

OPINION NO. 89-040**Syllabus:**

An issuing authority, as defined in R.C. 165.01(E), may proceed with an issue of refunding bonds under R.C. 165.07(D) when such issuing authority has a reasonable and well-founded expectation, coincident with the time of issuance, that the final interest cost of the refunding bonds, computed to absolute maturity, will be less than the final interest cost of the bonds to be refunded.

To: David J. Baker, Director, Department of Development, Columbus, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, June 8, 1989

You have requested my opinion regarding the proper interpretation and application of the second of three qualifying conditions set forth in R.C. 165.07(D) that must be satisfied in the case of a bond refunding that is undertaken pursuant to the terms of that section. R.C. 165.07(D) states as follows:

The issuing authority may issue refunding bonds of the issuer to refund any bonds previously issued under Chapter 165. or 761. of the Revised Code, for any of the following purposes:

....
Refunding any bonds of the issuer previously issued when the refunding bonds will bear interest at a lower rate than the bonds to be refunded, *when the interest cost of the refunding bonds computed to the absolute maturity will be less than the interest cost of the bonds to be refunded*, or when the average life of the refunding bonds will be greater than the remaining average life of the bonds to be refunded.

Refunding bonds issued pursuant to this section shall mature not later than thirty years from date of issue. Except as provided in this section, the terms of the issuance and sale of refunding bonds shall be

as provided in Chapter 165. of the Revised Code for an original issue of bonds. (Emphasis added.)

With respect to the emphasized portion of R.C. 165.07(D) set forth above, you wish to know whether an issue of refunding bonds will be and remain validly issued if the appropriate issuing authority has a reasonable expectation, coincident with the time of issuance, that the interest cost of the refunding bonds, computed to absolute maturity, will be less than the interest cost of the bonds to be refunded. You have raised this question because at the time of issuance, it may not be possible, as a practical matter, for the issuing authority to determine conclusively and with an absolute degree of certainty that the final interest cost of the refunding bonds will, in fact, be less than the interest cost of the bonds being refunded. In this regard, various financial contingencies, over which the issuing authority has no control, and not all of which are foreseeable, may occur between the time that the refunding bonds are issued and the time that those bonds mature and are redeemed. Such contingencies may, in turn, have an effect upon the interest cost of the refunding bonds and thereby result in a situation wherein the final interest cost of the refunding bonds does not match the amount of such final interest cost as originally projected by the issuing authority. In view of the foregoing, you wish to know whether an issuing authority may proceed with an issuance of refunding bonds under R.C. 165.07(D) when the issuing authority, on the basis of all pertinent market projections and other reliable financial information, has a reasonable and well-founded expectation that the final interest cost of those refunding bonds will be less than the interest cost of the bonds being refunded.

Pursuant to article VIII, §13 of the Ohio Constitution,¹ the General Assembly has enacted R.C. Chapter 165 for the purpose of providing a comprehensive mechanism for the issuance of industrial development bonds by the state and certain political subdivisions thereof. *See generally* 1985 Op. Att'y Gen. No. 85-011; 1984 Op. Att'y Gen. No. 84-032; 1983 Op. Att'y Gen. No. 83-087. The authority conferred upon the state and those political subdivisions in that regard is set forth in R.C. 165.02. *See* R.C. 165.02(A)-(L). In particular, R.C. 165.02(C) states that "[a]n issuer acting through its issuing authority may in accordance with Section 13 of Article VIII, Ohio Constitution...[i]ssue its bonds to provide funds, by

¹ Ohio Const. art. VIII, §13 states, in part, as follows:

To create or preserve jobs and employment opportunities, to improve the economic welfare of the people of the state, to control air, water, and thermal pollution, or to dispose of solid waste, it is hereby determined to be in the public interest and a proper public purpose for the state or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities, or corporations not for profit designated by any of them as such agencies or instrumentalities, to acquire, construct, enlarge, improve, or equip, and to sell, lease, exchange, or otherwise dispose of property, structures, equipment, and facilities within the State of Ohio for industry, commerce, distribution, and research, to *make or guarantee loans and to borrow money and issue bonds or other obligations to provide moneys* for the acquisition, construction, enlargement, improvement, or equipment, of such property, structures, equipment and facilities. (Emphasis added.)

