

OPINION NO. 80-070**Syllabus:**

1. For the purposes of R.C. 5705.14(A), the decision as to whether an unexpended balance in a bond fund is no longer needed for the purpose for which such fund was created is committed to the discretion of the bond issuing authority.
2. In the event that the purpose statement in a bond resolution authorizes a board of education to expend bond proceeds for site improvements and does not restrict the board to any particular type of improvements, a board of education may expend bond proceeds for site improvements on land that was

owned by the school district at the time the bonds were issued or purchased with the bond proceeds, or on land that was acquired subsequent to the issuance of the bonds and not acquired with bond proceeds. (1964 Op. Att'y Gen. No. 1456 overruled in part.)

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, November 3, 1980

I have before me your request for an opinion concerning the authority of a board of education to expend the unencumbered balance of a bond fund for additional school improvements. Your request is based upon the following series of events. In 1963 a city board of education established a building fund upon the issuance of \$1,400,000 School Improvement Bonds. The bonds were voted and issued for the following purposes:

Purchasing lands, constructing new fireproof school buildings, providing necessary walks, site improvements and landscaping, and making necessary alterations, improvements and additions to existing fireproof school buildings and buying equipment and furnishings.

As of December, 1979, the building fund contained an unencumbered balance of approximately \$96,000. A portion of the bonded debt remains outstanding. The board of education proposes to adopt a resolution indicating that the purpose for which the bonds were voted and issued has not been fully accomplished, that certain proposed site improvements are within the purpose for which the bonds were voted and issued, and that all available moneys in the building fund should be used to acquire and construct the proposed site improvements.

Your specific questions are as follows:

1. Must the board of education transfer the remaining balance in the 1963 bond fund to the bond retirement fund or does the current board possess the authority to determine that the original purpose of the issuance has not been fulfilled?
2. If the board does possess such authority, may the board of education expend the balance of the bond fund for site improvements on land (i) that was owned by the school district at the time the bonds were issued or purchased with the bond proceeds; or (ii) that was acquired subsequent to the issuance of the bonds [and not acquired with the bond proceeds] ?

Based upon the principles and case law discussed and applied in 1979 Op. Att'y Gen. No. 79-012 and 1979 Op. Att'y Gen. No. 79-016, I am compelled to conclude that the board of education does have the authority to determine that the original purpose of the issuance has not been fulfilled.

With respect to your first question, R.C. 5705.14(A) does require, as you note in your request, that "[t]he unexpended balance in a bond fund that is no longer needed for the purpose for which such fund was created shall be transferred to the sinking fund or bond retirement fund from which such bonds are payable." The statute does not, however, expressly identify how the determination that the balance is no longer needed for the purpose for which such fund was created is to be made. The case of *State ex rel. Board of County Commissioners v. Austin*, 158 Ohio St. 476, 110 N.E.2d 134 (1953), however stands for the proposition that the issuer has the authority to make this determination. In *Austin* a board of county commissioners issued notes and levied a tax for the purpose of constructing a county home. The county home was constructed as originally planned but without exhausting the proceeds of the tax. The court held that the board, upon finding that the original building was inadequate, had the authority to use the balance of the proceeds to construct an addition to the original building. Thus, until such time

as the issuer determines that the balance in a bond fund is no longer needed, the transfer requirements of R.C. 5705.14(A) are not triggered. As noted in Op. No. 79-012, the issuer must, of course, act in good faith and with due regard to the circumstances and interests of the subdivision, and the issuer actions may be subject to judicial scrutiny in the event that there are sufficient facts to support an allegation that the issuer has acted in bad faith or abused its discretion.

Your second question seeks clarification of the school board's authority to expend the balance of the bond fund for site improvements. As noted in Op. No. 79-012, the critical factor in determining whether a particular expenditure of bond proceeds is proper is whether the expenditure falls within the purpose stated in the resolution adopted by the issuer.

