OPINIONS

OF THE

ATTORNEY GENERAL

OPINION NO. 69-001

Syllabus:

1. A water utility lien held by a private water utility corporation which purports to encumber or affect real property is recordable in the mortgage record under Section 317.08 (B), Revised Code.

2. In recording instruments under Section 317.08 (B), Revised Code, the name of each grantor shall be entered in the direct index under the appropriate letter and the name of each grantee shall be entered in the reverse index under the appropriate letter.

To: J. Warren Bettis, Columbiana County Pros. Atty., Lisbon, Ohio
By: Paul W. Brown, Attorney General, January 15, 1969

I am in receipt of your request for my opinion wherein you ask:

1. Is a water utility lien held by a private water utility corporation recordable in the mortgage record by reason of Section 317.08 (B), Revised Code?

2. If said document is recordable, a majority of current owners of the property to which the liens would attach are purchasing under the terms of a land contract and not by deed, and as such, by what method would the documents be indexed?

Section 5301.25, Revised Code, provides in pertinent part:

"(A) All deeds, land contracts referred

to in division (B) (2) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated, * * *"

Section 317.08, Revised Code, lists the records to be kept by the county recorder as follows:

"The county recorder shall keep five separate sets of records as follows:

"(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices, as provided for in sections 5301.47 to 5301.56, inclusive, of the Revised Code; all declarations and bylaws as provided for in sections 5311.01 to 5311.22, inclusive, of the Revised Code; and all certificates as provided for in section 5311.17 of the Revised Code;

"(B) A record of mortgages, in which shall be recorded:

"(1) All mortgages, including amendments, supplements, modifications, and extensions thereof, <u>or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered</u>; (Emphasis added)

"(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contracts;

"(C) A record of powers of attorney;

"(D) A record of plats, in which shall be recorded all plats and maps of town lots, and of the subdivision thereof, and of other divisions or surveys of lands, and any center line in survey of a highway located within the county, the plat of which shall be furnished by the director of highways or county engineer and all drawings as provided for in

sections 5311.01 to 5311.22, inclusive, of the Revised Code;

"(E) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments thereof.

"All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record unemployment compensation liens, federal tax liens, discharges of recognizances, and excise, /and/ franchise tax liens on corporations, and liens provided for in section 5311.18 of the Revised Code in one volume."

The office of the Attorney General has opined on past occasions that the county recorder, as a ministerial officer, has the duty to receive and record a written instrument which purports to affect a conveyance or an encumbrance on real property. See Opinion No. 1053, Opinions of the Attorney General for 1964, page 2-202; Opinion No. 6400, Opinions of the Attorney General for 1956, page 275; Opinion No. 4531, Opinions of the Attorney General for 1932, page 960.

The water utility liens under discussion are allegedly created in recorded restrictive convenants, deed restrictions, plat restrictions, and in conditions contained in the sales contracts. Clearly these liens purport to affect the conveyance of real property. Therefore, the precise problem raised by your first question is in which of the five separate categories outlined in Section 317.08, supra, should the water utility liens be filed.

A close examination of Section 317.08, supra, reveals that such documents would be recordable under Section 317.08 (B) (1), Revised Code, which provides that written instruments by which lands are encumbered are entitled to record under this subsection. Although I refrain from the expression of any opinion as to the legal efficacy of the liens in question, it is quite clear that these instruments purport or attempt to encumber or affect real property and in doing so would affect the conveyance of the property. Therefore, under Section 5301.25, supra, said instruments are recordable and Section 317.08 (B) (1), supra, directs that such encumbrances be recorded in the mortgage records.

You then ask my opinion as to how such documents should be indexed, since a majority of lot owners are purchasing under a land contract which does not entail a mortgage. As regards indexing, Section 317.18, Revised Code, provides in pertinent part:

"At the beginning of each day's business

> the county recorder shall make and keep up general alphabetical indexes, direct and reverse, of all the names of both parties to all instruments theretofore received for record by him. * * * The indexes shall show the kind of instrument, * * *. The name of each grantor shall be entered in the direct index under the appropriate letter, * * *. The name of each grantee shall be entered in the reverse index under the appropriate letter, * * *."

The statute clearly requires the names of both parties to all recordable instruments to be indexed in direct and reverse indexes, the grantor's name being in the direct index and the grantee in the indirect.

Since the terms "grantee" and "grantor" are not defined by the statute, I can only assume these terms be accorded their commonly accepted legal meaning. "Grantee" would refer to the person upon whom the interest is bestowed and "grantor" the person by whom an interest in land is bestowed.

As regards indexing a land contract, the grantor is the party conveying the right to possession of the land and the grantee is the party obtaining the right to possession of the property. Accordingly, the grantor's (vendor's) name should appear in the direct index and the grantee's (vendee's) in the reverse index.

Therefore, in specific answer to your second question, I would cite the first paragraph of the syllabus in Opinion No. 2567, Opinions of the Attorney General for 1961, page 275, which states:

> "1. In keeping the records required by division (B) of Section 317.08, Revised Code, as effective September 29, 1961, the county recorder is required by Section 317.18, Revised Code, to enter the name of each grantor in the direct index under the appropriate letter, and name of each grantee in the reverse index under the appropriate letter."

Accordingly, it is my opinion and you are hereby advised:

1. A water utility lien held by a private water utility corporation which purports to encumber or affect real property is recordable in the mortgage record under Section 317.08 (B), Revised Code.

2. In recording instruments under Section 317.08 (B), Revised Code, the name of each grantor shall be entered in the di-

rect index under the appropriate letter and the name of each grantee shall be entered in the reverse index under the appropriate letter.

OPINION NO. 69-002

Syllabus:

A reduction in the salary of non-teaching employees is not permitted unless such a reduction is part of a uniform plan affecting all non-teaching employees in the district.

To: John L. Beckley, Vinton County Pros. Atty., McArthur, Ohio
By: Paul W. Brown, Attorney General, January 15, 1969

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

The Vinton County Board of Education employed bus drivers pursuant to Section 3319.082, Ohio Revised Code. Following the consolidation into one school district for the entire county, the transportation system and routes were changed from the prior year to provide for more efficient service. The new routing system brought with it a new salary schedule for the bus drivers based on: (1) total annual miles driven and (2) experience in years for each driver. The above schedule is uniform for all employed bus drivers but it does not apply to any other non -teaching employees. The salary schedule does result in the lowering of some salaries of the bus drivers in Vinton County. Your question in regard to this schedule is whether such a plan is contrary to Section 3319.082, Ohio Revised Code.

Section 3319.082, supra, provides as follows:

> "Notice of annual salary. In all school districts wherein the provisions of Sections 143.01 to 143.48, inclusive, of the Revised Code do not apply, each board of education shall cause notice to be given annually not later than the first day of July to each non-teaching school employee, who holds a contract valid for the succeeding school year, as to the salary to be paid such school employee during such year. Such salary shall not be lower than the salary paid during the preceding school year unless such reduction is a part of a uniform plan affecting the non-teaching employees of the entire district. This section does not prevent increases of salary after the board's annual notice has been given." (Emphasis added)

The clear meaning of this statute is that the bus drivers of Vinton County shall not be forced to receive a lower salary unless such a reduction in salary is part of a uniform plan af-

fecting all the non-teaching employees of the entire school district. Since there is no uniform plan calling for a reduction in salary for all non-teaching employees in the district, the proposed schedule for the Vinton County bus drivers is contrary to the provisions of Section 3319.082, supra.

It has been learned by this office that the consolidation into one school district for Vinton County occurred long before the transportation and routing systems were changed. Thus the fact that the consolidation took place has little or no bearing on the solution to the problem.

In conclusion, it is my opinion and you are hereby advised that a reduction in the salary of non-teaching employees is not permitted unless such a reduction is part of a uniform plan affecting all non-teaching employees in the district.

OPINION NO. 69-005

Syllabus:

Firms who perform consultation and search services including interviews and preparation of a resume; search in the client's field to compile a list of possible enterprises; contact letters: continuing consultation, and other like services for a client, are "employment agencies" within the purview of Sections 4143.01 and 4143.02, Revised Code, and are required to be licensed if doing business for hire in Ohio, even though the consultation and search contract stipulates the firm is not an employment agency.

To: J. Gordon Peltier, Director, Department of Commerce, Columbus, Ohio
By: Paul W. Brown, Attorney General, January 23, 1969

I have your request for my opinion concerning a particular type of agency related to the field of employment agencies known as a consultation and search agency, and you submit a sample contract which is illustrative. The question which you ask reads as follows:

> "Are such 'consultations and search agencies', as described above 'employment agencies' within the purview of Sections 4143.01 and 4143.02 of the Revised Code?"

Chapter 4143 of the Revised Code sets out the provisions for licensing of employment agencies. Section 4143.01 of the Revised Code reads in part as follows:

> "As used in sections 4143.01 to 4143.23, inclusive, of the Revised Code:
>
> "(A) 'Employment agency' means a person, firm association, or corporation which secures, or, by any form of representation or by means of signs,

bulletins, circulars, cards, writings, or advertisements, offers or agrees to secure or furnish, employment, engagements of help, or information or service of any character concerning or intended or purporting to promote, lead to, or consummate employment.

"(B) 'Hire' means any charge, fee, compensation, service, or benefit exacted, demanded, or accepted, or any gratuity received, for or in connection with any act, service, or transaction comprehended by 'employment agency,' or for or in connection with any transaction or representation which includes matters comprehended by 'employment agency.'"

Section 4143.02 of the Revised Code reads as follows:

"License required to engage in business.

"No person, firm, association, or corporation shall engage in the business of an employment agency, for hire, within this state, without first obtaining a license from the department of commerce, paying to said department the annual license fee of one hundred dollars, and executing and filing with the department a bond as provided in section 4143.04 of the Revised Code."

The representative contract which you submit provides that the corporate consultation firm will provide for the client, presumably an executive, a long list of enumerated services to effectuate for the client's best interest a career management and planning and search program to determine what he has to "sell," to whom, where and for how much. These services include interviews and preparation of a resume; search in the client's field to compile a list of possible enterprises; contact letters to each of the individuals in the organizations selected by research; counselling along the way, and other like services. The contract expressly stipulates that it is not an agency contract and that fees payable shall not be construed as placement fees. A flat service fee is charged for these services. In the particular case submitted, the fee was $1,500.

In the light of the stipulated fee required by the contract to be paid by the client, there can exist no doubt that this is a contract for hire.

Construing the contract provisions against the definitive language contained in Section 4143.01 (A), supra, it appears convincingly that the contract provisions bring the consulting firm well within the definition of "employment agency." Any person or firm who furnishes help, information or service intending or purporting to promote, lead to, or consummate employment is by statute included within the definition, and the agency must be licensed if doing business for hire within the state. A stipulation in the contract providing that the consulting firm is not

an employment agency cannot be of any legal effect in so far as the above quoted licensing provisions are concerned.

I am, therefore, of the opinion, and you are so advised, that firms who perform consultation and search services including interviews and preparation of a resume; search in the client's field to compile a list of possible enterprises; contact letters; continuing consultation, and other like services for a client, are "employment agencies" within the purview of Sections 4143.01 and 4143.02, Revised Code, and are required to be licensed if doing business for hire in Ohio, even though the consultation and search contract stipulates the firm is not an employment agency.

OPINION NO. 69-006

Syllabus:

Section 3313.39 of the Revised Code allows a local board of education to acquire land by eminent domain only for public school purposes and acquisition by eminent domain for any other purpose is not authorized.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, January 24, 1969

Before me is your predecessor's request for an opinion on the following question:

> "Does the local board of education have the power of eminent domain in order to acquire property for library purposes?"

The purposes for which a board of education may acquire property by eminent domain are enumerated in Section 3313.39, Revised Code. The pertinent part of this statute provides that the power of eminent domain may be exercised:

> "When it is necessary, in the opinion of any board of education, to procure or enlarge: (A) any site for a building <u>to be used for public school purposes</u> whether as classroom, auditorium, or for technical training, administrative, storage, or other educational purposes; * * *" (Emphasis added)

The intent of the General Assembly in promulgating this legislation was to empower a board of education with eminent domain when the land was needed "for public school purposes." This explicit language limits the remainder of the paragraph and makes it clear that any use of the land other than for public school purposes is not within the purview of the act. From the request submitted, it appears that the library in question would be a free public library and would be used for other than public school purposes.

The power of eminent domain is a powerful and encompassing privilege which is granted to the state and its particular subdivisions by the sovereign powers inherent in the state. Section 9, Article I of the Ohio Constitution provides the mode for eminent domain and only the legislature may exercise it or authorize eminent domain to take place. Blackman v. Cincinnati, 140 Ohio St. 25, 42 NE 2d 158 (1942).

It is well settled that statutes granting the power of eminent domain must be strictly construed. Ohio Power Co. v. Deist, 154 Ohio St. 473, 96 NE 2d 771 (1951).

Therefore, it is my opinion and you are hereby advised that Section 3313.39 of the Revised Code allows a local board of education to acquire land by eminent domain only for public school purposes and acquisition by eminent domain for any other purpose is not authorized.

OPINION NO. 69-008

Syllabus:

A court may not properly omit or suspend the mandate contained in Section 1531.99 (B), Revised Code, which provides, in part, "/n/o hunting and trapping license or permit to hunt deer may be issued to a person so convicted for a period of three years after the date of such conviction."

To: Russell J. McMaster, Paulding County Pros. Atty., Paulding, Ohio
By: Paul W. Brown, Attorney General, January 27, 1969

The request of your predecessor for my opinion reads, in part, as follows:

> "I should like your official opinion with reference to R.C. 1531.99 Paragraph (B).
>
> "The question is: 'The paragraph provides in part: "no hunting and trapping license or permit to hunt deer may be issued to a person so convicted for a period of three years after the date of such conviction." Is such imposition for three years mandatory or may the Court set a lesser period of time?'"

The full text of Section 1531.99, Revised Code, states:

> "(A) Whoever violates section 1531.02 of the Revised Code, or any rule, regulation, or order of the division of wildlife, shall be fined not less than fifteen nor more than two hundred dollars and costs of prosecution.
>
> "(B) Whoever violates section 1531.02 of the Revised Code concerning the taking or possession of deer shall be fined not less than one hundred nor more than five hundred dollars

and costs of prosecution, or be imprisoned not more than thirty days, or both, and such person may not take or possess deer for three years after the date of conviction of such violation. No hunting and trapping license or permit to hunt deer may be issued to a person so convicted for a period of three years after the date of such conviction."

Section 2947.13, Revised Code, authorizes any court to omit or suspend any part, or all, of a sentence for a misdemeanor; however, an examination of Section 1531.99 (B), supra, about which has been inquired, discloses that there is provided, not only a penalty in the nature of a fine, and a prohibition, of a person convicted of a violation of Section 1531.02, Revised Code, against the taking or possession of deer for a three year period following the conviction, but also a prohibition against the issuance of any hunting and trapping license, or permit to hunt deer, by the authorized issuing agencies. The latter prohibition would appear not to be a part of the sentence imposed upon the misdemeanant, and not subject to the discretion granted to the court by Section 2947.13, Revised Code.

It is, therefore, my opinion that a court may not properly omit or suspend the mandate contained in Section 1531.99 (B), Revised Code, which provides, in part, "/n/o hunting and trapping license or permit to hunt deer may be issued to a person so convicted for a period of three years after the date of such conviction."

OPINION NO. 69-009

Syllabus:

When an employee covered by the Federal Fair Labor Standards Act is hired on two contracts and is paid with two checks, the hours should be combined for calculation of overtime pay.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, January 27, 1969

I have before me the request of your predecessor for my opinion which reads as follows:

> "When an employee is hired on two contracts, such as bus driver and janitor and is paid with two pay checks, should the hours worked be combined for overtime pay or should the contracts be considered separately?"

On June 10, 1968 the United States Supreme Court in the case of Maryland, et al., v. Secretary of Labor Wirtz, et al.,

20 L. ed. 2d, 1020, upheld the overtime provided in the Amended Fair Labor Standards Act of 1966 for certain state-owned enterprises which extended minimum wage and maximum hours coverage to schools and hospitals, including those operated by the states or their subdivisions.

The 1966 amendment established special rules for computing overtime pay and set forth a schedule for applying the required time and one-half overtime pay to such employees. Congress changed the basis of employer coverage in 1961 to cover "all employees of any enterprise engaged in commerce or production for commerce, provided the enterprise also falls within certain listed categories." Congress added to the list in 1966 the following:

> "(4) Is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, a school for the mentally or physically handicapped or gifted children, an elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit)."

Based upon the above ruling of the Supreme Court, the employees in question fall into this category. Therefore, in answer to the present question of how to apply the Maryland, et al., v. Secretary of Labor Wirtz, et al., decision, the circular of the Auditor of State of the State of Ohio must be applied.

Circular No. 1561 of September 19, 1968 from the office of the Auditor of State, states as follows:

> "* * *In those instances where an employee serves under one or more contracts, the position is taken that the time worked under each contract must be considered together and that all time worked in excess of forty-four, forty-two, or forty hours is subject to the time and one-half rate. The overtime should be calculated as follows:
>
> "Assuming a hypothetical case, based upon a forty-four hour workweek, the following method of computation would be used when an employee works fifty hours in a week in two positions and is entitled to time and one-half for hours worked in excess of forty-four hours.

Same Employee		Rate Per Hour	Mon.	Tues.	Wed.	Thurs.	Fri.
Position (Contract)	1	$4.00	8	8	8	8	8
Position (Contract)	2	$2.00	2	2	2	2	2

Through Thursday, the employee would work forty hours. The forty-fourth hour would be worked halfway through Friday. The balance of four hours as Position 1 on Friday would entitle the employee to time and one-half pay at his rate per hour for Position 1 and the two hours worked as Position 2 would be computed at time and one-half at his rate per hour for Position 2.

The employees would thus be entitled to compensation as follows:

Position 1	36 hours	@$4.00 per hour	$144.00
Position 2	8 hours	@$2.00 per hour	16.00
	Total regular compensation		$160.00

Overtime:			
Position 1	4 hours	@$6.00 per hour	$ 24.00
Position 2	2 hours	@$3.00 per hour	6.00
	Total compensation including overtime		$190.00

"In other words, after the forty-four hours have been worked, regardless of when it occurs during the workweek, that amount of time in excess of forty-four hours for the balance of the workweek, applicable to a particular job, should be computed by multiplying the number of hours by the time and one-half rate per hour for such job.

"The procedure outlined above would be applicable in computing overtime for work in excess of forty-two (42) hours a week beginning February 1, 1968, and for work in excess of forty (40) hours a week beginning February 1, 1969."

Therefore, it is my opinion and you are hereby advised that when an employee covered by the Federal Fair Labor Standards Act is hired on two contracts and is paid with two checks, the hours should be combined for calculation of overtime pay.

OPINION NO. 69-012

Syllabus:

A school board may not allow a private investor to erect a building on the school's property and to lease this building to the school board.

To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio
By: Paul W. Brown, Attorney General, February 5, 1969

I have before me your predecessor's request for my opinion regarding whether it would be legally proper for the Boardman Local Board of Education to allow a private investor to erect a school-bus-storage-and-maintenance building upon school lands and for the Board then to enter into a lease of said building.

At the outset of this opinion I must advise you that I can find no authority, statutory or otherwise, for the Board to enter into such a lease arrangement regarding a building on its own land. I recognize that school boards have the duty to provide transportation for certain students pursuant to Section 3327.01, et seq., Revised Code. In order to provide such transportation, school boards may purchase school buses in the manner prescribed in Section 3327.08, Revised Code. I acknowledge that the maintenance of these school buses is one of the factors in the transportation operating costs of the school districts. I am told that, with regard to the maintenance of the school buses, the school boards choose either a self-maintenance program or a contract-maintenance program with some outside garage, or a combination of these programs.

