

August 7, 2019

Mr. Gerald O. Holland, Chairman
The Ohio Department of Commerce
Ohio Board of Building Standards
6606 Tussing Road
Reynoldsburg, Ohio 43068

SYLLABUS:

2019-027

1. The phrase “financing has been secured[,]” as utilized in R.C. 3781.1010, does not require that a school demonstrate that, as of September 15, 2020, it has available and on hand all of the funds necessary to cover the anticipated costs of the construction project, but does require that the school provide assurances that it has arranged for the necessary funding and is able to guarantee the availability of the same;
2. A school may satisfy its obligation to secure financing for a construction project in a number of ways, including the following methods, and the provision to the Board of evidence of the same:
 - A. The school’s acquisition of an unconditional loan commitment from a viable financial institution in an amount which will cover the anticipated costs of the project, and acceptance of the commitment by formal action by the board or governing body of the school;
 - B. The formal action of the board or governing body of the school in encumbering moneys on hand for the purpose of covering all or some portion of the anticipated costs of the project;
 - C. The formal action of the board or governing body of the school in dedicating or earmarking contributed funds on hand for the purpose of covering all or some portion of the anticipated costs of the project;
 - D. The appropriate approval by action of the board or governing body of the school and the voting electorate of the issuance of

bonds for the purpose of covering all or some portion of the anticipated costs of the project. *See* R.C. 133.15(A); R.C. 133.01(MM)(3); R.C. 133.15(B); R.C. 133.18(A);

- E. The appropriate approval by action of the board or governing body of the school and the voting electorate of a real estate tax the proceeds of which are permitted to be utilized for the purpose of covering the costs of permanent improvements, and the formal action of the board or governing body of the school to dedicate or earmark all or some portion of the future proceeds of that tax to cover all or some portion of the anticipated costs of the project. *See* R.C. 5705.21(A); R.C. 5705.19(F); R.C. 5705.01(E). The school may issue anticipation notes related to the tax, and the funds realized therefrom may be utilized to defray all or some portion of the anticipated costs of the project. *See* R.C. 5705.216; R.C. 5705.217;
- F. The appropriate approval and authorization of the issuance of general obligation bonds of the school and the formal action of its board or governing body designating the proceeds of the bonding process to cover all or some portion of the anticipated costs of the project. *See* R.C. 5705.218(A);
- G. The appropriate approval and enactment of a school income tax the proceeds of which may be expended in relation to the project, and formal action of the board or governing body of the school to designate or earmark all or some portion of the future receipts of that income tax for the purpose of defraying all or some portion of the anticipated costs of the project. *See* R.C. 5748.02(A). The school may issue anticipation notes related to the tax, and the funds realized therefrom may be utilized to defray all or some portion of the anticipated costs of the project. R.C. 5748.05;
- H. Moneys accumulated in an R.C. 5705.13(C) reserve balance account for the acquisition, construction, or improvement of any specifically identified fixed asset of a public school district may be counted against the anticipated cost of the project for the purpose of ascertaining if financing has been secured;

- I. Designation of any combination of some or all of the methods of provision of funding available to the school which covers and assures the provision of moneys adequate to cover the full anticipated costs of the project; and
- J. The formal entry by the board or the governing body of the school into a binding agreement with the Ohio Facilities Construction Commission which sets out a comprehensive arrangement for the provision by the Commission of partial payment of the amounts necessary to defray the full anticipated costs of the project and the sources of other resources which will be utilized to cover the balance of those costs, all in a manner consistent with R.C. 3318.08.



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August 7, 2019

OPINION NO. 2019-027

Mr. Gerald O. Holland, Chairman
The Ohio Department of Commerce
The Ohio Board of Building Standards
6606 Tussing Road
Reynoldsburg, Ohio 43068

Dear Chairman Holland:

We are in receipt of your letter of May 13, 2019, in which you solicit our opinion in relation to a matter incident to the functions of the Ohio Board of Building Standards (the “Board”). You write that the Board is “responsible for adopting rules of the Administrative Code governing the erection, construction, repair, alteration, and maintenance of all buildings and classes of buildings specified in Revised Code Section 3781.06.” You indicate further that “rules regulating non-residential buildings are codified in Ohio Administrative Code Division 4101:1 and are collectively known as the Ohio Building Code (OBC).”

You advise us that, on November 1, 2017, the Board “adopted an update to the OBC based on [the] 2015 International Building Code published by the International Code Council.” Part of this action included the inclusion of “a new requirement in OBC Section 423 for the construction of storm shelters in educational occupancies.” On June 7, 2018, however, the Ohio General Assembly adopted House Bill 21 of the 132nd General Assembly which took effect on September 28, 2018. You indicate that this legislation enacted R.C. 3781.1010 which effectively imposed a “moratorium” upon the enforcement of the newly adopted storm shelter requirement, and provided that “no rule of the Board shall require the installation of a storm shelter in a school building operated by a public or private school building prior to September 15, 2019, or as to any building ‘for which financing has been secured prior to’” that date.¹ You note that R.C.

