requirements of the city. Under the contract, the closing will occur (i.e., the city obtain the cash) between July 1 and July 24, 1980, which will have been no more than six months following the initial meeting of the Commission. Since the definition of "short-term" in the financial community would normally encompass the time frame envisioned by the purchase contract, it would appear that the time frame established by the Cleveland contract reasonably corresponds to the city's "short-term cash requirements" for the purposes of R.C. 118.25.