It may well be that in a given situation it would be more economical for a school board to use a self-maintenance program. It would be permissible for the school board to build its own bus-storage-and-maintenance building on its own land. This conclusion was reached in Opinion No. 5977, Opinions of the Attorney General for 1936, page 1263, the syllabus of which reads as follows:

> "A board of education which owns vehicles used for the transportation of school children, may lawfully expend public funds for the purpose of erecting a garage for the housing of those vehicles."

In Opinion No. 5977, supra, it was found that it was permissible for the school board to build such a bus garage on its own land pursuant to the terms of Section 7620, General Code. The present version of Section 7620, General Code, is found in Section 3313.37, Revised Code, which states as pertinent:

> "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 estate to be used as playgrounds for children or rent suitable school rooms, either within or without the district, and provide the necessary apparatus and make all other necessary provisions for the schools under its control.

"The boards of education may acquire land by gift or devise, by purchase, or by appropriation. Lands purchased may be purchased for cash, by installment payments, with or without a mortgage, by entering into lease-purchase agreements, or by lease with an option to purchase, provided that if the purchase price is to be paid over a period of time, such payments shall not extend for a period of more than five years, and a special tax levy shall be authorized by the voters of the school district in accordance with section 5705.21 of the Revised Code to provide a special fund to meet the future time payments.

"* * * * * * * * *"

The cost of erecting a building is a capital outlay. It is obvious that the cost of erecting a building for a self-maintenance program is not one of the transportation operating costs of a school district intended to be covered by the operating funds provided to each school district under the School Foundation Program. The "foundation money" or operating money provided to each school district pursuant to Chapter 3317, Revised Code, is not intended to be used for the purpose of erecting permanent improvements on school lands. Permanent buildings, such as a school bus garage, are the type of improvement that the legislature intended to be purchased from a school board's building fund (and this would entail a special tax levy, competitive bidding, etc.).

I recognize that in your request for my opinion the school board is not proposing to use its operating money to erect the bus garage. However, assuming that the school board could find a private investor who would be willing to finance the construction of the bus garage on school lands and then lease it to the school board, I am sure that the private investor would want to recoup at least his investment. Given the statutory restrictions on the use of school lands for non-school purposes, this private investor would have no potential lessee other than the school board and would certainly insist on a long-term lease in order to cover his investment. Thus, indirectly, the school board would be paying for cost of erecting the building with operating money. It might be that, even if such a lease arrangement were permissible, it would be an abuse of discretion for the school board to lease such a building for an extended period of time if, by doing so, the board ended up paying more money as rent than it would have cost to erect the building with school funds. However, as I stated at the outset, I can find no authority for a school board to enter into such a lease arrangement regarding a building on its own land.

Therefore, it is my opinion and you are hereby advised that a school board may not allow a private investor to erect a building on the school's property and to lease this building to the school board.

OPINION NO. 69-013

Syllabus:

1. A Council of Governments may perform joint purchasing on behalf of its members of items, the cost of which to each political subdivision would be less than the statutory amount for which competitive bidding would be required.

2. A Council of Governments may not jointly purchase items without competitive bids on behalf of its members, the cost of which to each political subdivision would exceed the statutory amount for which competitive bidding is required.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: Paul W. Brown, Attorney General, February 7, 1969

You state that the Miami Valley Council of Governments wishes to provide joint purchasing services by that organization to its members under the provisions of Section 167.08, Revised Code. You request my opinion on questions that read as follows:

> "1. May a Council of Governments perform joint purchasing on a contract basis on behalf of its members for items the cost of which to each political subdivision would be less than the statutory amount for which competitive bidding would be required for the particular type of political subdivision? (city, county, township, village, etc.)
>
> "2. May a Council of Governments perform joint purchasing on a contract basis on behalf of its members for items the cost of which to each political subdivision would exceed the statutory amount for which competitive bidding would be required for the particular type of political subdivision?"

Section 167.08, supra, constituting the final section in Chapter 167, Revised Code, entitled "Regional Councils of Governments," provides as follows:

> "The appropriate officials, authorities, boards, or bodies of counties, municipal corporations, townships, special districts, school districts, or other political subdivisions may contract with any council established pursuant to sections 167.01 to 167.07, inclusive, of the Revised Code to receive any service from such council or to provide any service to such council. Such contracts may also authorize the council to perform any

> function or render any service in behalf of such counties, municipal corporations, townships, special districts, school districts, or other political subdivisions, which such counties, municipal corporations, township, special districts, school districts, or other political subdivisions may perform or render."

This section thus specifically provides that any one or group of political subdivisions may contract with the council to perform any function which the subdivisions themselves may perform. This language appears clearly to be broad enough to enable the council to perform purchasing on behalf of its contracting members. There is nothing in the statutory language to impede the conduct of this purchasing function on a joint purchasing basis.

On the contrary, other provisions in Chapter 167, supra, are in support of a joint purchasing basis. Section 167.03, Revised Code, reads in part as follows:

> "(A) The Council shall have the power to:
>
> "* * * * * * * * *
>
> "(4) Promote cooperative agreements and contracts among its members or other governmental agencies and private persons, cooperation [corporations], or agencies;
>
> "* * * * * * * * *
>
> "(C) The council may, by appropriate action of the governing bodies of the members, perform such other functions and duties as are performed or capable of performance by the members and necessary or desirable for dealing with problems of mutual concern.
>
> "* * * * * * * * *

It will be noted, however, that in each reference the council is limited to performing on behalf of its contracting subdivisions just those functions which the subdivision itself is able to perform. This would rule out purchasing items without competitive bids on behalf of a subdivision the cost of which would exceed the statutory amount for which competitive bidding would be required. By the same test, however, it appears to follow that such purchasing function could be carried out on a competitive bid basis.

I am, therefore, of the opinion, and you are so advised:

1. A Council of Governments may perform joint purchasing on behalf of its members of items, the cost of which to each political subdivision would be less than the statutory amount for which competitive bidding would be required.

2. A Council of Governments may not jointly purchase items without competitive bids on behalf of its members, the cost of which to each political subdivision would exceed the statutory amount for which competitive bidding is required.

OPINION NO. 69-014

Syllabus:

(1) The township trustees may create a fire district covering the entire township under Section 505.37, Ohio Revised Code, and a municipal corporation included within the limits of such township may be included in such fire district. Opinion No. 231, Opinions of the Attorney General for 1945, overruled.

(2) The township trustees and the council of the village may combine to buy necessary fire equipment.

(3) The township trustees may pass a levy for the purpose of purchasing fire equipment but only pursuant to Section 505.37, Ohio Revised Code.

To: Elmer Spencer, Adams County Pros. Atty., West Union, Ohio
By: Paul W. Brown, Attorney General, February 10, 1969

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

(1) May the township trustees create a fire district under Section 505.37, Ohio Revised Code, covering the entire township and including therein a municipal corporation?

(2) May the township trustees and the council of the village combine to buy the necessary equipment?

(3) May the township trustees pass a levy for the purpose of purchasing such equipment?

As you pointed out in your letter, in reference to your first question, there seems to be a conflict between Section 505.37, supra, and Opinion No. 231, Opinions of the Attorney General for 1945. The 1945 Opinion was based on Section 3298-54, General Code, which was the predecessor of Section 505.37, supra. Section 3298-54, supra, provided in pertinent part as follows:

> "* * * * * * * * *
>
> "The board of trustees of any township in which there is located a municipal corporation or corporations, or a part of a municipal corporation, may by resolution whenever in their opinion it is expedient and necessary to guard against the occurrence of fires or to protect the property and lives of the citizens against damages resulting therefrom, create a fire district or districts of that portion of such township not included within the corporate limits of such municipal corporation or corporations, and may purchase or otherwise provide such fire apparatus, appliances, materials, fire

hydrants and such water supply for fire fighting purposes; or may contract for such fire protection for such fire district or districts the same as provided in Section 3298-60 for other subdivisions. The fire district or districts so created shall be given a separate name by which it shall be known and designated.

"* * * * * * * * *"
(Emphasis added)

The pertinent portion of Section 505.37, Ohio Revised Code, provides as follows:

"* * * * * * * * *

"The board of any township may, by resolution, whenever it is expedient and necessary to guard against the occurrence of fires or to protect the property and lives of the citizens against damages resulting therefrom, create a fire district of such portions of the township as it deems necessary, and the board may purchase or otherwise provide such fire apparatus, appliances, materials, fire hydrants and water supply for fire-fighting purposes, or may contract for such fire protection for such fire district as provided in section 505.44 of the Revised Code. The fire district so-created shall be given a separate name by which it shall be known.

"* * * * * * * * *"

This section does not specifically prevent the board from creating a fire district of that portion of the township included within the corporate limits of a municipal corporation. Section 505.37, supra, permits a board to create a fire district of such portions of the township as it deems necessary.

The omission of the limitation "not included within the corporate limits of such municipal corporation or corporations", which was a part of Section 3298-54, General Code, seems to indicate that a purpose of the amendment was to change that Section and the conclusion of Opinion No. 231, Opinions of the Attorney General for 1945. The intent of the Legislature appears to be that the board of trustees could create a fire district covering the entire township and including therein a municipal corporation.

The second question in your letter is answered by Section 505.37, supra, which is provided in pertinent part as follows:

"* * * * * * * * *

"The boards of any two or more townships, or the legislative authorities of any two or more political subdivisions, or any combination thereof, may, through joint action, unite in the joint purchase, maintenance, use, and operation of fire-fighting equipment, or for any other purpose designated in sections 505.37 to 505.44, inclusive, of the Revised Code, and may prorate the expense of such

joint action on such terms as are mutually agreed upon.

"* * * * * * * * *"

Since the council of a village is a legislative authority of a "political subdivision" of the township, then pursuant to Section 505.37, supra, the township trustees and the council of the village may combine to buy the necessary fire fighting equipment. The scope or structure of such a "combination" is not defined by Section 505.37, supra.

The township trustees may pass a levy for the purposes of purchasing equipment pursuant to Section 505.37, supra:

"* * * * * * * * *

"The board of any township or fire district created by such board under sections 505.37 to 505.44, inclusive of the Revised Code, or the legislative authority of any municipal corporation, may purchase the necessary fire-fighting equipment, buildings, and sites for such township, fire district, or municipal corporation and pay for it over a period of four years. Such board or legislative authority may also construct any buildings necessary to house fire-fighting equipment and pay for such buildings over a period of four years. Such board or legislative authority may issue the notes of the township, fire district, or municipal corporation, signed by the board or legislative authority and attested by the signature of the township or municipal clerk, covering such deferred payments and payable at the times provided, which notes may bear interest not to exceed six per cent per annum, and shall not be subject to sections 133.01 to 133.65, inclusive, of the Revised Code. The legislation authorizing the issuance of such notes shall provide for levying and collecting annually by taxation amounts sufficient to pay the interest on and principal of such notes. Not less than one-fourth of such purchase price or construction cost shall be paid in cash at time of purchase as provided in said contract and the remainder of the purchase price or construction cost shall be paid in annual installments of not less than one-fourth of the total purchase price may be issued and, in either event, the notes shall contain an option for prepayment. Such notes shall be offered for sale on the open market or given to the vendor or contractor if no sale is made." (Emphasis added)

In conclusion, it is my opinion and you are hereby advised that:

(I) The township trustees may create a fire district covering the entire township under Section 505.37, Ohio Revised Code, and a municipal corporation included within the limits of

such township may be included in such fire district. Opinion No. 231, Opinions of the Attorney General for 1945, overruled.

(2) The township trustees and the council of the village may combine to buy necessary fire fighting equipment.

(3) The township trustees may pass a levy for the purpose of purchasing fire equipment but only pursuant to Section 505.37, Ohio Revised Code.

OPINION NO. 69-015

Syllabus:

1. The monies received for the support of a County Board of Mental Retardation may be paid into the general fund of the county to the account of the board, unless the county funds are provided by a special levy, in which case, a separate fund must be established pursuant to Section 5705.10, Revised Code.

2. These funds are payable pursuant to vouchers approved by the County Board of Mental Retardation.

3. The monies received for the support of community mental health and retardation programs as authorized by Chapter 340, Revised Code, should be paid into the designated county treasury to the credit of the Community Mental Health and Retardation Fund.

4. These monies are payable pursuant to vouchers approved by the Community Board of Mental Health and Retardation.

To: David D. Dowd, Jr., Stark County Pros. Atty., Canton, Ohio
By: Paul W. Brown, Attorney General, February 11, 1969

Your request for my opinion poses the following questions:

"1. Should all monies received for the support of county board of mental retardation programs, including those monies received from the State pursuant to Section 5127.03 of the Revised Code, be paid into the county treasury to the credit of the General Fund or to the credit of a County Board of Mental Retardation Fund?

"2. Are the funds referred to in Question 1 payable pursuant to vouchers approved by the County Board of Mental Retardation or by the Board of Stark County Commissioners?

"3. Should all monies received for the support of community mental health and mental retardation programs, including those monies received from the State pursuant to Section 5119.62 of the Revised Code, be paid into the county treasury to the credit of the Community Health and Retardation Fund or to the credit of the General Fund?

"4. Are the funds referred to in Question 3 payable pursuant to vouchers approved by the Community Board of Mental Health and Retardation or by the Board of Stark County Commissioners?"

Your first two questions concern the County Board of Mental Retardation which was formed pursuant to the mandate of Chapter 5126, Revised Code, for the express purpose of supervising the operation of the training centers and workshops for the mentally deficient, which are provided by Sections 5127.01 to 5127.04, inclusive, of the Revised Code. The powers and duties of the County Board of Mental Retardation are set out in Section 5126.-03, Revised Code, which reads as follows:

"The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental hygiene shall:

"(A) Administer and supervise sections 5127.01 to 5127.04, inclusive, of the Revised Code and exercise such powers and duties as prescribed by the commissioner;

"(B) Submit an annual report of its work and expenditures, pursuant to section 5127.01 of the Revised Code, to the commissioner and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested;

"(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

"(D) Provide such funds as are necessary for the operation of training centers and workshops.

"Any county board of mental retardation may enter into a contract with another such board of another county or with a public or nonprofit agency or organization of the same or another county, to provide the training center, workshop facilities and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.

"The board of county commissioners <u>shall</u> levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section." (Emphasis added)

It can therefore be seen that there is an express mandate upon the County Commissioners to provide the funds which are necessary for the County Board of Mental Retardation to perform its functions through appropriation. This appropriation may be provided from a general levy for current expenses under Section 5705.05 (E), Revised Code, which provides as follows:

"(E) In the case of counties, the amounts necessary for the maintenance, operation, and

repair of public buildings, for the relief and support of the poor, for the relief of needy blind, for the support of mental health services, for the support of mental retardation services, for the relief of honorably discharged soldiers, indigent soldiers, sailors, and marines, for mothers' pension fund, support of soil conservation districts, watershed conservancy districts, educational television, and for the county's share of the compensation paid judges;" (Emphasis added)

The monies necessary for the operation of the workshop would be appropriated to this use by the county commissioners.

Where general fund monies are appropriated to a specific use, it is only necessary to establish an account within the general fund for the purpose intended. Monies would be paid upon vouchers approved by the County Board of Mental Retardation inasmuch as the monies have been appropriated to their use.

Further authority for the county commissioners to provide funds for this use is found in Section 5705.19, Revised Code, which provides in pertinent part:

"The taxing authority of any subdivision at any time prior to the fifteenth day of September, in any year, by vote of two-thirds of all the members of said body, may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:

"* * * * * * * * *

"(L) For the maintenance and operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons. Money received from levies enacted or renewed prior to the effective date of this section shall be appropriated to the use of the county board of mental retardation established under section 5126.01 of the Revised Code. Revenue from a tax levy passed or renewed after October 25, 1965 shall not be expended until the budget for the operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons for that calendar year has been submitted to and approved by the board of county commissioners. Thereafter, surplus funds from the tax levy not used for operating purposes may be dispensed by the county board of mental retardation after approval by the board of county commissioners for the replacement of necessary equipment, or for acquiring, constructing, or improving schools, training centers, workshops, clinics, and residential facilities for the mentally retarded;

"* * * * * * * * *"

Section 5705.10, Revised Code, provides in pertinent part as follows:

"* * * * * * * * *

"All revenue derived from a special levy shall be credited to a special fund for the purpose for which the levy was made.

"* * * * * * * * *"

Therefore, if the necessary funds were obtained through use of a special levy, it would be necessary that they be credited to a special fund.

A portion of the funds used for a workshop are received from other sources; namely, the Department of Mental Hygiene and Correction and the local boards of education as provided in Sections 5127.03 and 5127.04, Revised Code.

Section 5127.03, supra, reads as follows:

"On the thirtieth day of June of each year, the county board of mental retardation shall certify to the commissioner of mental hygiene:

"(A) The names and residences of the persons enrolled in the training center and workshop pursuant to section 5127.01 of the Revised Code;

"(B) The period of time each deficient person was enrolled;

"(C) An itemized report of expenditures which have been approved by the commissioner;

"(D) The net per capita cost for operating such training center and workshop.

"The division of mental hygiene, upon recepit and approval of the report provided in this section, shall present a voucher to the auditor of state in favor of the agency providing the specialized training in an amount not to exceed three hundred dollars per year for each mentally deficient person who is enrolled in such training center and workshop. Upon presentation of such voucher the auditor of state, if satisfied as to the correctness of the voucher, shall draw a warrant on the treasurer of state in the amount of the voucher."

Section 5127.04, supra, reads:

"The county board of mental retardation which during the school year has administered and supervised, pursuant to the provisions of section 5127.01 of the Revised Code, a training center for the mentally deficient shall prepare a statement for each person under twenty-one years of age who has received such training,

> such statement to show the name of the person, the name of the school district in which the person is a school resident, the name of the board providing the training, and the number of months the person received training. Not later than the thirtieth day of June the board shall forward a certified copy of such statement to the clerk of the board of education of the school district in which the person is a school resident and shall forward a certified copy of such statement to the commissioner of mental hygiene. Within thirty days after the receipt of such statement the board of education shall pay to the county board of mental retardation submitting the statement an amount equal to the computed amount of tuition that would be due the school district receiving the statement if a nonresident pupil attended the schools of such district for the same period of time that the mentally deficient person attended the training center, such amount to be computed in the manner prescribed by section 3317.08 of the Revised Code."

These monies are paid into the county treasury "in favor of the agency" and "to the county board of mental retardation." Therefore, they could be paid either to the special fund created as a result of a special levy or into a trust fund created pursuant to Section 5705.09 (H), Revised Code.

There is ample statutory authority in Section 5127.03, supra, for the County Board of Mental Retardation to expend its monies and I, therefore, can only conclude that the expenses incurred in the operation of the workshop should be paid directly on the warrant of the county auditor pursuant to vouchers approved by the County Board of Mental Retardation.

Your third and fourth questions relate to the Community Mental Health and Retardation Board which was formed pursuant to Chapter 340, Revised Code. Its powers and duties are set out therein. It is not primarily responsible for the operation of any specific mental health facility, but is rather a supervisory, coordinating and planning board charged with the following duties by Section 340.03, Revised Code, which reads as follows:

> "Subject to rules and regulations of the commissioner of mental hygiene, the community mental health and retardation board, with respect to its area of jurisdiction, and except for programs and facilities conducted pursuant to Chapter 5127. of the Revised Code, shall:
>
> "(A) Review and evaluate community mental health and retardation services and facilities and submit to the commissioner of mental hygiene, the board or boards of county commissioners, and the executive director of the program recommendations for reimbursement from state funds as authorized by section 5119.62 of the Revised Code and for the provision of needed additional services and facilities with special reference to the state comprehensive mental health plan;

"(B) Coordinate the planning for community mental health and retardation facilities, services, and programs seeking state reimbursement;

"(C) Receive, compile, and transmit to the division of mental hygiene applications for state reimbursement;

"(D) Promote, arrange, and implement working agreements with social agencies, both public and private, and with educational and judicial agencies;

"(E) Enter into contracts with state hospitals, other public agencies, and with private or voluntary hospitals and other private or voluntary nonprofit agencies for the provision of mental health and mental retardation service and facilities;

"(F) Appoint a qualified mental health specialist or qualified mental health administrator to serve as the executive director of the board on a full-time or part-time basis. If the executive director is neither a psychiatrist nor a pediatrician, the board shall designate a qualified doctor of medicine to assume responsibility for the medical activities of the board.

