

OPINION NO. 83-048**Syllabus:**

1. Pursuant to R.C. 145.11 and R.C. 3351.07(A)(2), the Ohio Student Loan Commission may renovate property which it holds as an investment, without regard to the authority of the Department of Administrative Services to act under R.C. 123.01.
2. When consultants are paid from an Ohio Student Loan Commission custodial reserve account, prior approval of the Controlling Board is required for such payments, pursuant to Section 88 (uncodified) of Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983).

To: Robert P. Zeigler, Executive Director, Ohio Student Loan Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, September 20, 1983

I have before me your request for my opinion on the following questions relating to the renovation of certain property held by the Ohio Student Loan Commission:

1. Where the Ohio Student Loan Commission is the tenant in investment property held by the Commission, may the Commission renovate the property pursuant to Section 145.11 of the Revised Code without regard to the statutory requirements relating to capital improvements[?]
2. Does Section 127.16 of the Ohio Revised Code apply to consultants who are employed to advise the Commission relative to the acquisition of investment property and the renovation of said property in order to maintain the investment value of real estate held by the Commission[?]

I think that it is helpful to begin with a discussion of the authority of the Ohio Student Loan Commission to invest in real property. Pursuant to R.C. 3351.07(A)(2), the Commission may:

Reject or take, hold, and administer, on behalf of the commission and for any of its purposes, real property, personal property, and

moneys, or any interest therein, and the income therefrom, either absolutely or in trust, for any purpose of the commission. The commission may invest funds in any investments in which funds of the public employees retirement system may be invested pursuant to section 145.11 of the Revised Code. The commission may acquire property or moneys for its purposes by the acceptance of gifts, grants, bequests, devises, or loans; provided, that no obligation of the commission shall be a debt of the state, and the commission shall have no power to make its debts payable out of moneys except those of the commission. (Emphasis added.)

R.C. 145.11(P) sets forth the authority of the Public Employees Retirement Board to invest in real property, as follows:

The board shall have full power to invest such funds:

....

(P) In real estate located within the United States, provided that the aggregate of all investments made under this division shall not exceed twenty-five per cent of the total value of all funds described in section 145.23 of the Revised Code, except that no investment in real estate made under authority granted elsewhere in this section shall be counted toward this limitation.

The board may invest under this division in any interest in real property, including, but not limited to, improved or unimproved real property, suitable, or adaptable without excessive cost, for more than one use, and whether or not income-producing; mortgages; deeds of trust; notes secured by real property; leaseholds; leases; ground leases; air rights; limited partnerships; real property interests owned, developed, or managed by joint ventures or limited partnerships; variable notes secured by real property; participations, created by any person regularly engaged in the business of making, or acting as a broker of, mortgage loans, in notes secured by real property; interests in collective investment funds; and condominium interests; provided that liability is limited to the amount of the investment. Unimproved real property acquired shall be subject to a development plan.

Real property purchased under this division may be improved by the board. Expenditures for improvements may include, but are not limited to, expenditures for demolition of existing structures, grading and landscaping, construction of new structures, modification of existing structures, fixtures, equipment, and related personal property. The board may manage the real property or may contract for management responsibilities with firms having expertise in the management of similar real property.

Real property purchased or improved under this division:

- (1) Shall be geographically dispersed;
- (2) May be leased to corporations, partnerships, or sole proprietorships with or without purchase option provisions, and lease payments may, but need not, include all or part of the purchase and improvement costs;
- (3) May be mortgaged to facilitate activities authorized in this division. (Emphasis added.)

Thus, pursuant to R.C. 3351.07(A)(2) and 145.11(P), the Ohio Student Loan Commission is authorized to invest in real property and to improve such property. You have indicated that, pursuant to this authority, the Commission has acquired certain real property which it seeks to renovate. Your first question is whether, where the Ohio Student Loan Commission is to be the tenant in investment property held by the Commission,¹ the Commission may renovate the property

¹ Since you have not raised any questions concerning the procedure by which the Ohio Student Loan Commission may become a tenant in property which it holds, I am not discussing that matter.

pursuant to R.C. 145.11 without regard to the statutory requirements relating to capital improvements.

You have not indicated specific statutory provisions with which you are concerned. I understand, however, that some question has arisen concerning whether the Ohio Student Loan Commission may itself carry out renovations pursuant to R.C. 3351.07(A)(2) and R.C. 145.11, or whether such activities may be undertaken only by the Department of Administrative Services (DAS), pursuant to its authority to purchase and improve property on behalf of state bodies. R.C. 123.01 sets forth the general authority of DAS over construction and improvement of state property. It reads, in part, as follows:

(A) The department of administrative services, in addition to those powers enumerated in Chapters 124. and 125. of the Revised Code, and as provided elsewhere by law, shall exercise the following powers:

. . .

