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1. EQUIPMENT — INSTALLATION WHERE NO SUCH TYPE EXISTED BEFORE — REPLACEMENT, EXISTING EQUIPMENT WITH NEW AND SUPERIOR EQUIPMENT, DIFFERENT IN QUALITY AND FUNCTION FROM ORIGINAL IS A “BETTERMENT AND ADDITION.”

2. “MAINTENANCE AND ORDINARY REPAIR” — RESTORATION TO A SOUND AND GOOD STATE AFTER DECAY, INJURY, DILAPIDATION OR PARTIAL DESTRUCTION — SECTION 3119 G.C. — CHILDREN’S HOME.

SYLLABUS:

1. *The installation of equipment where no such equipment existed before and the replacement of existing equipment with new and superior equipment differing substantially in quality and function from that which had theretofore been used is a “betterment and addition,” within the meaning of Section 3119, General Code.*

2. *Restoration to a sound and good state after decay, injury, dilapidation or partial destruction constitutes maintenance and ordinary repair within the meaning of Section 3119, General Code, and may include replacement.*

Columbus, Ohio, May 17, 1941.

Hon. Frank W. Springer, Prosecuting Attorney,
Lisbon, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

“Stark County and Columbiana County established a district home for children about the year 1875, which home is located in Stark County and is known as the Fairmount Children’s Home. The home was established as near as I can determine under the provisions of General Code Sections 3109 et seq., or rather under the revised statutes which were amended by the present code sections, and accordingly such home is subject to the provision of General Code Sections 3109 et seq., in the management and operation thereof.

Due to a mutual misunderstanding on the part of the officials of both counties, the cost of the maintenance and operation of the home in the past has been paid on a basis whereby Stark County paid 60% of the total cost and Columbiana County paid 40%. While still acting under this mistaken belief, the County Commissioners of the two counties ordered certain equipment purchased and placed in the home. Since that time it has been called to the Commissioners’ attention that the cost of operating and maintaining the home is covered by General Code Section 3119 and as a result the Columbiana County Auditor has refused to pay Columbiana County’s portion of the cost of the purchases until it is determined what that portion is.

The new equipment purchased and installed in the Fairmount Home consisted of new boilers, new stokers, new water pumps and new water softening equipment. The boilers and the water pumps replaced old equipment which had formerly been in the home, but in no way constituted a repair or addition to such old equipment but was purchased to replace the same. The water softening equipment and the stokers are entirely new in the home, there not having been such equipment there before.

Under General Code Section 3119 ‘the cost of all betterments and additions thereto shall be paid by the counties comprising the district in proportion to the taxable property of each county as shown by their respective duplicates. The current expense of maintaining the home and the cost of ordinary repairs thereto shall be paid by each such county in proportion to the number of children therefrom maintained in the home during the year.’ If the equipment purchased is considered as betterments and additions to the home as provided by said Section

3119, Columbiana County would now pay approximately 20% of the total cost and Stark County would pay 80%. If, however, said new equipment was considered as ordinary repairs, Columbiana County would pay approximately 32% of the cost thereof and Stark County approximately 68%. The difference in the method of computation means several thousand dollars to the counties involved.

The question on which we seek your specific opinion is whether or not all or any portion of the above described equipment shall be considered as ordinary repairs, or whether all or any portion thereof shall be considered as betterments and additions as contemplated by General Code Section 3119?

We further request your opinion as to whether or not you can define any general rules that may be followed in guiding the officials of the two counties in the future in determining on what basis the cost of purchases for the home shall be determined."

Section 3119, General Code, provides that:

"When an established site and buildings are used the joint board shall cause the value of such site and buildings to be properly appraised. This appraisal value, or in case of the purchase of a site, the purchase price and the cost of all betterments and additions thereto, shall be paid by the counties comprising the district, in proportion to the taxable property of each county, as shown by their respective duplicates. The current expense of maintaining the home and the cost of ordinary repairs thereto, shall be paid by each such county in proportion to the number of children therefrom maintained in the home during the year."

