

Sections 10510-6, 10510-16, 10510-37 and 10510-39, General Code, contain wide authority for the Probate Court to authorize the sale of real estate of a ward held by a guardian.

In my opinion to be found in Opinions of the Attorney General for 1934, Vol. III, page 1725, the third branch of the syllabus of which I quoted supra, it was held that a so-called trust deed to the Division of Aid for the Aged was an instrument in the nature of a mortgage. Sections 10506-59, 10506-60 and 10506-63, General Code, quoted supra, contain express authority for the Probate Court to authorize the encumbrance by mortgage of the real estate of a ward held by a guardian. It would seem to follow that this power vested in the Probate Court to authorize a guardian to mortgage the real estate of his ward would impliedly give authority to execute a so-called trust deed to the Division of Aid for the Aged, as this would in effect be, the borrowing of money within the contemplation of Sections 10506-59 and 10506-60, General Code, quoted supra.

Consequently in specific answer to your inquiry it is my opinion that in the event the Probate Court has appointed a guardian for an applicant for an Old Age Pension, and if by virtue of Section 1359-6 the Division of Aid for the Aged requires as a condition precedent to the granting of an Old Age Pension to such applicant a transfer of his real estate, the Probate Judge, has authority to authorize the guardian of such applicant to transfer real estate in trust to the Division of Aid for the Aged.

Respectfully,

JOHN W. BRICKER,

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4339.

TOWNSHIP TRUSTEES—AUTHORIZED TO PURCHASE LAND CONTAINING GRAVEL FOR USE ON TOWNSHIP ROADS ONLY PURSUANT TO AUTHORITY OF ELECTORS.

SYLLABUS:

1. *A board of township trustees may purchase land containing gravel for use on the township roads, and machinery to operate such land, only pursuant to authority of the electors, notwithstanding the fact that sufficient available funds may be on hand for such purpose.*

2. *Township trustees are without authority to acquire such land by lease for a period of years at a yearly rental.*

COLUMBUS, OHIO, June 15, 1935.

HON. GEORGE N. GRAHAM, *Prosecuting Attorney, Canton, Ohio.*

DEAR SIR:—Your letter of recent date is as follows:

“Following is a statement of facts and we respectfully request your opinion on the questions thereafter presented:

The township trustees of Lake Township in Stark County, Ohio, do not now own or operate a sand and gravel bank nor do they own any machinery for operating such bank. Said trustees have sufficient money in their general

fund to purchase or lease for a period of ten years a gravel bank or land containing gravel and sand in said township. They also have sufficient money in their general fund to purchase the necessary machinery and equipment to operate the same.

The question of acquiring such real estate by purchase or lease and the necessary machinery to operate it has never been presented to the electors of the township. Said trustees desire to operate such bank and use the gravel and sand for the maintenance of roads in said township and it may be they will desire to sell some of the sand and gravel not needed for the roads.

QUESTIONS

1. May the township trustees purchase land for such purpose and if so, how may it be done and how may it be paid for?
2. May the township trustees lease such land for such purpose for a period of ten years more or less?
3. May the township trustees purchase machinery and equipment and pay for it out of their general fund with cash on hand to operate a gravel bank they control under a lease for a period of ten years more or less?
4. May the township trustees purchase machinery and equipment and pay for it out of their general fund with cash on hand to operate a gravel bank which they purchase and acquire the title to?
5. If the trustees may purchase such land and acquire title thereto, may they pay for it out of cash on hand in their general fund, or may they pay the consideration under the lease out of cash on hand in their general fund?
6. May any or all of these matters above mentioned be done by the trustees without submitting the question to the electors in the township?"

I shall first consider the power of the township trustees to purchase land containing gravel, and machinery and equipment to operate the same, with moneys on hand in the general fund available for such purpose. In so far as the purposes of the general fund are concerned, moneys in such fund may be used for the purchase of such lands as a subdivision is authorized to purchase. Sections 2293-1 and 5625-5, General Code.

