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1. BRIDGE CONSTRUCTION BY STATE BRIDGE COMMISSION—FINANCED BY SALE OF FULLY PAID AND REDEEMED REVENUE BONDS—BRIDGE PART OF HIGHWAY SYSTEM—MAINTAINED BY DIRECTOR OF HIGHWAYS—FUNDS SUBJECT TO SECTION 5a, ARTICLE XII, OHIO CONSTITUTION—REVENUE FROM TOLLS COLLECTED BY COMMISSION—USED TO REPAY DEPARTMENT OF HIGHWAYS.
2. SPECIAL PROVISION AUTHORIZING COMMISSION TO PAY REVENUES TO DEPOSITORY “AS IT DETERMINES”—SECTION 5593.12 R. C.—EXCEPTION TO CHAPTERS 131 AND 135 R. C. RELATIVE TO DEPOSIT OF PUBLIC FUNDS.
3. EXPENDITURES—ATTENDANCE OF MEMBERS AT ENGINEER’S MEETING—PAID FROM TOLL REVENUE FUND. (1939 O. A. G. No. 849).

SYLLABUS:

1. Where a bridge has been constructed by the state bridge commission and the cost of such construction has been financed by the sale of revenue bonds as provided in Chapter 5593., Revised Code, and where all such bonds have been fully paid and redeemed, such bridge is a part of the state highway system, and it may be maintained, repaired, or reconstructed by the director of highways by the expenditure of funds which are subject to the limitations of Section 5a, Article XII, Ohio Constitution, notwithstanding the fact that such commission, under authority of Amended Senate Bill No. 356, 99th General Assembly (124 Ohio Laws, 390) has resumed the collection of tolls on such bridge to meet the cost of maintenance, repair, or reconstruction. Revenues accruing from such tolls may be applied to repay to the department of highways the funds so expended by the director.

2. The special provision in Section 5593.12, Revised Code, authorizing the state bridge commission to “provide by resolution * * * for the payment of the * * * revenues of such bridge to such * * * depository as it determines” constitutes an exception to the general provisions of Chapters 131., and 135., Revised Code, relative to the payment of moneys into the state treasury and to the deposit of public funds.

3. Expenditures in connection with the attendance of members of the state bridge commission at a meeting of a national trade or professional association of bridge, tunnel and turnpike engineers and technicians may properly be paid from funds of the commission accruing from bridge toll revenues. (Second paragraph of the syllabus in Opinion No. 849, Opinions of the Attorney General for 1939, p. 1131, overruled.)

Columbus, Ohio, December 26, 1956

Hon. James A. Rhodes, Auditor of State
State House, Columbus 16, Ohio

Dear Sir :

Your request for my opinion reads as follows :

“Bonds for the construction of the Steubenville-Weirton Bridge were all paid off, but by the provisions of Amended Senate Bill No. 356, enacted May 29, 1951, additional expenditures were authorized and the State Bridge Commission by virtue of the provisions of the bill re-assumed jurisdiction over the same as of February 6, 1952.

“Tolls for the use of the bridge were re-imposed on that date to defray the Commission’s portion of the cost of improvements to approaches. This improvement was performed by the State Highway Department in accordance with an agreement dated August 27, 1952 and a supplement to said agreement dated June 11, 1953.

“There are no bonds outstanding at this time and all interest coupons on such bonds have been paid. The revenues derived from the toll charges are deposited to the account of the State Bridge Commission.

“The agreement above referred to with the State Highway Department provides for the repayment by the Bridge Commission to the Highway Department of a net estimated monthly income of \$25,000.00 from the revenues derived for the use of the bridge.

“The State Highway Department furnished all of the funds necessary to pay for the approaches out of funds standing to the credit of the State Highway Department.

“An opinion is requested as to whether or not the toll revenues from the Steubenville-Weirton Bridge should be considered to be State funds and therefore subject to the provisions of R. C. 131.01 which provides that all such revenues be deposited in the State Treasury with a detailed, verified statement of such receipts being filed with the State Auditor.

