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APPROPRIATION—DUTIES OF BUILDING COMMISSION WHICH WAS APPOINTED FOR THE CONSTRUCTION OF A COUNTY TUBERCULOSIS HOSPITAL PURSUANT TO A VOTE OF THE PEOPLE AUTHORIZING A BOND ISSUE WHEN COUNTY COMMISSIONERS MAKE A SUPPLEMENTAL APPROPRIATION.

SYLLABUS:

Where a building commission has been appointed for the construction of a county tuberculosis hospital pursuant to a vote of the people authorizing a bond issue, and a supplemental appropriation is made by the county commissioners for the purpose of improvement of the site and furnishing of the building, such appropriation may be taken into consideration in fixing the compensation of such building commission, and such commission is authorized to expend the money so appropriated as a part of the building fund for such improvement.

COLUMBUS, OHIO, August 19, 1927.

HON. LYNN B. GRIFFITH, *Prosecuting Attorney, Warren, Ohio.*

DEAR MR. GRIFFITH:—This will acknowledge receipt of the recent communication from your office as follows:

“For the purpose of erection of a Tuberculosis Hospital, a bond issue of \$250,000.00 was voted by Trumbull County. Pursuant to the statute a Building Commission was appointed, and has been serving during the erection of this building.

It now develops that the money which was voted will be insufficient to complete the building. The part yet to be completed is chiefly furnishing, grading, providing walks, approaches, etc.

For this purpose the Commissioners intend to use the \$15,000.00 allowed them for public buildings each year; and the following questions have arisen:

1st: Is the Building Commission entitled to receive compensation from the \$15,000.00, this amount not being a part of the original bond issue?

2nd: Has the Building Commission the right to direct the spending of this \$15,000.00?

3rd: May the \$15,000.00 allowed the Commissioners be spent for furnishing this Tuberculosis Hospital; and for grading and building approaches?

As the commissioners desire to complete this hospital as soon as possible, we would appreciate an early opinion.”

At my request you advised me under date of August 15, 1927, that “no specified amount has yet been determined for the grading and furnishing” and furnished me with a certified copy of the ballot used, when the question of issuing bonds and levying taxes for the paying the cost of the tuberculosis hospital was submitted to the people. This ballot reads as follows:

“For an issue of bonds of Trumbull County, Ohio, for the purpose of acquiring a site for a tubercular hospital sewage disposal plant, constructing

a fire-proof tubercular hospital and furnishing it in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) and a levy of taxes outside all existing limitations estimated by the County Auditor of Trumbull County, Ohio, to average .06 mill for a period of seventeen (17) years, to pay the principal and interest on said bonds-----Yes.

For an issue of bonds of Trumbull County, Ohio for the purpose of acquiring a site for a tubercular hospital sewage disposal plant, constructing a fireproof tubercular hospital and furnishing it in the sum of One Hundred Fifty Thousand Dollars (\$150,000.00) and a levy of taxes outside all existing limitations estimated by the County Auditor of Trumbull County, Ohio, to average .06 mill for a period of seventeen (17) years, to pay the principal and interest on said bonds-----No.”

I observe particularly that you state the money which was voted will be insufficient to complete the building.

This is a situation which has too often arisen in the construction of public buildings in Ohio, and it has met with severe condemnation on the part of the Supreme Court.

The erection of a county tuberculosis hospital is governed by all the rules applicable to the construction of other county buildings. In the present case, as indicated by your letter, the requirements of Sections 2333 et seq., General Code, have apparently been complied with and a building commission appointed. Section 2338 of the General Code provides as follows:

“After adopting plans, specifications and estimates, the commission shall invite bids and award contracts for the building and for furnishing, heating, lighting and ventilating it, and for the sewerage thereof. Until the building is completed and accepted, by the building commission, it may determine all questions connected therewith, and shall be governed by the provisions of this chapter relating to the erection of public buildings of the county.”

The first portion of this section clearly indicates that the estimate shall include not only the building, but its *furnishing*, heating, lighting, and ventilating and sewerage. The building commission, therefore, is under obligation to see that estimates within the amount of the bond issue included the construction of the entire building and not one incomplete in any respect.

You will also notice that the commission is governed by all the provisions of the statutes with relation to public buildings. These are comprehended within the sections succeeding Section 2338 through Section 2366 of the General Code. The building commission is required to have detailed plans, drawings, representations, bills of material, specifications of work and estimates of cost of the proposed building prepared and placed on file with the county auditor. Published notice of the receipt of sealed proposals must be made and contracts are required to be let to the lowest bidder.

Particular notice should be taken of the language of Section 2358 of the General Code, which is as follows:

“No contract shall be made for a public building, bridge or bridge sub-structure, or for any addition to, change, improvement or repair thereof, or for the labor and materials herein provided for, at a price in excess of the estimates required to be made by the preceding sections.”

