

should find their remedy in the provisions of Section 2316 of the General Code.”

Although under the provisions of Section 2316 of the General Code, a contractor is required to give bond, “conditioned for the payment of all material and labor furnished for or used in the construction for which such contract is made,” we do not find a similar provision requiring such a bond for the furnishing of material to the state for road purposes when the state is making a direct purchase of said material.

In any event, the fact that there was no statute requiring the furnishing of a bond in the present instance, conditioned to pay material men, does not affect the conclusions herein reached, since it is a fundamental principle of law that general statutes do not apply to the state, unless by the express terms of such statutes the state comes within their provisions.

The holding of this department in Opinion No. 62, as hereinbefore referred to, did not turn upon the proposition that the material man had a remedy under the provisions of Section 2316, *supra*, but rather upon the broad general principle that the state could not be made a party to a suit or proceedings unless the statute so expressly provided.

Mention was made in said opinion of Section 2316 merely for the purpose of pointing out the remedy and not for the purpose of stating in any sense that Section 8324 of the General Code did not apply simply because material men in furnishing material in connection with the construction of a public building have a remedy under the provisions of Section 2316 of the General Code.

By virtue of the foregoing authorities, and answering your question specifically, it is my opinion that there is no provision in the Mechanics Lien Law (Section 8324, General Code) making the provisions thereof applicable to state funds, and the Director of Highways and Public Works is without power or authority to withhold funds due to a contractor under a contract entered into with the state for the furnishing of materials to be used in the construction, repair or maintenance of highways, on the ground that a person or company has filed with such director a statement or attempted lien, to the effect that the contractor owes to the person or company filing such statement or lien, money for work done or materials furnished in the manufacture of the materials furnished the Department of Highways and Public Works.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1253.

PARK IMPROVEMENT—BONDS ISSUED IN SERIES—PROCEEDS OF EACH SERIES GO INTO FUND FOR ENTIRE ISSUE—HOW EXPENDITURES MAY BE MADE AND PORTIONS TRANSFERRED.

SYLLABUS:

Where bonds to cover the cost of an improvement program are authorized by vote of the electors of a city and said bonds are issued in series or instalments, the proceeds of each series or instalment should be placed in a fund created for the entire bond issue. Expenditures may be made out of said fund on account of the several classes of improvements included in said improvement without regard to whether or not the amounts so expended at any time are in direct proportion to the

amounts allocated to each of the several classes, except that the total amount expended on account of a particular class shall not exceed the amount fixed in the resolution to submit the question to a vote of the people and in the certificate of the fiscal officer, unless the bond issuing authority has determined that in order properly to carry out the purpose of the bond issue the unexpended portion of an amount so fixed for one class should be transferred to another class of a longer maturity, as provided in Sections 2295-10, General Code, or 2293-10, General Code.

COLUMBUS, OHIO, November 10, 1927.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN :—Acknowledgment is made of the receipt of your communication as follows :

“Bonds for park purposes were authorized by the council of the city of _____ in the amount of \$1,250,000 for the purpose of acquiring real estate, (thirty year class) in the amount of \$600,000, for constructing and improving fire proof buildings (twenty-five year class) in the amount of \$210,000, and landscape planting, sidewalks, curbs, gutters, etc., (ten year class) in the amount of \$440,000.

The average number of years for the life of the issue was fixed at twenty in accordance with the provisions of present Section 2293-9, G. C., 112 O. L. 367.

Of the authorized issue, bonds in the amount of \$625,000 have been issued and sold to date and such amount has been arbitrarily allocated by the board of park commissioners as follows :

| | |
|--|--------------|
| 1st. Acquiring real estate..... | \$508,282.25 |
| 2nd. Constructing and improving buildings..... | 63,671.87 |
| 3rd. Landscape planting, etc..... | 43,072.92 |

The balance of the bond sale was used to pay the first year's interest on the bonds.

The entire amount allocated to the first purpose has not and will not be used for acquiring real estate until the spring of 1928 or later. The amounts allocated to the second and third purposes have been exhausted and additional funds for such purposes are needed at this time. The board of park commissioners proposes to transfer temporarily \$90,000 from the amount allocated to the first purpose to the second and third purposes.

Additional bonds will be sold in the spring of 1928 at which time the amounts transferred will be refunded.

Section 2293-10, G. C., 112 O. L. 368, provides that transfers may be made from the amount set aside for one class to another class, but that no such transfer may be made from any class to a class with a shorter maturity.

