

1604

EDUCATION, BOARDS OF—LEASE OF BUILDINGS FOR SCHOOL PURPOSES—PERIOD OF LEASE LIMITED BY REASONABLENESS—SUCH CONTRACT MAY INCLUDE PURCHASE FEATURES—§§5705.41, 3313.37, R.C.—UNLAWFUL TO APPLY ALL OR A PORTION OF LEASE PAYMENTS TOWARD PURCHASE—LEASE AGREEMENT, NOT A “CONTINUING CONTRACT” WITHIN THE MEANING OF §5705.41 R.C.

SYLLABUS:

1. “Continuing contracts” as provided in Section 5705.41, Revised Code, discussed.
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2. A board of education may, under the provisions of Section 3313.37, Revised Code, lease a suitable building for school purposes and make such lease agreement for a period of years, if reasonable. Such agreement may also include either an option or a firm contract to purchase such property, the former being a “continuing contract” as provided in Section 5705.41, Revised Code. It is unlawful, however, to apply all or a portion of the lease payments against the purchase price of the property.
3. Since a lease agreement coupled with a firm contract to purchase is not a “continuing contract” under Section 5705.41, Revised Code, the funds necessary to cover that portion of the contract representing the purchase price of the property must be appropriated and certified by the fiscal officer as being in the treasury or in the process of collection.

Columbus, Ohio, January 27, 1958

Hon. E. E. Holt, Superintendent of Public Instruction
Department of Education, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“We would appreciate your opinion in answer to the following questions:

"1. May a board of education lease a suitable building for school purposes from private owners with or without provisions for subsequent acquisition of title?

"Section 3313.37 of the Revised Code of Ohio does provide that a board of education may rent space or buildings for school purposes. However, we find no authority whatsoever for a board of education to enter into any contract that would provide for subsequent acquisition of title to such property.

"2. If a board of education may rent suitable buildings what would be the maximum length of time for which such a lease could run?

"3. Would the board of education have the right to guarantee the payment of rentals in the case of a long-time lease?"

Section 3313.37, Revised Code, reads as follows:

"The board of education of any school district, except a county school district, may build, enlarge, repair, and furnish the necessary schoolhouses, purchase or lease sites therefor, or rights of way thereto, or purchase or lease real state to be used as playgrounds for children or *rent suitable schoolrooms*, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for schools under its control." (Emphasis added)

There is no longer any question that the authority to rent schoolrooms includes by implication authority to lease. Opinion No. 240, Opinions of the Attorney General for 1919, p. 428. Since Section 3313.37, Revised Code, specifically authorizes a board of education to acquire real estate, it would be unduly strict to hold that the board may not take a lease with either an option or a firm contract to purchase. Since the latter method is not a continuing contract as hereinafter defined, that portion of the contract representing the purchase price of the property must be appropriated and certified as being either in the treasury or in the process of collection in accordance with Section 5705.41, Revised Code. Whichever method is used, such lease agreement must not be construed as applying all or a portion of the lease payments to the purchase price of the property.

I presume that when you ask whether a board of education may guarantee the payments under a long term lease you are actually inquiring as to whether a lease running longer than one year is valid under the current statutes.

Since Section 3313.37, *supra*, sets out no limitations as to the length of time a lease may run, the limitation, if any, must be found in the pro-

visions of Section 5705.41, Revised Code, the applicable portions of which are as follows:

“No subdivision or taxing unit shall:

“Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same, or in the case of a continuing contract to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * *”

This section seemingly would not specifically prohibit a board of education from entering into a lease agreement extending over a period of years. On the contrary, if such lease agreement can be considered a “continuing contract” then there is specific provision for it.

This consideration is important in determining whether the board must presently have available sufficient funds to cover the entire period of the contract, or only sufficient funds to cover the portion coming due in the first fiscal year.