The resolution about which you have inquired authorizes five different types of expenditures: 1) purchasing lands; 2) constructing new fireproof school buildings; 3) providing necessary walks, site improvements and landscaping; 4) making necessary alterations, improvements and additions to existing fireproof school buildings; and 5) buying equipment and furnishings. Expenditures for site improvements are not expressly limited by the terms of the resolution to the improvement of lands purchased with bond proceeds or owned by the district at the time the bonds were issued. The statement of purpose in the resolution permits the bond proceeds, or the interest earned on such proceeds, to be expended to improve land acquired subsequent to the issuance of the bonds and not acquired with the bond proceeds.

The fact that the purpose statement in the resolution can be read in the manner suggested above is not, however, dispositive of the issue you raise. It is necessary to consider two additional issues: first, whether, this interpretation of the purpose clause contravenes the single purpose requirement set forth in R.C. 133.10, and second, whether the board is limited as a matter of law to expenditures for site improvements that were within its contemplation at the time the bonds were issued.

With respect to the first issue, R.C. 133.10 provides that a resolution for the issuance of bonds "shall relate only to one purpose," but for school districts the purpose may be stated to include "any number of school buildings and all expenditures. . .for any one. . .building, or other structure, or group of buildings or structures for the same general purpose." In 1964 Op. Att'y Gen. No. 1456, one of my predecessors had occasion to consider the single purpose requirement in a situation analogous to the one about which you have inquired. The purpose statement at issue in 1964 Op. No. 1456 provided for "acquiring and improving real estate for school purposes and constructing, equipping and furnishing fireproof school buildings." My predecessor construed the purpose statement as limited to the construction, equipping and furnishing of fireproof school buildings, including the acquisition and improvement of real property for such school buildings. My predecessor expressly declined to construe the purpose statement as intended for the acquisition and improvement of real estate for school purposes and the construction of fireproof school buildings on real property other than that purchased with the proceeds of the bond issue, believing that if construed in this manner the resolution would relate to more than one purpose and would, consequently, violate R.C. 133.10. If I were to rely upon my predecessor's reasoning to answer your second question, I would have to conclude that the school board may not use the balance in the building fund to make site improvements on land acquired subsequent to the issuance of the bonds and not acquired with the bond proceeds. Under my predecessor's reasoning, the bond proceeds, and the interest earned thereon, could be expended to improve land only if such improvements related to existing school buildings or school buildings constructed with bond proceeds. I, however, disagree with my predecessor's analysis, and do not feel compelled to follow it on the basis of the authorities cited in support of his conclusion.

My predecessor relies primarily upon the case of Bearden v. Shaker Heights, 83 Ohio Law Abs. 314, 169 N.E.2d 314 (Cuyahoga County 1960). The significant

portion of the decision, in my opinion, is the following analysis at 83 Ohio Law Abs. 318-19, 169 N.E. 2d 318-19:

The ballot itself states that bonds shall be issued for the purpose of "improving recreation facilities by constructing swimming pools and other fireproof structures and play areas and otherwise developing the sites therefor." The Court construes this language in a much narrower sense than either the defendants or the amicus curiae do.

They assert that the language permits the unlimited improvement of recreational facilities. By reading the language the Court finds that the bond issue is not for improving recreational facilities generally rather; it is for improving recreational facilities specifically by constructing swimming pools, and other fireproof structures in play areas, and otherwise developing the sites therefor. Thus the bonds could not be sold and a levy of taxes made outside the ten mill limitation to improve recreational facilities within the city by constructing play areas or fireproof structures without having them relate to the swimming pools.

Thus, the court's conclusion that the bonds could not be sold to construct play areas unrelated to swimming pools is based upon its construction of the purpose statement itself. The court was not confronted with the question of whether swimming pools and unrelated play areas could properly be combined in a single purpose.

