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REPAIR *VIS-A-VIS* IMPROVEMENT—BOND ISSUE PROCEEDS LIMITS, ARTICLE VIII, SECTION 2e—REPAIRS MAY NOT BE FINANCED FROM SUCH PROCEEDS— MAINTENANCE MAY NOT BE FINANCED FROM SUCH FUNDS—IMPROVEMENTS MAY BE MET FROM SUCH FUNDS.

SYLLABUS:

1. The expense of repairs to steam lines and boilers in the State House and other state office buildings, may not be legally charged to or paid out of funds derived from the sale of bonds under the provisions of Article VIII, Section 2e of the Ohio Constitution.

2. The Soldiers' and Sailors' Home is a welfare institution of the State of Ohio within the purview of Section 2e of Article VIII of the Constitution.

3. The installation of a new mechanical system for coal handling, to replace primitive methods of handling coal for the Ohio Soldiers' and Sailors' Home is an "improvement" within the meaning of Section 2e of Article VIII of the Constitution, and therefore the cost of such installation may lawfully be paid from the proceeds of bonds therein authorized.

Columbus, Ohio, October 11, 1957

Hon. James A. Rhodes, Auditor of State
Columbus, Ohio

Dear Sir:

I have before me your two requests for my opinion, both involving the use of the funds derived from the sale of bonds pursuant to Section 2e of Article VIII of the Constitution as adopted November 8, 1955.

1. Your first request reads as follows:

"Article 8, Section 2E, of the Ohio Constitution, provides the authority for issuing, expending and retiring bonds, or other obligations, for a capital improvement construction program. Since the passage of such amendment there has been a general view that the portion of such fund for 'and state offices' could be only used for an addition to or new state offices. This concept may be narrow and incorrect.

"The office of Auditor of State has received copies of the Controlling Board action at meetings held July 19, and July 26, 1957, in respect to Request No. 4 and 6, of the Department of

Public Works. Such copies show that the Controlling Board approved releases of money in H. B. No. 939 of an item of appropriation to the Department of Public Works for '1-Rehabilitation and repair of state buildings.' Apparently the action of the Controlling Board was proper.

"The copies of the Controlling Board letters state the monies released are for the following purposes: 'This release is to cover: Repairs to steam lines in the Annex and State House, and to feeder lines from the Ohio Penitentiary to Ohio Departments Building, Wyandotte Building and State House.' Amount involved \$8,500.00. The second action of the Controlling Board authorizes the purchase of two complete sets of tubes for boilers No. 2 and No. 3 at the Old Blind School, in the amount of \$8,599.00.

"On these copies of letters from the Controlling Board, and below the signature of the president of such Board, is further language to the following effect:

'The Director of Finance has established, in accordance with Section 7 of House Bill 939-1957, the following account'

"Then follows a statement setting forth the language used in H. B. 939, under Department of Public Works-Item 1, then the statement-

'Source of funds: Capital Improvement Construction Fund'.
Signed by the Director of Finance.

"From these two copies of letters it appears that the Director of Finance is instructing the Auditor of State to charge any expense in connection with these two Controlling Board releases to the Capital Improvement Construction Fund.

"As no copies of H. B. 939 are available for study at this date, we have reviewed the original of such bill, as contained in the office of the Clerk of the House, and Section 7 of such bill is entirely foreign and does not relate in any fashion to the action of the Director of Finance. We have also reviewed the Journals of the House and Senate in relation to H. B. 939 and no amendment or amendments to such bill, other than changes in amounts of appropriation, are noted. If H. B. 939 contains a Section 7, other than shown in the original bill on file with the Clerk of the House, we are at a loss to know by what procedure, legislation or otherwise, such bill was changed or amended. Article II, Section 15.

"Aside from what is contained in H. B. 939 in relation to Section 7, our question is:

"'May repairs (to steam lines and boilers) be made and the expense therefor legally charged to funds derived under the provisions of Article VIII, Section 2e of the Ohio Constitution?'"

I note your reference to House Bill No. 939, which, according to its title, makes appropriations "for capital improvements and other general purposes". There is a reference, among other sources, to "moneys to the credit of the Capital Improvements Fund created by Section 139.27, of the Revised Code". This section and the sections immediately preceding it, show clearly that the revenues constituting that fund were those arising from the sale of the bonds authorized by the constitutional amendment above referred to.