(3) To make contracts for and supervise construction of any projects and improvements, or construction and repair of buildings under the control of the state government, or any department, office, or institution thereof, except contracts for the repair of buildings under the management and control of the departments of public welfare, mental health, mental retardation and developmental disabilities, rehabilitation and correction, and youth services, and boards of trustees of educational and benevolent institutions, which contracts shall be made and entered into by the directors of public welfare, mental health, mental retardation and developmental disabilities, rehabilitation and correction, and youth services, and the boards of trustees of such institutions, respectively; and all such contracts may be in whole or in part on unit price basis of maximum estimated cost, with payment computed and made upon actual quantities or units;

. . . .

(C) Purchases for, and the custody and repair of, buildings under the management and control of the department of public welfare, mental health, mental retardation and developmental disabilities, and rehabilitation and correction, and buildings of educational and benevolent institutions under the management and control of boards of trustees, are not subject to the control and jurisdiction of the department of administrative services.

It is clear that the Ohio Student Loan Commission is, at least in some sense, an office of the state government. The Ohio Student Loan Commission was created by R.C. 3351.05 "for the purposes of making available to residents and qualified nonresidents, improved opportunities for education, and improving the general health and welfare by raising the educational levels of such residents and qualified nonresidents by guaranteeing loans made to persons who are attending or plan to attend eligible institutions of education and their parents, when such loans are made to assist such persons and their parents in meeting their expenses of education. . . ." The Commission consists of nine members, appointed by the Governor with the advice and consent of the Senate. R.C. 3351.06. It is authorized to guarantee the loan of money to assist persons attending eligible institutions in meeting their educational expenses. R.C. 3351.07(A)(1). Property and income of the Commission used for its statutory purposes are expressly exempted from taxes and assessments by R.C. 3351.10. Under R.C. 3351.11, the Commission is made subject to examination and audit by the Auditor of State and required to make an annual report of its condition to the Governor, the General Assembly, and the State Auditor. R.C. 3351.01(A)(2) states that "no obligation of the commission shall be a debt of the state, and the commission shall have no power to make its debts payable out of moneys except those of the commission." R.C. 3351.08(F) provides, however, that an account containing special loan insurance premiums paid to the Commission shall be held in the custody of the Treasurer of State, and R.C. 3351.131

provides for a Student Loan Commission operating expense account in the state special revenue fund, stating that all expenses of the Commission shall be paid from the special account. R.C. 3351.12 provides that, upon dissolution of the Commission or the cessation of its activities, all property and moneys of the Commission shall be vested in the state and credited to the general revenue fund. R.C. 3351.13 designates the Ohio Student Loan Commission as "the state agency" authorized to enter into contracts concerning certain federal programs for education.

Based upon the statutory scheme governing its existence, I conclude that the Ohio Student Loan Commission is a creature of the General Assembly which serves, at least for some purposes, as an office or agency of the state. See R.C. 131.31(O) (defining "[s]tate agency" for purposes of R.C. Title I as "every organized body, office, and agency established by the laws of the state for the exercise of any function of state government"). See generally 1967 Op. Att'y Gen. No. 67-002 (finding that the Ohio Higher Education Assistance Commission, predecessor to the Ohio Student Loan Commission, was subject to the civil service provisions then in effect). It appears, then, that DAS is empowered by R.C. 123.01(A)(3) to "make contracts for and supervise construction of any projects and improvements, or construction and repair of buildings" under the Commission's control. Both R.C. 123.01(A)(3) and R.C. 123.01(C) set forth exceptions from the authority of DAS, but the Commission is not included as one of those exceptions. See generally R.C. 3345.16 (providing that R.C. 123.01 and certain other provisions of R.C. Chapter 123 do not apply to properties held as earning-power properties in a college or university endowment portfolio).

It does not follow from the foregoing, however, that the Commission may not undertake renovation of its investment property without acting through DAS. Rather, where two state bodies have been given concurrent powers, it has been determined that either of such bodies may undertake the authorized activities. In 1950 Op. Att'y Gen. No. 2049, p. 512, one of my predecessors considered the intention of provisions which authorized the Director of Public Works to acquire the real estate required by the state government, or any department or office thereof, and provisions which granted the Department of Natural Resources, the Highway Department, or the Department of Liquor Control similar authority with respect to their respective operations. My predecessor concluded, at 514, that "the only reasonable conclusion to draw... is that the two offices concerned have concurrent powers." A similar conclusion was reached in 1946 Op. Att'y Gen. No. 1090, p. 505, with respect to the authority of both the Department of Public Works and the Conservation and Natural Resources Commission to exercise the power of eminent domain. 1946 Op. No. 1090 states, in part, at 507:

It is a primary rule of statutory construction that all statutory provisions should be so construed if possible as to give full force and effect to each and all of them. . . . [The provisions in question] are not, in my opinion, inconsistent or repugnant to each other. There is no limitation on the number of governmental agencies which the General Assembly can authorize to exercise the power of eminent domain.