"(G) Prescribe the duties of the executive director and review his performance thereof;

"(H) Approve salary schedules for employees and consultants in agencies and facilities maintained and operated, in whole or in part, or by contract, under the direction of the board;

"(I) Recruit and promote local financial support for mental health and retardation programs from private and public sources;

"(J) In the event a needed service cannot be provided by an existing public or private agency, directly operate a mental health or mental retardation facility until such time as this responsibility can be assumed by another agency.

"(K) Prescribe fees to be charged for services, not to exceed the cost of the service. Physicians and mental health professionals shall be allowed to follow and assist in the care of the patients under the direction of the director of the facility.

"(L) Establish the operating procedures of the board and submit an annual report of the programs under the jurisdiction of the board, including a fiscal accounting, to the board of county commissioners.

"(M) Establish such rules and regulations or standards and perform such other duties as may

be necessary or proper to carry out Chapter 340. of the Revised Code."

The County Commissioners have authority to provide funds for the use of this board, but, in contradistinction to their duty to provide funds for the operation of the Chapter 5127, Revised Code, workshop, they are not required by law to do so. Section 340.07, Revised Code, provides as follows:

> "The board of county commissioners of any county participating in a community health and retardation program, upon receipt from the community mental health and retardation board of a resolution so requesting, may appropriate money to a public agency for the acquisition, construction, reconstruction, maintenance, and operation of mental health and mental retardation diagnostic, treatment, rehabilitation, and training facilities and programs, hospital units, schools, workshops, and residential facilities for mentally ill, mentally retarded, and emotionally disturbed persons or may appropriate money to a private nonprofit corporation or association for the operation of such facilities and programs.
>
> "Such facilities and programs shall be authorized by the commissioner of mental hygiene and shall be operated under rules and regulations adopted under Chapter 340. and section 5119.61 of the Revised Code, subject to sections 119.01 to 119.13, inclusive, of the Revised Code."

Although it is not mandatory upon the County Commissioners to provide funds to the Community Mental Health and Retardation Board, they have been given express authority for a special levy for this purpose by Section 5705.221 [5707.22.1], Revised Code, as follows:

> "At any time the board of county commissioners of any county by a majority vote of the full membership may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation by levies on the current tax duplicate will be insufficient to provide the necessary requirements of the community mental health and retardation program established pursuant to Chapter 340. of the Revised Code and that it is necessary to levy a tax in excess of such limitation for mental health and retardation purposes.
>
> "Such resolution shall conform to section 5705.19 of the Revised Code and be certified and submitted in the manner provided in section 5705.-25 of the Revised Code.
>
> "If the majority of electors voting on a levy to supplement general funds appropriations for the support of the comprehensive mental health and mental retardation program vote in favor of the levy, the board may levy a tax within the county at the additional rate outside the

ten-mill limitation during the period, for the purpose stated in the resolution."

It is my understanding that at the present time, state monies are being provided quarterly in advance and constitute approximately seventy-five percent of the budget as approved by the Commissioner of Mental Hygiene. The local twenty-five percent may be provided by the County Commissioners or other sources, i.e., United Appeal or other donations. Since the funds are provided from various sources and the County Treasurer is charged with their custody, it would be necessary for a separate fund to be established as a repository for such funds. This is especially true where the community involved consists of more than one county: funds may be forthcoming from the general fund of each county if said funds are appropriated by the commissioner; the funds from special levies would necessarily be put in a separate fund as provided by Section 5705.10, supra. Certainly, the general fund would not be a proper repository for funds from charitable donations made for an express purpose. Section 340.10, Revised Code, provides as follows:

> "State funds allocated for the support of a community mental health and retardation program shall be paid to the county treasurer or, in a joint program, to the treasurer of that custodian of the community mental health and retardation fund and authorized to make payments from such fund on order of the county auditor and on recommendation of the community mental health and retardation board."

Clearly, then, the General Assembly provided that there be a distinct fund, held by a County Treasurer, payable upon the warrant of the County Auditor pursuant to vouchers approved by the Board.

Therefore, it is my opinion and you are hereby advised that:

1. The monies received for the support of a County Board of Mental Retardation may be paid into the general fund of the county to the account of the board, unless the county funds are provided by a special levy, in which case, a separate fund must be established pursuant to Section 5705.10, Revised Code.

2. These funds are payable pursuant to vouchers approved by the County Board of Mental Retardation.

3. The monies received for the support of community mental health and retardation programs as authorized by Chapter 340, Revised Code, should be paid into the designated county treasury to the credit of the Community Mental Health and Retardation Fund.

4. These monies are payable pursuant to vouchers approved by the Community Board of Mental Health and Retardation.

OPINION NO. 69-016

Syllabus:

Any motor vehicle purchased pursuant to Section 307.41, Revised Code, at a cost in excess of two thousand dollars must be obtained through competitive bidding pursuant to Section 307.86, Revised Code.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: Paul W. Brown, Attorney General, February 11, 1969

I have before me your request for my opinion on the following question: Does Section 307.86, Revised Code, prohibit the County Commissioners from purchasing motor vehicles without having competitive bidding under Section 307.41, Revised Code, if the amount is in excess of $2000.00?

Section 307.41, Revised Code, reads as follows:

> "Whenever the board of county commissioners deems it necessary to purchase motor vehicles except for its use or for the use of any department under its direct control it shall adopt a resolution setting forth the necessity for such purchase, together with a statement of the kind and number of vehicles required and the estimated cost of each. Upon adoption of the resolution the board may purchase such vehicles.
>
> "If the board deems it necessary to purchase motor vehicles for its use or for the use of any department under its direct control, application shall be made by the board to a judge of the court of common pleas of such county. Upon hearing the application, if such judge finds it necessary and expedient to purchase such vehicles, he shall so order, and fix the number and kind of such vehicles, and the amount to be expanded for each."

Section 307.86, Revised Code, which outlines the requirements of competitive bidding, reads as follows:

> "Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, physician, professional engineer, surveyor, or appraiser by or on behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code, at a cost in excess of two thousand dollars, except as otherwise provided in section

307.02, 3501.301 [3501.30.1], 3505.13, 5543.19, 5555.71, 5713.01, or 6137.05, of the Revised Code, shall be obtained through competitive bidding. However, competitive bidding is not required when:

"(A) The board of county commissioners, by a unanimous vote of its members, makes a determination that a real and present emergency exists and such determination and the reasons therefor are entered in the minutes of the proceedings of the board, when:

"(1) The estimated cost is less than ten thousand dollars or

"(2) There is actual physical disaster to structures;

"(B) Such purchase consists of supplies or a replacement or supplemental part or parts for a product or equipment owned or leased by the county and the only source of supply for such supplies, part, or parts is limited to a single supplier;

"(C) Such purchase is from the federal government, state, another county or contracting authority thereof, a board of education, township, or municipal corporation;

"(D) Such lease is a renewal of a lease for electronic data processing equipment, services, or systems."

While there are certain exceptions to the prohibitions outlined in Section 307.86, supra, none of them would apply to the purchase of motor vehicles under Section 307.41, supra. Thus, within the explicit terms of Section 307.86, supra, any motor vehicle purchased at a cost in excess of two thousand dollars must be obtained through competitive bidding. Section 307.86, supra, does apply to a purchase of motor vehicles pursuant to Section 307.41, supra.

Some reference has been made to the fact that competitive bidding may be impossible if pursuant to Section 307.41, supra, the judge of the court of common pleas fixes the amount to be expended for each vehicle. Of course, if the amount to be expended for each vehicle is less than two thousand dollars, competitive bidding is not required. However, in the more likely situation, where the amount to be expended on each vehicle is greater than two thousand dollars, competitive bidding is required as follows: The judge of the court of common pleas would fix the amount to be expended and such a figure would be the ceiling under which competitive bids would be received. If a bid that is received is lower than the figure set by the judge, then it would be used. If all of the bids received are higher than the ceiling set by the judge, then the Board of County Commissioners should either obtain approval of the lower of these high bids, adjust the ceiling upward or seek lower bids elsewhere.

In conclusion, it is my opinion and you are hereby advised that any motor vehicle purchased pursuant to Section 307.41, Revised Code, at a cost in excess of two thousand dollars must be obtained through competitive bidding pursuant to Section 307.86, Revised Code.

OPINION NO. 69-019

Syllabus:

1. The so-called "Karate Stick," the use of which may endanger life or cause great bodily harm, is a dangerous weapon under the provisions of Section 2923.01 of the Revised Code.

2. The manufacture, sale or exposure for sale of the so-called "Karate Stick" is prohibited under the provisions of Section 2923.02 of the Revised Code.

To: Robert M. Chiaramonte, Superintendent, State Highway Patrol, Columbus, Ohio
By: Paul W. Brown, Attorney General, February 13, 1969

You have requested my opinion as to whether the "Karate Stick" can be classified as a dangerous weapon, and if arrest action can be taken against an individual found to be carrying the instrument "* * *concealed on or about his person* * *" under Sections 2923.01 and 2923.02 of the Ohio Revised Code.

Section 2923.01, Revised Code, provides in pertinent part:

> "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person.* * *"

As my predecessor commented in Opinion No. 68-022, Opinions of the Attorney General for 1968, which was issued on July 25, 1968:

> "The definition which appears to have been accepted for some years is that a dangerous weapon is one likely to produce death or great bodily harm. As the court stated in United States v. Williams, 2 Fed. 61, 65:
>
> "'Whether a particular weapon is a deadly or dangerous one is generally a question of law. Sometimes owing to the equivocal character of the instrument - as a belaying pin - or the manner and circumstances of its use, the question becomes one of law and fact, to be determined by the jury under the direction of the court. But where it is practicable for the court to declare a particular weapon dangerous or not, it is its duty to do so. A dangerous weapon is one likely to produce death or great bodily injury.* * *'
>
> "See also United States v. Reeves, 38 Fed.

404, 407 and State v. Cavender, 243 PAC (Or) 766.

"In Price v. United States, 156 Fed. 950, 952 (CA9) it was stated:

"'A dangerous weapon is one likely to produce death or great bodily injury. United States v. Williams (CC) 2 Fed. 64. Or perhaps it is more accurately described as a weapon which in the manner in which it is used or attempted to be used may endanger life or inflict great bodily harm.'"

In the descriptive information which you attached to your request it is stated with respect to the instrument in question that, "It is more versatile than the mace or riot stick and may result in serious injury or even death to the unsuspecting or uninformed officer." Your description appears to fall with the accepted definition of a dangerous weapon.

Your second question goes to the prohibition of manufacture and sale of certain weapons under the admonition set forth in Section 2923.02 of the Revised Code which provides in part:

"No person shall manufacture, sell or expose for sale, any weapon known or designated as brass knuckles, billy, slung shot, sandbag, blackjack, or other weapon of similar character."

The phrase "* * * or other weapon of similar character" would appear to apply to the weapon which you have described.

It is, therefore, my opinion and you are hereby advised that:

1. The so-called "Karate Stick," the use of which may endanger life or cause great bodily harm, is a dangerous weapon under the provisions of Section 2923.01 of the Revised Code.

2. The manufacture, sale or exposure for sale of the so-called "Karate Stick" is prohibited under the provisions of Section 2923.02 of the Revised Code.

OPINION NO. 69-020

Syllabus:

The bond required to be given pursuant to Section 2923.04, Revised Code, may be either a corporate surety bond or a personal surety bond, and the adjutant general may accept either type, provided that the particular bond tendered in each case is satisfactory to him.

To: Major General S. T. Del Corso, Adjutant General, Columbus, Ohio
By: Paul W. Brown, Attorney General, February 13, 1969

I have before me your request for my opinion on the question of whether the bond required to be given pursuant to Section 2923.-04, Revised Code, need be a corporate surety bond, or whether a personal surety bond may be accepted.

Section 2923.04, supra, reads in pertinent part as follows:

> "No person shall own, possess, transport, have custody of, or use a shotgun with barrel less than eighteen inches in length, or rifle with a barrel of less than sixteen inches in length, or shotgun or rifle with an overall length of less than twenty-six inches, or machine gun, light machine gun or submachine gun, unless he first procures a permit therefor from and at the discretion of the adjutant general,* * *. Before obtaining such permit each applicant shall give bond to this state, to be approved by the adjutant general, in the sum of five thousand dollars, conditioned to save the public harmless by reason of any unlawful use of such weapon while under the control of such applicant or under the control of another with his consent; and any person injured by such improper use may have recourse on said bond.* * *"

The question of the legality of attempting to limit official bonds to bonds executed by corporate sureties was considered in Opinion No. 113, Opinions of the Attorney General for 1937. That opinion was occasioned by the passage of a resolution, by the Board of Real Estate Examiners, to the effect that the Board would accept only such brokers' bonds as were given by a recognized surety company.

The then Attorney General concluded that the Board of Real Estate Examiners could not prescribe corporate sureties to the exclusion of personal sureties on the bonds which were the subject of Opinion No. 113, supra. This conclusion was based upon State, ex rel. McKell v. Robins, 71 Ohio St. 273, and State ex rel. Barr v. Deckenbach, 105 Ohio St. 643.

In the Robins case, supra, the Supreme Court considered the constitutionality of Section 3641c, Revised Statutes, which required that any administrator's bond in excess of $2000 be executed and guaranteed by a surety company authorized to do business in the State of Ohio. The court recognized the right of the legislature to require bonds to be given "for the faithful performance of official or fiduciary duties, or the faithful keeping, applying, or accounting for funds or property* * *," and to make reasonable requirements as to execution, approval, and security in order to effectuate fully the purposes of such bonds. However, it rejected the contention that official bonds may be limited to bonds issued by qualified corporate sureties. The pertinent part of the opinion of the court is quoted in Opinion No. 113, supra, beginning at page 143:

> "'* * *Before the enactment of this statute an officer was at liberty to present a bond signed by personal sureties or by a surety company or companies. The right of choice between the classes of sureties is now denied him. It is now made compul-

sory upon him to give bond signed by surety companies, and personal security is in effect abolished. It is very plain that the security companies may be greatly benefited by this legislation, but an adequate corresponding benefit or protection to the general public, such as would justify such a radical and drastic limitation upon individual rights is not apparent. The amount of loss to the state, county, township or municipality on official bonds, or to the beneficiaries under bonds of executors, administrators, guardians, trustees or other fiduciaries, comparatively speaking, is trifling. Indeed it is possible that the loss is no greater than would result when the bonds shall be signed exclusively by incorporated companies, which sometimes become insolvent as individuals do. It is true that the loss, if any default occurs, falls on the sureties, and that there have been special acts of the general assembly for the relief of sureties in cases in which it was claimed that the principal was not in fault. Some of these acts are meritorious, many of them improvident, and most of them unconstitutional. It argues nothing in favor of the legislation which is assailed here that sureties sometimes seek to escape from the consequences of their contract of suretyship. The fact remains that those whose interests are protected by personal bond rarely lose. We have not been advised of any necessity for, or general demand for, the abolition of personal security and the substitution therefor of corporate security, and the reasons which we have given persuade us that the public welfare does not require it.

"'* * * * * * * * *

"'It does not seem to us, therefore, that any part of this statute was promoted by considerations of public necessity or public welfare, and thence it follows that it is an unconstitutional restriction upon the liberty to contract which is guaranteed by Article 7, Section 1 of the constitution of this state.'"

In the Deckenbach case, supra, following its decision in the Robins case, supra, the court declared unconstitutional a city ordinance which required operators of motor vehicles and taxicabs to post a bond signed by a surety company as a prerequisite to the issuance of a license.

Of course, Section 2923.04, supra, does not attempt to limit the bonds given pursuant to it to corporate surety bonds. However, a determination to so limit the bonds given pursuant to this section would meet the same constitutional objections as were considered in the Robins and Deckenbach cases, supra, and in Opinion No. 113, supra.

Therefore, it is my opinion and you are hereby advised that the bond required to be given pursuant to Section 2923.04, Revised Code, may be either a corporate surety bond or a personal surety bond, and the adjutant general may accept either type, provided that the particular bond tendered in each case is satisfactory to him.

OPINION NO. 69-021

Syllabus:

Section 309.08, Revised Code, requires that one elected to the office of prosecuting attorney remain a licensed attorney in order to continue in office.

To: Hamlin C. King, Gallia County Pros. Atty., Gallipolis, Ohio
By: Paul W. Brown, Attorney General, February 14, 1969

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

> 1. Does Section 309.02, Revised Code, make it necessary to be a licensed attorney only in order to be elected to the office of prosecuting attorney, or does the section, by implication, require that one remain a licensed attorney in order to continue in office?
>
> 2. Assuming that one does need to be a licensed attorney in order to continue in office as prosecuting attorney, does the office become automatically vacant when a prosecuting attorney loses his license to practice law, or is a quo warranto proceeding necessary in order to vacate the office?

The pertinent part of Section 309.02, supra, reads as follows:

> "No person shall be eligible as a candidate for the office of prosecuting attorney, or shall be elected to such office who is not an attorney at law licensed to practice law in this state.* * *"

The powers and duties of the prosecuting attorney are prescribed in Section 309.08, Revised Code, the pertinent part of which reads as follows:

> "The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court.* * *"

Section 309.02, supra, and Section 309.08, supra, have not heretofore been interpreted with reference to the questions you pose. In order to answer these questions, it is therefore necessary to examine cases in other jurisdictions in which similar statutes and questions have been considered.

The case of Brown v. Woods, et al., 39 P. 473, 2 Okl. 601, arose because the petitioner therein, who had been the successful

candidate for the office of county attorney, was suspended from the practice of law by the district court of the county in which he was to serve between the time of his election and the time at which he was to assume office. He brought a mandamus action in the Supreme Court of Oklahoma to require the incumbent county attorney to turn the office over to him, and to require the judge of the district court of the county to recognize him as the county attorney. The petitioner contended that, as he had been admitted to practice before the Supreme Court of Oklahoma, he was eligible to enter upon the duties of the office of county attorney, even though he had been suspended from practice by a judgment of the district court of the county. The Supreme Court rejected this contention, for reasons which appear later in this opinion.

Section 1702 of the Laws of Oklahoma of 1893, the laws which were involved in the Brown case, supra, provided in pertinent part as follows:

> "* * *no person shall be eligible to the office of county attorney who is not duly admitted to practice in some court of record in this territory."

Section 1705 of the same laws provided in pertinent part as follows:

> "It shall be the duty of the county attorney of the several counties to appear in the district courts of their respective counties and prosecute and defend, on behalf of the territory, or his county, all actions or proceedings, civil or criminal, in which the territory or county is interested or a party;* * *"

It is apparent that the Oklahoma statutes under consideration in the Brown case, supra, and the Ohio statutes under consideration in this opinion have certain similarities. Both the Oklahoma and Ohio statutes impose the duty on the county or prosecuting attorney to appear in court on behalf of his county, and both statutes require, as a condition of eligibility for the office, that one be admitted to the practice of law. However, neither statute contains an express provision that one who has been elected to the office must remain in good standing as a member of the bar.