"It might be further pointed out that the State Bridge Commission since 1951 has retained the firm of Parker, Bolon & Craig to prepare a monthly financial statement at a cost of \$150.00 each month. This service was required under the terms of the Indenture by which bonds were sold to pay for the cost of construction of the bridge. It is not provided for in the agreements between the Bridge Commission and the State Highway Department.

"An opinion is requested as to whether or not findings should be made against the Bridge Commission and the firm of Parker, Bolon & Craig who have made these financial reports for the State Bridge Commission and received the fees therefor.

"In addition to preparing the monthly financial statement, this firm acts as financial advisers to the Commission. An opinion is requested as to whether or not the payment of a fee to a private agency to act as such financial adviser is a proper expenditure of the toll revenue funds.

"Our report further indicates that the Commissioners of the State Bridge Commission and its Secretary-Treasurer attended a convention of the American Bridge, Tunnel & Turnpike Association at Atlantic City, New Jersey on October 12, 1955 to October 14, 1955.

"In your Opinion (1939 O. A. G. 849), you held that the State Bridge Commission could not legally expend funds derived from tolls collected for transit over bridges operated by such Commission for the purpose of paying dues in national toll bridge association or paying expenses incurred in attendance of commission members at conventions of such association. An opinion is requested as to whether or not a finding should be made for this expenditure.

"R. C. 5593.14 provides that tolls shall cease:

'When the particular bonds issued for any bridge and the interest thereon have been paid, or a sufficient amount has been provided for their payment and continues to be held for that purpose, tolls for the use of such bridge shall cease except for the cost of maintaining, repairing, and operating such bridge or for the repayment of any valid obligation due the state incurred by the state bridge commission in retiring its bonds. Thereafter and as long as the cost of maintaining, repairing, and operating such bridge is provided for through means other than tolls, no tolls shall be charged for transit over such bridge and such bridge shall be free.'

"In the case of the Steubenville-Weirton Bridge, all of the bonds that were issued were paid off. The approaches to the Steubenville-Weirton Bridge were redesigned and the money to construct the approaches was "borrowed" from the State High-

way Department. The contract herein referred to provided for the repayment to the Highway Department.

“An opinion is requested as to whether or not any part of the motor vehicle fuel tax could be appropriated under the authority of Section 5735.27 or any of the other sections of the Code for the purpose of constructing these approaches with subsequent reimbursement to the Highway Construction Fund through toll charges.

“Whether or not the use of such funds violates Article XII, Section 5a of the Ohio Constitution. Further, whether or not Amended Senate Bill No. 356 was constitutional.

“An opinion is further requested as to whether or not these tolls are “public moneys” and subject to the provisions of the Uniform Depository Act.”

Amended Senate Bill No. 356, 99th General Assembly, to which you refer, reads as follows:

“AN ACT

“To empower the state bridge commission to assume jurisdiction over, charge tolls for the use of and necessary improvements in the Steubenville-Weirton bridge and the approaches thereto.

“Steubenville-Weirton bridge; state bridge commission.

“Section 1. Notwithstanding any of the provisions of sections 1084-1 to 1084-17 of the General Code, both inclusive, and in addition to the powers heretofore granted, the state bridge commission is hereby authorized and empowered:

“(a) To assume jurisdiction over, operate and maintain the Steubenville-Weirton bridge, between Steubenville, Ohio, and Weirton, West Virginia, heretofore acquired by the commission, notwithstanding the fact that tolls for the use of such bridge have ceased and such bridge has been maintained by the state highway department. Jurisdiction over such bridge shall be assumed upon determination by the commission that it is in the best interest of the people of the state of Ohio for the commission to assume jurisdiction over such bridge and to operate and maintain the same as a toll bridge until sufficient proceeds have been realized from the charge of tolls to completely finance the cost of all constructions, repairs, maintenance, alterations and improvements in the bridge and the approaches thereto, found by the commission to be necessary or advisable to the continued proper functioning of the bridge;

“(b) To charge tolls for the use of such bridge in order to provide a fund with which to finance the cost of all constructions,

repairs, maintenance, alterations and improvements in such bridge or the approaches thereto, deemed necessary or advisable by the commission ;

“(c) To construct, repair, maintain, alter or improve the bridge or the approaches thereto, the cost of any such construction, repair, maintenance or alteration to be financed entirely out of the proceeds of the tolls charged for the use of the bridge ;

“(d) To cease the charging of tolls for the use of such bridge and to relinquish jurisdiction over, operation and maintenance thereof to the state highway department, upon determination by the commission that to do so would be in the best interest of the people of the state of Ohio.”