Your letter raises some question about Section 7, of said House Bill 939. How or when it got into the bill does not appear to me to be a matter of serious concern, but it appears in the copy of the enrolled bill as authenticated by the signatures of the presiding officers of the Senate and the House as provided in Section 17, Article II, Ohio Constitution, and thereafter filed with the Secretary of State. This, under the decision of the Supreme Court in *Ritzman v. Campbell*, 93 Ohio St., 246, is conclusive evidence of the enactment of the bill as so authenticated. Section 7 of the Act reads as follows:

"Within the limits set forth in this act, the director of finance shall establish accounts indicating the source and amount of funds for each item of appropriation made in sections one and two of this act and shall determine the form and manner in which such appropriation accounts shall be maintained."

Under the heading "Department of Public Works" there is appropriated, among other items:

"1. Rehabilitation and repair of state buildings—For improvements and deferred maintenance in buildings housing the various departments of the state—\$500,000."

While the above Act refers to "Capital Improvements Construction Fund created by Section 129.37 of the Revised Code", there is nothing in the item above quoted which refers directly to that fund. And, it will be noticed, the legislature in making the appropriation did not specify the improvements that were to be made, and made no mention of the repair work for which you are now asked to make payment out of the proceeds of the bonds issued pursuant to Section 2e of Article VIII.

Section 2e of Article VIII, authorized the issuance of bonds in a total sum not exceeding \$150,000,000.

"The state may borrow money and issue bonds or other obligations therefor for the purpose of acquiring, constructing, re-

constructing and otherwise improving and equipping buildings and structures, excluding highways, and for the purpose of acquiring sites for such buildings and structures, for the penal, correctional, mental, and welfare institutions of the state; for the state supported universities and colleges of the state; for class room facilities to be leased or sold by the state to the public school districts unable within limitations provided by law to provide adequate facilities without assistance from the state; *and for state offices*; provided that the aggregate total amount of such borrowing under authority of this section shall not exceed \$150,000,000.”
(Emphasis added.)

It is further provided that not more than one-half of such total sum should be used for the penal, correctional, mental and welfare institutions, and not more than one-half for the other purposes enumerated.

Stripped of the words which are irrelevant to the question which we are now considering, we may read the above paragraph as follows:

“The state may borrow and issue bonds * * * for the purpose * * * of *constructing, reconstructing or otherwise improving* and equipping buildings and structures * * * for state offices. * * *.”
(Emphasis added.)

The essence of all these purposes is to be found in the word “improving”. There is a careful avoidance of the words “repair” and “repairing”, and I am convinced that the General Assembly in submitting this amendment and the people in voting for it, intended to exclude *repair* of the various public buildings mentioned. The language used, it seems to me, admits of no other construction.

Accordingly, it appears to me that the only question presented by your letter is whether the requests of the department of public works referred to in your letter call for moneys for *improving* and *equipping* the Ohio Departments Building, Wyandotte Building and the State House, or whether such requests call for moneys for repair of such buildings.

There is a well defined difference between “repair” and “improvement.” Applying the definitions as given by Webster, “repair” is “restoration to a sound or good state after decay, injury, etc.” while “improvement” is defined as the “enhancement in value, as land by cultivation or reclamation, or property by erection of buildings, or the laying out of streets or the installation of utilities”. Plainly, a building is “improved” when something new and different is added to it which enhances its value.

If a householder finds his roof leaking, his plastering falling off, his foundation sinking, his plumbing pipes burst, he must *repair* these defects, due to long use and decay. If he decides that instead of a new roof on his kitchen he should add a half story to that part of his house, thereby acquiring an additional room, that constitutes an improvement.

Sometimes, as in the case of the leaking roof, the building of the improvement may be said to include or supplant the repair. I note in 20 Words & Phrases, page 330, a decision where these distinctions were pointed out. It was held by the United States Circuit Court of Appeals in *Garland v. Samson*, 237 F. 31 :

“The word ‘repair,’ as defined by Webster : ‘Act of repairing ; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.’—is applied by courts in the construction of statutes and contracts. The word ‘improvement,’ defined by the same authority as ‘a valuable addition or betterment as a building, clearing, drain, fences, etc., on land,’ is a broader word than ‘repair,’ but includes the latter and is also practically applied by the courts.”

In support of this proposition the court cites a considerable number of cases, including among others *Plumbing Co. v. Arcadia*, 124 Minn., 313; *Archbold v. King*, 97 Kans., 5, and *Barker v. Walstein*, 48 N. J. Eq., 94.

In *Daugherty v. Taylor*, 5 Ga., 773, it was held :

“To ‘repair’ is to mend, to restore to a sound state whatever has been partially destroyed, to make good an existing thing, restoration after decay, injury, or partial destruction. An improvement is a valuable and useful addition, something more than a mere repair or restoration to the original condition.”