In an effort to determine just what sort of contract is classified as “continuing” under this section it is helpful to trace evolution of said section through various stages of development. Section 5660, General Code (1910), reads as follows:

“The commissioners of a county, the trustees of a township and the board of education of a school district, shall not enter into any contract, agreement or obligation involving the expenditure of money, or pass any resolution or order for the appropriation or expenditure of money, unless the auditor or clerk thereof, respectively, first certifies that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate, and in process of collection and not appropriated for any other purpose; money to be derived from lawfully authorized bonds sold and in process of delivery shall, for the purpose of this section, be deemed in the treasury and in the appropriate fund. Such certificate shall be filed and forthwith recorded, and the sums so certified shall not thereafter be considered unappropriated until the county, township or board of education, is fully discharged from the contract, agreement or obligation, or as long as the order or resolution is in force.”

This section was repealed in 1925, 111 Ohio Laws, 371, 375, and replaced with a new Section 5660, General Code, which incorporated the substantial meaning of the earlier statute and added the following significant language:

“* * * In the case of contracts running *beyond the termination of the fiscal year* in which they are made for salaries of *educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made*, the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent to the making of such contract or lease *shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year* in which such contract or lease be made, provided further that in each subsequent fiscal year in which such contract or lease is in effect the auditor or fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases, the amount of the obligation remaining unfulfilled at the end of a fiscal year and which will become payable during the next fiscal year shall be included in the appropriations for such next year.” (Emphasis added)

It is noteworthy, I think, that this section specifically provides for certain contracts and leases which cover a period longer than one year. Noteworthy, too, is the inclusion of leases in the same category as contracts for educational employees, the latter having always been recognized as contracts of the “continuing” type.

Section 5660, General Code, was repealed in 1927, 112 v. 409, Sec. 40, and was replaced by Section 5625-33, General Code, 112 v. 406, Sec. 33, the part pertinent for the purposes of this case reading as follows:

“Section 33. No subdivision or taxing unit shall:

“(d) Make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the same (or in the case of a *continuing contract* to be performed in whole, or in part, in an ensuing fiscal year, the amount required to meet the same in the fiscal year in which the contract is made), has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. * * * (Emphasis added)

In reading this section it is apparent that the legislature did not specifically provide for the disposition of particular contracts and leases as was done under Section 5660, *supra*; the inference is quite strong, however, that it was the intention of the legislature to include these specific contracts and leases within the meaning of "continuing contract" as used in Section 5625-33, General Code. This inference gains added stature when it is noted that a portion of Section 5660, *supra*, is carried over into Sections 5625-36, General Code, 112 v. 408, Sec. 36, which reads:

"In the case of *contracts or leases running beyond the termination of the fiscal year in which they are made*, the fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases the amount of the obligation remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for such next year as a fixed charge. * * *
(Emphasis added)

The provision last quoted appears to recognize without explicitly so stating, that leases may run for a considerable number of years and that the sum which may be required to pay the annual rental in future years will have to be appropriated from year to year by the taxing authority in its annual appropriation. Manifestly, when the legislature used the words "continuing contract" in Section 5625-33, General Code, it intended to characterize the type of contracts and leases set forth previously in the old Section 5660, *supra*. It should be noted that Section 5625-33, General Code, is, for the purposes of this case, identical with Section 5705.41, Revised Code. Likewise, Section 5625-36, General Code, is the same as Section 5705.44, Revised Code.

Here it is helpful to note certain opinions of my predecessors in office which give substance to the reasoning set out above.

In Opinion No. 3734, Opinions of the Attorney General for 1941, p. 341, it was held that county commissioners were authorized to enter into a lease for years, with an option of renewal, and even though this question was not considered especially in relation to Section 5623-33, General Code, Section 5705.41, Revised Code, it is inescapably clear that the then Attorney General saw no problem under the above section since he alluded to it expressly in other connections. Likewise, in Opinion No. 1680, Opinions of the Attorney General for 1947, p. 132, it was concluded that the Adjutant General was authorized to enter into leases running longer than

two years, *explicitly finding that this would not violate Section 5625-33, General Code, Section 5705.41, Revised Code.* Although not mentioned, it must be assumed that the Attorney General classified these leases as “continuing contracts,” since otherwise no authority would have existed.