Section 7214, General Code, as enacted in its present form in 1915, provides in so far as pertinent:

"The county commissioners or township trustees may contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining or repairing any highways, bridges or culverts within the county, and also appropriate additional land necessary for cuts and fills together with a right of way to or from the same for the removal of material.
* * *"

Section 3298-20, General Code, prior to amendment by the 87th General Assembly, in the enactment of the Uniform Bond Act, authorized township trustees to purchase real estate containing stone and gravel, and necessary machinery to operate same in the following language:

"The trustees of a township may levy a tax in such amount, as they determine, to purchase real property, containing suitable stone or gravel, and the necessary machinery for operating the same, when deemed necessary for the construction, improvement, or repair of the public roads within the township,

to be under the control of the trustees or a person appointed by them. The question of levying such tax, for such purpose, and the amount asked therefor, shall be submitted to the qualified electors of the township at a general election. * * *.”

These sections were under consideration in an opinion appearing in Opinions of the Attorney General for 1923, page 33, the syllabus of which is as follows:

“Trustees of a township, owning a stone or gravel quarry, cannot purchase additional lands for such quarry without the submission of the question to the voters of the township and their approval thereof.”

After quoting Sections 7214 and 3298-20, *supra*, the then Attorney General said:

“Thus there is under sections 3298-20 and 3298-23 G. C. provision made for township trustees to purchase stone or gravel quarries and this provision is only after a vote of qualified electors of the township.

To say that trustees could buy quarries under section 7214 G. C. without a vote would render useless sections 3298-20 and 3298-23 G. C. No such interpretation can be placed.

Land can only be taken by township trustees under section 7214 G. C. for ‘cuts and fills’. If stone or gravel quarries are to be purchased it must be under section 3298-20 or 3298-23 G.C.”

Section 3298-20, General Code, in its present form as amended by the Uniform Bond Act, provides:

“No tax shall be levied or bonds issued by the trustees of a township to purchase real property containing suitable stone or gravel and the necessary machinery for operating the same, unless approved by a vote of the people in the manner provided by law.”

In 1928, this office held in an opinion reported in Opinions of the Attorney General for 1928, Vol. II, page 1071, as set forth in the second branch of the syllabus:

“Township trustees may purchase additional machinery for use in the operation of a stone quarry owned by the township out of the levy of a tax or an issue of bonds, as provided in Section 3298-20, General Code. The authority to levy such tax must first be obtained by a vote of the electors and the question of levying such tax must be submitted to the electors in the manner prescribed by Sections 5625-15, et seq., General Code. The authority to issue such bonds must first be obtained by a vote of the electors and the question of issuing such bonds must be submitted to the electors in the manner prescribed in sections 2293-19, et seq., General Code.”

While not directly concerned with the question of purchasing land or machinery with available funds on hand, here again this office seemed to take the unqualified position that such lands or machinery may be purchased only pursuant to authority of the electors. After quoting Section 3298-20, as it existed prior to its amendment, as well as in its present form, the then Attorney General said at page 1073:

"In both forms of Section 3298-20, General Code, that is, before and after its amendment in The Uniform Bond Act, the inhibition against township trustees levying a tax or issuing bonds without a vote of the people is on the purchase of real estate *and* machinery. This section is clearly limited to the initial expenditure, that is, the original acquisition of real estate and the machinery necessary to quarry stone or gravel, and does not cover the operation of the stone quarry or gravel pit, once it has been acquired, or the repair or replacement of machinery necessary to such operation. A favorable vote of the people authorizing the purchase of real estate and machinery for operating the same establishes a definite policy, that is, it authorizes the purchase of said real estate and authorizes the trustees to purchase machinery and operate the quarry. Once this policy has been established the authority to operate continues and carries with it the power to replace parts of machinery that have been broken and to purchase new machinery to replace that which has become worn out in the course of such operation."