This enactment, not being one of a general nature, has not been codified.

It has long been the policy of this office not to question the constitutional validity of enactments of the General Assembly, this on the ground that to declare a law invalid under the constitution is beyond the scope of this office.

In the instant case I may say, however, that there seems to be slight, if any, grounds for raising such a question.

In the first place, after a bridge bond issue has been fully paid out and the structure thus financed becomes a part of the state highway system as provided in Section 5593.15, Revised Code, I see no reason why it should not be maintained, repaired, or reconstructed with funds subject to the limitations of Section 5a, Article XII, Ohio Constitution. The mere fact that its original cost was financed by the sale of revenue bonds, by an agency having special fiscal powers in this regard, seems to me quite unimportant. Thus, in a somewhat analagous situation, involving the use of such funds to meet the initial cost of a toll turnpike, the court, in *State, ex rel. Kauer, v. Defenbacher*, 153 Ohio St., 268, held in the fifth and sixth paragraphs of the syllabus :

“* * * Expenditures for the study of a turnpike project, pursuant to Section 1220, General Code, are part of the ‘the state’s share of the cost of constructing * * * the state highways of this state,’ within the meaning of those words as found in Section 5541, General Code ; and money so expended would, as contemplated by Section 5 of Article XII of the Constitution, be used for the stated object of the tax imposed by Section 5541, General Code.

“Money so expended would be ‘expended for * * * costs for construction * * * of public highways and bridges and other statutory highway purposes,’ within the meaning of Section 5a of Article XII of the Constitution. * * *”

As to the constitutional validity of Amended Senate Bill No. 356, I am not informed as to the basis of your doubt. If you have in mind the provisions in Section 19, Article I, of the constitution as to roads “open to the public without charge,” your attention is invited to the very limited interpretation given this provision in *State, ex rel. Allen, v. Ferguson*, 155 Ohio St., 26, in which it was held in the fifth paragraph of the syllabus:

“* * * The provision with respect to roads open to the public without charge, found in Section 19 of Article I of the Constitution, applies only to a situation where private property is appropriated without first making compensation to the owner. That section of the Constitution does not limit the power of the General Assembly to provide for the exercise of the right of eminent domain by the taking of private property necessary for the construction or repair of toll roads, except that, in such an instance, provision must be made for compensation in money to the owner before the taking. * * *”

Here it will be seen that there is no general constitutional provision against toll roads, but merely a limitation on the proceedings to appropriate property to establish them.

I am not informed whether any land was appropriated in the case at hand in connection with the reconstruction of the bridge approaches by the highway department pursuant to the agreements of August 27, 1952 and June 11, 1953. If that was the case, however, it is clear, under the *Allen* case, *supra*, that the owners could have raised the question if the director failed to make compensation before the taking; but it is equally clear that if no such objections were raised they must be deemed to have been waived.

Any question of the authority of the commission to undertake to collect tolls for the purpose of defraying the expense of maintenance, repair, etc., of a toll bridge would appear to be disposed of by reference to Section 5593.14, Revised Code, which reads as follows:

“When the particular bonds issued for any bridge and the interest thereon have been paid, or a sufficient amount has been provided for their payment and continues to be held for that pur-

pose, tolls for the use of such bridge shall cease except for the cost of maintaining, repairing, and operating such bridge or for the repayment of any valid obligation due the state incurred by the state bridge commission in retiring its bonds. Thereafter and as long as the cost of maintaining, repairing, and operating such bridge is provided for through means other than tolls, no tolls shall be charged for transit over such bridge and such bridge shall be free."