The court in the Brown case, supra, expressed the opinion that, even in the absence of a specific statutory provision, it was the intention of the legislature that one who assumes the office of county attorney continues to be of good moral character and that he remain admitted to the practice of law. This position is stated as follows, in 39 P., at page 74:

> "* * *The evident purpose and intention of the legislative act, with reference to the eligibility of a person to the office of county attorney, was not only that he should possess the qualifications to perform the duties of the office of county attorney, but that there should be a judgment and determination of a court that he does possess the moral and mental qualifications of an attorney, - that there should be a determination of a court that he is a person of good moral character, and learned and skilled in the legal profession. It requires that he 'shall have been

duly admitted to practice,' and then specifies the particular duties that he is required to perform. The statute, it is true, does not say, in terms, that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intention of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose, and intention of the language used is as much within the act as though it were a part of the language itself.* * *

"Now, the reason and intention of this act of the legislature, with reference to the eligibility and duties of a person holding the office of county attorney, is not only that he be admitted to practice in a court of record, but that he remain admitted to practice in the court where his duties must be performed;* * *"
(Emphasis added)

The court concluded that it would be absurd to draw another conclusion from the statutes it was considering. In the same manner, and for the reasons stated in the Brown case, supra, it is implied in Section 309.08, supra, that one who assumes the office of prosecuting attorney remain admitted to the practice of law in this state while in office.

The facts disclosed by your letter of request make it unnecessary for me to answer your second question. However, I note the opinion of the court in Commonwealth ex rel. Pike County Bar Association v. Stump, 57 S.W. 2d 524, 247 Ky. 589. In 57 S.W. 2d, at page 525, the court states:

"* * *the loss of the office in case of disbarment is only an incident thereto, which results as a consequence of the loss of the right to practice law, since the prosecuting attorney is, most generally at least, required to be a member of the bar and have license to practice law as a prerequisite to holding his office, and if he is deprived of such license he is no longer qualified to fill the office.* * *"

The loss of the office in case of suspension is, likewise, incident to the suspension, and no separate action would seem to be required to vacate it.

In conclusion, it is my opinion and you are hereby advised that Section 309.08, Revised Code, requires that one elected to the office of prosecuting attorney remain a licensed attorney in order to continue in office.

OPINION NO. 69-022

Syllabus:

A title guarantee and trust company organized under the general corporation laws of Ohio prior to August 6, 1941, as a corporation for profit for the purposes stated in Section 1735.01, Revised Code, which is authorized to insure titles to real estate pursuant to the last paragraph of Section 3929.01, Revised Code, is not required by law nor authorized by law to file the annual reports referred to in Sections 5725.18 and 5725.21, Revised Code, with the Superintendent of Insurance and is therefore not subject to the annual tax on the privilege of being an insurance company.

To: G. W. Porterfield, Ohio Tax Commissioner, Columbus, Ohio
By: Paul W. Brown, Attorney General, March 4, 1969

Your request for my opinion asks whether title guarantee and trust companies which are by law authorized to issue title insurance would be subject to the Ohio franchise tax (Chapter 5733, Revised Code) and either the personal property tax (Chapter 5711, Revised Code) or the tax upon dealers in intangibles (Sections 5725.-13 through 5725.17, Revised Code) or whether said companies would be subject to the annual franchise tax on the privilege of being an insurance company (Sections 5725.18 through 5725.25, Revised Code). You indicate that this question is prompted by the enactment of Amended Senate Bill No. 224 (132 Ohio Laws S 224) pertaining to the regulation of the business of title insurance and title insurance companies by the Superintendent of Insurance of Ohio.

By subsequent communications, you have furnished me with the names of the seven companies whose tax status is in issue, and I have before me copies of the articles of incorporation together with all amendments thereto for each of them, the originals of which are on file with the Secretary of State. All of these title guarantee and trust companies are corporations for profit organized prior to August 6, 1941, under the general corporation laws of Ohio.

Section 1735.01, Revised Code, formerly Section 9850, General Code, reads as follows:

> "A title guarantee and trust company may prepare and furnish abstracts and certificates of title to real estate, and bonds, mortgages, and other securities; guarantee such titles, the validity and the due execution of such securities, and the performance of contracts incident thereto; make loans for itself or as agent or trustee for others, and guarantee the collection of interest and principal of such loans; take charge of, and sell, mortgage, rent, or otherwise dispose of, real estate for others, and perform all the duties of an agent relative to property deeded or otherwise entrusted to it."

An examination of the articles and amendments thereto for

these seven companies reveals that the purpose clause of each of the companies is substantially in the language of Section 1735.01, Revised Code, and its predecessor, Section 9850, General Code.

In 1953, the then Superintendent of Insurance inquired of the then Attorney General whether title guarantee and trust companies, as distinguished from title insurance companies, were under the supervision of the Superintendent of Insurance and in Opinion No. 3008, Opinions of the Attorney General for 1953, page 397, it was determined that they were not. The first branch of the syllabus in Opinion 3008 reads as follows:

> "1. Title guarantee and trust companies, formed under the provisions of Section 9850 et seq., General Code, Section 1735.01, R.C., prior to August 6, 1941, which insure titles to property in this state against loss by reason of defects, encumbrances or other matters, and insure the correctness of searches for instruments, liens, charges or other matters affecting the title to property within this state, are not under the supervision of the superintendent of insurance in the same manner as title insurance companies formed under Section 9510, paragraph 5, General Code, Section 3939.01 (sic), R.C., in so far as the insuring and/or guaranteeing of titles and the insuring and/or guaranteeing the correctness of searches are concerned."

The then Attorney General made a comprehensive analysis of how title guarantee and trust companies evolved into the title insuring field, beginning on page 399 and continuing through page 404, and being in accord therewith, I will direct your attention thereto.

In regard to the taxation of title guarantee and trust companies, it was observed, on page 404:

> "Certain other considerations merit mention with respect to the question regarding supervision of title guarantee and trust companies which write title insurance. Title guarantee and trust companies have always paid only the general corporation franchise tax provided for in Section 5495, General Code, Section 5733.01, R.C. Domestic <u>insurance</u> companies pay an annual franchise tax upon the privilege of 'being an insurance company' pursuant to Sections 5414-8 and 5414-9, General Code, Sections 5725.01 and 5725.18 R.C. Although the statutory definition of 'insurance company' accompanying these latter sections might conceivably be held broad enough to include a title guarantee and trust company writing contracts of title insurance, it should be recognized that no provision has been made in the code requiring annual statements to be filed by title guarantee and trust companies with the superintendent of insurance. Since title guarantee and trust companies are not required to file annual statements with the insurance division

there is nothing from which the division might compute the annual franchise tax levied upon domestic insurance companies. This is in contrast with title insurance companies, organized or admitted under Section 9510, General Code, which are required to file reports with the division, pursuant to Section 0561-1 (sic), General Code, Section 3929.12, R.C."

In conjunction with the above-quoted language, it should be noted that Section 5725.21, Revised Code, pertaining to the annual franchise tax on the privilege of being an insurance company (Sections 5725.18 through 5725.25, Revised Code), reads in pertinent part:

"Sections 5725.18 to 5725.21, inclusive, and 5725.25 of the Revised Code do not apply to any other domestic insurance company which is not required by law, or by election made pursuant to law, to file annual reports with the superintendent* * *"

The annual report for insurance companies formed under Section 3929.01, Revised Code, which includes title insurance companies (division (E) of Section 3929.01, Revised Code), is required by Section 3929.30 et seq., Revised Code, formerly Section 9590 et seq., General Code. The then Attorney General was in error in referring to the sworn statement required of title insurance companies (Section 3929.12, Revised Code, formerly Section 9561-1, General Code) for the purpose of computing reserve deposits as being the annual report. In respect to insurance companies formed under Section 3929.01, Revised Code, the annual report from which the alternative bases for the domestic insurance franchise tax are computed pursuant to Section 5725.18, Revised Code, is the report required by Section 3929.30, Revised Code. It is this report which supplies all of the information from which the tax bases are calculated. The sworn statement previously required of title insurance companies (Section 3929.12, Revised Code, repealed effective December 12, 1967 by Amended Senate Bill No. 224, 132 Ohio Laws S 224) could not have been used for the purpose of determining the franchise tax bases because, though it showed title insurance premiums received during the year, it did not show the admitted and nonadmitted assets, liabilities and reserves of the title insurance company.

By the enactment of Amended Senate Bill No. 224, supra, Section 1109.31, Revised Code, was amended, effective January 2, 1968, to read as follows:

"Title guaranty and trust companies shall make such reports to the superintendent of banks as are required to be made by trust companies to the superintendent of banks, and shall be subject to the examinations, fees, and forfeitures to which trust companies are subject, such examinations to be made by, and such fees and forfeitures assessed by and paid to, the superintendent of banks; provided that any title guaranty and trust company or title guaranty company whose business function is the issuance of title insurance as defined in section 3953.01 of the Revised Code, shall, in-

> sofar as the issuance of such title insurance is concerned, be under the supervision of the superintendent of insurance as provided in sections 3901.07 and 3953.01 to 3953.28, inclusive, of the Revised Code."

and Sections 3953.01 through 3953.28 of the Revised Code were enacted, effective December 12, 1967, for the purpose of supervising and regulating the business of title insurance and title insurance companies. As can be seen from a reading of the definition of "Title insurance," "The business of title insurance" and "Title insurance company" appearing in divisions (A), (B) and (C), respectively, of Section 3953.01, Revised Code, no distinction is made between a title insuring company and a title guaranteeing company for the purpose of regulation and supervision. However, a thorough examination of the amendments and all of the enactments contained within the bill fails to disclose the requirement therein that a title guarantee and trust company, formed under Chapter 1735, Revised Code, file an annual repprt with the Superintendent of Insurance comparable to that required by Section 3929.30, Revised Code, of title insurance companies formed under division (E) of Section 3929.01, Revised Code. Nor do I find any statutory provision therein authorizing a title guarantee and trust company to elect to file an annual report comparable to the report required by Section 3929.30, Revised Code, with the Superintendent of Insurance.

Accordingly, giving effect to the exclusionary language contained in Section 5725.21, Revised Code, and the absence of any statutory requirement or authority that a title guarantee and trust company file or elect to file an annual report of its admitted and nonadmitted assets, liabilities and reserves with the Superintendent of Insurance, I must conclude that title guarantee and trust companies formed under Chapter 1735, Revised Code, though under the supervision of the Superintendent of Insurance, are not subject to the annual franchise tax on the privilege of being an insurance company provided by Sections 5725.18 through 5725.25, Revised Code..

Therefore, it is my opinion and you are hereby advised that a title guarantee and trust company organized under the general corporation laws of Ohio prior to August 6, 1941, as a corporation for profit for the purposes stated in Section 1735.01, Revised Code, which is authorized to insure titles to real estate pursuant to the last paragraph of Section 3929.01, Revised Code, is not required by law nor authorized by law to file the annual reports referred to in Sections 5725.18 and 5725.21, Revised Code, with the Superintendent of Insurance and is therefore not subject to the annual tax on the privilege of being an insurance company.

OPINION NO. 69-023

Syllabus:

A foster home is not a charitable or correctional institution within the meaning of Chapter 331, Revised Code, and therefore not amenable to inspection by a Board of County Visitors.

To: Denver L. White, Director, Department of Public Welfare, Columbus, Ohio
By: Paul W. Brown, Attorney General, March 4, 1969

Your recent request for my opinion asks if a foster home which cares for children in the custody of a County Child Welfare Board is a charitable or correctional institution within the meaning of Chapter 331, Revised Code, and subject to inspection by the Board of County Visitors.

Section 331.01, Revised Code, reads in pertinent part:

> "In each county there shall be a board of county visitors consisting of six persons, not more than three of whom shall have the same political affiliations, for the inspection of all charitable and correctional institutions, supported in whole or in part from county or municipal corporation funds.* * *"

The duties of the board are set out in Section 331.04, Revised Code, which reads in pertinent part as follows:

> "The board of county visitors, by personal visitation or otherwise, shall keep fully advised of the condition and management of <u>all charitable or correctional institutions supported in whole or in part by county or municipal taxation, or which are under county or municipal control, and especially the county home, county jail, municipal prisons, and children's homes</u>. From time to time the board of county visitors shall recommend to the board of county commissioners and to other officials responsible for such institutions, such changes and additional provisions as the board of county visitors deems essential for the economical and efficient administration of the institutions.* * *"
> (Emphasis added)

Clearly the statutory duty to inspect refers directly to institutions which are under the direct control and supervision of county or municipal authorities. The statute further defines these institutions by setting out express examples of institutions amenable to this inspection.

Foster homes are defined by statute in Subsection (F), Section 5153.01, Revised Code, as follows:

> "(F) 'Foster home' means a <u>family home</u> in which any child is received, apart from its parents, for care, supervision, or training." (Emphasis added)

A foster parent is defined in Black's Law Dictionary, 4th Edition, page 784, as follows:

> "One who has performed the duties of a parent to the child of another by rearing the child as his own child."

It can therefore be readily seen that a foster home is a <u>family</u> home which provides care to children by incorporating them into

the life of the family. These homes are not under the direct control and management of any public body or official. Instead the regular home life of the family is continued with the addition of one or more children who are considered a part of the family group. A payment is received for this care; however, such payment is no more than enough to pay the cost of care to the child or children.

Therefore, it is my opinion and you are hereby advised that a foster home is not a charitable or correctional institution within the meaning of Chapter 331, Revised Code, and therefore not amenable to inspection by a Board of County Visitors.

OPINION NO. 69-024

Syllabus:

Section 2903.05, Revised Code, prohibits sale or exhibition for sale to minors under sixteen years of age, toy pistols made of hard substances, including air guns, or any form of explosive gun.

To: Donald L. Dodd, Champaign County Pros. Atty., Urbana, Ohio
By: Paul W. Brown, Attorney General, March 5, 1969

I have before me the request of your predecessor for my interpretation of Section 2903.05, Revised Code, which reads in pertinent part as follows:

> "No person shall sell or exhibit for sale, to a minor under sixteen years of age, a pistol manufactured of a metallic or hard substance, commonly known as a 'toy pistol' or an air gun, or any form of explosive gun."

In attempting to ascertain the intention of the legislature in enacting a statute prohibiting the sale of toy pistols to minors under sixteen, special attention must be paid to the history of the statute.

As the statute now reads, there is a question whether the legislature intended the phrase "air gun" to further define "toy pistol" since no comma separates the two phrases. In researching the history of the statute, I conclude that the legislature intended "an air gun" to be a restrictive phrase which is for the purpose of clarifying the phrase "toy pistol."

In 1883, Section 6986 of the Ohio Laws prohibiting the sale of toy pistols to minors under the age of fourteen was passed. It referred only to a "toy pistol" and made no reference whatever to an air gun. However, in 1913, Section 6986 (b) of the Ohio Laws was revised and incorporated into the General Code as Section 12966. It read as follows:

> "Whoever sells or exhibits for sale, to a minor under sixteen years of age, a pistol manufactured of a metallic or hard substance, commonly known as a 'toy pistol' or air gun, or any form

> of explosive gun, shall be fined not less than ten dollars nor more than fifty dollars or imprisoned not less than ten days nor more than twenty days, or both, and be liable in damages to any person injured by such sale."

It will be noted that the phrase "or air gun" was included in this section. The comma which had previously followed the term "toy pistol" was dropped and no mention was made of its omission. So for many years, the pertinent portion of Section 12966 of the General Code read "* * *'toy pistol' or air gun, * * *."

In 1953 this section of the code was again revised and incorporated into the Ohio Revised Code as Section 2903.05. In final form, the word "an" is inserted to modify "air gun" with the portion of the statute in question now reading "* * * commonly known as a 'toy pistol' or an air gun,* * *." (Emphasis ours).

The question of interpretation, as the law now stands, is centered on the word "an", which was added by the General Assembly when it promulgated the Ohio Revised Code in 1953. The General Assembly makes it clear, however, that the revised statutes will be presumed to bear the same meaning as the original sections and will be so construed unless it appears that a change was intended by the legislature. We can interpret the construction of the statute which has undergone revision and codification to be changed only when the intent of the legislature to make such a change is clear. Part of the reason for the revision in 1953 was to correct typing and spelling errors and also to improve the grammar of the statutes. Since the words "air gun" had no modifier in the General Code, the addition of "an" before "air gun" makes this phrase consistent with "a toy pistol."

As stated in Loftin v. Loew's, Inc., 75 App. 448, 31 O.O. 267:

> "When the entire legislation affecting a particular subject matter has undergone revision and consolidation by codification, the revised section will be presumed to bear the same meaning as the original sections, unless it is clearly manifested that the Legislature intended a change."

The same attitude is expressed by the legislature in Section 1.24, Revised Code:

> "That in enacting this act it is the intent of the General Assembly not to change the law as heretofore expressed by the section or sections of the General Code in effect on the date of enactment of this act. The provisions of the Revised Code relating to the corresponding section or sections of the General Code shall be construed as restatements of and substituted in a continuing way for applicable existing statutory provisions, and not new enactments."

In light of the aforementioned statements by the court and the legislature, the addition of the word "an" in the Revised Code does not change the essential meaning of the statute.

However, Section 1.02 (H), Revised Code, states that the word "or" may be read "and" if the sense requires it. In this case, it appears that the legislature wished to include air guns within the broad provisions of toy pistols made of hard substances, but not to limit the prohibition merely to air guns. Thus, the statute should read in pertinent part, "* * *'toy pistol' and (sic) an air gun, or any form of explosive gun."

Therefore, it is my opinion and you are hereby advised that Section 2903.05, Revised Code, prohibits sale or exhibition for sale to minors under sixteen years of age toy pistols made of hard substances, including air guns, or any form of explosive gun.

OPINION NO. 69-025

Syllabus:

1. The board of education of each city, exempted village, and local school district by employment contract with the teacher provides what shall constitute "regular duties" and "additional duties" and determines the amount of compensation relative to each, as authorized by Section 3319.08, Revised Code.

2. Unless the contract between the board of education and the teacher provides that the teacher's regular duties shall include the possible assignment of substitute teaching duties, such assignment would constitute duties beyond the regular teaching duties. Such additional duties and the compensation therefor are the proper subject of a supplemental contract.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, March 5, 1969

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

> "In one of the local school districts located in our County, the superintendent has followed the practice on occasions, where it is impossible to obtain a substitute, of assigning regular teachers from the staff that have 'planning periods' during various periods of the day, to take over classes of an absent teacher.
>
> "* * * * * * * * *
>
> "The question has thus arisen as to whether or not such teachers who fill in for an absent teacher on such a casual basis must be paid for these assignments over and above their regular contract rate, and also whether or not this is to be considered as a duty beyond the regular duty of a teacher."

Section 3319.07, Revised Code, inter alia, provides:

"The board of education of each city, exempted village, and local school district shall employ the teachers of the public schools of their respective districts.* * *"

The procedure to be followed by the board of education for the employment of teachers of the public schools is provided in part by Section 3313.18, Revised Code. The clerk of the board of education shall record the proceedings of each meeting in a book to be provided by the board for that purpose, which shall be a public record, cf. Section 3313.26, Revised Code.

Section 3319.08, Revised Code, inter alia, provides:

"The board of education of each city, exempted village, and local school district shall enter into written contracts for the employment and reemployment of all teachers and shall fix their salaries which may be increased but not diminished during the term for which the contract is made, except as provided in section 3319.12 of the Revised Code.

"If a board of education adopts a motion or resolution to employ a teacher under a limited or continuing contract and the teacher accepts such employment, the failure of such parties to execute a written contract shall not avoid such employment contract.

"The board of education of each city, exempted village, and local school district may include in such contract duties beyond the regular duties and for such additional duties the salary of the teacher may be supplemented. Such boards may discontinue at any time the assignments of special duties beyond the regular classroom teaching duties and the supplemental salary allowed for such additional duties shall be discontinued upon relief from such additional duties. In addition to supplemental salary payments as provided in this section, such boards of education may grant salary increase at any time without the imposition of additional duties. * * *

"Contracts for the employment of teachers shall be of two types, limited contracts and continuing contracts. A limited contract for a superintendent is a contract for such term as authorized by section 3319.01 of the Revised Code, and for all other teachers for a term not to exceed five years. A continuing contract is a contract which shall remain in effect until the teacher resigns, elects to retire, or is retired pursuant to section 3307.37 of the Revised Code, or until it is terminated or suspended and shall be granted only to teachers holding professional, permanent, or life certificates."