This section was under consideration in the case of *State ex rel. vs. Andrews*, 105 O. S. 489, and I call your attention to the language of Judge Hough on page 497:

"The legislature provided that the contracts let must be within the limits of the estimates adopted, and a construction of the provisions of the statutes clearly indicates a limitation of the estimate within the amount expendable for the given purpose, and the amount expendable for such purpose is *substantially limited to that approved by the electorate* of the political subdivision."

I am of course not advised as to the reasons which have compelled the expenditure of an extra \$15,000.00 in this case. Under the language of Judge Hough, however, I feel it my duty to say that the building commissioners were required by statute to keep the estimates of the work within the \$250,000.00 authorized by a vote of the people. They are also governed by the mandatory provision of the statute making it illegal to let any contract in excess of the estimate.

I have not overlooked, however, the qualification contained in the language of Judge Hough which I have just quoted. You will observe that he has stated the amount expendable is *substantially* limited to that approved by the electorate of the political subdivision. This is indicative of the fact that there may be other sources of revenue available for the construction of the improvement which may properly be used in addition to the funds derived from the bond issue. For example, where one improvement is to replace one prior made which has become inadequate, a bond issue may be used only to provide a supplemental source of revenue in addition to that derived from the sale of the old improvement. Subdivisions also, in many instances, have other sources of revenue which are contemplated to be used at the time the bond issue is submitted to a vote of the people and the amount so submitted is correspondingly reduced. Proper procedure, however, demands that the necessary resolutions and notice, as well as the ballot should be so drawn as to advise the electorate of the fact that the use of additional funds is contemplated and that all of the funds to be used for the proposed improvement should be made available to the building commission prior to the preparation of plans, specifications, etc., in order that the limitation of their expenditure may be clearly defined and the plans and estimates prepared accordingly.

From your statement of facts, the deficiency evidently has arisen subsequent to the preparation of plans, specifications, etc., and after many of the contracts have been awarded and certain of the work completed. In this respect, the procedure is subject to criticism, but I will answer your questions on the assumption no more will be expended than substantially the amount approved by the electorate and the additional expenditure is not only necessary, but may be legally made.

Your first question deals with the right of members of the building commission to receive compensation for their work in supervising the construction of the hospital from the amount which the commissioners propose to appropriate.

Section 2334 of the General Code prescribes the method of determining the amount of compensation of the building commission and the sources thereof. It provides as follows:

"The persons so appointed shall receive a reasonable compensation for the time actually employed, to be fixed by the court of common pleas and on its approval paid by the county treasury. Their compensation in the aggregate shall not exceed two and one-half per cent of the *amount received by the county from taxes raised or from the sale of bonds for the purpose of constructing the building.*" (Italics the writer's.)

It is to be observed that the two and one-half per cent limitation is based upon not only the amount received from the sale of bonds, but also from taxes raised. This clearly contemplates that any other source of revenue derived from taxation may be used as the basis for the determination of the compensation of the building commissioners.

The question of the compensation of commissioners was under consideration by my predecessor and his opinion is reported in Opinions of the Attorney General for 1926, at page 215. In the case there under consideration a substantial amount was transferred from the maintenance fund and made available for the building of a new district tuberculosis hospital. After pointing out that this maintenance fund was derived originally from taxation, that opinion held:

"Where a building commission has been appointed for the construction of a county tuberculosis hospital pursuant to a vote of the people authorizing a bond issue, and a supplemental appropriation is made by the county commissioners for the purpose of improvement of the site and furnishing of the building, such appropriation is available for the payment of the compensation of such building commission, and such commission is authorized to expend the money so appropriated as a part of the building fund for such improvement."

In the opinion the then Attorney General said:

"The money transferred to the building fund does not lose its identity as moneys raised by taxation by reason of being transferred from one fund to another. As long as the same has not been expended for any purpose it may be said to be money raised by taxation.

It is therefore my opinion that moneys legally transferred by the county commissioners from other funds to the building fund can be considered in figuring the compensation due the building commissioners under Section 2334 of the General Code."

This opinion quotes with approval and follows a former opinion of this department reported in Opinions, Attorney General, 1917, Vol. II, p. 435, in which it was held:

"Under Section 2334, G. C., the members of the building commission are entitled to receive only two and one-half per cent of the amount received by the county from taxes raised for the purpose of constructing the building or from the amount received by the county from the sale of bonds for the purpose of constructing the building. The commissioners are not entitled to any per cent of money received from an insurance company to cover loss of an old building by fire even though this money is expended by the building commission in the construction of the new building."

If therefore, this money may legally be transferred to the building fund, I am of the opinion that it may be taken into consideration in determining the amount of the compensation of the building commission, which may be paid in an amount not in excess of two and one-half per cent of such amount so transferred plus the amount received from the sale of bonds. This fund having been transferred or appropriated for the purpose of constructing this building, becomes an essential part of the sources of revenue for the completion of the improvement. I think it clear from the sections relative to the appointment and duties of a building com-

mission that the commission is to have the entire supervision of all of the work until the building is completed and accepted. The language of Section 2338 of the General Code, which I have heretofore quoted, makes this conclusion inescapable. There would be inevitable loss of efficiency and economy and resultant friction from the placing of the authority as to part of the improvement in one body and for the remainder in another.