It may be that you have in mind an invalid delegation of authority to the commission to fix toll rates. This question was disposed of, however, in *State, ex rel. Bridge Commission, v. Griffith*, 135 Ohio St., 334, in which the court in a decision "By the Court," said:

"* * * It is the contention of the respondent that this act is unconstitutional in that it attempts to delegate legislative power, in violation of Section I of Article II of the Constitution. The respondent contends that the Legislature did not supply sufficient standards and effect sufficient limitations on the power of the commission, but rather left to them the determination of questions which require legislation on the part of the commission. The respondent points out that the bridges to be purchased are not designated by the Legislature, and that the price to be paid, the tolls to be charged, the amount and interest rate of the securities to be issued, and price at which they are to be sold, are left solely to the discretion of the commission, and therefore there is an unconstitutional delegation of legislative powers.

"An examination of the statutes shows that the act is not one entirely without standards. Although the Legislature has conferred upon the State Bridge Commission discretion as to when it shall acquire bridges, it has carefully guarded the exercise of that power by describing generally the bridges that may be purchased, Sections 1084-1, 1084-15b, General Code, by defining the term 'cost of bridges' as used in the act, as including 'the cost price, cost of improvements, financing charges, interest during any period of disuse before completion of improvements, cost of traffic estimates and of engineering and legal expenses, plans, specifications and surveys, estimates of cost and of revenues, other expenses necessary or incident to determining the feasibility or practicability of the enterprise, administrative expense and such other expenses as may be necessary or incident to the financing herein authorized and the acquisition of the bridge and the placing of the bridge in operation,' Section 1084-2, General Code, by providing in detail the procedure to be used in issuing bridge revenue bonds, Section 1084-10, General Code, providing the maximum interest to be paid, and the maximum term of the bonds, Section 1084-10, General Code, and by fixing a formula to determine the rate of tolls to be charged, Section 1084-13, General Code.

“These statutes indicate a definite limitation established by the Legislature to control the powers of the commission. It is clear that every bridge is not of the same age, the same value or the same income possibilities, and any more stringent limitations would make the act unworkable; and since the state has the undoubted power to acquire bridges, it has also the power to delegate to a commission the administrative duty of determining their value and what would be a reasonable price to be paid for their purchase.* * *”

In Amended Senate Bill No. 356, supra, it will be observed that the commission is given discretion to collect tolls on this facility “until sufficient proceeds have been realized * * * to completely finance the cost of all constructions, repairs, maintenance, alterations and improvements in the bridge and the approaches thereto, found by the commission to be necessary or advisable to the continued proper functioning of the bridge.”

I deem this delegation of authority to be no broader in scope than that approved by the court in the Griffith case, supra, and so perceive no question of the validity of the act on this point.

It was with these considerations in mind, when the 1952 contract between the commission and the Director of Highways was submitted to me for approval, that my Opinion No. 1775, dated August 21, 1952, was written. That opinion in part, is as follows:

“You have submitted for my approval a contract between the Director of Highways and the State Bridge Commission of Ohio, covering the improvement of the west approaches to the Steubenville-Weirton Bridge.

“As you state in your letter of transmittal, I had previously advised you by letter that the parties have legal authority to enter into such agreement.

“My examination discloses that such agreement is in proper legal form, and I have accordingly endorsed my approval thereon.

* * *

Moreover, it may be noted that the operations of the Director of Highways under this contract were unsuccessfully resisted in *Kincaid v. Linzell*, No. 43,792, Common Pleas Court of Jefferson County, decided April 30, 1954. In this decision Judge Hooper said:

“* * * As heretofore stated, the Bridge Commission has the statutory right to make contracts, and the Court does not find

that Amended Senate Bill 356 (99th General Assembly), or any other statute applicable hereto, prohibits the Bridge Commission from entering into a contract with the Director of Highways, as in the present case. Therefore, the Court finds that under the statutes the Bridge Commission does have authority to enter into the contract in question with the Director of Highways.