Pursuant to Section 3319.08, Revised Code, the contract of employment of each teacher shall be in writing. The rights and duties existing between the board of education and the teacher depend upon the terms of their contract. Such contract, of course, is subject to any conditions or limitations imposed thereon by statute.

The terms "regular duties" and "additional duties" are not specifically defined by statute. What shall constitute "regular duties" and "additional duties" and the compensation for each may therefore be the subject of agreement between the parties at the time each contract of employment or reemployment is entered. Additional duties may also be the subject of a supplemental agreement between the board of education and the teacher.

Your inquiry did not submit a specific teacher's contract for consideration. Obviously, contractual provisions specifically dealing with the subject of your inquiry would be controlling.

Section 3319.10, Revised Code, provides that teachers may be employed as substitute teachers to take the place of regular teachers absent on account of illness or on leave of absence or to fill temporary positions created by emergencies. Such substitute teachers receive compensation for such employment. It is logical to conclude that a regular teacher who performs the normal day-to-day teaching duties and, in addition, also performs the duties of a substitute teacher, is performing "additional duties."

Section 3319.08, Revised Code, empowers the board of education to contract for duties beyond the teacher's regular duties and to compensate such teacher for the performance of such duties. A determination to assign duties not previously contracted for, and the compensation to be paid therefor, would be the proper subject of a supplemental contract.

It is therefore my opinion that:

1. The board of education of each city, exempted village, and local school district by employment contract with the teacher provides what shall constitute "regular duties" and "additional duties" and determines the amount of compensation relative to each, as authorized by Section 3319.08, Revised Code.

2. Unless the contract between the board of education and the teacher provides that the teacher's regular duties shall include the possible assignment of substitute teaching duties, such assignment would constitute duties beyond the regular teaching duties. Such additional duties and the compensation therefor are the proper subject of a supplemental contract.

OPINION NO. 69-026

Syllabus:

Section 343.01, Revised Code, does not permit a board of county commissioners to lease land for use as a landfill operation in connection with a garbage and refuse disposal district.

To: Harry A. Sargeant, Jr., Sandusky County Pros. Atty., Fremont, Ohio
By: Paul W. Brown, Attorney General, March 6, 1969

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

Is the authority granted to a board of county commissioners by Section 343.01 of the Revised Code broad enough to permit the board to lease land for use as a landfill operation in connection with a garbage and refuse disposal district?

Section 343.01, Revised Code, reads in pertinent part:

> "* * *the board may acquire, construct, improve, enlarge, replace, maintain, and operate such garbage and refuse collection systems within any such district and such garbage and refuse disposal plants and facilities within or without any such district as are necessary for the protection of the public health."

If we are to construe statutes strictly, we must look closely at the language of the law. Although at first blush the language of the statute seems broad enough to encompass your request, a closer look reveals the lack of express authority for the board to lease land for use as a landfill operation.

The word "acquire" in the statutes has been held in Ohio to mean the purchase of something, or to make property one's own. State ex rel. Fisher v. Sherman, 21 N.E. 2d 447, 135 Ohio St. 458 (1939).

Since county offices are created by the legislature, the determination of the powers and duties of these offices is likewise wholly a matter for the legislature. In other words, county officials have only such powers and duties as are expressly given them by statute. Acts of county officers which exceed the limits of their powers are void. State v. Griggsby, 6 ONP 202, 8 ODNP 616 (1899). It would seem, therefore, that the leasing of land for a landfill operation is not authorized by the statute in question.

Your second question is as follows: "* * *may the Board of County Commissioners contract with a person or firm to construct, operate and maintain a landfill operation on the leased grounds?" The answer to your first question obviates an answer to your second question.

Therefore, it is my opinion and you are hereby advised that Section 343.01, Revised Code, does not permit a board of county commissioners to lease land for use as a landfill operation in connection with a garbage and refuse disposal district.

OPINION NO. 69-027

Syllabus:

A nonconforming use existing under a township zoning regulation is not terminated by virtue of an amendment to the regulation changing the area classification from residential to commercial. The exclusive method of uncompensated termination as provided by statute is voluntary discontinuance for two years or more.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, March 6, 1969

I have your request for my opinion as to whether a nonconforming use of the particular parcel of real estate you have in mind is extinguished by virtue of an amendment to the governing township zoning regulation changing the classification of the area in which the parcel is situated from residential to commercial. You further ask under what circumstances a nonconforming use may be terminated.

I am assuming that the use of the property in question is nonconforming under the commercial classification, as well as under the former residential classification. The Ohio zoning enabling statute applicable to townships prohibits a township from zoning-out a use which exists at the time of enactment of the zoning regulation. The statute also provides just one basis for termination of a nonconforming use, namely: when it has been discontinued voluntarily for two years or more. Section 519.19, Revised Code, reads as follows:

> "The lawful use of any dwelling, building, or structure and of any land or premises, as existing and lawful at the time of enactment of a zoning resolution or amendment thereto, may be continued, although such use does not conform with such resolution or amendment but if any nonconforming use is voluntarily discontinued for two years or more, any future use of said land shall be in conformity with sections 519.02 to 519.25, inclusive, of the Revised Code. The board of township trustees shall provide in any zoning resolution for the completion, restoration, reconstruction, extension, or substitution of nonconforming uses upon such reasonable terms as are set forth in the zoning resolution."

Thus, the Ohio enabling statute clearly fails to provide that a township may terminate a nonconforming use by the enactment of an amended regulation changing the classification of the area in question. Further, Ohio law strongly indicates that any attempt to so terminate a nonconforming use by this method would be unconstitutional. In the case of Akron v. Chapman, 160 Ohio St. 382 (1953), the court in discussing a municipal zoning ordinance which attempted to terminate a nonconforming use which had existed for a reasonable

period of time, held in Syllabus 2 of the Opinion as follows:

> "2. The right to continue to use one's property in a lawful business and in a manner which does not constitute a nuisance and which was lawful at the time such business was established is within the protection of Section 1, Article XIV, Amendments, United States Constitution, and Section 16, Article I of the Ohio Constitution, providing that no person shall be deprived of life, liberty, or property without due process of law."

I think it is worth emphasizing in connection with your stated question, Section 519.19, supra, specifically provides that the lawful use of any premises existing at the time of enactment of a township zoning resolution or amendment thereto, may be continued and that in either case, termination occurs only by voluntary discontinuance after two years or more. The method terminating an existing use through eminent domain procedure where compensation is involved is not implied in your question and therefore not here discussed.

I am, therefore, of the opinion, and you are so advised, that a nonconforming use existing under a township zoning regulation is not terminated by virtue of an amendment to the regulation changing the area classification from residential to commercial. The exclusive method of uncompensated termination as provided by statute is voluntary discontinuance for two years or more.

OPINION NO. 69-028

Syllabus:

A fireman who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund, and who is now receiving benefits from the Police and Firemen's Disability and Pension Fund created by Section 742.02, Revised Code, is not eligible to receive compensation for permanent total disability as long as the pension received is at least as great as the compensation that would be payable.

To: M. Holland Krise, Chairman, Industrial Commission, Columbus, Ohio
By: Paul W. Brown, Attorney General, March 20, 1969

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

> "* * * whether a claimant who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund,

> and who is now receiving benefits from the Policemen's and Firemen's Disability and Pension Fund created by Section 742.02, R.C., is eligible to receive compensation for permanent total disability. For the purpose of this opinion, assume that the pension which the claimant is receiving is in excess of the compensation payable for permanent total disability."

You have also called my attention to Section 4123.02, Revised Code, which provides in part:

> "Sections 4123.01 to 4123.94, inclusive, of the Revised Code do not apply to policemen or firemen in municipal corporations where the injured policemen or firemen are eligible to participate in any policemen's or firemen's pension funds established and maintained by a municipal corporation, unless the amount of the pension funds provided by the municipal corporation through taxation and paid to such policemen or firemen is less than they would have received if the municipal corporation had no such pension fund. In such event policemen and firemen shall receive the regular state compensation for policemen and firemen in municipal corporations where no such pension funds have been created, less the sum received by the policemen or firemen from the pension funds provided by the municipal corporation through taxation. * * *"

This statute denies Workmen's Compensation to a fireman who is eligible to receive a disability pension from funds provided through taxation by a municipal corporation whenever the disability pension is at least equal to the Workmen's Compensation that would be payable to other injured workmen who are similarly disabled.

Section 4123.02, Revised Code, was enacted prior to the creation of the state-administered Police and Firemen's Disability and Pension Fund under Chapter 742, Revised Code. Therefore, the question arises whether participation in the state pension funds created by Section 742.02, Revised Code, is participation in "any * * * firemen's pension funds established and maintained by a municipal corporation." Although no court of this State has touched precisely upon this question in any reported decision, it is my opinion that participation in the Police and Firemen's Pension Fund created by Section 742.02, Revised Code, precludes payment of permanent total disability compensation by operation of Section 4123.02, supra, when the disability pension is at least equal to the compensation that would be payable.

Before the enactment of Chapter 742 of the Revised Code, municipalities were required to maintain Firemen's Pension Funds under Section 741.02, Revised Code (G.C. S4600). State, ex rel. English v. Industrial Commission, 160 Ohio St. 443 (1954). These funds were maintained by both employer contributions raised through a tax levy and through deductions from

employee's wages. Firemen who were paid disability pensions from these funds in excess of the compensation that would be payable under Workmen's Compensation were constitutionally denied payment of Workmen's Compensation for disability by Section 4123.02, Revised Code, and by predecessor provisions in 1465-61, General Code. State, ex rel. English v. Industrial Commission, supra, State, ex rel. Van Liew v. Industrial Commission, 165 Ohio St. 545 (1956).

The enactment of Chapter 742 of the Revised Code caused all of the municipal pension funds set up under Section 741.02, supra, to be superseded by the Police and Firemen's Disability and Pension Fund; however, municipalities were not relieved of their duty to provide funds from taxes to pay firemen's pensions. In addition, the rights of participants in municipal firemen's funds to receive benefits and pensions in accordance with the rules of the superseded funds became fixed by operation of Section 742.37 (A), Revised Code. The assets of the superseded municipal funds were required to be transferred entirely to the state pension funds on January 1, 1967. Therefore, the effect of the enactment of Chapter 742, supra, was to leave unchanged both the substantive rights of firemen who had participated in the superseded municipal funds and the duty of cities to provide sufficient tax monies to pay pensions and benefits for their employees. Chapter 742, supra, merely placed the administration of all pension fund assets in the discretion of the state pension fund trustees and relieved cities of the administrative duties.

Because the enactment of Chapter 742 of the Revised Code changed none of the substantive rights and duties that existed prior to its effective date and because it only effected changes in the management of the assets of the municipal pension fund, it is my opinion that participation in the Police and Firemen's Disability and Pension Fund is, in fact, participation in "any * * * firemen's pension funds established and maintained by a municipal corporation." It is my opinion that Section 4123.02, supra, merely requires that cities establish and maintain pension funds; a city fulfills these required functions by collecting taxes and paying money to the state pension fund equal to its accrued liability for firemen's pensions. The state pension fund acts merely as an intermediary between a fireman and his employer; the fireman receives the same pension provided by the same source of taxation that he formerly received from his municipal pension fund. The fact that a municipality now uses a state agency to manage and distribute its firemen's pensions instead of using its own agency should not affect the relationship between its firemen and the Workmen's Compensation Laws.

Section 4123.02, Revised Code, excludes firemen from Workmen's Compensation who participate in any pension fund established and maintained by a municipality, the broad language of the statute does not require participation in a particular fund. The exclusion is not limited to participation in funds that were created pursuant to laws in existence at the time of the enactment of Section 4123.02, Revised Code. The present exclusion from Workmen's Compensation contained in Section 4123.02, Revised Code, eliminated the requirement of its predecessor in Section 1465-61, General Code, that municipal funds be established under laws already in existence. Therefore, it can be seen that Section 4123.02, Revised Code, anticipated that firemen's pensions might be administered in

a manner different from that provided by Section 741.02, et seq. in 1953. Because Chapter 742, supra, created rights and duties that were identical to those that existed in the municipal pension funds which it caused to be superseded, participation in a fund created by Section 742.02, supra, would bar payment of compensation in every instance that participation in a municipal firemen's pension fund would bar payment.

Therefore, it is my opinion and you are so advised that a fireman who was injured May 23, 1957, while in the employ of the City of Youngstown Fire Department, who began receiving benefits on June 1, 1959, from the Youngstown Firemen's Pension Fund, and who is now receiving benefits from the Police and Firemen's Disability and Pension Fund created by Section 742.02, Revised Code, is not eligible to receive compensation for permanent total disability as long as the pension received is at least as great as the compensation that would be payable.

OPINION NO. 69-029

Syllabus:

A school bus driver who is in service for not less than eleven months a year is entitled to the vacation benefits provided by Section 3319.084, Revised Code.

To: Joseph Murray, Ashland County Pros. Atty., Ashland, Ohio
By: Paul W. Brown, Attorney General, March 10, 1969

On behalf of one of the local school districts in Ashland County, you have requested my opinion on the following question:

> "Is a regularly employed school bus driver entitled to two (2) week paid vacation under Section 3319.084, Revised Code of Ohio, when he is employed as a school bus driver for the full school year, together with an additional eight (8) weeks during the summer months."

The controlling statute is Section 3319.084, Revised Code:

> "In all school districts each full-time nonteaching school employee including full-time hourly rate and per diem employees, after service of one calendar year with a board of education, shall be entitled, during each year thereafter, while continuing in the employ of such board of education, to vacation leave with full pay for a minimum of two calendar weeks,

excluding legal holidays. Employees continuing in the employ of such board of education for fifteen or more years of service shall be entitled to vacation leave with full pay for a minimum of three calendar weeks, excluding legal holidays.

"In case of the death of a nonteaching school employee, the unused vacation leave to the credit of such employee, not to exceed the vacation leave accrued to his credit for two years immediately preceding his last anniversary date and the pro-rated portion of his earned but unused vacation leave for the current year, shall be paid to the surviving spouse, or other dependent.

"For the purposes of this section, a full-time employee is a person who is in service for not less then eleven months in each calendar year."
(Emphasis added)

In your request for my opinion you state that the school bus driver in question works "the full school year" plus eight weeks during the summer months. Section 3319.084, supra, entitles each full-time nonteaching school employee to the specified amounts of vacation leave and, as underlined above, defines "full-time employee" as a "person who is in service for not less than eleven months in each calendar year." Therefore, if this bus driver's service during the "full school year" plus eight weeks in the summer months adds up to his being in service for not less than eleven months in each calendar year, he is entitled to the vacation leave specified in Section 3319.084, supra.

Accordingly, it is my opinion and you are hereby advised that a school bus driver who is in service for not less than eleven months a year is entitled to the vacation benefits provided by Section 3319.084, Revised Code.

OPINION NO. 69-031

Syllabus:

Under Subsection (C), Section 4, Article IV, Ohio Constitution, the judge who is elected to the office of judge of the court of common pleas shall make appointments pursuant to Section 2301.-18, Revised Code, and Section 5901.02, Revised Code.

To: H. Michael Moser, Auglaize County Pros. Atty., Wapakoneta, Ohio
By: Paul W. Brown, Attorney General, March 14, 1969

The letter of your predecessor requesting my opinion states that there is one probate judge and one judge of the court of common pleas in Auglaize County, and that it is your understanding that both of these judges will be court of common pleas judges under Subsection (C), Section 4, Article IV, Ohio Constitution.

You refer to Section 2301.18, Revised Code, which states that the court of common pleas shall appoint a stenographic reporter as official shorthand reporter for such court. You also refer to Section 5901.02, Revised Code, which states that the county soldier's relief commission shall be composed of five persons appointed by a judge of the court of common pleas.

Your question is which one of the judges, the probate judge or the judge of the court of common pleas, is to make appointments under Section 2301.18, supra, and Section 5901.02, supra, in light of the foregoing Constitutional provision.

Your understanding of Subsection (C), Section 4, Article IV, supra, is correct. Unless otherwise provided by law, all judges of the probate courts will become judges of the courts of common pleas under this provision.

However, any appointments heretofore made by a judge of the court of common pleas under Section 2301.18, supra, and Section 5901.02, supra, are to be continued to be made by the judge elected to the office of judge of the court of common pleas. While it is true that judges of the probate courts will become judges of the courts of common pleas, such judges of the probate courts are to be elected specifically to the probate bench, and have the power "to employ and control the clerks, employees, deputies and referees of such probate division of the common pleas courts." Subsection (C), Section 4, Article IV, supra.

It is clear that, under this provision, the probate judge is to make appointments connected with the probate division of the court of common pleas, while the common pleas judge is to make appointments connected with that court.

In conclusion, it is my opinion and you are hereby advised that under Subsection (C), Section 4, Article IV, Ohio Constitution, the judge who is elected to the office of judge of the court of common pleas shall make appointments pursuant to Section 2301.18, Revised Code, and Section 5901.02, Revised Code.

OPINION NO. 69-032

Syllabus:

When a new township is created which conforms to the limits of a municipality and is created from part of the area of three different existing townships, the city ordinance which sets out the boundaries for the new township should describe the new boundaries of each of the three townships from which area was annexed and how it relates to the new township.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: Paul W. Brown, Attorney General, March 19, 1969

I have before me your request for my opinion concerning Newark City Ordinance #68-106 which sets out the boundaries for a new township called Legend Township which would be created to conform to the corporation limits of the City of Newark. The City of Newark actually comprises parts of Newark Township, Granville Township, and Madison Township. The Ordinance now refers to the creation of a new township out of that portion of Newark Township now included within the limits of the municipal corporation of the City of Newark, Ohio.

The question presented is as follows:

> "* * * whether the Ordinance #68-106 should also include therein that the new township would be created in accordance with the corporation limits of The City of Newark, should also provide that the township lines of Granville Township and Madison Township should also be made to conform to the corporation limits of The City of Newark."

Section 503.02, Revised Code, states:

> "The board of county commissioners may change the boundaries of any civil township, or partition any township among other townships within the county, by attaching a part of one township to another, by dividing one township and attaching the parts to other townships, or by laying off and designating a new township from the territory of one or more townships of the same county or from territory not before included in a civil township, when it is made to appear necessary or expedient by a petition for that purpose, signed by a majority of the householders residing within the bounds of the townships to be affected by such partition or division."

The above section points out that the changing of boundaries of one or more existing townships to create a new township is authorized under the Revised Code. Therefore, the Board of County Commissioners may form Legend Township out of the three existing townships.

Section 503.07, Revised Code, states:

> "When the limits of a municipal corporation do not comprise the whole of the township in which it is situated, or if by change of the limits of such corporation include territory lying in more than one township, the legislative authority of such municipal corporation, by a vote of the majority of the members of such legislative authority, may petition the board of county commissioners for a change of township lines in order to make them identical, in whole or in part, with the limits of the municipal corporation, or to erect a new township out of the portion of such township included within the limits of such municipal corporation. The board, on presentation of such petition, with the proceedings of the legislative

authority authenticated, at a regular or adjourned session, shall upon the petition of a city change the boundaries of the township or erect such new township, and may upon the petition of a village change the boundaries of the township or erect such new township."

The above section of the Ohio Revised Code points out that a new township may be formed out of territory lying in more than one township and it may conform to the limits of a municipal corporation. However, when such new township is formed the boundaries must be strictly determined.

In the present case there are three townships involved. Ordinance #68-106 creates a new township that conforms to the boundaries of the Municipal Corporation of Newark which takes in parts of each of the three townships now within the municipal corporation.

The effect of boundaries of a municipal corporation and township becoming identical is stated in Section 703.22, Revised Code, which reads as follows:

> "When the limits of a municipal corporation become identical with those of a township, all township offices shall be abolished, and the duties thereof shall be performed by the corresponding officers of the municipal corporation. All property, moneys, credits, books, records, and documents of such township shall be delivered to the legislative authority of such municipal corporation. All rights, interests, or claims in favor of or against the township may be enforced by or against such municipal corporation."