The terms used in Section 3119, supra, with reference to the method of computation that is to be employed in proportioning the costs among the counties comprising a district charged with the support of a children's home have sufficient precision and suggest to the mind but one interpretation.

While it might be contended that terms such as "maintaining * * * and * * * ordinary repairs" and "betterments and additions" are equivocal and subject to various interpretations necessitating resort to the rules of statutory interpretation, the terms assume a clear and definite meaning because of their context in the section under consideration.

The legislative intent with respect to that which shall constitute "betterments and additions" loses all obscurity in the light of the dis-

tinguishing terminology "maintaining * * * and * * * ordinary repairs."

"Betterments and additions" as a term, implies substantial alteration, addition or change to the premises, greater than mere "repair." 266 N.Y.S. 630, 633; 77 S.W. 56; 5 Words and Phrases, 392.

It has also been defined as a term used to designate improvements, etc. on real estate by which the property is increased in value. 16 How. Prac. 220; 5 Words and Phrases, 391.

Because of the increase in value aspect, the term not only encompasses new equipment where there had been no such equipment before, but also the replacement of existing equipment with new and superior equipment where the cost of such replacement is in excess of the cost of renewal equipment of a like kind and quality and similar to that which had theretofore been used. 245 Fed. 792, 793; 3 Words and Phrases, 392.

Hence the term "betterments and additions" does not encompass substitution of new equipment or machinery that is of like kind and quality and similar to the old or worn equipment or machinery that is to be replaced. Such a substitution constitutes maintenance and repair.

Substantiating this conclusion are the following court interpretations of the term "repair" and "ordinary repair":

"'Repairs' as used in a covenant to make all necessary repairs to a gate, includes the replacing of the gate if removed." *Beach v. Crain*, 2 N.Y. (2 Const.) 86, 93; 36 Words and Phrases, 964.

"The replacing of an old bridge by a new one is within the meaning of the word 'repairs'." *Hartford & N.H.R. Co. vs. Grant*, 11 Fed. Cas. 599, 701; 36 Words and Phrases, 964.

"A lease providing that the premises should at all times be open to the inspection of the lessor or his agents, * * * and for necessary repairs, means ordinary repairs, but does not include the substitution of one system of heating for another or for a new heater *unless the old one was worn out*." *Gulliver v. Fowler et al.*, 64 Conn. 556; 36 Words and Phrases, 955. (Underscoring the writer's).

"Covenant to keep premises in repair refers to condition

of premises as entity, and not as to component parts thereof, and hence any upkeep, including if necessary entire replacement of component parts of building or rented premises, is a 'repair.'" Bell House v. Wilkins et al., 34 Ga. 285; 36 Words and Phrases, 964.

"Where rented premises consisted of house equipment with furnishings which during lease became so useless that its replacement was necessary, replacement was a 'repair.'" Bell House v. Wilkins et al., 34 Ga. 285; 36 Words and Phrases, 964.

"The word 'maintain' meaning practically the same thing as 'repair,' which means to restore to a sound and good state after decay, injury, dilapidation, or partial destruction." Chambers et al. v. North River Line et al., 52 Fed. (2d) 1065, Circuit Court of Appeals, Sixth Circuit (1931).

The qualifying word "ordinary" in connection with the word "repair" does not change the above definitions for it refers to that which is usual, established, regular or common.

Therefore, the new stokers and new water softener equipment, mentioned in your inquiry are betterments or additions, while the new boilers and new water pump mentioned in your inquiry as replacements may constitute repairs if such replacement is merely a renewal of that which has become old and worn.

In answer to your specific inquiry, therefore, and in accordance with your request for general rules for future guidance, it is my opinion that:

1. The installation of equipment where no such equipment existed before and the replacement of existing equipment with new and superior equipment differing substantially in quality and function from that which had theretofore been used is a "betterment and addition," within the meaning of Section 3119, General Code.

2. Restoration to a sound and good state after decay, injury, dilapidation or partial destruction constitutes maintenance and ordinary repair within the meaning of Section 3119, General Code, and may include replacement.

Respectfully,

THOMAS J. HERBERT,
Attorney General.