This subject was discussed in a recent opinion of this department viz., Opinion No. 862, rendered under date of August 15, 1927, a copy of which I enclose.

For the reasons above stated, and more fully discussed in Opinion No. 862, supra, I am of the opinion, in answer to your second question, that any moneys appropriated by the county commissioners for the improvement in question should be expended by the building commission appointed for the construction of such improvement.

Your third question is whether the \$15,000.00 which the commissioners propose to allow may be spent for furnishing the tuberculosis hospital and for grading and building approaches thereto. You state that the commissioners intend "to use the \$15,000.00 allowed them for public buildings each year." By this statement I assume that you have reference to the provisions of Section 5638 of the General Code prior to its repeal by the 87th General Assembly in House Bill No. 80. That section read as follows:

"The county commissioners shall not levy a tax, appropriate money or issue bonds for the purpose of building county buildings, purchasing sites therefor, or for land for infirmary purposes, the expenses of which will exceed \$15,000.00, except in case of casualty, and as hereinafter provided; or for building a county bridge, the expense of which will exceed \$18,000.00, except in case of casualty, and as hereinafter provided; or enlarge, repair improve, or rebuild a public county building, the entire cost of which expenditure will exceed \$10,000.00; without first submitting to the voters of the county, the question as to the policy of making such expenditure."

As I have just stated, however, this section was repealed in House Bill No. 80 and an analogous section (Section 2293-16) enacted, which so far as pertinent is as follows:

"The net indebtedness created or incurred by any county without vote of the electors shall never exceed a sum equal to one per cent of the first one hundred million dollars or part thereof of the tax list of the county plus one-half of one per cent of such tax list in excess of one hundred million dollars.

In ascertaining this limitation bonds issued prior to the effective date of this act for the construction, resurfacing, maintenance or repair of roads, including bonds theretofore issued under Section 1223 of the General Code, shall not be considered except as to the amount if any by which the amount of such bonds outstanding exceeds one per cent of the tax list of the county.

* * * * *

Provided that, except by vote of the electors, bonds shall not be issued by any county in an amount exceeding twenty thousand dollars in any period of five years, for the acquisition, construction, improvement, enlargement or extension of any one county building, including the acquisition of a site therefor, but this limitation shall not apply to buildings for a district consisting of two or more counties.

The total net indebtedness created or incurred by any county shall never exceed a sum equal to three per cent of the first one hundred million

dollars or part thereof of the tax list, plus one and one-half per cent of the tax list in excess of one hundred million dollars. In ascertaining the limitations of this section, the bonds specified in Section 2293-13 and the following bonds shall not be considered:

- (a) Bonds issued prior to April 29, 1902, or to refund, extend the time of payment or in exchange for bonds issued prior to April 29, 1902.
- (b) Bonds issued heretofore to meet deficiencies in the revenue."

The repeal and the new section were effective August 10, 1927. You will observe that the section authorizes the issuance of bonds in an amount not exceeding twenty thousand dollars in any period of five years for the improvement of any one county building without a vote of the people. The provision of Section 5638 limiting the aggregate amount of levies and appropriations has thus been eliminated. The only limitation is upon the issuance of bonds. So long, therefore, as there be unexpended balances in the general fund which may be appropriated for these purposes, I am of the opinion that the commissioners would be authorized to make an appropriation for an improvement of the lands under consideration without regard to the limitations of Section 5638, provided the appropriation was made after August 10th. Such appropriation should be made to the building fund for the improvement so as to make it available for use by the building commission.

Summarizing my conclusions, if it be assumed that the contemplated additional appropriation be a lawful one and within the rule laid down in the case of State, ex rel., vs. Andrews, supra, this department not having sufficient facts to pass on this question, I am of the opinion that where a building commission has been appointed for the construction of a county tuberculosis hospital pursuant to a vote of the people authorizing a bond issue and a supplemental appropriation is made by the county commissioners for the purpose of improvement of the site and furnishing of the building, such appropriation may be taken into consideration in fixing the compensation of such building commission, and such commission is authorized to expend the money so appropriated as a part of the building fund for such improvement.

Respectfully,
EDWARD C. TURNER,
Attorney General.

898.

APPROVAL, FINAL RESOLUTIONS ON ROAD IMPROVEMENTS IN
FAIRFIELD, JEFFERSON AND VINTON COUNTIES.

COLUMBUS, OHIO, August 20, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter of August 19, 1927, enclosing for my approval final resolutions covering improvements on:

Lancaster-Logan Road, I. C. H. No. 340, Sec. Lancaster Bridge, Fairfield County.

McArthur-Athens Road, I. C. H. No. 160, Sec. McArthur, Vinton County

Steubenville-Cambridge Road, I. C. H. No. 26, Sec. Cross Creek Bridge, Jefferson County.