The creation of the new township results in the area of the other three townships being outside of the municipal corporation of Newark. Therefore, as a result of the above section, the new boundaries abolish all duties which Newark Township, Granville Township, and Madison Township formerly had with respect to the area combined into the new township. The boundaries of the new township, Legend Township, must be strictly determined. Since Legend Township's boundaries are identical to those of the municipal corporation the remaining portions of Madison, Granville, and Newark Townships must also conform their outside boundary to the municipal corporation.

In conclusion, it is my opinion and you are advised that when a new township is created which conforms to the limits of a municipality and is created from part of the area of three different existing townships, the city ordinance which sets out the boundaries for the new township should describe the new boundaries of each of the three townships from which area was annexed and how it relates to the new township.

OPINION NO. 69-033

Syllabus:

Incumbent elected county officials must be re-elected after April 1, 1970 in order to qualify for the increased remuneration under Chapter 325, Revised Code.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, March 20, 1969

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

> "Will the 1970 census change the remuneration of county elected officials, or will they have to be re-elected after the 1970 census in order to receive the increased remuneration as set up in the various schedules pertaining to each elected county official under Chapter 325, Revised Code?"

This question has been dealt with by our office in Opinion No. 1644, Opinions of the Attorney General for 1960. In this Opinion we stated that a county official becomes eligible for the new salary schedule based on the federal census when he is elected or appointed on or after April 1 of the year which is stated in the statute. Paragraph 1 of the Syllabus of the aforementioned Opinion reads as follows:

> "1. County officials who were elected or appointed to office prior to April 1, 1960, should be paid salaries * * * based on the population of their respective counties as shown by the 1950 federal census; however, such an official elected or appointed on or after April 1, 1960, should be paid a salary under the appropriate section based on the population of his respective county as shown by the 1960 federal census, effective April 1, 1960."

The latest amendments under Chapter 325, Revised Code, have changed the language slightly, but not in any meaningful sense. The words "next preceding his election", which refer to the appropriate federal census, have been replaced with the wording "as ascertained by the latest federal census of the United States." Although the language of the statute has been modified, the meaning remains the same, i.e. the county elected official, if now in office, must be re-elected after the 1970 census goes into effect in order to qualify for the salary increase. It was clearly pointed out in Opinion No. 7437, Opinions of the Attorney General for 1956, that Article II, Section 20, Ohio Constitution, prohibits an official having his salary raised during the term for which he is elected. Such an increase has been held to be unconstitutional State, ex rel. v. Raine, 49 Ohio St. 580 (1892).

Therefore, it is my opinion and you are hereby advised that incumbent elected county officials must be re-elected after April 1, 1970 in order to qualify for the increased remuneration under Chapter 325, Revised Code.

OPINION NO. 69-034

Syllabus:

The board of county commissioners is not authorized to expend public funds for the payment of premiums on a group hospitalization plan for public officers, as provided in Section 305.171, Revised Code, which plan would begin after the commencement of the existing statutory terms of such officers, since such expenditures would be in violation of Section 20, Article II, Ohio Constitution.

To: Lawrence S. Huffman, Allen County Pros. Atty., Lima, Ohio
By: Paul W. Brown, Attorney General, March 20, 1969

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

> "Does the Board of County Commissioners have the right, in light of the provisions of Article 2, Section 20 of the Ohio Constitution to expend public funds for the payment of premiums on a group hospitalization plan for public officers as provided in Section 305.171, Revised Code, which plan would begin after the commencement of the existing terms of said officers?"

You inform me that the board of county commissioners of your county now has such a group hospitalization plan under consideration for the employees and elected officials of the county and that the cost of the plan under consideration would be approximately $150.00 per person per year.

Section 305.171, Revised Code, concerning which you inquire, reads as follows:

> "The board of county commissioners of any county may procure and pay all or part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state."

Section 20, Article II of the Ohio Constitution reads as follows:

> "The general assembly, in cases not pro-

vided for in this constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished."

This constitutional provision has been interpreted to apply only to those officers who serve for fixed statutory terms, and not to apply to those employees who serve at the pleasure of an appointing authority. Opinion No. 176, Opinions of the Attorney General for 1957. The provision clearly applies to a board of county commissioners, De Chant v. Kelser, 133 Ohio St. 429 (1938), although it does not apply to a county employee who serves at the pleasure of an appointing authority.

Further, Section 305.171, supra, is not unconstitutional on its face, the right to use public funds for the payment of all or part of the insurance premiums for public officers or employees having been recognized, 16 A.L.R. 1089, supp. 27 A.L.R. 1267, as long as statutory authority exists for the payment of premiums on the specific types of insurance coverage in question. See Opinion No. 5252, Opinions of the Attorney General for 1955. Such authority clearly exists in the instant case.

Your letter of request for my opinion indicates that you are aware of the foregoing basic considerations, and that your specific concern is the legality of making the premium payments permitted by Section 305.171, supra, for those county officers who have begun to serve their existing statutory terms at the time the proposed group hospitalization plan is to become effective. Where is has been permitted by law, as heretofore outlined, the payment of all or part of the insurance premiums on a group policy covering the officers and employees of a political subdivision of this state has been consistently regraded as part of the compensation of such officers or employees. See Opinion No. 4685, Opinions of the Attorney General for 1941. However, the precise question of whether such premium payments, if begun after an officer has entered upon an existing statutory term of office, are in violation of Section 20, Article II, supra, has not heretofore been raised. The answer to the question hinges on whether or not the words "salary" and "compensation", as used in this constitutional provision, are synonymous and may be used interchangeably. This matter has been considered on several occasions by both the courts of this state and this office, and the decisions on it have not been uniform. Opinion No. 978, Opinions of the Attorney General for 1951, page 827. The then Attorney General, in Opinion No. 387, Opinions of the Attorney General for 1945, after an exhaustive analysis of the cases and opinions construing this provision, concluded that the two words in question were used interchangeably. He concluded, as stated at page 478 of the opinion, that "what the Constitution prohibits is not a change in salary, but any action of the legislature either by changing the term or compensation which would affect the salary."

Later opinions issued by this office, notably Opinion No. 978, Opinions of the Attorney General for 1951, have distinguished Opinion No. 387, supra, but have not overruled it. As stated by the then Attorney General at page 835 of Opinion No. 978, supra:

"In summarization, it definitely appears that the framers of the Constitution of 1851 did not intend the terms 'salary' and 'compensation'

to be used interchangeably or synonymously. However, I do not believe that the 1945 opinion of this office /Opinion No. 387, supra/ should be overruled. My reasoning for such conclusion is based upon the fact that in addition to the fees there involved, the county commissioners did receive a fixed salary. As heretofore pointed out in the cases of State ex rel. v. Raine /49 Ohio St. 580 (1892)/ and Lueders v. Beaman /106 Ohio St. 650 (1922)/, the officers there involved were not limited in their compensation to fees, but received, in addition thereto, such fixed salary. I conclude, however, that as to officers who do not receive any fixed salary, * * * the provisions of Article II, Section 20 of the Constitution do not preclude the General Assembly from increasing or decreasing * * * compensation during their terms of office."

The county commissioners in the instant case receive a fixed salary, as presumably do all other county officers to whom the proposed hospitalization plans would apply. I agree with the conclusion reached in Opinion No. 978, supra, that at least as regards an officer who receives a fixed salary, Opinion No. 387, supra, should not be overruled. Undoubtedly, the proposed premium payments on behalf of those county officers who come within the purview of Section 20, Article II, supra, would be an increase in their compensation, and would, in the words of Opinion No. 387, supra, "affect the salary" which they receive, in violation of this constitutional provision.

Therefore, it is my opinion and you are hereby advised that the board of county commissioners is not authorized to expend public funds for the payment of premiums on a group hospitalization plan for public officers, as provided in Section 305.171, Revised Code, which plan would begin after the commencement of the existing statutory terms of such officers, since such expenditures would be in violation of Section 20, Article II, Ohio Constitution.

OPINION NO. 69-036

Syllabus:

A coroner in his investigation of a death coming within his jurisdiction does not have the authority to apply law to the facts and determine what, if any, statute has been violated, and the legal responsibility of the persons involved.

To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio
By: Paul W. Brown, Attorney General, April 18, 1969

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

> "Is a coroner in his investigation of a death coming within his jurisdiction limited in his authority to determining the facts of the death, or does his authority extend to applying the law to the facts and determining what, if any, statute has been violated, and the legal responsibility of the persons involved?"

Section 313.06, Revised Code, states the following:

> "The coroner, his deputy, and assistants shall be available at all times for the performance of their duties as set forth in sections 313.01 to 313.22, inclusive, of the Revised Code."

Section 313.02, Revised Code, states the qualifications for coroner:

> "No person shall be eligible to the office of coroner except a physician who has been licensed to practice as a physician in this state for a period of at least two years immediately preceding his election or appointment as a coroner, and who is in good standing in his profession, or is a person who was serving as coroner on October 12, 1945."

Section 313.15, Revised Code, reads as follows:

> "All dead bodies in the custody of the coroner shall be held until such time as the coroner, after consultation with the prosecuting attorney, or with the police department of a municipal corporation, if the death occurred in a municipal corporation, or with the sheriff, has decided that it is no longer necessary to hold such body to enable

him to decide on a diagnosis giving a reasonable and true cause of death, or to decide that such body is no longer necessary to assist any of such officials in his duties."

From a reading of the above statutes, it will be noted that the county coroner is a physician who determines the cause of death of all dead bodies which have come into his custody. The coroner works in conjunction with the prosecuting attorney, who is the chief legal officer of the county.

Section 309.08, Revised Code, states the powers and duties of the prosecuting attorney to be as follows:

> "The prosecuting attorney may inquire into the commission of crimes within the county and shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party, and such other suits, matters, and controversies as he is required to prosecute within or outside the county, in the probate court, court of common pleas, and court of appeals. In conjunction with the attorney general, such prosecuting attorney shall prosecute cases arising in his county in the supreme court. In every case of conviction, he shall forthwith cause execution to be issued for the fine and costs, or costs only, as the case may be, and he shall faithfully urge the collection until it is effected or found to be impracticable to collect, and shall forthwith pay to the county treasurer all moneys belonging to the state or county which come into his possession."

Section 309.09, Revised Code, provides as follows:

> "The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries except those organized as a part of a city school district or of a municipal corporation, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code.
>
> "Such prosecuting attorney shall be the legal adviser for all township offi-

cers, and no such officer may employ other counsel or attorney, except on the order of the board of township trustees, duly entered upon its journal, in which the compensation to be paid for such legal services shall be fixed. Such compensation shall be paid from the township fund."

The above section points out that the prosecuting attorney is the legal adviser to all county officers. Since the coroner is a county officer, it is the duty of the prosecuting attorney to advise him on all legal questions and interpretations.

It is the duty of the prosecuting attorney to institute and prosecute actions in the enforcement of the laws of Ohio. Therefore, it is the prosecuting attorney's duty to apply the law to the facts and to determine what, if any, statute has been violated. The coroner, as a physician, is not qualified to make legal determinations.

Therefore, it is my opinion, and you are advised that a coroner in his investigation of a death coming within his jurisdiction does not have the authority to apply law to the facts and determine what, if any, statute has been violated, and the legal responsibility of the persons involved.

OPINION NO. 69-037

Syllabus:

Chapter 3377, Revised Code, confers no specific or implicit authority upon the Ohio Higher Education Facility Commission to repay a loan made by a private insurance company to a college, even though the ultimate purpose of such repayment may be to facilitate the building of a new college library.

To: John D. Millett, Vice Chairman, Ohio Higher Educational Facility Commission, Columbus, Ohio
By: Paul W. Brown, Attorney General, April 18, 1969

I have before me your request for my opinion which asks whether the Ohio Higher Educational Facility Commission may, pursuant to Chapter 3377, Revised Code, in order to facilitate the construction of a new college library, repay a loan made by a private insurance company by acquiring college property.

An answer to your question may be found by examining the substance of the individual sections of recently enacted Chapter 3377, supra. (Amended Senate Bill No. 453 of the 107th Ohio General Assembly).

Section 3377.02, Revised Code, reads:

"There is hereby created the Ohio higher educational facility commission for the purpose of enhancing the educational opportunities of the people of the state, thereby promoting the employment opportunities, economic welfare, public health and general welfare of the people, and for the purpose of alleviating the pressing demands upon tax supported colleges and universities by encouraging the means of instruction through provision for educational facilities at educational institutions in the manner provided in Chapter 3377. of the Revised Code. The Ohio higher educational facility commission is a body both corporate and politic, constituting an agency or instrumentality of the state and performing essential functions of the state." (Emphasis added)

Section 3377.01 (B), Revised Code, specifically mentions "libraries" as being "educational facilities" within the context of Chapter 3377, Revised Code.

Section 3377.04, Revised Code, provides in its entirety:

"The Ohio higher educational facility commission may:

"(A) Acquire by gift or purchase and hold and mortgage real estate and interests therein and personal property to be used as a project or a part thereof;

"(B) 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 division (B) of section 3377.01 of the Revised Code;

"(C) Issue bonds of the state, as provided in Chapter 3377. of the Revised Code, to provide funds for acquiring, constructing, reconstucting, furnishing, or equipping one or more projects or parts thereof;

"(D) Enter into contracts and execute all instruments necessary or appropriate to carry out the purposes of Chapter 3377. of the Revised Code;

"(E) Fix, alter, and collect rentals and other charges for the use and occupancy of a project and lease the project to educational institutions, including a contract with or the granting of an option to the lessee to purchase the project for such price as the commission in its sole discretion determines to be appropriate, after retirement or redemption, or provision therefor, of all the bonds of the issuer issued to provide funds for the project;

"(F) Retain, contract with, or employ and fix the compensation of financial consultants, appraisers, accounting experts, architects, engineers, attorneys at law, or other employees, agents, and independent contractors as are necessary in the judgment of the commission to carry out Chapter 3377. of the Revised Code and collect fees, charges, and accept gifts and appropriations to meet the expenses of employing such persons;

"(G) Pledge, assign, hypothecate, or otherwise encumber as security for the bonds, the rentals, revenues, and other income, charges, and moneys realized from the use, lease, sale, or other disposition of one or more projects or parts thereof as may be designated in the bond proceedings and enter into trust agreements or indentures of mortgage for the benefit of bondholders;

"(H) Enter into appropriate arrangements with any federal or state department or agency, county, township, municipal corporation, or other political subdivision, taxing district, or public body or agency for the planning and installation of streets, roads, alleys, water supply and distribution facilities, storm and sanitary sewage collection and disposal facilities, and other necessary appurtenances to a project;

"(I) Purchase fire and extended coverage and liability insurance for a project, insurance protecting the commission and its officers and employees against liability for damage to property or injury to or death of persons arising from the project, and any other insurance the commission may agree to provide under the bond proceedings;

"(J) Sell, lease, release or otherwise dispose of real and personal property or interests therein, or a combination thereof, acquired by the commission under authority of Chapter 3377. of the Revised Code and no longer needed for the purposes of such chapter or of the commission, and grant such easements and other rights in, over, under, or across a project as will not interfere with its use of such property. Such sale, lease, release, disposition, or grant may be made without competitive bidding and in such manner and for such consideration as the commission in its judgment deems appropriate.

"(K) Sue and be sued, implead and be impleaded;

"(L) Adopt and use an official seal;

"(M) Receive and accept from any public agency loans or grants for or in aid of a project or any portion thereof, and receive and accept loans, grants, aid, or contributions from any source of money, property, labor, or other things of value to be held, used, and applied only for the purposes for which received;

"(N) Do all other acts necessary or appropriate to carry out the purposes of Chapter 3377. of the Revised Code."

It must be noted that in the broad enabling statute, Section 3377.04, supra, no specific authority can be found for the authorization for such an act or one similar on the part of the Ohio Higher Educational Facility Commission. But it is evident that Section 3377.04, supra, gives the Ohio Higher Educational Facility Commission wide latitude in implementing its lawful projects. However, Section 3377.02, supra, presupposes that the projects of the Commission will be "enhancing the educational opportunities" of Ohio's populace.

The word "enhance" is defined in Webster's Third New International Dictionary as:

"advance, * * * to increase the worth or value of, * * *".

Interpreting the above cited definition, I can only conclude that the repayment of a loan, as in the instant situation, would not "enhance" educational opportunities. Permitting the Commission to repay this outstanding debt would not, in my opinion, be a direct enhancement of educational opportunity in Ohio, but an indirect, unauthorized means to achieve an end which is legitimate within the context of Chapter 3377, supra. I believe a Pandora's box possibly would be opened if a contrary result were reached.

Therefore, it is my opinion and you are advised that Chapter 3377, Revised Code, confers no specific or implicit authority upon the Ohio Higher Educational Facility Commission to repay a loan made by a private insurance company to a college, even though the ultimate purpose of such repayment may be to facilitate the building of a new college library.

OPINION NO. 69-038

Syllabus:

A fire department, volunteer or hired, maintained by a township may operate an ambulance purchased under authority of Section 505.37, Revised Code, to protect property and lives against damages and accidents, and such use is not limited to emergency situations in conjunction with fire protection.

To: William F. McKee, Richland County Pros. Atty., Mansfield, Ohio
By: Paul W. Brown, Attorney General, April 24, 1969

I am in receipt of your opinion request wherein you inquire as to whether or not a fire department, volunteer or hired, maintained by a township, may operate an ambulance purchased under authority of Section 505.37, Revised Code, for any emergency situation or whether such ambulance may be used only in emergency situations in conjunction with fire protection.

Section 3298-54, General Code, (predecessor to Section 505.37, Revised Code) as enacted in 1920, provided in part as follows:

> "Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents resulting therefrom. * * *" 108 Ohio Laws, Pt. II, 1152. (Emphasis added)

In 1951 Section 3298-54, General Code, was changed to read in part as follows:

> "Township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damages and accidents and may, with the approval of the specifications by the county prosecuting attorney, purchase or otherwise provide such fire apparatus, appliances, materials, fire hydrants and such water supply for fire fighting purposes as may seem to the trustees to be advisable. * * *" 124 Ohio Laws, 397. (Emphasis added)

The words "resulting therefrom" were removed from the statute and "damages and accidents" were no longer limited to those resulting from fires.

Section 505.37, Revised Code, in pertinent part, presently reads substantially as it did after the 1951 amendment, and provides as follows:

> "The board of township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damage and accidents and may, with the approval of the specifications by the prosecuting attorney, purchase or otherwise provide such fire apparatus, mechanical resuscitators or other equipment, appliances, materials, fire hydrants, and water supply for fire-fighting purposes as seems advisable to the board. Such board shall provide for the care and maintenance of fire equipment, and, for such purposes, may purchase, lease, or construct and maintain necessary buildings, and it may establish and maintain lines of fire-alarm communications within the limits of the township. The board may employ one or more persons to maintain and operate fire-fighting equipment, or it may enter into an agreement with a volunteer fire company for the use and operation of such equipment. The board may compensate the

members of a volunteer fire company on such basis and in such amount as it deems equitable.

"* * * * * * * * *"
(Emphasis added)

After the 1951 amendment, Opinion No. 2416, Opinions of the Attorney General for 1953, page 114, held:

"1. Under the provisions of Section 3298-54, General Code, township trustees, in addition to being authorized to guard against the occurrence of fires, are further authorized to protect property and lives against damages and accidents; and under such authority may acquire and operate emergency vehicles or 'rescue cars' for such purposes.

"2. Township trustees may enter into an agreement with a volunteer fire company for the operation of any such equipment as the township itself is authorized to operate, designed to protect against fires, damages and accidents."

Subsequently, Opinion No. 3066, Opinions of the Attorney General for 1962, page 437, held in part as follows:

"1. A board of township trustees may, under Section 505.37, Revised Code, furnish water of the township fire department to private citizens to protect the property and lives of such citizens where drought or other causes have resulted in an emergency situation.