In the case of *Zangerle v. Republic Steel Corporation*, 144 Ohio St., 529, the court had occasion to determine whether certain machinery installed in a building by a tenant amounted to an “improvement” of the land, and thereby became a fixture. It was held as stated in the second paragraph of the syllabus :

“The term ‘improvements’ in the sentence found in Section 2 of Article XII of the Constitution reading ‘Land and improvements thereon shall be taxed by uniform rule according to value’ contemplates something which creates a permanent benefit to the land.”

The case turned on the taxability as real or personal property, of machinery for the rolling and shaping of steel, as personalty or as a part of the realty.

The use of the word "equipment" in the constitutional amendment does not appear to me to have an important bearing on the question under consideration. Equipment is a somewhat elastic term which, under some circumstances relates to articles of short life used or useful in the conduct of a business, including automobiles, typewriters, letter paper and lead pencils; or when applied to buildings, limited to those installations which are incorporated in a building and necessary for its efficient operation. Thus, in *American Seating Co. v. Board*, 141 Fla., 57, it was defined as follows :

"The word 'equipment' may mean supplies of permanent or enduring character, or it may mean supplies for current purposes."

In *Shoe Company v. Jacob* (D. C. Pa.), 49 F. Supp., 118, it was held :

"'Equipment' meant the physical facilities available for production including machines and tools."

To like effect, *Appeal Tax Court of Baltimore v. St. Peters Academy*, 50 Md., 345; *Edkins v. Board of Education*, 287 N. Y., 505.

There is nothing in the project covered by the requisition in question, which appears to partake of the nature of equipment for the public buildings named.

In the light of these authorities it appears to me that if the requests referred to in your letter for funds arising from the issuance of bonds under Article VIII, Section 2e of the Constitution, are for the purpose of making permanent improvements to the various state office buildings named, they should be honored as falling within the purposes for which the bonds were issued. On the contrary, if these expenditures are designed for the purpose of making repairs to these buildings, growing out of use, decay or obsolescence of the structure or any of their facilities, then they fall within the category of maintenance or repair, which expense should be borne by appropriations from the general funds of the state and not paid out of the bond issue authorized by the constitutional amendment aforesaid. As to a portion of these expenditures, the letter of request relative to the heating plant is frank in stating that the purpose is for "repairs to steam lines in the Annex and State House, and to feeder lines

from the Ohio Penitentiary". Likewise, while not so clearly characterized, the request for \$8,599, being for the "purchase of two complete sets of tubes for boilers Nos. 2 and 3, at the old Blind School", would appear equally to be in the nature of a repair, due to the aging of the tubes in these two boilers. It is a matter of common knowledge that tubes in steam boilers do, in time, lose their efficiency and have to be replaced. The letter does not suggest that these requests are for additions to the heating plants or the heating facilities for any of these buildings but merely for the replacement of parts worn out with the passage of time.

Accordingly, I feel impelled to the conclusion that the requests to which you refer in your first communication are for purposes not contemplated by or included within the provisions of the bond issue contained in Article VIII, Section 2e, of the Constitution.

In specific answer to your first question, it is my opinion that the expense of repairs to steam lines and boilers in the State House and other state office buildings, may not be legally charged to or paid out of funds derived from the sale of bonds under the provisions of Article VIII, Section 2e of the Ohio Constitution.

Coming now to your second request for my opinion, your letter reads as follows:

"In a copy of a letter from the President of the Controlling Board, the Auditor of State is informed that the Controlling Board consents to and approves of the release of \$135,000 in Item I, of the appropriation made to the Ohio Soldiers' and Sailors' Home, as contained in H. B. 939. In the latter part of the letter, the Director of Finance states he has established that such release and expenditures thereunder, shall be charged to the Capital Improvement Construction Fund.

"A question has arisen as to the propriety of charging expenditures from such appropriation to the Capital Improvement Construction Fund. The appropriation made to the Ohio Soldiers' and Sailors' Home in H. B. 939, reads as follows:

"1. Improvements of existing facilities—For repair and rehabilitation of existing facilities including installation of coal handling system \$265,000."

"The purposes and use of the moneys in the Capital Improvement Construction Fund are contained in Article VIII, Section 2e, of the Ohio Constitution.

"In the Constitution, it will be noted that a portion of this money may be used 'for the penal, correctional, mental and welfare institutions of the State', and another portion may be used

'for the state supported universities and colleges, public school class room facilities and state offices.' Our first question—Is the Ohio Soldiers' and Sailors' Home in any of the categories as set out in the Constitution?