It also provides that "[l]aws may be passed to carry into effect such purposes and to authorize for such purposes the borrowing of money by, and the issuance of bonds or other obligations of, the state, or its political subdivisions, taxing districts, or public authorities, its or their agencies or instrumentalities." *See State ex rel. Burton v. Greater Portsmouth Growth Corporation*, 7 Ohio St. 2d 34, 36-37, 218 N.E.2d 446, 449 (1966) (Ohio Const. art. VIII, §13 "has a single purpose, to allow the state and governmental subdivisions to give financial assistance to private industry or to other governmental units in order to create new employment within this state").

loans or otherwise, for acquiring, constructing, reconstructing, enlarging, improving, furnishing, or equipping one or more projects or parts thereof."² (Footnote added.) The remaining subdivisions of R.C. 165.02 provide that an issuer acting through its issuing authority may acquire, hold, and mortgage real estate and personal property to be used as a project or as a part thereof, R.C. 165.02(A); purchase, construct, reconstruct, enlarge, improve, furnish, and equip and lease, sell, exchange, and otherwise dispose of projects or parts thereof for the purposes set forth in Ohio Const. art. VIII, §13, R.C. 165.02(B); make loans, and all agreements incidental thereto, for the acquisition, construction, reconstruction, enlargement, improvement, furnishing, or equipping of projects or parts thereof, R.C. 165.02(D); enter into contracts and execute all instruments necessary or appropriate to carry out the purposes of R.C. Chapter 165, R.C. 165.02(E); fix, alter, and collect rentals and other charges for the use and occupancy of a project and lease the project to others, R.C. 165.02(F); retain, contract with, or employ and fix the compensation of financial consultants, appraisers, accountants, architects, engineers, attorneys, and employees as are necessary to carry out the provisions of R.C. Chapter 165, R.C. 165.02(G); pledge, assign, hypothecate, or otherwise encumber as security for the bonds that are issued the rentals, revenues, and other income, charges, and moneys realized from the use, lease, sale, or other disposition of one or more projects, R.C. 165.02(H); enter into arrangements with the federal government, other state departments and agencies, or other political subdivisions of the state for the purpose of planning and installing streets, roads, and water and sewer services in connection with a project, R.C. 165.02(I); purchase various forms of fire, extended coverage, and personal liability insurance in connection with a project, R.C. 165.02(J); sell, lease, release, or otherwise dispose of real and personal property acquired by the issuer under R.C. Chapter 165 and no longer needed for the purposes of that chapter, R.C. 165.02(K); and do all other acts necessary or appropriate to carry out the purposes specified in Ohio Const. art. VIII, §13 and R.C. Chapter 165, R.C. 165.02(L).

Other provisions within R.C. Chapter 165 address the purposes for which industrial development bonds may be issued, and the form such bonds shall take, R.C. 165.03; the provisions that may be included within the bond proceedings that shall be a part of the contract with the holders of such bonds, R.C. 165.04; the negotiation of trust agreements or indentures securing such bonds, R.C. 165.05; and the rights of bond holders, R.C. 165.06. *See also* R.C. 165.08 (industrial development bonds as

² R.C. 165.01 defines a variety of terms as used in R.C. Chapter 165, including the terms, "[i]ssuer," "[i]ssuing authority," and "[p]roject":

(D) "Issuer" means the state, or a county or municipal corporation of this state which county or municipal corporation has, pursuant to section 1724.10 of the Revised Code, designated a community improvement corporation as its agency for industrial, commercial, distribution, and research development and for which a plan has been prepared by such community improvement corporation and confirmed by its issuing authority.

(E) "Issuing authority" means in the case of the state, the director of development; in the case of a municipal corporation, the legislative authority thereof; and in the case of a county, the board of county commissioners or whatever officers, board, commission, council, or other body might succeed to the legislative powers of the commissioners.

(H) "Project" means real or personal property, or both, including undivided and other interests therein, acquired by gift or purchase, constructed, reconstructed, enlarged, improved, furnished, or equipped, or any combination thereof, by an issuer, or by others in whole or in part from the proceeds of a loan made by an issuer, for industry, commerce, distribution, or research and located within the boundaries of the issuer. A project as defined in this division is hereby determined to qualify as facilities described in Section 13 of Article VIII, Ohio Constitution.

lawful investments); R.C. 165.09 (tax exemptions for certain real or personal property of an issuer used in connection with a project financed pursuant to R.C. Chapters 165 or 761); R.C. 165.12 (funds from which industrial development bonds are payable).

R.C. 165.07 also grants an issuing authority the power to refund a prior issue of bonds. R.C. 165.07(A)-(D) set forth the circumstances in which such a bond refunding may be undertaken, and certain conditions that must be satisfied, or that must be present, with respect to the types of refundings enumerated therein. In particular, R.C. 165.07(D), which is the focus of your inquiry, delineates three such conditions, each different and distinct from the other, that may apply to a bond refunding that is undertaken pursuant to that section. R.C. 165.07(D) first states that an issuing authority may refund any bonds previously issued by an issuer "when the refunding bonds will bear interest at a lower rate than the bonds to be refunded." Secondly, an issuing authority may refund a prior issue of bonds "when the interest cost of the refunding bonds computed to the absolute maturity will be less than the interest cost of the bonds to be refunded." Finally, an issuing authority may refund a prior issue of bonds in those instances "when the average life of the refunding bonds will be greater than the remaining average life of the bonds to be refunded."