"2. In such a situation, if the emergency so requires, the board of township trustees may, under Section 505.37, Revised Code, deliver such water for the use of such citizens.

"* * * * * * * * *"

Opinion No. 3332, Opinions of the Attorney General for 1962, page 793, held as follows:

"Under Sections 505.37 and 505.39, Revised Code, a board of township trustees may acquire and operate an ambulance for the purpose of protecting property and lives against damages

and accidents. (Opinion No. 2416, Opinions of the Attorney General for 1953, page 114, followed.)"

The most recent opinion relating to an interpretation of Section 505.37, Revised Code, is found in Opinion No. 560, Opinions of the Attorney General for 1963, page 570, and holds as follows:

> "Township trustees may only acquire and operate or contract for the operation of 'Life Squads' or rescue vehicles when they are used by fire departments, volunteer or hired, in conjunction with fire protection."

In addition to the guidelines heretofore set forth by the opinions cited, Section 505.443, Revised Code, became effective on September 20, 1967 and reads as follows:

> "In order to obtain ambulance service, or to obtain additional ambulance service in times of emergency, any township may enter into a contract, for a period not to exceed three years, with one or more townships, municipal corporations, or private ambulance owners, regardless of whether such townships, municipal corporations, or private ambulance owners are located within or without the state, upon such terms as are agreed to by them, to furnish or receive ambulance services or the interchange of ambulance services within the several territories of the contracting subdivisions, if such contract is first authorized by respective boards of township trustees or other legislative bodies.
>
> "Such contract may provide for a fixed annual charge to be paid at the times agreed upon and stipulated in the contract, or for compensation based upon a stipulated price for each run, call, or emergency, or the elapsed time of service required in such run, call, or emergency, or any combination thereof."
> (Emphasis added)

The legislature could have placed but did not place words of limitation on the kind of ambulance service for which the township might contract under the provisions of Section 505.443, supra, and thereby limit such ambulance service to service in conjunction with fire protection. In reflecting upon the legislative intent, it would appear inconsistent that the township itself could acquire and operate rescue vehicles or ambulances only in conjunction with fire protection, but could contract under Section 505.443, supra, for ambulance service not limited to fire

protection. As heretofore indicated, Section 505.37, supra, provides that the board of township trustees may establish all necessary regulations to protect the property and lives of the citizens against damage and accidents.

Opinion No. 560, Opinions of the Attorney General for 1963, page 570, is overruled.

Accordingly, it is my opinion and you are hereby advised that a fire department, volunteer or hired, maintained by a township may operate an ambulance purchased under authority of Section 505.37, Revised Code, to protect property and lives against damages and accidents, and such use is not limited to emergency situations in conjunction with fire protection.

OPINION NO. 69-039

Syllabus:

One who is a state senator in Ohio may also hold the office of village solicitor whether the village be in his senate district or outside of the district.

To: Joseph R. Grunda, Lorain County Pros. Atty., Elyria, Ohio
By: Paul W. Brown, Attorney General, April 29, 1969

Your request for my opinion reads as follows:

> "Whether or not it is compatible for a state senator in Ohio to also hold the positions of village solicitor for two villages, one village being situated within the senatorial district being represented by said senator, and the other village being outside of said district but within the same county as the other village. All three of the positions simultaneously held are salaried."

In response to your question it is necessary to refer to Article II, Section 4 of the Ohio Constitution. That provision is as follows:

> "No person holding office under the authority of the United States, or any lucrative office under the authority of this state, shall be eligible to, or have seat in, the general assembly; but this provision shall not extend to township officers, justices of the peace, notaries public, or officers of the militia."

In construing this provision, Opinion No. 236, Opinions

of the Attorney General for 1913, states:

> "This constitutional provision is one of several safeguards thrown about the legislative department to prevent undue influence in mental function of legislating for the state. There is a direct prohibition against a person holding office either under the authority of the United States, or a lucrative office under the authority of this state, being eligible to the general assembly. The section provides certain exceptions to this sweeping prohibition, namely: Township officers, justices of the peace, notaries public and officers of the militia. The holding of any and all other offices renders one both ineligible to, as well as causing the forfeiture of their seat in the general assembly."

Whether Article II, Section 4 of the Ohio Constitution applies to the present situation depends upon whether the position of village solicitor can be considered an "office" within the terms of the constitutional provision.

Section 733.48, Revised Code, states:

> "When it deems it necessary, the legislative authority of a village may provide legal counsel for the village, or for any department or official thereof, for a period not to exceed two years, and provide compensation for such counsel."

You will note that the constitutional prohibition applies only to those who hold an "office". The Attorney General in Opinion No. 217, Opinions of the Attorney General for 1915, on page 412 states:

> "The position of village solicitor is not an 'office'* * *."

The Opinion further reads:

> "The village solicitor being appointed by contract, fulfilling only contractual duties, serving for an indefinite term and not being obligated to take oath or give bonds, is not an 'official' within the meaning of section 4762, General Code, which stipulates that these duties shall fall upon any official serving in a similar capacity to that of prosecuting attorney or city solicitor."

Therefore, it is my opinion and you are accordingly advised that one who is a state senator in Ohio may also hold the office of village solicitor whether the village be in his senate district or outside of the district.

OPINION NO. 69-040

Syllabus:

1. It is mandatory for a local board of education to provide training and/or educational facilities and services for children with an intelligence quotient of 50 or below unless such children have been determined to be incapable of profiting substantially by further instruction as provided by Section 3321.05, Revised Code.

2. A local board of education is entitled to receive tuition from other local boards of education in those instances specifically provided for by statute.

3. There is no intelligence quotient below which a local board of education is without authority to provide classes for children.

4. Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, May 2, 1969

I have before me your request for my opinion which reads as follows:

> "1. Is it mandatory for a local board of education to provide training and/or educational facilities and services for children with an I.Q. of 50 or below?
>
> "2. If the answer to No. 1 is 'No,' then is it permissive for a local board of education to provide facilities and services to establish classes for children with an I.Q. of 50 or below?
>
> "3. If the answer to No. 1 and/or No. 2 is 'Yes,' may a local board of education charge tuition of other local boards of education for the services in the absence of a contract/agreement?

"4. Is there an I.Q. level below which a local board of education is without authority, either mandatory or permissive, to provide classes for children?

"5. Is there an age limit when considering the permissive or mandatory nature of providing classes for children with an I.Q. of 50 or below?"

School attendance is mandatory in Ohio and there is a strong public policy that free education in an appropriate school is available to every child of school age. Board of Education v. Dille, 109 Ohio App. 344 (1959). The method of excluding children of school age who are incapable of profiting substantially from education is set forth in Section 3321.05, Revised Code, as follows:

"A child of compulsory school age may be determined to be incapable of profiting substantially by further instruction.

"The state board of education may prescribe standards and examinations or tests by which such capacity may be determined, and prescribe and approve the agencies or individuals by which they shall be applied and conducted; but the capacity of a child to benefit substantially by further instruction shall be determined with reference to that available to the particular child in the public schools of the district in which he resides, and no child shall be determined to be incapable of profiting substantially by further instruction if the superintendent of public instruction, pursuant to board standards, finds that it is feasible to provide for him in such district, or elsewhere in the public school system, special classes or schools, departments of special instruction or individual instruction through or by which he might profit substantially, according to his mental capacity as so determined. In prescribing, formulating, applying, and giving such standards, examinations or tests, the state board of education may call for assistance and advice upon any other department or bureau of the state, or upon any appropriate department of any university supported wholly or partly from state appropriations.

"The result of each examination or test made with the recommendation of the agency or individual conducting the same, shall be reported to the superintendent of public instruction, who, subject to board standards, may make the determin-

ation authorized in this section. If a child is determined to be incapable of profiting substantially by further instructions, such determination shall be certified by the superintendent of public instruction to the superintendent of schools of the district in which he resides, who shall place such child under the supervision of a visiting teacher or of an attendance officer, to be exercised as long as such child is of compulsory school age. The superintendent of public instruction shall keep a record of the names of all children so determined to be incapable of profiting substantially by further instruction and a like record of all such children residing in any school district shall be kept by the superintendent of schools of such district. Upon request of the parents, guardians, or persons having the care of such child whose residence has been changed to another school district the superintendent of schools shall forward a card showing the status of such child as so determined to the superintendent of schools of the district to which the child has been moved.

"Any determination made under this section may be revoked by the state board of education for good cause shown.

"A child determined to be incapable of profiting substantially by further instruction shall not hereafter be admitted to the public schools of the state while such determination remains in force."

The predecessor to this Section, Section 7762-7, General Code, was construed in Board of Education v. State, ex rel. Goldman, 47 Ohio App. (1934). In that case, a local board of education passed a resolution excluding from school children having an intelligence quotient below 50. The father of a child excluded under this standard filed an action in mandamus. The Court considered Section 7762-7, General Code, and the other statutes governing education in the state and held that a local board of education had no authority to exclude a child from public schools under this Section. In reaching its decision, the Court found that there was a strong public policy that every child of compulsory school age be entitled to attend public schools. It also found that only the State Department of Education had authority to make the determination that a child was incapable of benefiting substantially from education. The Court stated at page 424 of its Opinion as follows:

"It is to be borne in mind, however, that not only compulsory attendance is required by our laws, but also that the right to attend our public schools belongs to the people. Education for all youth is deemed of paramount importance. It is the foundation of popular government and is considered so essential that between certain ages children must attend our schools.

> "The question arises as to where the authority to exclude a child of low mentality is vested. The question in this case is whether or not this child was legally refused admission to the schools. A careful study of Section 7762-7, General Code, leads us to the conclusion that the Department of Education may prescribe the standards, and examinations or tests, and approve the agencies or individuals by which they shall be applied and conducted, but that under that Section a determination of the question must be finally made by the Department of Education, which counsel for the Board of Education concedes means the State Department of Education. In this case the State Department of Education made no final determination. Without such final approval or determination by the Department of Education, we think that this child was not excluded in accordance with the provisions of the statute, and that the Court below was right in granting a peremptory writ of mandamus."

Each child of compulsory school age is to be afforded the opportunity to attend a proper public school unless and until the board of education makes a determination that the child is incapable of profiting substantially from such education. Until the board makes such a determination, every child of compulsory school age is entitled to the same educational opportunities. Section 3321.05, provides for an individual determination in each case. In fact, in making the determination, a capacity of the child to benefit shall be determined with reference to the education available to the particular child in the public schools of the district in which he resides.

A school board or school district is not empowered to make tuition payments, except in those instances specifically provided for by statute. Opinion No. 65-16, Opinions of the Attorney General for 1965. Some of those instances are as follows: Section 3313.64, Revised Code, provides that children who are admitted to a private or public children's home or institution but who were, prior to admission, school residents of a school district other than that in which the home or institution is located may attend school in the school district in which such home or institution is located. In situations such as this, tuition is payable by the school district in which the child resided prior to admission to such home or institution. Section 3317.08, Revised Code, provides that the political subdivision owning a tax exempt territory shall pay the tuition costs for the children residing within such tax exempt territory. Section 3323.10, Revised Code, provides that if a child who is a school resident of one school district attends special instruction classes in another district, which special instruction is needed by the child because of his handicap, then the Board of education of the district in which the class is located may require the payment of tuition by the board of education of the district in which such child is a school resident. Section 3323.01, Revised Code, provides the authority for establishing classes of special instruction for, among others, physically, emotionally, or mentally handicapped persons over the age of five. Section 3327.04, Revised Code, provides that a school district may contract with the board of another school district for admission or transportation or both of pupils into any school in such other district on terms to be agreed upon by the school boards involved.

Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.

In conclusion, it is my opinion and you are hereby advised:

1. It is mandatory for a local board of education to provide training and/or educational facilities and services for children with an intelligence quotient of 50 or below unless such children have been determined to be incapable of profiting substantially by further instruction as provided by Section 3321.05, Revised Code.

2. A local board of education is entitled to receive tuition from other local boards of education in those instances specifically provided for by statute.

3. There is no intelligence quotient below which a local board of education is without authority to provide classes for children.

4. Unless and until a determination that a child with an intelligence quotient below 50 is incapable of profiting substantially by further instruction, the age limits to be considered in determining the necessity for providing classes to such children are the same age limits which must be considered for providing classes for all children. Until such a determination is made, therefore, the only age limits which have any application to providing classes for children are the compulsory school age limits contained in Section 3321.01, Revised Code, which provides that a child between six and eighteen years of age is of compulsory school age.

OPINION NO. 69-042

Syllabus:

1. The Board of Trustees of The Ohio State University has the requisite authority to adopt the proposed Rules for the University Faculty -- 55.00. Open Housing, a copy of which is attached to this Opinion as an Appendix, upon a determination by the Board that such rules reasonably and not arbitrarily advance the Board's valid interests in housing facilities and non-discrimination with respect to the students at the University.

2. The proposed rules are outside the legal parameters of State and Federal laws with respect to certain owner-occupied dwellings insofar as the proposed rules treat discrimination based on religion or national origin, but within such parameters insofar as they treat discrimination based on race.

3. The Board of Trustees of The Ohio State University, as such,

does not have authority to supplement authority given in the Ohio Civil Rights Act.

To: The Board of Trustees, Ohio State University, Columbus, Ohio
By: Paul W. Brown, Attorney General, May 2, 1969

I have before me your request for my opinion, forwarded through Mr. Edward Q. Moulton, Secretary of the Board, regarding the proposed Rules for the University Faculty -- 55.00. Open Housing. You have enclosed with your request a copy of these proposed rules. For reference purposes and since my opinion is requested with respect to such rules, I am attaching a copy of the proposed rules to this Opinion as an Appendix.

Your request for my opinion contains three questions: (1) "whether the Board has the requisite authority to adopt the enclosed rules," (2) "whether said rules are within the legal parameters of existing State and Federal Laws and" (3) "whether the University Board of Trustees has the authority under the Constitution and Laws of the State to supplement the authority given in the Ohio Civil Rights Act."

The Ohio State University, originally named the Ohio Agricultural and Mechanical College, was created by the Legislature through an act passed on March 22, 1870. 67 Ohio Laws, 20. The pertinent provisions of this act relating to the powers of the Board of Trustees are as follows:

> "* * * * * * * * *
>
> "Sec. 2. The government of said college shall be vested in a board of trustees, * * *
>
> "* * * * * * * * *
>
> "Sec. 5. The board of trustees shall have power to adopt by-laws, rules and regulations for the government of said college; * * *
>
> "* * * * * * * * *"

The powers originally granted to the Board of Trustees have remained undiminished since the inception of the University. Sections 3335.02 and 3335.08, Revised Code, provide, respectively, that "[t]he government of the Ohio state university shall be vested in a board of nine trustees, * * *" and that "[t]he board of trustees of the Ohio state university may adopt bylaws, rules, and regulations for the government of the university."

In Pyeatte v. Board of Regents of University of Oklahoma, et al., 102 F. Supp. 407 (1951), affirmed per curiam 342 U.S. 396, in sustaining a resolution of the Board of Regents of the University of Oklahoma requiring that all undergraduate students of that University,

with certain exceptions, be required to live in university-operated housing, the Court had occasion to consider an Oklahoma statute much like Section 3335.08, supra. At 102 F. Supp. 413, the Court stated:

> "* * * The term 'government' is very broad and necessarily includes the power to pass all rules and regulations which the Board of Regents considers to be for the benefit of the health, welfare, morals and education of the students, so long as such rules are not expressly or impliedly prohibited. Rheam v. Board of Regents of University of Oklahoma, 161 Okl. 268, 18 P. 2d 535.
>
> "* * * * * * * * *"

The powers of the Board of Trustees of The Ohio State University are no less broad than the powers of the board involved in the Pyeatte case, supra. As the Court stated in that case, at 102 F. Supp. 415:

> "The state has a decided interest in the education, wellbeing, morals, health, safety and convenience of its youth."

In another case, which has bearing on the issues considered in this Opinion, it was recognized that the governing body of a state university "can validly impose a wide variety of regulations." Sigma Chi Fraternity v. Regents of the University of Colorado, 258 F. Supp. 515 (1966), at 526. In that case, a social fraternity was placed on probation, with loss of rushing and pledging privileges, because the national fraternity with which it was affiliated had suspended a Chapter on a different campus for pledging a Negro student. The Court in the Sigma Chi case, supra, upheld the action of the Regents of the University of Colorado in placing the local Chapter of the fraternity on probation.

The Court stressed the point that the interest of the Regents that was being advanced was not invalid and stated, at page 527:

> "Indeed, the Supreme Court of the United States has in recent years recognized the importance of elimination of racial discrimination in educational institutions."

Based upon the lines of authority represented by Pyeatte, supra, and Sigma Chi, supra, it seems clear that the governing body of a state university has a valid and continuing interest in the issues of housing facilities for students and non-discrimination with respect to students. It follows that the Board of Trustees of The Ohio State University, under its specific rule-making authority (Section 3335.08, Revised Code), has the power and authority to adopt and promulgate rules advancing its interest in these issues, with

accompanying sanctions to be imposed against students who do not abide by such rules. See also, in this respect only, State, ex rel. Weaver v. Board of Trustees of Ohio State University, 126 Ohio St. 290 (1933).

Having arrived at the conclusion that it is within the authority of the Board to enact rules to advance the Board's substantial interest in housing facilities and non-discrimination and in order to answer your question, i.e., "authority to adopt the enclosed" Rules (See Appendix), it is necessary to determine the tests to be applied. The Weaver case, supra, referred to rules which are "reasonable" and "not arbitrary." The Court in the Sigma Chi case, supra, refers to action which is not "an excessive use of power." Perhaps the most explicit statement of the test was made by the Court in the Pyeatte case, supra, at page 415:

> "If there is any state of facts which tends to support the regulatory measures and such measures are not clearly unreasonable or arbitrary, then the * * * regulation will be upheld as being constitutional."

The answer to your question, based upon the foregoing, lies in the application of the above tests to the proposed rules. If the Board of Trustees determines that the proposed rules will advance the interests of the Board in housing facilities and non-discrimination with respect to students at the University and, in view of the degree of gravity and extent of the problem based upon their factual knowledge or factual knowledge available to them, determines that the proposed rules are reasonable and not arbitrary in dealing with the problem, then the Board has the requisite authority to adopt the proposed rules (as set out in the Appendix).

Although you have not asked my opinion regarding the application of the proposed rules, I feel compelled to add a caveat in respect to the application at this point. The proposed rules, with respect to its application to students provides only that (See 55.02. f., Appendix):

> "Any charge that a student has violated this rule shall be subject to a hearing, in conformity with due process, by the appropriate tribunal charged with the adjudication of violations of University rules."

The most recent and governing court decisions on the rights of students whose right to remain in school is questioned have recognized the applicability of constitutional due process. The leading case in this area is St. John Dixon, et al. v. Alabama State Board of Education, et al., 294 F. 2d, 150 (1961). Since it is now recognized that students are entitled to the constitutional guarantee of due process, and since the above quoted portion of the proposed rules do not specify the steps necessary to protect that substantial guarantee, the Board of Trustees should consider the procedures to

be followed to insure that this fundamental right of students guaranteed by both the United States and Ohio Constitutions is adequately protected.

The rules appear to me to be extremely broad. Certainly the proposed rules are so much broader than the problem they seek to cure that I foresee difficulties in administration. These difficulties may lead to disappointment of the proponents of the rules when they later evaluate its results as opposed to their expectations.

The answer to your second question regarding whether or not the proposed rules are within the parameters of existing State and Federal laws presents a paradox in the present state of the law. Section 55.02.(a)(1) of the proposed rules (See Appendix) reads as follows:

> "No student shall become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list, as defined in subsection d. This section shall not apply to students living with their parents."