"The court is of the opinion and holds that the Director of Highways has the right to enter into the contract to make the improvements in question and to advance funds for the payment thereof and to be repaid such advancement by the Bridge Commission. * * *

This decision was subsequently affirmed by the Court of Appeals, and still later a motion to certify the record was overruled by the Supreme Court.

Coming now to the question of the deposit in the state treasury of the toll revenues now being collected by the commission, we may note the following provision in Section 131.01, Revised Code:

"On or before Monday of each week, every state officer, state institution, department, board, commission, and every college or university receiving state aid shall pay to the treasurer of state all moneys, checks, and drafts received for the state, or for the use of any such state officer, state institution, department, board, commission, or college or university receiving state aid, during the preceding week, from taxes, assessments, licenses, premiums, fees, penalties, fines, costs, sales, rentals, or otherwise and file with the auditor of state a detailed, verified statement of such receipts."

In Section 5593.12, Revised Code, however, we find provisions for the execution by the Commission of a trust indenture as follows:

"* * * Such trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as are reasonable and proper, including covenants setting forth the duties of the state, county, or city and the bridge commission of such state, county, or city, in relation to the acquisition, improvement, maintenance, operation, repair, and insurance of the bridge, the custody, safeguarding, and application of all moneys, and may provide that the bridge shall be constructed or acquired, or partly acquired and partly constructed, and paid for under the supervision and approval of consulting engineers employed or designated by such commission and satisfactory to the original purchaser of the bonds issued for such bridge, their successors,

assigns, or nominees, who may be given the right to require that the security given by contractors and by an depository of the proceeds of the bonds or revenues of the bridge or other moneys pertaining to it be satisfactory to such purchaser, successors, assigns, or nominees.

“The commission may provide by resolution or trust indenture for the payment of the proceeds of the sale of the bonds, and, the revenues of the bridge to such officer, board, or depository as it determines for the custody thereof, and the method of disbursement thereof, with such safeguards and restrictions as it determines. * * *.”

You suggest that because the bonds have been fully paid out there is no longer any authority, under the trust indenture, to exercise this power of selecting a depository. It is true that these provisions must be read in *pari materia*, but it must be observed also that this section, in language wholly free of ambiguity, authorizes the commission to “provide by resolution or trust indenture for the payment of the * * * revenues of the bridge to such * * * depository as it determines * * *.”

In Amended Senate Bill No. 356. *supra*, there is no language that indicates that the commission, in resuming toll collections, is to be shorn of any of its powers under the general act by which it was established although, of course, the commission does not have the power to issue revenue bonds to finance repairs, reconstruction, etc. See Opinion No. 2380, Opinions of the Attorney General for 1953, p. 71.

It must be remembered, however, that the commission has been, and still is, engaged in what is essentially a commercial enterprise for profit, and is an agency which operates solely on its own revenues without the aid of appropriations by the legislature to meet its expenses. In this situation it would appear that the legislative decision to select the commission, rather than some other state agency, such as the department of highways for example, to resume bridge toll collections, coupled with the circumstance that no appropriation to meet the expense of such operations was provided, is strongly indicative of a deliberate intent to place these operations in the hands of an agency having the special fiscal powers to operate such an essentially commercial venture.

Accordingly, since special statutory provisions prevail over those which are general, *Engineering Co. v. Jones*, 150 Ohio St., 423, it is my conclusion that the general provisions of Section 131.01, Revised Code,

do not apply to the revenues collected by the commission under authority of Amended Senate Bill No. 356, *supra*.