¹ Although the provision, as initially enacted, set September 15, 2019, as the date by which financing must be secured, as part of Amended Substitute House Bill 166, the General Assembly has changed the operative date to September 15, 2020.

R.C. 3781.1010, as amended by the recent action of the General Assembly, reads:

3781.1010 does not include a definition of what action is required of a school for it to demonstrate that “financing has been secured.” It is on this basis, that you pose the following question:

For the purposes of R.C. 3781.1010 what actions must a public or private school have taken, or conditions need to be present, to demonstrate that “financing has been secured” for a public or private school so that the school would not be required to install a storm shelter in accordance with OBC Section 423?

The Ohio Board of Building Standards was established and is existent pursuant to R.C. 3781.07. As you indicate, the duties of the Board include the responsibility to “formulate and adopt rules governing the erection, construction, repair, alteration, and maintenance of all buildings or classes of buildings specified in section 3781.06 of the Revised Code” and to “incorporate those rules into separate residential and nonresidential building codes.” R.C. 3781.06 refers to a number of types and classes of buildings including “[a]ny building that may be used as a place of . . . education . . . or occupancy by the public . . .” R.C. 3781.06(A)(1).

When a statutory provision fails to provide a specific definition of a word, term, or phrase contained therein, but there exists no ambiguity as to its meaning, the provisions of the enactment should be given their natural, literal, common or plain meaning. R.C. 1.42; *State v. Elam*, 68 Ohio St. 3d 585, 587, 629 N.E.2d 442 (1994); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983). The word “financing” may be defined in a manner consistent with the context of the R.C. 3781.1010 as “[f]unds thus raised and provided . . .” *Webster’s Third International Dictionary* 851 (1993); *accord Black’s Law Dictionary* 748 (10th ed. 2014). To “finance” means “to provide with necessary funds in order to achieve a desired end . . .” *Webster’s Third International Dictionary* 851 (1993). As used in the statute, the word “secured” is properly defined as having “put beyond hazard of losing or not receiving; guarantee . . .” *Webster’s Third International Dictionary* 2053 (1993). Read in context, therefore, the phrase

No rule of the board of building standards for the erection, construction, repair, alteration, and maintenance of buildings adopted under section 3781.10 of the Revised Code shall require the installation of a storm shelter in any school building operated by a public or private school prior to September 15, 2020, or in any such school building undergoing or about to undergo construction, alteration, repair, or maintenance for which financing has been secured prior to that date. Any rule adopted by the board that conflicts with this section shall not be effective with respect to any school building prior to September 15, 2020.

As used in this section, "school building," "public school," and "private school" have the same meanings as in section 3781.106 of the Revised Code.

R.C. 3781.1010.

“financing has been secured” as set out in R.C. 3781.1010 requires that a school must have arranged for and is able to provide assurance of the availability of the financing necessary to carry out its construction project, as planned and proposed, and that this act has been completed prior to September 15, 2020.

It seems apparent from the unambiguous language of the statute, that the intent of the General Assembly is to limit its application to a public or private school which has arranged for the provision of funds adequate to complete its project as it is proposed. The statute does not require that the school acquire and have on hand all of the funds which will be necessary to cover the anticipated cost of its project, although moneys on hand which have been properly designated for that purpose may be attributed toward the project costs. Clearly, the General Assembly in the enactment of the provision anticipated that such construction projects, often if not in all cases, would be undertaken prior to the actual accumulation by a school of all of the funds which it is anticipated will be necessary to fully complete the work. It is sufficient that the school has and demonstrates legally enforceable mechanisms for the provision of the anticipated costs of the project.

In addition to the accumulation of funds which are properly committed for the completion of the project, a school may master its obligation to secure financing for the anticipated cost of the construction in a number of ways. It is our understanding that it is a common practice incident to securing loans for the purpose of providing funds for a construction project to solicit of a lending institution an unconditional commitment letter issued by a viable lending institution or entity specifying the amount of financing which will be provided. Such a commitment, once provided by the lender and accepted by the borrower, becomes a binding contractual arrangement which may be relied upon as an assurance of funding to the extent of the commitment.

Further, relevant provisions of the Revised Code provide mechanisms made applicable by the terms thereof to various public schools which may be utilized for the purpose of securing or arranging for the provision of public funds to be utilized in relation to a construction project. Below we summarize a number of these options.