"The Home, of course, is established under Ohio statutes, is operated by a Board of Trustees, and its admittances are established by law and in cooperation with the Federal Government requirements. The State of Ohio receives payment from the Federal Government covering a portion of the cost of each former veteran admitted. Under the statutes the Home is not included in the Welfare Department or in the Mental Hygiene and Correction Department, hence, all these matters tend to lead us to a state of confusion which brings up our question.

"Our second question: May an appropriation for repair and rehabilitation of existing facilities be legally charged to the Capital Improvement Construction Fund?

"The words 'repair and rehabilitation' are not used in the constitutional amendment, but are generally given to describe some phase of current or deferred maintenance. The general accepted use, in State government, of the words 'Capital Improvement', is the creation of a new asset to the State, and not merely replacing, or mending, or renovating an existing asset to a more usable or better condition. The ordinary usage or past customs and practices may not apply to this subject, hence, the reason for your opinion in this matter as to correctness of the allocation of this money."

The following is a further provision contained in Section 2e of Article VIII of the Constitution:

"Not more than \$75,000,000 of the total expenditure from such borrowing shall be for acquisition, construction, reconstruction and other improvement and equipping of buildings and structures, or for acquisition of sites for such buildings and structures, for the state supported universities and colleges, public school class room facilities and state offices; and not more than \$75,000,000 of the total expenditure from such borrowing shall be for acquisition, construction, reconstruction and other improvement and equipping of buildings and structures, or for acquisition of sites for such buildings and structures, for the *penal, correctional, mental, and welfare institutions of the state.*"

(Emphasis added.)

The Ohio Soldiers' and Sailors' Home was established in 1886, 83 O. L., 107, by Act of the General Assembly, reading as follows:

"There shall be established in this State an institution under the name of 'the Ohio Soldiers' and Sailors' Home' which insti-

tution shall be a home for honorably discharged soldiers, sailors and marines.”

This statute has come down to the present time without change and now appears as Section 5907.01, Revised Code. This home was then and is still under the control and management of a board of five persons appointed by the Governor with the consent of the Senate.

Your letter raises a question whether this is a welfare institution of the state, because it is not placed under the control of one of the state departments. I can see no substance whatever in that suggestion. The same legislative body which has set up the “state departments” has created this home, with its own controlling authority. In like manner the legislature has created the Soldiers’ and Sailors’ Orphans’ Home, under control of a similar board. Section 5909.01 et seq. R. C. Also by various statutes it has organized a number of state colleges and universities, each under the control of a board of trustees.

Furthermore, I can see no reason why the fact of contributions by the federal government to the support of the Home in question, should affect its status as an institution of the state. The federal government contributes to a considerable number of the state institutions and projects, including some which are under the direct charge of the so-called “state departments”.

The real question involved in your letter is whether the expenditure requested for the installation of a coal handling system for the Soldiers’ and Sailors’ Home, may lawfully be paid from the proceeds of the bond issue in question. In other words, whether it constitutes a repair or an improvement.

The authorities and argument contained in the discussion of your first letter apply equally here. I am informed by the state architect’s office that the proposed installation is a complete new system, supplanting a primitive method of handling the coal. It is not an attempt at a mere repair of a worn out mechanical device. The fact that the legislature in passing the appropriation bill, included an item of \$265,000 for :

Ohio Soldiers’ and Sailors’ Home Improvement and rehabilitation of existing facilities, *including installation of coal handling system.* * * *”
(Emphasis added.)

indicates that it understood that while it was providing for some things which were in the nature of “repairs to existing facilities” it was also

providing funds for a new and important addition, to-wit, the "installation of a coal handling system."

Accordingly, I have no hesitancy in concluding that the request for money to defray the cost of this improvement for said home may properly be met out of funds arising from the bond issue hereinabove referred to. To the extent that this item provides for repair, of course, charges therefor could not be made against these special funds.

Therefore, in specific answer to your questions it is my opinion that :

1. The expense of repairs to steam lines and boilers in the State House and other state office buildings, may not be legally charged to, or paid out of funds derived from the sale of bonds, under the provisions of Article VIII, Section 2e of the Ohio Constitution.

2. The Soldiers' and Sailors' Home is a welfare institution of the State of Ohio, within the purview of Section 2e of Article VIII of the Constitution.

3. The installation of a new mechanical system for coal handling, to replace obsolete methods of handling coal for the Ohio Soldiers' and Sailors' Home is an "improvement" within the meaning of Section 2e of Article VIII of the Constitution, and therefore the cost of such installation may lawfully be paid from the proceeds of bonds therein authorized.

Respectfully,

WILLIAM SANBE

Attorney General