An analogous question was under consideration in an opinion reported in Opinions of the Attorney General for 1933, Vol. III, page 1707, wherein was considered the question of the authority of a township and village to unite in the erection of a public building without submitting the question to the electors. After quoting Sections 3399, 3400, 3401 and 3402, General Code, which provide for submitting to the electors a tax levy for such purpose, it is said in the opinion at page 1708:

"The township trustees, of course, have only such powers as are expressly granted to them, and such as are necessarily implied from those expressly given. Section 3399 authorizes the erection of such a joint building as 'hereinafter provided' if the electors of both the township and the village so determine. Clearly, such a building cannot be erected without the vote of the electors thereon, regardless of the necessity of a tax levy, since there is no authority therefor. The method outlined in these statutes of having the electors vote upon such a proposition is to submit the question to them as to whether or not a tax shall be levied for such improvement. In the case of the erection of a town hall by the township trustees alone, sections 3395 and 3396, General Code, provide for a submission to the electors of the question of making such improvement, and the trustees then are authorized to levy such taxes which may be necessary to pay the cost thereof. That procedure does not apply to a building to be erected by both the township and village. The only method which the statutes provide for securing the approval of the electors of such an improvement, is by submitting to them the question of a tax levy therefor. While upon the approval of two-thirds of the electors of both the township and village the township trustees and the village council are authorized to make such a tax levy, I am of the view that, if it then appears that the cost of said improvement can be paid out of the general funds of said subdivisions without the necessity of an extra tax levy, the taxing authority of such subdivisions would not be required to levy any additional tax."

In a later opinion appearing in Opinions of the Attorney General for 1934, Vol. I, page 341, the first branch of the syllabus is as follows:

"A township hall cannot be built, removed, improved or enlarged at a cost to the township greater than two thousand dollars without submitting the

question to the electors of the township, even though there are sufficient unencumbered funds in the general fund of the township to pay such entire cost."

Section 3298-20, General Code, here under consideration, is, of course, couched in somewhat different language than some of the sections under consideration in the foregoing opinions and it should also be observed that there is no express machinery provided for submitting to the electors the sole policy question of purchasing such land or machinery; but the same may be said as to the statutes under consideration in the 1933 opinion, *supra*. While questions of this nature are not without difficulty, this office has long adhered to the policy of strict construction of such statutes authorizing the expenditure of public funds. That construction has, of course, ample support by the courts. In *State, ex rel. vs. Pierce*, 96 O. S. 44, the third branch of the syllabus is as follows:

"In case of doubt as to the right of any administrative board to extend public money under a legislative grant, such doubt must be resolved in favor of the public and against the grant of power."

It is my opinion that a board of township trustees may purchase land containing gravel for use on the township roads, and machinery to operate such land, only pursuant to authority of the electors, notwithstanding the fact that sufficient available funds may be on hand for such purpose.

You next inquire as to the authority to lease such land. The General Code contains no authority whereby township trustees may expend public funds in the acquisition of land for the use of the township by lease. Section 18, General Code, authorizing township trustees to accept lands by gift or devise, provides that such gift or devise may be in fee simple or any lesser estate. This is, of course, no authority to expend the taxpayers' money in payment of rentals. Section 3244, General Code, provides that townships shall be capable of receiving or holding real estate by devise or deed, but does not authorize the receiving of real estate by lease.

Section 3298-20, *supra*, relates to the "purchase" of real property containing stone or gravel. The word "purchase" was construed in *Hackett vs. School District*, 150 Pa. 220, as including all modes of acquisition except that of descent. This case was commented upon in my opinion appearing in Opinions of the Attorney General for 1934, Vol. II, page 829, holding that township trustees could not use the township's share of the proceeds of motor vehicle tax to pay the cost of leasing stone crushers. Even if the word "purchase" as used in Section 3298-20, General Code, were to be construed as including the acquisition of such land by lease, then it would still be necessary to submit the question to the electors in view of the conclusion I have reached as to what I have treated as your first question. I do not think that such a construction of the word "purchase" is here authorized. It was obviously not the legislative intent to provide for an election upon the matter of entering into such a lease and it is my opinion that such land may not be so acquired.

It is believed that you will find the foregoing conclusions and the authorities hereinabove cited dispositive of each of your six questions.

Respectfully,

JOHN W. BRICKER,

Attorney General.