

Opinion No. 33-685

November 15, 1933

BY: E. K. NEUMANN, Attorney General

TO: Mr. Irvin P. Murphy, Superintendent of Schools, Hope, New Mexico.

{*91} With reference to your letter of November 6, 1933, with relation to the power of School District No. 8, Eddy County, to procure from the Government a loan under the Public Works Act for the purpose of erecting a school and community hall and gymnasium, or, if there is no power to make the loan, the power to have same built by the Government and lease same upon an agreed rental until the funds expended are repaid the Government.

Under the provisions of the Public Works Act, funds for public works will be furnished by the United States Government, to be repaid under the following conditions:

1. By a bond issue of the borrowing governmental agency in the amount of Public Works Act funds furnished, to be paid out of proceeds of taxation.
2. By a bond or debenture issue of the borrowing governmental agency in the amount of Public Works Act funds furnished, to be paid out of revenues derived out of the property built, acquired or improved.
3. By a mortgage of the property built, acquired or improved in the amount of the Public Works Act funds furnished.
4. By a lease of the property built, acquired or improved to the governmental agency, upon the basis of the rentals being considered as a repayment of the Public Works Act funds furnished.

Under Section 11 of Article IX of the State Constitution, as amended by Constitutional Amendment No. 2 adopted by the vote of the people on September 19, 1933, we find the following provision:

"No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding {*92} six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment."

Under said Constitutional provision, unless a bond issue can be voted for the improvement contemplated, condition No. 1 could not be met. Even if a bond issue for such purposes can be had by vote, the amount of the bonds issued must be within the six per cent limitation fixed by the Constitution.

Likewise, condition No. 2 cannot be met for the property built, acquired or improved is not revenue property within the meaning of the Public Works Act, even though there might be authority in law, which I doubt, for school districts to issue revenue bonds or debentures for the purpose of borrowing money to build or acquire revenue property.

It would also be impossible to meet condition No. 3, for such procedure would be in violation of said Constitutional provision. For a full discussion of this proposition see the case of Palmer vs. City of Albuquerque, 19 N.M. 285.

This leaves for consideration only condition No. 4 as a possible chance to obtain the buildings desired. Various statutes have been examined, in addition to the above quoted constitutional provision, and we find the following that have some bearing upon the subject:

a. "After March 12, 1897, it shall be unlawful for any board of county commissioners, city council, town trustees, board of education, board of trustees, or board of school directors of any school district, for any purpose whatever to become indebted or contract any debts of any kind or nature whatsoever during any current year which, at the end of such current year, is not and cannot then be paid out of the money actually collected and belonging to that current year, and any and all kind of indebtedness for any current year which is not paid and cannot be paid, as above provided for is hereby declared to be null and void, and any officer of any county, city, town, school district or board of education, who shall issue any certificate or other form of approval of indebtedness separate from the account filed in the first place or who shall, at any time, use the fund belonging to any current year for any other purpose than paying the current expenses of that year, or who shall violate any of the provisions of this section, shall be deemed guilty of a misdemeanor and upon a conviction thereof shall be fined not less than one hundred nor more than one thousand dollars or be confined in the county jail for a period of not more than six months or by both such fine and imprisonment, in the discretion of the court trying the case."

b. Under Sec. 33-4246, 1929 Code, the year referred to for school districts is from September 1st to August 31st of the next year.

c. Under Sec. 33-5901, 1929 Code, the county commissioners of each county are required to make estimates of all county expenditures, including school districts, for the ensuing year. Such estimates to be made on or before May 1st of each year, and may be termed as budgets. This power for school districts is placed in the hands of a school budget commission as provided for in Sec. 120-601, 1929 Code, Sec. 120-602 and Sec. 120-603, as amended by Sec. 3, Chapter 119, Laws of 1931, provide further procedure.

d. We come now to Sec. 120-604, Code of 1929, as amended by Sec. 4, Chap. 119, Laws of 1931, which in part is as follows:

"* * *. District direct charge funds shall include property insurance, **lease of school buildings**, erection of school buildings, and repair to school buildings and equipment, new equipment, purchase of school grounds, improvement of grounds and buildings, transportation to supplement transportation allowance from the regular county maintenance fund, and interest on and sinking funds for district school bonds. * * *"

From the foregoing citations, it is apparent that school districts may budget for the cost of leasing school {93} buildings, subject, in all cases and relating to any expenditures, to the approval of various boards and officials. First, the school commission (See Sec. 120-601, supra), secondly, the county commission (See Sec. 33-5901, supra), third, the educational budget auditor and lastly, the State Tax Commission (see Sec. 120-606 1929 Code).

Consequently, subject to the annual approval of these officers and boards, broadly speaking there is a possibility of the officers of your school district meeting condition No. 4. Several things must be considered, however, before we can conclude that this power is an absolute power.

The first question that comes to mind in such consideration is: Does the Bateman Act, Sec. 33-4241, supra, prohibit a lease for longer than one year? We think not, for reason that the rental, if fixed upon an annual basis and not as a lump sum for the entire term of the lease, coming due each year is a debt for the particular year, or current year, which can only be paid out of the money collected for that particular year and belonging thereto. We will not consider the possibility of failure of collections of such funds, for that alone has no bearing upon the right of the official to incur an indebtedness budgeted for in any particular year.

"Similarly a rental contract under which the school organization undertakes to pay a yearly rental, which of itself does not exceed the constitutional limit, does not create a debt of the aggregate payments."

56 C.J. 540-41.

The most serious question presented is: Can the present set of officials legally enter into a long term lease beyond the terms of their office so as to bind future boards to pay the rentals contracted for the full term of such lease? There is no doubt that municipal school boards, and we are assuming that this particular district is a municipal district, have the power to lease buildings and grounds for needed school purposes. There is some limitation to this power even in absence of a specific statute. As we view it, there are in this state no statutes which imply that the powers of the board are limited to the current term, or that contracts entered into for a greater period would invalidate such contract. In the case of Board of Education vs. Board of Education, 24 S.W. (2d) 889, the Supreme Court of Tennessee states:

"Upon authorities cited, we hold that a county board of education, acting in good faith and without collusion, may lease a school building for a period extending beyond their term of office * * *."

Prior to the above statement, the court says: "In principle, there is no distinction between the power of a county board and a municipal board to enter in such a contract." The particular lease was for a period of 10 years.

Some difficulty perhaps might be experienced in order to have the various taxing boards and officials to provide funds to meet the annual rentals, but this difficulty could be solved, we believe, by the application of the following rule as stated in 56 C.J. 555, to-wit:

"It is generally the duty of the particular board or officer empowered to appropriate the necessary funds available for educational purposes, and if for a proper purpose, may be compelled so to do."

We conclude, therefore, that your municipal school board may:

1. Safely contract to lease the building and grounds, erected and purchased by the government, for needed school purposes in good faith and for a term of years beyond the term of the members of the present board;
2. That the various taxing boards and officers must provide the annual rentals for such purposes.

There is, of course, the possibility that there might be a complete failure of funds available for such purposes, but this is so remote that we believe it will not operate as a bar to the transaction.