Your inquiry relates to the second qualifying condition set forth in R.C. 165.07(D). You wish to know whether an issue of refunding bonds will be and remain validly issued in those instances in which an issuing authority has a reasonable expectation, at the time of issuance, that the interest cost of the refunding bonds, computed to the absolute maturity thereof, will be less than the analogous interest cost of the bonds to be refunded. As I have already noted, your question has been prompted by a practical problem encountered by an issuing authority in calculating the final interest cost associated with a particular issue of refunding bonds, and certifying that such interest cost will, in fact, be less than the final interest cost of the bonds being refunded. Notwithstanding the best efforts of an issuing authority in making such a calculation, market conditions and other financial contingencies over which the issuing authority has no control, and some of which cannot be anticipated or foreseen with any reasonable degree of certainty, may, over the entire life of the refunding bonds, have a material effect upon the final interest cost thereof. The occurrence of such contingencies may result in a situation in which the final interest cost of the refunding bonds differs from the issuing authority's original projection thereof at the time the bonds were issued. Obviously, the uncertainty engendered in this regard by such a prospect might effectively prevent an issuing authority from ever proceeding with an issue of refunding bonds on the basis of the second condition stated in R.C. 165.07(D). Accordingly, you have suggested that the second condition set forth in R.C. 165.07(D) be interpreted as permitting the issuance of refunding bonds when an issuing authority, in reliance upon all relevant financial data available at the time of issuance, has a reasonable and well-founded expectation that the final interest cost of the refunding bonds, computed to their absolute maturity, will be less than the final interest cost of the bonds being refunded.

Recently, in response to an earlier inquiry on the part of the Department of Development, I had occasion to examine and comment upon the first and second refunding conditions delineated in R.C. 165.07(D). In 1988 Op. Att'y Gen. No. 88-079 you requested my opinion regarding the first condition in R.C. 165.07(D), which requires that refunding bonds bear interest at a lower rate than the bonds that are being refunded. You specifically asked whether such lower interest rate must prevail for the duration of the term for which the refunding bonds are issued, until the bonds reach their maturity. In considering this particular question, I first noted that the traditional economic rationale for bond refundings supported a finding that the lower interest rate requirement of R.C. 165.07(D) must be observed throughout the entire term for which the refunding bonds are issued. In this regard, a bond refunding "often is undertaken precisely because older bonds can be redeemed and refinanced prior to their maturity date with new bonds at significantly lower rates of interest," and "[i]t follows, therefore, that the lower interest rates mandated by the first condition in R.C. 165.07(D) must prevail for the duration of the term for which the refunding bonds are issued if the desired savings in this regard are to be realized." Op. No. 88-079 at 2-393 and 2-394.

I then noted that the foregoing interpretation of R.C. 165.07(D)'s first condition was also supported by an important distinction between the first and second conditions of R.C. 165.07(D) and the respective circumstances in which those two conditions are evidently intended to apply. On this point I stated the following:

The first condition set forth in R.C. 165.07(D) addresses the lower interest rate that refunding bonds are to bear in relation to the interest rate borne by the refunded bonds, whereas the second condition addresses the lower "interest cost of the refunding bonds computed to the absolute maturity" (emphasis added) as compared to the analogous interest cost of the bonds being refunded. In this regard, it appears that the concept of "interest cost...computed to the absolute maturity" expressed by the second condition is intended to take into account the final, actual cost of a bond refunding, as determined and affected by a variety of financial contingencies that may occur at either random or regular intervals throughout the entire term for which the bonds are sold and issued. An example of the foregoing that most readily comes to mind is the situation in which the annual interest rate applied to the refunding bonds is variable or floating, rather than fixed, such that the annual interest rate may, depending upon the circumstances, fluctuate above or below the annual interest rate borne by the refunded bonds....

Conversely, the first condition stated in R.C. 165.07(D) appears to contemplate a situation in which the interest rate of the refunding bonds is an annual fixed rate, below that of the refunded bonds, or is so closely analogous to a fixed rate that there is little likelihood that such rate, once established, will equal or exceed the interest rate applicable to the bonds being refunded. As a practical matter, therefore, the question whether the conditions specified in R.C. 165.07(D) must prevail throughout the entire term for which the refunding bonds are issued is germane to this first condition only. Thus, insofar as the first condition, in contrast to the second, addresses a fixed annual rate of interest on refunding bonds, it appears reasonably implicit that such rate shall continue to be lower than that of the rate applicable to the refunded bonds throughout the entire term for which the refunding bonds are issued. (Footnote omitted.)