The proposed transfer is from a thirty year class to classes of a shorter maturity, but since only a part of the bonds authorized have been issued and the transfer will be temporary, may the city auditor legally make such proposed transfer or rearrangement on instruction from the board of park commissioners?"

Section 20 of House Bill No. 1 passed by the 87th General Assembly on April 21, 1927, (112 O. L. p. 385) provides in part :

“Bonds issued prior to the effective date of this act and bonds issued after said date, which have been approved by vote of the people, or by reso-

lution of the taxing authority prior to the day this act is filed with the secretary of state, shall be valid obligations of the taxing district issuing the same if they would be valid under the provisions of law in effect prior to the passage of this act. Bonds which have been approved by vote of the people, prior to the effective date of this act, may be issued thereafter under the provisions of Section 2293-25 to 2293-29 inclusive. * * * "

So far as pertinent, Sections 2293-25 and 2293-29, General Code, relate to the issuing of notes in anticipation of an issue of bonds, the issue of bonds in instalments if so desired, the offer of the bonds to the trustees of the sinking fund and the advertisement and sale of the bonds if rejected by said trustees. Said sections do not, therefore, affect your question.

It seems clear from a reading of Section 20, supra, that the provisions of law in effect prior to the passage of House Bill No. 1, of which Section 2293-10, General Code, is a part, must be looked to in order to answer your question.

Section 2295-10, General Code, which was specifically repealed in House Bill No. 1, but which is still in effect for purposes of the bond issue above referred to, provides:

Before any resolution, ordinance or other measure providing for the issuance of bonds, notes or other evidences of indebtedness of any county or other political subdivision, including charter municipalities, is passed or adopted, the fiscal officer thereof shall certify to the bond-issuing authority the maximum maturity of such bonds or indebtedness, calculated in accordance with the provisions of the foregoing sections, and no such bonds, notes or other evidences of indebtedness shall be authorized or issued with maturities extending beyond the maturities as thus certified by such fiscal officer. Where the proposed indebtedness falls within class (h), such certification shall also contain a schedule of the respective amounts of the proposed bonds falling within each of classes (a) to (g) inclusive. The amount expended from the proceeds of the bonds for any purpose or purposes falling within any class shall not exceed the amount allotted in said schedule to said class; provided, however, that whenever the bond-issuing authority deems such transfer to be necessary for the carrying out of the purpose of the bond issue, then such authority may transfer any unexpended portion of the amount allotted to any class from the class to which it was originally so allotted to any class with a longer maturity and, upon such transfer, the amount expended for any purpose or purposes falling within the class to which such transfer has been authorized may include the amount so transferred; but no transfer may be made from any class to a class with a shorter maturity. Each such certificate shall state whether or not the asset, property, construction or improvement has an estimated life or usefulness of at least five years; and the provisions of Sec. 2295-7 of the General Code shall apply to any asset, property, construction or improvement certified as having an estimated life or usefulness of less than five years."

It will be noted that Section 2295-10, supra, refers to "class (h)" which appears in the preceding Section, 2295-9, General Code. Section 2295-9, General Code, contains a schedule of maximum maturities for bonds for certain improvements, beyond which such bonds may not run, and provides further:

"Class (h) A single bond issue for a purpose which includes two or more of the foregoing classes, the average number of years of usefulness as measured by the weighted average of the amounts proposed to be expended for said several classes in accordance with above table of maturities; such estimating and calculation of average to be made by the fiscal officer."

Section 2295, General Code, was also repealed in House Bill No. 1, but is still applicable to your question. It provides in part:

" * * * All monies from the principal on the sale of such bonds shall be credited to the fund on account of which the bonds are issued and sold, and all moneys from premiums and accrued interest on the sale of such bonds shall be credited to the sinking fund from which said bonds are to be redeemed."

Provisions similar to those quoted from Sections 2295-10 and 2295-9, supra, may be found in Sections 2293-10 and 2293-9, General Code, enacted as a part of House Bill No. 1. Section 5625-9, General Code, enacted as a part of House Bill No. 80 by the 87th General Assembly, provides specifically for the establishment by each subdivision of a special bond fund for each bond issue and Section 5625-10, General Code, also a part of House Bill No. 80, contains a provision similar to that quoted from Section 2295, General Code, supra, to the effect that the proceeds of the sale of a bond issue shall be paid into a special fund for the purpose of such issue.

