

JANUARY 27, 1956

HON. ROBERT L. FINLEY
Acting State Treasurer
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-7

DEAR MR. FINLEY:

We have your request dated January 11, 1956 for our opinion as to whether the Governor, the Acting State Treasurer and the Comptroller (hereinafter referred to as the "State officials") may legally assent at this time to the proposed current bank borrowing of \$8,000,000 by the New Jersey Highway Authority and to express by a writing, in the form annexed hereto as Exhibit A, their intention and decision to assent to the issuance by the Authority, following the completion of the Egg Harbor Bridge (the Minimum Parkway Completion date), of revenue bonds in the amount of \$22,000,000 for costs of completion of the Parkway proper and construction of the Thruway feeder road, as provided for in the Fourth and Fifth Supplemental Resolutions of the Authority, copies of which have been submitted.

As we advised former State Treasurer Archibald S. Alexander by letter dated August 20, 1954, no provision requiring assent by the State officials to borrowing by the New Jersey Highway Authority is found in the act creating the Highway Authority and defining its powers nor in the act providing for the State's guaranty of the first \$285,000,000 of bonds issued by the Highway Authority.

The only provisions for such assent are found in the covenants of the General Bond Resolution adopted by the New Jersey Highway Authority on July 8, 1953. The mechanics for the authorization of the bonds of a series are set forth in section 403 and following of the General Bond Resolution. After the bonds, other than guaranteed bonds, have been authorized by a Supplemental Resolution of the Authority, they are to be executed on behalf of the Authority and then delivered to the Trustee under the General Bond Resolution for authentication (section 405 G.B.R.). The Trustee is then required (section 406 G.B.R.) to authenticate the bonds and deliver them to the Authority or upon its order, if the conditions, if any, set forth in the Supplemental Bond Resolution authorizing such bonds and the conditions set forth in section 407 of the General Bond Resolution have been complied with. Section 407 sets forth various conditions which must be fulfilled before the Trustee may authenticate and deliver bonds of any series. Among those conditions is the requirement that there be delivered to the Trustee "(5) A written document signed by the Governor, State Treasurer and State Comptroller of the State, or any two of such officials including the Governor, referring to the Supplemental Resolution authorizing such Bonds and stating that said Supplemental Resolution is assented to by the signers".

Section 708 of the General Bond Resolution, quoted at length in my letter of August 20, 1954, likewise requires the assent of the State officials before bonds, notes or other evidence of indebtedness other than the bonds provided for by the General Bond Resolution may be issued.

As we also stated in our letter of August 20, 1954:

"The provisions in Sections 407 and 708 requiring the written consent of the Governor, State Treasurer and State Comptroller or two of any such

officials including the Governor, are valid covenants made pursuant to the authority of R.S. 27:12B-9. They constitute a contractual restriction on the right of the Authority to issue additional bonds, notes or other evidence of indebtedness. Failure of the State officials named to give their consent would prohibit the issuance by the Authority of any additional securities irrespective of the reason, if any, given by the State officials for refusal to give their consent.

I call to your attention, however, that Attorney General Parsons, in his opinion of July 6, 1953 (Formal Opinion 1953 - No. 29), which dealt with the first issue of \$150,000,000 of State guaranteed bonds, said:

'The State's vital interest in the timely and successful completion of the Garden State Parkway is matched by the people's concern that State revenues will not be required to contribute to the payment of obligations incurred by the Authority. The restrictions accepted by the Authority and the covenants which it has given are capable of achieving both objectives. In my opinion, the Authority, in issuing further securities at a later date, and the Governor, State Treasurer, and Comptroller, in consenting to such action at that time will be obligated at such time to satisfy themselves that Garden State Parkway revenues always will be adequate to discharge all Highway Authority debts.' "

In our opinion, the State officials have the power to assent to the current bank borrowing of \$8,000,000, this pursuant to the provisions for such assent found in Section 708 of the General Bond Resolution.

It is further our opinion that the State officials have the power now to execute and deliver Exhibit A hereto attached in which, among other things, they state that:

"If the Authority, on or after August of 1956, shall be required to sell said Series D Bonds and Series E Bonds in order to comply with its obligations under said resolution of January 18, 1956 and the Loan Agreement authorized thereby, and if the bonds so sold bear a rate or rates of interest, and are sold at prices, reasonably consistent with the rates of interest prevailing on, and market prices obtainable for, new issues of bonds of like character at the time of such sale, it is our intention and we have decided to assent to said Fourth and Fifth Supplemental Resolutions when completed and adopted by the Authority.

The foregoing does not, of course, in any way preclude the Authority from requesting assent to resolutions authorizing bonds (or notes to be issued) at an earlier date for retiring such Promissory Notes or prevent our assenting to such resolutions if we determine that such assent should be given."

The Fourth and Fifth Supplemental Resolutions referred to contain all the terms of the proposed bonds except for the interest rates. We understand from representatives of the Authority and the State Officials' financial advisor that the sinking fund and redemption provisions conform to those of the prior issues of the Highway Authority bonds so that the proposed new bonds are not required to be redeemed or paid off at a faster pro rata rate than the bonds now outstanding.