See generally Trumbull County Board of Education v. State ex rel. Van Wye, 122 Ohio St. 247, 171 N.E. 241 (1930) (noting that two governmental boards may be authorized to exercise administrative functions with respect to the same subject matter).

I find that the analysis outlined in those opinions is applicable also to the statutes governing DAS and the Ohio Student Loan Commission. Under R.C. 123.01, DAS has the power to make contracts for, and supervise construction of, any projects and improvements undertaken by the Commission, as an office of state government. The Commission is, however, granted the express authority to "administer...real property...for any purpose of the commission," R.C. 3351.07(A)(2), and to invest in, and improve, real property, R.C. 145.11. The express grant of such authority to the Commission provides it with authority to undertake

improvements of its investment property which is concurrent with the power possessed by DAS. Thus, I do not find that the Commission must act only through DAS in undertaking the proposed renovation. Rather, I conclude that, pursuant to R.C. 145.11 and R.C. 3351.07(A)(2), the Commission may renovate property which it holds as investment, without regard to the authority of DAS to act under R.C. 123.01.

As noted above, you have not indicated specific statutory provisions to which your first question relates. I have discussed the provisions mentioned in the attachments to your request; however, absent specific references, I am unable to ensure that I have considered every section of the Revised Code which may be relevant to your concerns. If you should have additional questions concerning particular provisions which are not discussed in this opinion, do not hesitate to contact me again.

I turn now to your second question, whether R.C. 127.16 applies to consultants who are employed to advise the Commission relative to the acquisition of investment property and the renovation of said property, in order to maintain the investment value of real estate held by the Commission.² I note that R.C. 127.16 was recently amended by the biennial budget bill, Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983). Division (B) now reads:

No state agency shall purchase from a particular supplier any services, equipment, materials, or supplies, or any combination thereof, that, when combined with all other such purchases the agency has made from the supplier during the fiscal year will amount to ten thousand dollars or more, unless the purchase is competitively bid or approved by the controlling board.

See R.C. 127.16(D)(10) (R.C. 127.16 does not apply to investment transactions and procedures of any state agency, although the agency must file certain information with the Controlling Board).

It is my understanding that the consultants in question are to be paid from the Student Loan Commission's custodial reserve fund.³ Section 88 (uncodified) of Am. Sub. H.B. 291 states in relevant part: "Notwithstanding Chapter 3351 of the Revised Code, no moneys shall be drawn from Ohio Student Loan Commission custodial reserve accounts without prior approval of the Controlling Board." You have indicated that the custodial reserve fund is one of the Commission's custodial reserve accounts. Thus, because the consultants are to be paid from one of the Commission's custodial reserve accounts, Section 88 of Am. Sub. H.B. 291 requires Controlling Board approval prior to the payment of the consultants.

Because I have concluded that Section 88 requires Controlling Board approval prior to the payment of the consultants in question, it is unnecessary for me to decide whether R.C. 127.16 applies to the consultants, as the specific provisions of Section 88 prevail over the more general provisions of R.C. 127.16. See generally R.C. 1.51; State ex rel. Myers v. Chiaramonte, 46 Ohio St. 2d 230, 348 N.E. 2d 323 (1976). In declining to address the applicability of R.C. 127.16, I express no opinion

² Since you have not raised any questions concerning the authority of the Commission to employ such consultants, I am not discussing that matter.

³ Since you have not asked from which source or sources of funds compensation for such consultants may come, I am not discussing that matter. See generally R.C. 145.11; R.C. 3351.08(F) (providing that certain funds received by the Ohio Student Loan Commission shall be deposited to an account in the custody of the Treasurer of State); R.C. 3351.13 (creating the Student Loan Commission operating expense account in the state special revenue fund and specifying that money in the account shall be used solely to pay the expenses of the Commission); 1982 Op. Att'y Gen. No. 82-082 (discussing expenditures from custodial accounts held by the Treasurer of State).

on the type of state bodies to which R.C. 127.16 applies, nor do I express an opinion as to the scope of the exception found in R.C. 127.16(D)(10).

Based upon the foregoing, it is my opinion, and you are hereby advised, that:

1. Pursuant to R.C. 145.11 and R.C. 3351.07(A)(2), the Ohio Student Loan Commission may renovate property which it holds as an investment, without regard to the authority of the Department of Administrative Services to act under R.C. 123.01.
2. When consultants are paid from an Ohio Student Loan Commission custodial reserve account, prior approval of the Controlling Board is required for such payments, pursuant to Section 88 (uncodified) of Am. Sub. H.B. 291, 115th Gen. A. (1983) (eff. July 1, 1983).