

June 19, 2014

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
21 West Boardman Street
Youngstown, Ohio 44503

SYLLABUS:

2014-023

Austintown Township is permitted to use \$800,000.00 of the funds received from the Casino Operator Settlement Fund, pursuant to uncodified section 610.15.10 of Am. Sub. H.B. 59 of the 130th General Assembly, to satisfy existing securities that Austintown Township issued pursuant to R.C. 505.262 to purchase a communication system.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2014-023

The Honorable Paul J. Gains
Mahoning County Prosecuting Attorney
21 West Boardman Street
Youngstown, Ohio 44503

Dear Prosecutor Gains:

We have received your request for an opinion whether Austintown Township, which received one million dollars from the Casino Operator Settlement Fund, pursuant to uncodified section 610.15.10 of Am. Sub. H.B. 59 of the 130th General Assembly, may spend \$800,000.00 of those funds on a communication system as infrastructure or a capital improvement. If so, you ask whether the funds can be applied to satisfy securities that were issued pursuant to R.C. 505.262 prior to the effective date of uncodified section 610.15.10 of Am. Sub. H.B. 59 to purchase the communication system, or whether the funds must be used for new infrastructure or capital improvements. Before answering your questions, it is helpful to give some background on the Casino Operator Settlement Fund, Am. Sub. H.B. 59, R.C. 505.262, and the general definitions of “infrastructure” and “capital improvement.” *See* R.C. 3772.34; Am. Sub. H.B. 59, 130th Gen. A. (2013) (eff. June 30, 2013, with certain sections effective Sept. 29, 2013) (sections 610.15.10 and 610.15.11, uncodified); R.C. 505.262.

Casino Operator Settlement Fund and Am. Sub. H.B. 59

The Casino Operator Settlement Fund is created pursuant to R.C. 3772.34. The fund is designed to receive any money paid to the state by the operators of casino facilities in excess of certain amounts as provided in the Revised Code or the Ohio Constitution. R.C. 3772.34. Money in the fund may be used for activities related to workforce development, economic development, job creation, training, education, food banks, and expenses. R.C. 3772.34; *see also* Ohio Const. art. XV, §6 (C).

In 2013, the General Assembly enacted Am. Sub. H.B. 59. Uncodified section 610.15.10 of Am. Sub. H.B. 59 requires the Director of Budget and Management to pay one million dollars by a certain date from the Casino Operator Settlement Fund to certain municipal corporations or townships

where a commercial racetrack is located or relocated.¹ Am. Sub. H.B. 59, section 610.15.10 (uncodified). The Director of Budget and Management must pay an additional one million dollars to each of these municipal corporations and townships at a later date as well. *Id.* Each municipal corporation or township receiving these funds must use at least fifty percent of the funds for infrastructure or capital improvements. *Id.*

Financing Through R.C. 505.262

As explained in your letter and as gathered through a phone call with a member of your staff, Austintown Township wishes to use the money it received from the Casino Operator Settlement Fund to pay back securities that the township issued pursuant to R.C. 505.262 to finance a communication system put in place in 2012. R.C. 505.262 grants a board of township trustees the power to issue securities in order to finance purchases of equipment, buildings, and sites for any lawful township purpose. R.C. 505.262(A). These securities must be signed by the board of township trustees and attested by the signature of the township fiscal officer. *Id.* The securities are not subject to R.C. Chapter 133, the uniform public securities law, except for R.C. 133.20, which limits their maximum maturity. *Id.* The resolution authorizing the issuance of the securities shall provide for levying and collecting annually by taxation, amounts sufficient to pay the interest on and principal of the securities. *Id.* The securities may contain a clause permitting prepayment at the option of the board. *Id.* Securities shall be offered for sale on the open market or given to the vendor or contractor if no sale is made. *Id.* Securities issued pursuant to R.C. 505.262 have their own specific debt service charge limitation. R.C. 505.262(B).

A Communication System is Considered Infrastructure

Am. Sub. H.B. 59 requires that a township that receives money from the Casino Operator Settlement Fund as specified in section 610.15.10 use at least fifty percent of that money for “infrastructure or capital improvements.” Austintown Township has received one million dollars pursuant to this section. Therefore, if Austintown Township wants to use \$800,000.00 of the money it received from the Casino Operator Settlement Fund to pay for a communication system, such a payment will only be lawful if the communication system is considered “infrastructure or capital improvements.”

¹ Uncodified section 610.15.10 of Am. Sub. H.B. 59 was preceded by uncodified section 10 of Am. Sub. H.B. 386, 129th Gen. A. (2012) (eff. June 11, 2012, certain sections effective July 1, 2015). In 2013, uncodified section 10 was repealed by Am. Sub. H.B. No. 51, 130th Gen. A. (2013) (eff. July 1, 2013, with certain sections effective April 1, 2013) (section 601.11, uncodified). Later in 2013, Am. Sub. H.B. 59 repealed and amended section 10 of Am. Sub. H.B. 386, as amended by Am. Sub. H.B. 51. Am. Sub. H.B. 59, sections 610.15.10 and 610.15.11 (uncodified). Am. Sub. H.B. 59 contains the current version of the law.