It does appear that the court subsequently suggests in dicta that a resolution providing for the construction of swimming pools and unrelated play areas would violate the "one purpose rule" as set out in R.C. 133.10. This portion of the court's opinion, however, is predicated upon its observation that a municipality's authority to provide for play fields is conferred by a statutory provision separate and distinct from the statutory provision authorizing a municipality to provide for swimming pools. There is no similar statutory bifurcation with respect to a school board's authority to undertake capital improvements for educational purposes. See R.C. 3313.37 (authority of a board of education to undertake capital improvements).

1964 Op. No. 1456 also relies upon the case of State ex rel. Speeth v. Carney, 163 Ohio St. 159, 126 N.E.2d 449 (1955) (bond resolution providing for the "construction of subways" contains only one purpose). The significance of this case is its recitation of the test for determining singleness of purpose, which is stated at 163 Ohio St. 184-85, 126 N.E. 2d 463-64, as follows:

The purpose of the statute is to prevent the union in one act of diverse, incongruous and disconnected matters, having no relation to or connection with each other. . .to give electors a choice to secure what they desire without the necessity of accepting something which they do not want (see 4 A. L. R. [2d], 626); and to prevent double propositions being placed before a voter having but a single expression to answer all propositions, thus making logrolling impossible (see 4 A. L.R. [2d], 622). In applying the rule, the courts invoke a test as to the existence of a natural relationship between the various structures or objects united in one proposition so that they form "but one rounded whole." See 4 A. L. R. (2d), 630.

As authority for this general rule the Speeth court relied heavily upon 4 A.L.R. 617. Collected in that annotation are numerous decisions involving the interpretation and application of state statutes or constitutional provisions analogous to R.C. 133.10. The landmark case cited there is Kellams v. Compton, 206 S.W.2d 498 (Mo. 1947), which case is in my opinion analogous to the situation about which you inquire. In that case a school board submitted to the district's electorate a proposition authorizing the issuance of bonds for three projects at three different locations: 1) athletic field bleachers, 2) a sixteen room high school building, and 3) a four room elementary school. Applying the "natural relationship" test the court held that the three projects were not so unrelated or incongruous as

to violate the single purpose rule. If the natural relationship test is as severe as suggested in 1964 Op. No. 1456, the Kellams court would have had to invalidate the proposition since the athletic field bleachers were not related to either the high school building or the elementary school building.

Subsequent cases decided in accordance with the analysis and annotations set forth in 4 A. L. R. 2d 617 similarly suggest that, at least with respect to school districts, any number of physically distinct capital improvements may be combined in a single resolution provided they are all related to the general purpose of providing or improving school facilities. See, e.g., Kimsey v. Board of Education, 507 P.2d 180 (Kan. 1973) (issuance of bonds for one or more buildings for junior high school purposes and for senior high school purposes did not violate singleness of purpose rule); Lilly v. Crisp County School System, 162 S.E.2d 456 (Ga. App. 1968) (notice stating that bonds would be issued "for the purpose of providing funds to pay the cost of acquiring, constructing and equipping school buildings and facilities useful or desirable in connection therewith, adding to, improving, renovating, repairing and equipping existing educational facilities. . .acquiring the necessary property therefor. . .and paying expenses incident to accomplishing the foregoing" was valid since the purposes stated so naturally related to providing additions and improvements to school facilities); Miles v. State, 101 S.E.2d 173 (Ga. App. 1957) (bond election for providing funds to construct and equip "school buildings, libraries, auditoriums, cafeterias, gymnasiums, athletic fields and buildings . . ." was not subject to criticism as dual purpose since all purposes were related to improving school facilities); Buhl v. Joint Independent Consolidated School District, 82 N.W.2d 836 (Minn. 1957) (proposal for bond issue for purpose of acquisition and betterment of schoolhouses was valid); Roll v. Carrollton Community Unit School District, 121 N.E.2d 1 (Ill. 1954) (proposition for bond issue to purchase site and build high school, to build attendance center, and to build an addition to existing school was valid since all embodied one general purpose).

