

OPINION NO. 79-012**Syllabus:**

Absent a showing of bad faith or abuse of discretion, a board of education may expend surplus proceeds of a bond issue for the construction of a building that falls within the purpose of the bond issue, as stated in the board's resolution and on the ballot placed before the electors of the district, but which was specifically excluded from the board's plans and specifications before such bond issue was placed on the ballot.

To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio
By: William J. Brown, Attorney General, May 4, 1979

I have before me your request for my opinion on the following question:

[Is it] a proper exercise of authority for a board of education to expend proceeds of a bond issue for the construction of a building that falls within the description of the ballot language ("constructing buildings") but which was specifically excluded from the plans and specifications before such bond issue was placed on the ballot?

Your request is premised upon the following sequence of events. On July 17, 1973, a board of education resolved to place a bond issue and tax levy on the November, 1973 ballot for the purpose of undertaking certain capital improvements. The plans and specifications included the construction of a natatorium. The proposal was defeated by the electors. On November 27, 1973, the board of education resolved to place a bond issue and tax levy on the ballot of the March special election. The natatorium was deleted from the plans and specifications. Accordingly, this bond issue was for \$178,000 less than the issue proposed in July, 1973. The issue was approved by the electors. In November, 1975, the project architect reported that, after completion of the planned facilities, there would be a surplus of \$455,647 in the building fund. The board of education proceeded to have the natatorium constructed with such surplus funds.

A board of education's authority to issue bonds is subject to the requirements and limitations set forth in R.C. Chapter 133, the Uniform Bond Law. R.C.

133.01(A) (as used in R.C. Chapter 133, "subdivision" includes a school district other than a county school district). Of particular significance to the issue you raise is that portion of R.C. 133.36 which states that ". . . [t]he money from the principal, on the sale of . . . bonds or notes, shall be credited to the fund on account of which the bonds or notes are issued and sold and used only for the purpose set out in the resolution or ordinance of the taxing authority" The required resolution referred to in R.C. 133.36 may relate only to one purpose. In the case of a school district, however, any number of school buildings may be included in one purpose. R.C. 133.10.

With respect to the situation about which you have inquired, the resolution of the board of education stated in pertinent part as follows:

BE IT RESOLVED, by the Board of Education . . . that it is necessary to provide for acquiring real estate for school purposes, constructing, remodeling, improving and making additions to buildings for school purposes, providing furniture, furnishings and equipment for school purposes and equipping and otherwise improving school sites

The purpose as stated in the board's resolution was incorporated in the ballot prepared by the county board of elections and presented to the electorate. You indicate in your letter that you have no doubt that the construction of a natatorium falls within the description of purpose stated in the resolution and on the ballot. Nor do you question the authority of a board of education to undertake the construction of a natatorium. Rather, your concern focuses on the fact that the natatorium was specifically excluded from the plans and specifications before the board at the time it resolved to place the second bond issue proposal before the electorate.

As discussed previously, the critical factor in determining whether a particular expenditure of proceeds of a bond issue is proper is whether the expenditure falls within the purpose stated in the resolution adopted by the taxing authority. There is no provision in R.C. Chapter 133 that imports legal significance to collateral or supplemental materials, such as preliminary plans or specifications or informal statements of intent, considered or prepared by the taxing authority contemporaneously with the adoption of its resolution. Recognizing the controlling significance of the purpose stated in the resolution adopted by the taxing authority, the courts have upheld the authority of a taxing authority to amend its plans for the construction of buildings or facilities subsequent to the approval of the bond issue, provided that the amendment is consistent with the stated purpose. See, e.g., State ex rel. Board of County Commissioners v. Austin, 158 Ohio St. 476 (1953) (board of county commissioners issued notes and levied a tax for the purpose of constructing a county home, which was constructed without exhausting the proceeds of the tax; upon finding that the original building was inadequate, the board had the authority to use the balance of the proceeds to construct an addition to the original building); Hire v. Board of County Commissioners, 16 Ohio Op. 2d 169 (C.P. Allen County 1960) (board of county commissioners could use funds provided by a bond issue for the construction of an airport at a site other than the site originally designated). More specifically, the courts have held that the requirement that a board of education submit the question of a bond issue to the electors of the district does not withdraw from the board its authority and discretion with respect to the control and management of school buildings. For this reason, a board of education may amend its plans for the construction of school facilities subsequent to the approval of a bond issue for this purpose, provided that the added or substituted facility is one the board is empowered to construct and that it falls within the purpose stated in the resolution. See, e.g., State ex rel. Van Harlingen v. Board of Education, 104 Ohio St. 360 (1922) (approval of a bond issue to raise funds for the construction of a schoolhouse did not require the board to proceed with the construction of a particular building); Bartlett v. Board of Education, 71 Ohio Law Abs. 140 (C.P. Montgomery County 1955) (board of education was not limited by a bond levy, the express purpose of which was to acquire a site and construct an

elementary school and additions to existing school buildings, to the construction of a single school; the board could use the proceeds to construct two new buildings).

With respect to your specific questions, I am unable to conclude, consistent with the foregoing cases, that a board of education lacks the authority to expend surplus proceeds of a bond issue for the construction of a facility which falls within the purpose of the bond issue stated in the board's resolution but which was excluded from the plans and specifications before such bond issue was placed on the ballot. I would not want one to infer from this conclusion, however, that the discretion of a board of education in such cases is unlimited. A board of education has a duty to exercise its authority and discretion in good faith and to use its best judgment with due regard to the circumstances and interests of the district at the time of its action. See, e.g., Brannon v. Board of Education, 99 Ohio St. 389 (1919); cf. Hire v. Board of County Commissioners, *supra* (court's holding was dependent upon its finding that there had been no abuse of discretion, fraud, or collusion in any of the actions of the board of county commissioners). This office does not, however, have the authority to determine whether a board of education has acted in bad faith or abused its discretion. Only a court can make this type of determination. I have, therefore, assumed for the purposes of this opinion that no allegations of bad faith or abuse of discretion were intended in your request.

It is, therefore, my opinion, and you are so advised, that absent a showing of bad faith or abuse of discretion, a board of education may expend surplus proceeds of a bond issue for the construction of a building that falls within the purpose of the bond issue, as stated in the board's resolution and on the ballot placed before the electors of the district, but which was specifically excluded from the board's plans and specifications before such bond issue was placed on the ballot.