As to your question relating to the expense of attendance of the meeting of the American Bridge, Tunnel and Turnpike Association, I invite your attention to the following statement in Opinion No. 849, *Opinions of the Attorney General for 1939*, p. 1131, 1135, 1136:

“* * * Your question as to the lawfulness of an expenditure of funds under the control of the bridge commission ‘for dues in the National Toll Bridge Association’ is not without difficulty, and were it not for the rule of law applicable to public expenditures and the holding of the Supreme Court in the case of *State ex rel. v. Semple*, 112 O. S., 559 (1925), I would be inclined to hold such an expenditure legal. * * *”

In *State, ex rel. McClure, v. Hagerman*, 155 Ohio St., 320, however, the court overruled the *Semple* case, *supra*, as disclosed by the second paragraph of the syllabus which reads:

“* * * The objectives, purposes and activities of the Municipal Finance Officers Association of Ohio as disclosed by the evidence in this case are not such as to justify this court in holding that the commission of the city of Dayton as the legislative body of the city abused its discretion in directing an expenditure for a membership in that association. *State, ex rel. Thomas, v. Semple, Dir. of Finance*, 112 Ohio St., 559, overruled.”

In view of the writer's reluctance to reach the conclusion he did in the 1939 opinion but for the decision in the *Semple* case, I conclude, since that case has been overruled, that the 1939 opinion should likewise be overruled. Accordingly, since I am unable to distinguish between (1) dues in a national trade or professional association and (2) the expense of attending a meeting of such a body, it is my view that no finding should be made as to such expenditures.

As to expenditures in the employment of a firm to prepare “financial reports” and to “act as financial adviser,” it is undoubtedly true that the commission was authorized, under the terms of Section 5593.12, Revised Code, to include provision for such services in the trust indenture as a protection not only to the bond holders but as well to promote the efficiency of its own operations. However, it may be pointed out that this section also authorizes the commission to “provide by resolution *or* trust indenture for the payment of the proceeds of the sale of the bonds, and the

revenues of the bridge to such officer, board, or depository as it determines for the custody thereof, and the method of disbursement thereof, with such safeguards and restrictions as it determines." While I have no knowledge of the extent to which the accounting and financial services here in question are required it seems obvious that where the bonds have been fully paid out the need for them, especially "financial services," would be considerably less than was the case when the bond holders, as well as the commission, enjoyed the benefit of them. On this question of mixed law and fact I can only say that the commission has some discretion in the matter and such expenditures could be deemed unlawful only in the event there has been an abuse of discretion. Accordingly, you would be justified in making a finding as to these expenditures only in the event you should determine, after considering all the facts and circumstances involved, that the commission has abused its discretion.

As to the application of the Uniform Depository Act, what has been said above as to the precedence of a special provision over one that is general is pertinent here also. In Section 5593.12, Revised Code, the commission is authorized to "provide by resolution * * * for the payment of the * * * revenues of the bridge to such * * * depository as it determines * * *." This provision, in my opinion, must be regarded as an exception to Chapter 135, Revised Code, in which general provisions are found for the deposit of "public moneys" of the state and its several "subdivisions."

Accordingly, it is my opinion that :

1. Where a bridge has been constructed by the state bridge commission and the cost of such construction has been financed by the sale of revenue bonds as provided in Chapter 5593., Revised Code, and where all such bonds have been fully paid and redeemed, such bridge is a part of the state highway system, and it may be maintained, repaired, or reconstructed by the director of highways by the expenditure of funds which are subject to the limitations of Section 5a, Article XII, Ohio Constitution, notwithstanding the fact that such commission, under authority of Amended Senate Bill No. 356, 99th General Assembly, 124 Ohio Laws, 390, has resumed the collection of tolls on such bridge to meet the cost of maintenance, repair, or reconstruction. Revenues accruing from such tolls may be applied to repay to the department of highways the funds so expended by the director.

2. The special provision in Section 5593.12, Revised Code, authorizing the state bridge commission to "provide by resolution * * * for the payment of the * * * revenues of such bridge to such * * * depository as it determines" constitutes an exception to the general provisions of Chapters 131., and 135., Revised Code, relative to the payment of moneys into the state treasury and to the deposit of public funds.

3. Expenditures in connection with the attendance of members of the state bridge commission at a meeting of a national trade or professional association of bridge, tunnel and turnpike engineers and technicians may properly be paid from funds of the commission accruing from bridge toll revenues. Second paragraph of the syllabus in Opinion No. 849, Opinions of the Attorney General for 1939, p. 1131, overruled.

Respectfully,

C. WILLIAM O'NEILL

Attorney General