Upon the basis of the foregoing analysis, it is my opinion that the natural relationship test was incorrectly applied in 1964 Op. No. 1456. I am persuaded by my analysis of the applicable case law to conclude that a board of education may include in a single bond resolution a number of physically distinct improvements, provided that all such improvements relate to the general purpose of providing or improving school facilities. In specific response to your question, it is my opinion that the purpose statement about which you have inquired may be construed to authorize the board to undertake site improvements regardless of whether the land to be improved was owned by the district at the time the bonds were issued or was purchased with the bond proceeds. The single purpose requirement of R.C. 133.10 is not violated by construing the purpose statement to permit the board to expend the bond proceeds, or the interest earned on the bond proceeds, to improve land acquired subsequent to the issuance of bonds and not acquired with the bond proceeds.

Remaining to be considered, however, is the issue of whether the board of education is limited as a matter of law to expenditures for site improvements that were within its contemplation at the time the bonds were issued. 1964 Op. No. 1456 suggests that the board's power is so limited. The applicable portion of the opinion states:

Your third and last question is may this money be used to construct drainage ditches which are needed on the sites near the buildings constructed from the sale of these bonds. Again, if these drainage ditches may be fairly said to be a part of the original acquisition and improvement of these school building sites this money may be used for their construction. It may not, however, be retained and used as a special fund to pay for improvements found desirable after the building sites have been acquired and improved and the buildings have been erected thereon and furnished.

Again, I must disagree.

As I noted in Op. No. 79-012 at 2-39, "a board of education may amend its

plans for the construction of school facilities subsequent to the approval of a bond issue. . . provided that the added or substituted facility is one the board is empowered to construct and it falls within the purpose stated in the resolution." A board of education has the statutory power to determine the needs of the school district, and the approval of a bond issue does not withdraw from the board its discretion in such matters. See State ex rel. Harlingen v. Board of Education, 104 Ohio St. 360, 136 N.E. 196 (1922); State ex rel. Clarke v. Board of Education, 11 Ohio App. 146 (Clinton Co. 1919); Bartlett v. Board of Education, 71 Ohio Law Abs. 140, 128 N.E.2d 267 (C.P. Montgomery County 1955). Accordingly, with respect to your specific question, it is my opinion that the board of education may expend the bond proceeds, or the interest earned thereon, for site improvements, regardless of whether the specific improvement was within its contemplation at the time the bonds were issued. It may, therefore, expend such funds to improve land that was acquired subsequent to the issuance of the bonds and not acquired with the bond proceeds.

Before concluding, I wish to emphasize, as I did in Op. No. 79-012, that while a board of education has broad discretion to determine and provide for the needs of the school district, its discretion in such matters is not unlimited or unreviewable. A board of education has a duty to act in good faith and to use its best judgment with due regard to the circumstances and interests of the district at the time of its action. Brannon v. Board of Education, 99 Ohio St. 369, 124 N.E. 235 (1919). In the event that there are facts suggesting that a board of education has not acted in good faith or has not given due regard to the circumstances or interests of the district as a whole, the board's decision may be subjected to judicial scrutiny.

In specific response to your questions, it is my opinion, and you are advised, that:

1. For the purposes of R.C. 5705.14(A), the decision as to whether an unexpended balance in a bond fund is not longer needed for the purpose for which such fund was created is committed to the discretion of the bond issuing authority.
2. In the event that the purpose statement in a bond resolution authorizes a board of education to expend bond proceeds for site improvements and does not restrict the board to any particular type of improvements, a board of education may expend bond proceeds for site improvements on land that was owned by the school district at the time the bonds were issued or purchased with the bond proceeds, or on land that was acquired subsequent to the issuance of the bonds and not acquired with bond proceeds. (1964 Op. Att'y Gen. No. 1456 overruled in part.)