R.C. 133.15(A) empowers “[t]he taxing authority of any subdivision . . . [to] issue securities of the subdivision for the purpose of paying all or any portion of the costs of any permanent improvement that the subdivision is authorized . . . to acquire, improve or construct.” R.C. 133.15(A). For the purposes of this section a “school district” is a “subdivision.” R.C. 133.01(MM)(3). “Costs of permanent improvements that may be financed with, and paid from the proceeds of securities include, without limitation . . . the costs of: acquiring, constructing, reconstructing, rehabilitating, installing, remodeling, renovating, enlarging, equipping, furnishing, or otherwise improving permanent improvements; site clearance, improvement, and preparation; acquisition of real or personal property” as well as certain identified administrative costs and expenses incident to a project. R.C. 133.15(B). A school district may submit to the electors of the district the question of issuing general obligations of the district to cover the cost of any permanent improvement. R.C. 133.18(A). If approved by the electorate, the anticipated

proceeds of the sale of securities as proposed may be counted as part of the financing that has been secured even though the issuance of the bonds so authorized and the collection of the proceeds of their sale has not yet been completed.

R.C. 5705.21(A) authorizes the “board of education of any city, local, exempted, cooperative education, or joint vocational school district” to declare that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide adequate funds to meet the requirements of the district, and that it is, therefore, necessary to levy a tax in excess of that limitation. R.C. 5705.21(A). Such a levy may be proposed for a number of purposes including “the construction or acquisition of any specific permanent improvement or class of improvements that the taxing authority of the subdivision may include in a single bond issue[.]” R.C. 5705.19(F), or “general permanent improvements” R.C. 5705.21(A). For the purposes of the section, the phrase “permanent improvements” is defined as “any property, asset, or improvement with an estimated life or usefulness of five years or more, including land and interests therein; and reconstructions, enlargements, and extensions thereof having an estimated life or usefulness of five years or more.” R.C. 5705.01(E). Any levy so proposed is subject to the approval or rejection of the electors of the school district. Notes anticipating the receipt of levy money may be issued pursuant to R.C. 5705.216 and R.C. 5705.217.

Further, R.C. 5705.218(A) affords “[t]he board of education of a city, local, or exempted school district” the authority to declare the necessity of issuing “general obligation bonds for permanent improvements.” R.C. 5705.218(A). The resolution declaring such necessity must state the “necessity and purpose of the bond issue[.]” R.C. 5705.218(A)(1). The proposal is subject to electoral approval, and provision is made for the issuance of “anticipation notes” for the purpose of funding “general permanent improvements” R.C. 5705.218(F)(3).

In addition to the authority to seek funding through levies and bond issues assessed on the basis of real estate taxation, “[t]he board of education of any school district, except a joint vocational school district,” may propose that an income tax be levied for the purpose of generating funds for the purposes of the district. R.C. 5748.02(A). The proposed tax may be imposed for both “current expenses and permanent improvements,” and, if it is, the resolution of the board or governing body of the district proposing the tax must apportion the tax revenues between the two purposes. R.C. 5748.02(B)(1). The imposition of the tax is subject to voter approval. R.C. 5748.02(C). Notes anticipating the income tax receipts may be issued under R.C. 5748.05.

We note as well that R.C. 5705.13 authorizes a taxing authority of a subdivision to establish a “reserve balance account” for the purpose of accumulating funds to be used to acquire, construct, or improve any “fixed assets” of the subdivision. R.C. 5705.13(C). The resolution which creates the fund must identify the source of the money, the amount to be accumulated for that purpose, the period of time over which the money will be accumulated, and the fixed asset for which the money will be expended. It is our understanding that public school districts frequently create and utilize such reserve balance accounts in relation to renovation projects and smaller new build undertakings. As such, the board of a public school district may

accumulate moneys in an R.C. 5705.13(C) reserve balance fund to be utilized for the acquisition, construction, or improvement of any specifically identified fixed asset. All of the moneys accumulated and deposited in such a fund may be counted against the anticipated cost of the project for the purpose of ascertaining if financing has been secured.

R.C. 3315.18 requires that “[t]he board of education of each city, exempted village, local, and joint vocational school . . . establish a capital and maintenance fund” and sets out the extent to which moneys are to be credited to such an account. R.C. 3315.18(A). The proceeds of the fund may be utilized “for acquisition, replacement, enhancement, maintenance, or repair of permanent improvements . . .” *Id.*

R.C. 123.20 creates the Ohio Facilities Construction Commission (the “OFCC”). The purpose of this body is to provide “financial assistance to school districts for the acquisition or construction of classroom facilities in accordance with Chapter 3318. of the Revised Code, and any other applicable provisions of the Revised Code.” R.C. 123.20(A). R.C. Chapter 3318 sets out the procedures pursuant to which a school district may seek and secure project funding administered by the OFCC. Provisions of the Chapter are applicable to local, exempted village, and city schools; and other sections involve joint vocational school districts. R.C. 3318.01(D).