You refer in your letter to Mr. McKelvey's findings as to the effect of the issuance of additional bonds for the construction of the Thruway feeder road on the surplus available for retirement of the bonds heretofore issued. Mr. McKelvey's findings do not affect the legal power or authority of the State Officials to assent to the present bank borrowing and to execute the writing annexed as Exhibit A. Those findings are one of the factors, among others, to be considered by the State Officials in determining whether to give their assent to the bank borrowing and to execute Exhibit A. Among the many other factors which the State Officials should (and have) considered are: Mr. McKelvey's complete analysis of the situation and the financial aspects of the proposed bank borrowing and bond issues, and the various representations which have been made to the State Officials by the Highway Authority, its engineers, etc., including representations as to the substantial savings to be realized if work on the proposed Thruway feeder road is begun forthwith rather than awaiting the expiration of the Minimum Parkway Completion date.

Nor is the power and authority of the State Officials affected by the fact referred to in your letter:

"a. The fact that the Minimum Parkway Completion Date will not be attained until the completion of the Egg Harbor Bridge some time in May 1956 and that therefore any present assent by the State authorities to the present issuance of notes and later issuance of bonds would precede the attainment of such Minimum Parkway Completion Date and the actual issuance of the bonds, which must await the attainment of such date."

The Minimum Parkway Completion Date is defined in the General Bond Resolution (Sec. 102) (32)) as the date when the authority shall have opened to traffic the original Parkway project from Paramus to Cape May. We are advised that that date will arrive when the Egg Harbor Bridge is completed. As Hawkins, Delafield & Wood, bond counsel for the Authority, correctly observe: "First, the restriction on bond financing based on the Minimum Parkway Completion Date relates only to Bonds issuable under the General Bond Resolution and not to notes or other bonds issuable by the Authority pursuant to the Act, and indeed relates only to Bonds authorized with respect to acquisition of additional parkway facilities or financing the Thruway Feeder Road, and not to Bonds for further financing or necessary repair of the Parkway Project (Sections 407 - 412). Secondly, this time restriction established in the General Bond Resolution (Sections 411 (2) and 412 (3)) controls only the action of the Trustee in delivering Bonds previously authorized or sold and addresses itself in no respect to the powers of the Authority to undertake construction of the Thruway Feeder Road or financing thereof on notes or other bonds or to the privilege given by the General Bond Resolution (Section 407 (5)) to the State Officers to assent to a Supplemental Resolution of the Authority authorizing Bonds for financing the Thruway Feeder Road or for any other authorized purpose. Thirdly, the time restriction, established as it is as binding only on the Trustee, is not by the General Bond Resolution made applicable to Authority financing on notes or other bonds on a subordinated basis which is permitted as an exception to other restrictions of the General Bond Resolution (Section 708) substantially on authorizing action by the Authority and State Officers only, not the Trustee."

In view of the foregoing, it is our opinion that the fact that the Minimum Parkway Completion date has not yet been reached does not affect the power of the State Officials to execute the assent and the writing annexed hereto as Exhibit A.

When the bonds are actually to be issued, which will be after a determination is made as to the interest rate and the price at which the bonds are to be sold, the Authority will have to obtain an assent from the State Officials. Without such assent the Trustee under the General Bond Resolution would not have authority to authenticate the proposed new bonds.

Very truly yours,

GROVER C. RICHMAN, JR.
Attorney General

By: HAROLD KOLOVSKY
Asst. Attorney General

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FEBRUARY 8, 1956

AARON K. NEELD, *Director*
Division of Taxation
State House
Trenton, New Jersey

MEMORANDUM OPINION—P-8

DEAR MR. NEELD:

You have requested an opinion (1) whether the purchase of accounts receivable by a corporation constitutes the doing of a financial business within the meaning of N.J.S.A. 54:10B, and (2) whether the phrase "discounting and negotiating" as used in this statute impliedly includes "purchasing" so as to subject such a corporation's activities to a tax under the Financial Business Tax Act.

The facts, as stated by you, are that the American Commercial Corporation, a New Jersey corporation, purchases from its customers receivables, book debts, notes, acceptances, drafts and other choses in action by written agreement. On making such purchases, American pays 75% of the face value of the accounts receivable to the customer from moneys it borrows from banks. American acquires full and absolute title at the time of purchase. As the debtor makes payment to American, the 25% originally withheld is paid to the customer, subject to a service charge levied by the corporation. Such service charge is the only source of income of American. You also state the corporation's activities do not appear to be in substantial competition with the business of national banks.

The section of the Financial Business Tax Law defining financial business is N.J.S.A. 54:10B-2(b), which reads:

"'Financial business' shall mean all business enterprise which is (1) *in substantial competition* with the business of national banks and which (2) employs moneyed capital with the object of making profit by its use as money, *through discounting and negotiating* promissory notes, drafts, bills of exchange and other evidences of debt; buying and selling exchange; making of or dealing in secured or unsecured loans and discounts; * * *. This shall include, without limitation of the foregoing businesses commonly known as industrial banks, dealers in commercial paper and acceptances, sales finance, personal finance, small loan and mortgage financing businesses, as well as any other enterprise employing moneyed capital coming into competition with the business of national banks; * * *." (*Italics added*).