Am. Sub. H.B. 59 left the terms “infrastructure” and “capital improvements” undefined. When there is no specific definition given for a word in the Revised Code, the word is given “its natural, literal, common, or ordinary meaning.” 1994 Op. Att’y Gen. No. 94-025 (syllabus, paragraph 1); *see* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983). The dictionary defines “infrastructure” as “a substructure or underlying foundation” and “the basic installations and facilities on which the continuance and growth of a community, state, etc. depend, as roads, schools, power plants, transportation and communication systems.” *Webster’s New World Dictionary* 723 (2d College ed. 1986); *see* 1994 Op. Att’y Gen. No. 94-037, at 2-191 (applying dictionary definition of infrastructure). The definition of “capital improvement” refers to the definition of “capital expenditure,” which is defined as “an outlay of funds to acquire or improve a fixed asset.” *Black’s Law Dictionary* 201 (7th ed. 1999).²

² The terms “infrastructure” and “capital improvement” are defined elsewhere in the Revised Code and their definitions vary depending on the context of the particular Revised Code chapter that contains them. *See, e.g.*, R.C. 3769.20(F) (defining “major capital improvement” in the Revised Code chapter concerning horse racing as the “renovation, reconstruction, or remodeling, costing at least six million dollars, of a race track facility”); R.C. 3769.08(J)(4)(a) (defining “capital improvement” as an “addition, replacement, or remodeling of a structural unit of a race track facility” and noting the term does not include “the cost of replacement of equipment that is not permanently installed, ordinary repairs, painting, and maintenance required to keep a race track facility in ordinary operating condition”); R.C. 164.01(A) (defining “capital improvement” for purposes of the Revised Code chapter concerning aid to local government improvements as “acquisition, construction, reconstruction, improvement, planning, and equipping of roads and bridges, . . . waste water treatment systems, water supply systems, solid waste disposal facilities, and storm water and sanitary collection, storage, and treatment facilities, including real property, interests in real property, facilities, and equipment related or incidental to those facilities”); R.C. 151.08(A)(1) (defining “capital improvement projects” in the Revised Code chapter concerning issuance of capital facilities bonds and obligations as the “acquisition, construction, reconstruction, improvement, planning, and equipping of roads and bridges, waste water treatment systems, water supply systems, solid waste disposal facilities, flood control systems, and storm water and sanitary collection, storage, and treatment facilities, including real property, interests in real property, facilities, and equipment related or incidental to those facilities”); R.C. 5537.01(C) (defining “infrastructure project” for purposes of the Revised Code chapter concerning the Turnpike Commission as “any public express or limited access highway, super highway, or motorway, . . . that is constructed or improved, in whole or in part, with infrastructure funding”); R.C. 5709.82(A)(2) (defining “infrastructure costs” for purposes of the Revised Code section concerning compensation for a school district or taxing unit for revenue foregone as a result of tax exemptions to mean “costs incurred by a municipal corporation in a calendar year to acquire, construct, reconstruct, improve, plan, or equip real or tangible personal property that directly benefits or will directly benefit the exempted property”); R.C. 5531.10(A)(8) (defining “state infrastructure project” for purposes of the Revised Code chapter concerning federal cooperation for roads,

You have asked whether the communication system purchased by Austintown Township is infrastructure or a capital improvement as understood by Am. Sub. H.B. 59. A member of your staff has informed us that the communication system purchased by Austintown Township is a dispatching system that is used to connect all emergency personnel of the township. Emergency personnel, and their ability to communicate with each other effectively and efficiently, are important aspects of the “continuance” and “growth” of a community. *See Webster’s New World Dictionary* 723 (2d College ed. 1986). Thus, a dispatching system is a “basic installation[] ... on which the continuance and growth of a community ... depend[s].” *See id.* Moreover, “communication system” is provided by the dictionary as an example of infrastructure. *Id.* In our view it is clear that the dispatching communication system purchased by Austintown Township is “infrastructure” for purposes of Am. Sub. H.B. 59.

Funds from the Casino Operator’s Settlement Fund May Be Used to Pay Securities Issued Pursuant to R.C. 505.262

Now that we have determined that the communication system purchased by Austintown Township is “infrastructure,” we must determine whether the moneys paid to the township from the Casino Operator Settlement Fund can be applied to satisfy securities that were previously issued pursuant to R.C. 505.262 to purchase the communication system. In 2012 Austintown Township issued securities to purchase and operate a communication system. Uncodified section 610.15.10 of Am. Sub. H.B. 59 was effective in 2013. This means that the communication system was already purchased and the securities already issued at the time Austintown Township received the money pursuant to uncodified section 610.15.10 of Am. Sub. H.B. 59. Therefore, we must determine whether the restriction set forth in uncodified section 610.15.10 of Am. Sub. H.B. 59 that at least fifty percent of the money must be used for infrastructure or capital improvements includes infrastructure or capital improvements that were already in existence at the time the money was transferred to the township. In other words, we must determine whether the money can be used for existing infrastructure or capital improvements, or whether it must be used for new infrastructure and capital improvements.