Op. No. 88-079 at 2-394. Thus, the lower interest rate requirement of R.C. 165.07(D) was most likely intended to apply in those instances in which refunding bonds are issued at a fixed rate of interest, and the logical and reasonable inference therefrom, consistent with the underlying cost-saving objective of a bond refunding, is that such lower interest rate shall remain constant for the entire term of issuance. On the other hand, the lower interest cost requirement imposed as the second refunding condition in R.C. 165.07(D) was more than likely meant to apply, *inter alia*, when the interest rate specified for an issue of refunding bonds is variable, not fixed, and thus subject to fluctuation throughout the life of the issue. *See, e.g.*, R.C. 9.982(A)(1) (permitting the use of floating interest rate structures in the case of bonds issued under, *inter alia*, R.C. Chapter 165); R.C. 165.03(A) (bonds issued under R.C. Chapter 165 "shall bear interest at such rate or rates, or at a variable rate or rates changing from time to time in accordance with a base or formula, as provided in or authorized by the bond proceedings"). *See also* R.C. 9.981(D) (R.C. 9.98-983, which are applicable to bonds issued under R.C. Chapter 165, "shall be liberally construed to permit flexibility in the arrangements therein provided to enhance the issuance of such bonds"). Such rate fluctuation may, in turn, be caused or influenced by many different factors, including conditions within the bond market itself, specific monetary policies promulgated by the United States Federal Reserve Board, and the overall performance of the domestic economy as a whole, or individual sectors thereof.

As you note in your letter, the element of unpredictability inherent in the use of a variable interest rate poses a unique problem for an issuing authority that intends to proceed with an issue of refunding bonds in accordance with the second condition listed in R.C. 165.07(D). Certainly, an issuing authority that decides to employ a variable interest rate structure as permitted by the second condition will be able to arrive at a reasonably accurate approximation of the final interest cost of such bonds. However, an unqualified declaration by the issuing authority that such

sum will, in fact, materialize as the final interest cost at the time such bonds mature is not possible. Nonetheless, I find myself in agreement with your statement that costs of underwriting, printing expenses, and other legal expenses incident to a bond refunding are generally as great as those incurred in connection with the original issue, and thus, it is unlikely that an issuing authority would willingly assume those additional expenses were it not reasonably certain of realizing a correspondingly significant savings in bond interest costs.

In this instance, I find that R.C. 165.07(D) may reasonably be interpreted as permitting an issuing authority to proceed with an issue of refunding bonds when it has a reasonable and well-founded expectation that the final interest cost of the refunding bonds, computed to absolute maturity, will be less than the final interest cost of the bonds to be refunded. Such an interpretation comports with certain principles of statutory construction that appear to govern in this situation. In R.C. 1.47 the General Assembly has set forth several presumptions that are to be observed with respect to the enactment of particular statutes. R.C. 1.47 states that, in its enactment of a statute, the General Assembly is presumed to have intended the entire statute to be effective, R.C. 1.47(B), a result that is just and reasonable, R.C. 1.47(C), and a result that is feasible of execution, R.C. 1.47(D). Consonant therewith the Ohio courts have stated that ambiguous statutory provisions should be interpreted, if possible, in a manner that permits a logical and reasonable result. *Gulf Oil Corporation v. Kosydar*, 44 Ohio St. 2d 208, 339 N.E.2d 820 (1975) (syllabus, paragraph two); *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St. 2d 47, 242 N.E.2d 566 (1968) (syllabus, paragraph four); *State ex rel. Cooper v. Savord*, 153 Ohio St. 367, 92 N.E.2d 390 (1950) (syllabus, paragraph one); *In Re Appeal of Ohio Radio, Inc.*, 25 Ohio App. 2d 84, 88, 266 N.E.2d 575, 577 (Ottawa County 1970). See also R.C. 1.49(A), (E) (if a statute is ambiguous, a court, in determining the intention of the legislature, may consider among other matters the object sought to be attained by the statute in question, and the consequences of a particular construction).

Absent other evidence to the contrary, therefore, one may presume that R.C. 165.07(D), as enacted by the General Assembly, is intended to be effective and operative in its entirety, and thus interpreted in a manner that permits an issuing authority to proceed with a bond refunding pursuant to any of the three qualifying conditions enumerated therein, secure in the knowledge that such bonds are and will remain validly issued debt instruments. Interpreting the interest cost requirement of R.C. 165.07(D) as you have suggested does facilitate the foregoing objectives, insofar as such an interpretation enables an issuing authority to undertake a bond refunding pursuant to R.C. 165.07(D)'s second qualifying condition, notwithstanding the practical difficulties otherwise presented in arriving at an exact calculation of the final interest cost of such refunding bonds.

It is, therefore, my opinion, and you are advised that an issuing authority, as defined in R.C. 165.01(E), may proceed with an issue of refunding bonds under R.C. 165.07(D) when such issuing authority has a reasonable and well-founded expectation, coincident with the time of issuance, that the final interest cost of the refunding bonds, computed to absolute maturity, will be less than the final interest cost of the bonds to be refunded.