From a reading of the statutes above referred to it seems clear that it was and is the intention of the legislature that the proceeds of sale of each bond issue, except premium and accrued interest, shall be credited to a single fund established for the purpose of such bond issue, without regard to the classes covered by such issue, except that there should not be paid out of said fund, on account of any specific class included in said improvement, an amount in excess of that appearing in the schedule contained in the certificate of the fiscal officer, as required in Section 2295-10, General Code, or 2293-10, General Code, supra.

There is, of course, little or no difficulty encountered in applying the above rule where the entire cost of an improvement comprising a number of classes is evidenced by a single bond issue. In such case the various amounts allocated to each of the classes are automatically fixed by the certificate of the fiscal officer and such amounts cannot be exceeded except that as provided in Sections 2295-10 and 2293-10, General Code, the unexpended portion of any class may be transferred to a class with a longer maturity where such transfer is necessary to carry out the purpose of the issue.

The difficulty arises when bonds to cover the cost of an improvement are issued in installments or series, such as is being done in the case you present. While you do not so state in your communication, I am informed that the \$1,250,000.00 bond issue was authorized by vote of the electors of the City of _____ in November, 1926.

Section 5649-9c, General Code, repealed in House Bill No. 1, but still in force insofar as the above bonds are concerned, provides in part:

"* * * The proceeds of the bonds shall be used exclusively for the purposes set forth in the resolution of the bond-issuing authority submitting such issue to vote of the people. Bonds may be issued in series, and the terms of such series may be different. Each series shall be issued under the authority of a separate resolution or ordinance and shall comply as to maturity and all other terms with the provisions of Sections 2295-9 to 2295-12, inclusive, of the General Code."

The above section authorizes the issue of the bonds in series and provides that the proceeds of the bonds shall be used exclusively for the purposes set forth in the resolution submitting such issue to vote of the people, and further provides that each series shall comply as to maturity and all other terms with the provisions of Sections 2295-9 to 2295-12, inclusive, of the General Code. While I do not have before me a copy of the resolution submitting the bond issue to vote of the people, I assume that the amounts allocated therein to the various classes are the same as stated in your communication, to-wit, \$600,000 for real estate, \$210,000 for constructing and improving fireproof buildings and \$440,000 for landscaping, walks, curbs, gutters, etc., and I am further assuming that the certificate of the fiscal officer as to weighted average and maximum maturity is based on the same figures. I am unable to find any authority in the law for the making of any allocation by the board of park commissioners other than in the resolution submitting the bond issue to a vote of the people. It is this resolution and the certificate of the fiscal officer which control the expenditures to be made from the proceeds of the bond issue, and this is true regardless of whether the bonds are issued as one issue or in instalments.

In carrying out an improvement program of the magnitude of the one referred to in your communication, it is obvious that amounts expended from time to time on the various classes of the improvement cannot always be in direct proportion to the amounts fixed in the election resolution or in the certificate of the fiscal officer. An illustration is often helpful and I submit the following: A school program involving a bond issue of \$1,125,000 and calling for the purchase of five (5) sites at 25,000 each and the erection and furnishing of five (5) school houses thereon at a cost of \$200,000 each, having been approved by the voters of a city, the board of education determines that present needs require only one school house to be erected immediately, but that it would be advantageous to purchase all of the sites at once. The board, therefore, by resolution, authorizes a bond issue in the sum of \$325,000 for the purpose of purchasing the five sites and erecting one building. No one would contend that it would be necessary to issue the entire \$1,125,000 of bonds in order to acquire the five sites. It is just such situations that the provision in Section 5649-9c, General Code, *supra*, authorizing the issue of bonds in series or in instalments, was intended to cover. Any other procedure would result in an enormous waste of public monies by way of interest.

In view of the foregoing it is my opinion that the \$90,000 referred to in your communication, included by the board of park commissioners in the amount allocated to the purchase of real estate, may properly be expended on one or both of the other classes and that additional expenditures may be made on account of the several classes in the improvement program as funds become available by the issue of additional series of bonds without regard to such allocation, except that the total amount so expended on a particular class shall not exceed the amount fixed in the resolution to submit the question to a vote of the people and in the certificate of the fiscal officer, unless the board has determined that in order properly to carry out the purpose of the bond issue, the unexpended portion of an amount so fixed for one class should be transferred to another class of a longer maturity, as provided in Sections 2295-10, General Code, or 2293-10, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.