A board of township trustees “can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them.” *Tr. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875). Thus, there must be statutory authority expressly or impliedly granting the township

highways, and bridges as “any public transportation project undertaken by the state, including ... all components of any such project”); R.C. 149.433(A)(2) (defining “infrastructure record” as used in R.C. 149.433 (exemption of security and infrastructure records) as “any record that discloses the configuration of a public office’s or chartered nonpublic school’s critical systems including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of the building in which a public office or chartered nonpublic school is located”).

trustees the power to use the money from the Casino Operator Settlement Fund to pay securities issued under R.C. 505.262.

First we look to the language of R.C. 505.262. Although R.C. 505.262 does not explicitly grant the board of township trustees the ability to pay for securities issued under R.C. 505.262 with money from sources other than a tax levy, it does imply that such a transaction is permitted. R.C. 505.262(A) provides that the resolution authorizing the issuance of securities “shall provide for levying and collecting annually by taxation, amounts sufficient to pay the interest on and principal of the securities.” Thus, R.C. 505.262 contemplates an arrangement whereby the annual collection of taxes will be used to pay the interest and principal on the securities. R.C. 505.262(A) also states, however, that securities issued under that section “may contain a clause permitting prepayment at the option of the board.” Thus, R.C. 505.262 also contemplates an arrangement whereby the securities may be paid at a time earlier than anticipated. Reading these two clauses together, R.C. 505.262 implies that money other than tax revenues may be used to pay the securities.

Further support for this conclusion can be found by examining an analogous chapter of the Revised Code, R.C. Chapter 133. R.C. Chapter 133 is the uniform public securities law and provides “[t]he purposes for and means by which the state and its political subdivisions may incur debt.” 1993 Op. Att’y Gen. No. 93-039, at 2-204; *see also* Ohio Const. art. VIII (public debt and works) and Ohio Const. art. XII (finance and taxation). While securities issued pursuant to R.C. 505.262 are exempt from the requirements of R.C. Chapter 133 (except for R.C. 133.20 as specified), R.C. Chapter 133 is instructive because it provides a detailed plan for the way debt of a political subdivision is typically structured. *See State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph two) (“[s]tatutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent”). Pursuant to R.C. 133.34(A)(5), money from other sources can be used to “fund any outstanding securities or public obligations issued by the taxing authority pursuant to authorization by law or the Ohio Constitution.” Thus, R.C. 133.34 contemplates that money from a variety of sources could be used to fund³ existing securities. Based on the language of R.C. 505.262 itself, as well as analyzing the way other securities are typically structured under R.C. Chapter 133, it is clear that there is no barrier in securities law to using money from other sources to fund outstanding securities.

Finally, nothing in the language of R.C. 3772.34 or Am. Sub. H.B. 59 prohibits Austintown Township from paying for securities previously issued under R.C. 505.262 with money paid to it from the Casino Operator Settlement Fund. Uncodified section 610.15.10 of

³ As used in R.C. Chapter 133, “fund” means “to provide for the payment of debt charges and expenses related to that payment at or prior to retirement by purchase, call for redemption, payment at maturity, or otherwise.” R.C. 133.01(P).

Am. Sub. H.B. 59 simply requires that at least fifty percent of the funds given to the township be used for “infrastructure” and does not require that the funds be used for “existing” infrastructure or “new” infrastructure. Had the General Assembly intended to make a distinction between “new” or “existing” infrastructure, it certainly could have done so, as it has in other sections of the Revised Code. See R.C. 164.05(D), (H) (distinguishing between “new” and “existing” infrastructure); R.C. 164.06(B); 1994 Op. Att’y Gen. No. 94-037; see also *Metro. Sec. Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81 (1927) (when the General Assembly has “used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended”); *Lake Shore Elec. Ry. Co. v. P.U.C.O.*, 115 Ohio St. 311, 319, 154 N.E. 239 (1926) (had the General Assembly intended a term to have a particular meaning, “it would not have been difficult to find language which would express that purpose”).

Conclusion

For the reasons discussed above, it is my opinion, and you are hereby advised that Austintown Township is permitted to use \$800,000.00 of the funds received from the Casino Operator Settlement Fund, pursuant to uncodified section 610.15.10 of Am. Sub. H.B. 59 of the 130th General Assembly, to satisfy existing securities that Austintown Township issued pursuant to R.C. 505.262 to purchase a communication system.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General