R.C. 3318.032 sets out a formula for the computation of the share of “basic project costs” which a school district is obligated to contribute. R.C. 3318.032. To cover its basic project cost obligation, a district may agree to apply a specified amount of the available proceeds of a property tax levy, or a school district income tax. R.C. 3318.052(A)(1).

A school district may apply any “local donated contribution” to the district’s portion of the basic project cost in a manner consistent with R.C. 3318.084. That section defines “local donated contribution” as (1) “[a]ny moneys irrevocably donated or granted to the district by a source other than the state which may be expended for the purpose;” (2) “[a]ny irrevocable letter of credit which the district board has encumbered for such payment;” (3) “[a]ny cash the district has on hand which its board has similarly encumbered including any year-end cash balances which may be so expended;” and (4) “[a]ny money spent on the project by a source other than the district or the state . . .” R.C. 3318.084(C)(1)-(4).

The process culminates with the entry by the district and the OFCC into an agreement providing for funding by the OFCC of a designated portion of the cost of the district’s construction project. Such an agreement may be considered as evidence of funding to the extent of the amount provided therein. The agreement must set out provisions mandated by statute including a comprehensive rendition of the sources of project funding which will be realized from sources other than the Commission. *See* R.C. 3318.08.

On the basis of the foregoing, it is our opinion, and you are advised that:

1. The phrase “financing has been secured[,]” as utilized in R.C. 3781.1010, does not require that a school demonstrate that, as of September 15, 2020, it

- has available and on hand all of the funds necessary to cover the anticipated costs of the construction project, but does require that the school provide assurances that it has arranged for the necessary funding and is able to guarantee the availability of the same;
2. A school may satisfy its obligation to secure financing for a construction project in a number of ways, including the following methods, and the provision to the Board of evidence of the same:
 - A. The school's acquisition of an unconditional loan commitment from a viable financial institution in an amount which will cover the anticipated costs of the project, and acceptance of the commitment by formal action by the board or governing body of the school;
 - B. The formal action of the board or governing body of the school in encumbering moneys on hand for the purpose of covering all or some portion of the anticipated costs of the project;
 - C. The formal action of the board or governing body of the school in dedicating or earmarking contributed funds on hand for the purpose of covering all or some portion of the anticipated costs of the project;
 - D. The appropriate approval by action of the board or governing body of the school and the voting electorate of the issuance of bonds for the purpose of covering all or some portion of the anticipated costs of the project. *See* R.C. 133.15(A); R.C. 133.01(MM)(3); R.C. 133.15(B); R.C. 133.18(A);
 - E. The appropriate approval by action of the board or governing body of the school and the voting electorate of a real estate tax the proceeds of which are permitted to be utilized for the purpose of covering the costs of permanent improvements, and the formal action of the board or governing body of the school to dedicate or earmark all or some portion of the future proceeds of that tax to cover all or some portion of the anticipated costs of the project. *See* R.C. 5705.21(A); R.C. 5705.19(F); R.C. 5705.01(E). The school may issue anticipation notes related to the tax, and the funds realized therefrom may be utilized to defray all or some portion of the anticipated costs of the project. *See* R.C. 5705.216; R.C. 5705.217;

- F. The appropriate approval and authorization of the issuance of general obligation bonds of the school and the formal action of its board or governing body designating the proceeds of the bonding process to cover all or some portion of the anticipated costs of the project. *See* R.C. 5705.218(A);
- G. The appropriate approval and enactment of a school income tax the proceeds of which may be expended in relation to the project, and formal action of the board or governing body of the school to earmark or to designate all or some portion of the future receipts of that income tax for the purpose of defraying all or some portion of the anticipated costs of the project. *See* R.C. 5748.02(A). The school may issue anticipation notes incident to the tax, and the funds realized therefrom may be used to defray all or some portion of the anticipated the costs of the project. R.C. 5748.05;
- H. Moneys accumulated in an R.C. 5705.13(C) reserve balance account for the acquisition, construction, or improvement of any specifically identified fixed asset of a public school district may be counted against the anticipated cost of the project for the purpose of ascertaining if financing has been secured;
- I. Designation of any combination of some or all of the methods of provision of funding available to the school which covers and assures the provision of moneys adequate to cover the full anticipated costs of the project; and
- J. The formal entry by the board or the governing body of the school into a binding agreement with Ohio Facilities Construction Commission which sets out a comprehensive arrangement for the provision by the Commission of partial payment of the amounts necessary to defray the full anticipated costs of the project and the sources of other resources which will be utilized to cover the balance of those costs, all in a manner consistent with R.C. 3318.08.

Respectfully,



DAVE YOST
Ohio Attorney General