Perhaps the only clear reference to “continuing contracts” is to be found in Opinion No. 4006, Opinions of the Attorney General for 1941, p. 585, wherein the question was presented whether a board of county commissioners could enter into a five year agreement to purchase insurance, the premiums being paid annually. After having concluded that the board was not actually entering into a five year agreement because it had retained the right to cancel at the end of any year, the opinion continued on to say at page 587:

“Whether the commissioners could enter into a contract of insurance for a period of five years and obligate themselves to pay the premiums annually is a question not presented by you and I have therefore given no consideration to it. If they have such power, it would be a *continuing contract within the meaning of the term as used in Section 5625-33, General Code, and certification could be made by the county auditor during each fiscal year for the amount required to be paid during such year. * * ** (Emphasis added)

Since a lease for a period of years is obviously a “continuing contract” as provided for in Section 5705.41, Revised Code, I find no reason why a board of education may not enter into such lease agreement, provided, of course, said board complies in all other respects with Section 5705.41 (D), *supra*, to wit: that a certificate be obtained stating that the amount necessary to meet such agreement in the year in which made has been appropriated and is in the treasury or in process of collection. It would be impossible to state as a matter of law that a contract for any given number of years would be legal or illegal; therefore, a board of education may lease a suitable building for school purposes for a “reasonable time.”

In arriving at this conclusion, I am not unmindful of the opinions repeatedly published by this office in which installment purchases of real estate have been held unlawful. Without attempting an exhaustive survey of the law of contracts, it is reasonably clear that the words “continuing contract” as used by the legislature and as interpreted by numerous of my predecessors, describe what is known as a “divisible contract.” As briefly as possible, 3 Williston On Contracts, (Rev. Ed.) defines a divisible contract at page 2408 as:

“A contract is divisible when by its terms, 1, performance of *each party* is divided into two or more parts, and, 2 the number of parts due from *each party* is the same, and, 3, the performance of *each part* by one party is the agreed exchange for a corresponding part by the other party.” (Emphasis added)

There can be no question that a contract for the purchase and sale of real estate does not lend itself to the definition set out above. Delivery of a deed begins and ends with the single act, and even though payments may be spread out over a number of installments there is no corresponding continuing performance on the part of the grantor. His entire duty is either terminated now or postponed until a later date. It is plain, therefore, that a contract for the sale of property is not a divisible contract.

This being true, there is complete harmony between the decisions cited above. Installment purchases of real estate are unlawful because of the lack of statutory provision for them, while leases for a period of years are lawful in as much as they are “continuing contracts” under Section 5705.41, Revised Code. Since the board of education is authorized to enter into this latter type of contract, and since the contract obligates the board to fulfill its terms, any further guarantee outside the contract would be superfluous.

Finding as I do, it is my opinion and you are advised:

1. “Continuing contracts” as provided in Section 5705.41, Revised Code, discussed.

2. A board of education may, under the provisions of Section 3313.37, Revised Code, lease a suitable building for school purposes and make such lease agreement for a period of years, if reasonable. Such agreement may also include either an option or a firm contract to purchase such property, the former being a “continuing contract” as provided in Section 5705.41, Revised Code. It is unlawful, however, to apply all or a portion of the lease payments against the purchase price of the property.

3. Since a lease agreement coupled with a firm contract to purchase is not a “continuing contract” under Section 5705.41, Revised Code, the funds necessary to cover that portion of the contract representing the

purchase price of the property must be appropriated and certified by the fiscal officer as being in the treasury or in the process of collection.

Respectfully,
WILLIAM SAXBE
Attorney General