Section 4112.01, Revised Code, which is part of the Ohio Civil Rights Act, provides in pertinent part as follows:

> "* * * * * * * * *
>
> "(J) 'Housing accommodations' includes any building or structure or portion thereof which is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or leased for commercial housing.
>
> "(K) 'Commercial housing' means housing accommodations held or offered for sale or rent by a real estate broker, salesman, or agent, or by any other person pursuant to authorization of the owner, by the owner himself, or by legal representatives, but does not include any personal residence offered for sale or rent by the owner or by his broker, salesman, agent, or employee.
>
> "(L) 'Personal residence' means a building or structure containing living quarters occupied or intended to be occupied by no more than two individuals, two groups, or two families living independently of each other and occupied by the owner thereof as a bona fide residence for himself and any members of his family forming his household. If a personal residence is vacated by the owner it shall continue to be considered

owner-occupied until occupied by someone other than the owner or until sold by the owner, whichever occurs first.

"* * * * * * * * *"

Title 42, United States Code, Section 3603, which is part of the Federal Civil Rights Act of 1968, provides in pertinent part as follows:

"* * * * * * * * *

"(b) Nothing in section 3604 of this title (other than subsection (c) shall apply to -

"(1) any single-family house sold or rented by an owner: Provided, That such private individual owner does not own more than three such single-family houses at any one time: Provided further, That in the case of the sale of any such single-family house by a private individual owner not residing in such house at the time of such sale or who was not the most recent resident of such house prior to such sale, the exemption granted by this subsection shall apply only with respect to one such sale within any twenty-four month period: Provided further, That such bona fide private individual owner does not own any interest in, or is there owned or reserved on his behalf, under any express or voluntary agreement, title to or any right to all or a portion of the proceeds from the sale or rental of, more than three such single-family houses at any one time: Provided further, That after December 31, 1969, the sale or rental of any such single-family house shall be excepted from the application of this sub-chapter only if such house is sold or rented (A) without the use in any manner of the sales or rental facilities or the sales or rental services of any real estate broker, agent, or salesman, or of such facilities or services of any person in the business of selling or renting dwellings, or of any employee or agent of any such broker, agent, salesman, or person and (B) without the publication, posting or mailing, after notice, of any advertisement or written notice in violation of section 3604 (c) of this title; but nothing in this proviso shall prohibit the use of attorneys, escrow agents, abstractors, title companies, and other such professional assistance as necessary to perfect or transfer the title, or

"(2) rooms or units in dwellings containing living quarters occupied or intended to be occu-

pied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters as his residence.

"(c) For the purposes of subsection (b) of this section, a person shall be deemed to be in the business of selling or renting dwellings if -

"(1) he has, within the preceding twelve months, participated as principal in three or more transactions involving the sale or rental of any dwelling or any interest therein, or

"(2) he has, within the preceding twelve months, participated as agent, other than in the sale of his own personal residence in providing sales or rental facilities or sales or rental services in two or more transactions involving the sale or rental of any dwelling or any interest therein, or

"(3) he is the owner of any dwelling designed or intended for occupancy by, or occupied by, five or more families."

It should be noted that the word "family," as used in the foregoing Federal statute, is defined by Section 3602(c) thereof to include a single individual.

As is evident, both the Federal and State statutes relating to fair housing exempt certain partially owner-occupied premises from their respective operations under stated conditions. The proposed rule, in effect, does not, and in that sense is outside the parameters of the statutes in question.

In 1968, however, the Supreme Court of the United States decided the case of Jones v. Mayer Co., 392 U.S. 409; 20 L. Ed. 2d, 1189. The case arose as a result of the refusal of the Mayer Co. to sell a home to petitioner Jones for the sole reason that petitioner Jones was a Negro. The Court, in deciding in favor of petitioner Jones, grounded its decision on an 1866 statute, 42 U.S.C., Sec. 1982, which reads as follows:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."
(Emphasis supplied)

The Court went to great lengths to point out that Section 1982, supra, was not a comprehensive "open housing" law and distinguished its operation from the recently enacted Civil Rights Act of 1968, supra, on the grounds that Section 1982, supra, dealt only with racial

discrimination and not with discrimination on the grounds of religion or national origin. In addition, the Court pointed out that it did not deal "specifically" with discrimination in connection with the sale or rental of a dwelling. The Court did hold, however, at 20 L. Ed. 2d, 1192, as follows:

> "We hold that §1982 bars all racial discrimination, private as well as public, in the sale or rental of property, and that the statute, thus construed, is a valid exercise of the power of Congress to enforce the Thirteenth Amendment."
> (Emphasis by the Court)

Thus the paradox in answer to your second question. The proposed rule is beyond the parameters of Federal and State laws insofar as it treats discrimination on the basis of religion or national origin regarding certain owner-occupied dwellings, but within the parameters of Federal (and necessarily State) law insofar as it treats discrimination on the basis of race.

In addition to the paradox raised by your second question, I have serious concern over the application of the proposed rule to homeowners in the University area who are subject to its application. These citizens, like the students, are entitled to the full measure of protection of the constitutional guarantees of due process. The proposed rules contemplate charges brought by University officials or students to be investigated by the Special Assistant for Student Affairs, using student investigators, with charges, if any, being brought before a Panel consisting of six faculty members and five students. (See 55.03. and 55.04. Appendix).

It may be that such a procedure and such a Panel will not result in the protection of the fundamental rights of a homeowner against whom a complaint is lodged. No court has directly ruled on the issue with respect to a rule such as that proposed, however. I am constrained to point out that the State of Ohio, through its legislative branch, has established a Civil Rights Commission (Section 4112.03, Revised Code), with more than ample power and authority to carry out the investigative and hearing functions contemplated by the rules. There is little question as to protection of constitutionally guaranteed rights of individuals in the operation of the Commission. It is objective and not directly related to the University in its operation. The Commission and its operation have already been recognized as constitutional, at least sub silentio, by the courts of this State. See Gegner v. Graham, 1 Ohio App. 2d, 422 (1964). Finally, the orders of the Commission are, by law, subject to judicial review. Section 4112.06, Revised Code.

The lengths to which the State has gone to foster non-discrimination, while protecting the rights of all citizens, and the machinery established for accomplishing those aims should be considered by the Board before adopting the proposed rules, at least with respect to the methods established by such rules for investigating and hearing complaints. As previously stated, the rights of the individual homeowners subject to the proposed rules are no less important than those of the students at the University.

Your third question refers to the authority of the Board of Trustees to "supplement the authority given in the Ohio Civil Rights Act." The only "authority given" in the Ohio Civil Rights Act (Sections 4112.01 to 4112.99, Revised Code,) is given to the Ohio Civil Rights Commission (Sections 4112.04, et seq., Revised Code,) with respect to enforcing the Act, and to common pleas courts. (Section 4112.06, Revised Code,) with respect to judicial review of orders of the Commission. Since no authority is given to the Board of Trustees of The Ohio State University, as such, under the Ohio Civil Rights Act, it follows that the Board has no authority to "supplement the authority given," In addition, any such supplementation would be a matter for the General Assembly, in whom the legislative power of the State of Ohio is vested. Article II, Section 1, Constitution of Ohio.

Accordingly, it is my opinion and you are hereby advised:

1. The Board of Trustees of The Ohio State University has the requisite authority to adopt the proposed Rules for the University Faculty -- 55.00. Open Housing, a copy of which is attached to this Opinion as an Appendix, upon a determination by the Board that such rules reasonably and not arbitrarily advance the Board's valid interests in housing facilities and non-discrimination with respect to the students at the University.

2. The proposed rules are outside the legal parameters of State and Federal laws with respect to certain owner-occupied dwellings insofar as the proposed rules treat discrimination based on religion or national origin, but within such parameters insofar as they treat discrimination based on race.

3. The Board of Trustees of The Ohio State University, as such, does not have authority to supplement authority given in the Ohio Civil Rights Act.

APPENDIX

Rules for the University Faculty

The Faculty Council on March 11, 1969, approved the following proposed new section to the Rules for the University Faculty--55.00. Open Housing, upon the recommendation of the Committee on Rules. These rules will be included in the reprinted copy of the Rules for the University Faculty upon approval by the Board of Trustees.

55.00. Open Housing

55.01. The Open Housing Policy.

It is the policy of The Ohio State University that rental housing be available to all of the University's students on equal terms without regard to race, religion, color, or national origin.

55.02. The Open Housing Rule.

a. (1) No student shall become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list, as defined in subsection d. This section shall not apply to students living with their parents.

(2) Upon a finding by the appropriate tribunal that a student has violated this subsection, with knowledge that the premises are on the discriminatory housing list, he shall be liable to recorded probation or suspension.

b. (1) If a student becomes a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list without knowledge of that fact he shall not continue his residence therein for more than thirty days after he received notice to vacate from the Office of the Vice President for Student Affairs unless he is bound by a lease for a longer time, in which case he shall not continue his residence therein beyond the term required by such lease. The prohibition of this subsection does not apply to a student who resides in the premises at the time of the finding of discrimination, and who remains in the same unit.

(2) Upon a finding by the appropriate tribunal that a student has violated this subsection, he shall be liable to recorded probation or suspension.

c. (1) No student shall enter into any arrangement to become a resident of any premises (whether registered or unregistered with the University) which is on the discriminatory housing list.

(2) Upon a finding by the appropriate tribunal that a student has violated this subsection, with knowledge that the premises are on the discriminatory housing list, he shall be liable to recorded probation or suspension.

d. The discriminatory housing list shall consist of those premises which the Open Housing Panel has ordered to be placed on such list for the periods prescribed pursuant to Rule 55.06.

e. A student is a person who is registered for course credit toward a University degree or who is seeking housing in preparation for registration and candidacy.

f. Any charge that a student has violated this rule shall

be subject to a hearing, in conformity with due process, by the appropriate tribunal charged with the adjudication of violations of University rules.

55.03. The Open Housing Panel.

The Open Housing Panel shall consist of:

Six faculty members selected by vote of the Faculty Council, at least one of whom shall be a member of the Faculty Council;

Three undergraduate student members selected by vote of the Student Assembly;

One graduate student member selected by vote of the Council of Graduate Students;

One professional student member selected by vote of the Professional College Council.

Faculty members of the Open Housing Panel shall be designated for a term of two years. The initial Panel shall decide by lot which three faculty members shall serve for a one-year term so that three positions will become vacant each year. Student members of the Panel shall serve for a term of one year. Faculty and student members may serve successive terms.

Vacancies shall be filled in the same manner that the position which has become vacant was filled; those appointed to fill vacancies shall serve out the term of the member they are replacing.

The Open Housing Panel shall elect its own chairman and such other officers as the members deem appropriate. The Panel shall keep a record of each case consisting of a brief description of the facts, the decision (including any concurring or dissenting opinion), and the vote of each member. These case records shall be filed with the Vice President for Student Affairs, who shall maintain them, and make them available to the Panel, parties, and the public at reasonable times in accordance with a published schedule.

The Open Housing Panel shall adopt its own rules of procedure not inconsistent with these provisions.

55.04. Complaints.

a. Any student, the Vice President for Student Affairs, or the Director of Housing may lodge a complaint that an owner, landlord or the authorized agent of either has discriminated in the rental of housing to students on the grounds of race, religion, color or national origin with the Office of the Special Assistant for Student Affairs within six months of the alleged act of discrimination.

b. The complaint shall contain a statement of the acts alleged to constitute the discrimination.

c. The Special Assistant shall use student investigators for the purpose of determining whether owners, landlords, or their authorized agents discriminate on the grounds of race, religion, color, or national origin in the rental of housing.

55.05. The Hearing.

a. Upon receipt of a complaint, the Special Assistant shall:

(1) Request the Open Housing Panel to convene a public hearing to determine whether the named owner, landlord, or an agent of either, discriminated against the University's students in the rental of housing on the basis of race, religion, color, or national origin.

(2) Serve by registered mail upon the landlord, owner, or authorized agent in charge of the premises a copy of the complaint and of this rule.

b. The Special Assistant or the complainant may present evidence material to a determination of the charges and cross-examine witnesses, with or without the aid of counsel, at a hearing convened for the purpose by the Panel.

c. The Open Housing Panel shall, on the written request of the Special Assistant, conduct a public hearing no earlier than ten days after the making of the complaint and its notice of hearing to the Special Assistant, the complainant, and the party charged with discrimination, who shall be advised of his right to appear, to be represented by counsel, to present witnesses, and to cross-examine witnesses who testify.

55.06. Findings.

After considering only the evidence admitted at the hearing, the Open Housing Panel shall determine whether the owner, landlord, or the authorized agent of either of them has refused to rent on equal terms without regard to race, religion, color, or national origin to all of the University's students. A refusal to rent shall include those situations where the owner, landlord, or authorized agent refuses to rent premises to a student who is gathering evidence to determine whether the owner, landlord, or authorized agent discriminates within the meaning of this rule.

If the Open Housing Panel finds by a preponderance of the evidence that there has been such a discriminatory refusal to rent, it shall enter a determination that the premises be placed on the discriminatory housing list.

Any premises placed on the discriminatory housing list shall remain on the list for the period prescribed by the Open Housing Panel, but it shall not be less than one year nor more than three years. However, in extreme circumstances, the Panel may prescribe a period of less than one year provided that its reasons are included in the record provided for in Rule 55.03. No premises shall be removed from the discriminatory housing list until: (a) the period prescribed by the Open Housing Panel has ended, (b) a written pledge of compliance with this rule has been received from the landlord or owner of the premises, and (c) with reference to premises which are rented through an agent, (i) the owner or landlord has given the agent written instructions to comply with this rule, (ii) has submitted a copy of said instructions to the Open Housing Panel, (iii) has received the Open Housing Panel's approval of such instructions, and (iv) has pledged in writing to give such approved written instructions to all future agents.

If the Panel finds that the landlord or owner has breached a pledge previously given under this section the premises shall be placed on the discriminatory housing list for a period of not less than three years.

55.07. The Discriminatory Housing List.

The Vice President for Student Affairs, upon receipt of a decision of discrimination by the Open Housing Panel shall place the premises wherein the discrimination took place on the discriminatory housing list. He shall also notify the owner or landlord of the premises that none of the University's students will be permitted to become residents of or make any arrangement to become a resident of the building for the period of time determined by the Open Housing Panel.

Any owner or landlord, or authorized agent who knowingly rents or enters into any arrangement to rent housing to a student in premises which he has been notified are on the discriminatory housing list shall, after a hearing establishing this fact, have the term of listing extended for three additional years. A complaint of violation of this section shall be processed in accordance with Rules 55.04. and 55.05.

55.08. Notice.

The discriminatory housing list, divided by geographical area, shall be published periodically in the Lantern, and shall be included in the registration materials of every student together with a copy of this rule.

A copy of this rule shall be conspicuously published in a newspaper of general circulation at least five times during the month preceding the commencement of each quarter. A copy of this rule shall also be sent or delivered to each landlord who is known to the University to have student tenants in Franklin County.

The Lantern shall not accept or print any advertisement for rental of any building on the discriminatory housing list.

OPINION NO. 69-043

Syllabus:

A municipal police officer can not execute a search warrant outside the boundaries of his municipality because such an act can not be authorized by the legislative body of a municipality, within its power of local self-government, and has not been authorized by state statute.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: Paul W. Brown, Attorney General, May 7, 1969

I have before me your request for my opinion which asks whether or not a municipal police department officer can execute a search warrant outside the corporation limits of his municipality.

Section 3, Article XVIII, Ohio Constitution, reads:

> "Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local, police, sanitary and other similar regulations, as are not in conflict with general laws."

The powers and duties of a municipal police officer are defined in Section 737.11, Revised Code, which reads:

> "The police force of a municipal corporation shall preserve the peace, protect persons and property, and obey and enforce all ordinances of the legislative authority thereof, and all criminal laws of the state and the United States. The fire department shall protect the lives and property of the people in case of fire. Both the police and fire departments shall perform such other duties as are provided by ordinance. The police and fire departments in every city shall be maintained under the civil service system."

Although Section 737.11, supra, does not restrict the municipal police officer to the municipality itself in the performance of his duties, interpretation of the phrase "powers of local self-government" in Section 3, Article XVIII, supra, may dictate that such a restriction be imposed.

In State, ex rel. Canada v. Phillips, 168 Ohio St. 191 (1958), the seventh syllabus reads in part:

> "Where a municipality establishes and operates a police department, it may do so as an exercise of the powers of local self-

government conferred upon it by sections 3 and 7 of Article XVIII of the Constitution;

"* * * * * * * * *"

In Beachwood v. Board of Elections, 167 Ohio St. 369 (1958), the first syllabus stated:

> "The power of local self-government granted to municipalities by Article XVIII of the Ohio Constitution relates solely to the government and administration of the internal affairs of the municipality, and, in the absence of a statute conferring a broader power, municipal legislation must be confined to that area." (Emphasis added)

A municipality, which can not legislate outside municipal boundaries by its own authority, similarly, can not empower its policeofficers to act outside the same municipal boundaries. One of my predecessors, when considering the question of whether a municipal policeman would be eligible for disability benefits for injuries sustained outside the municipality, noted in Opinion No. 50, Opinions of the Attorney General for 1959, at page 27:

> "Generally, the responsibility of a police department does not extend beyond the corporate limits of the municipality which supports it."

Several exceptions to this general rule are then mentioned by my predecessor, but I believe authority for any exception would have to be derived from the state itself. It is well established that a municipal police officer is an officer of the state, appointed under authority given by the state. State, ex rel. Speller v. Painesville, 13 O.C.C. (N.S.) 577 (1910), aff'd, 85 Ohio St. 483 (1912); De Romedis v. Yorkville, 21 O.N.P. (N.S)340 (1918).

Thus, a special state statute could conceivably vest municipal police with such extra-territorial power. Section 2935.02, Revised Code, permits a municipal police officer holding a warrant for the arrest of an accused person to pursue and arrest the accused individual in any county, which is one of the exceptional situations described by my predecessor in Opinion No. 50, supra. I can not find statutory authority, express or implied, for any territorial enlargement of a municipal police officer's power to execute a search warrant outside the municipality.

Therefore, it is my opinion and you are advised that a municipal police officer can not execute a search warrant outside the boundaries of his municipality because such an act can not be authorized by the legislative body of a municipality, within its power of local self-government, and has not been authorized by state statute.

OPINION NO. 69-045

Syllabus:

1. It is necessary to have competitive bidding, pursuant to Section 307.86, Revised Code, before entering into a group health insurance contract authorized by Section 305.171, Revised Code, if the premium cost for such insurance is in excess of two thousand dollars.

2. There is no statutory limitation on the term of a group health insurance contract authorized by Section 305.171, Revised Code.

3. Community mental health and retardation board employees (when such board is within a single county), county agricultural experiment farm employees, and county mental retardation board employees, are all "county employees" for the purposes of Section 305.171, Revised Code.

4. Non-teaching employees of a county school board are not within the scope of Section 305.171, Revised Code, as they may receive group health insurance pursuant to Section 3313.02, Revised Code.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, May 16, 1969

I have before me your request for my opinion which reads in essence:

> "1. Is it necessary to have competitive bidding before entering into a contract to procure group insurance as provided in Section 305.171, Revised Code?
>
> "2. May the contract be entered into for only one (1) year, or three (3) years, or five (5) years, or may it be entered into for an indefinite period?
>
> "3. Are employees in the following departments considered County employees and within the scope of the statute:
>
> "a. Community Mental Health and Retardation Program Employees.
>
> "b. County Agricultural Experiment Farm Employees.
>
> "c. County Mental Retardation Board Employees.
>
> "d. County School Board Non-teaching Employees."

Section 305.171, Revised Code, provides:

"The board of county commissioners of any county may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state."

Section 307.86, Revised Code, provides:

"Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, physician, professional engineer, surveyor, or appraiser by or on behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code, at a cost in excess of two thousand dollars, except as otherwise provided in section 307.02, 3501.301 [3501.30.1], 3505.13, 5543.19, 5555.71, 5713.01, or 6137.05, of the Revised Code, shall be obtained through competitive bidding. However, competitive bidding is not required when:

"(A) The board of county commissioners, by a unanimous vote of its members, makes a determination that a real and present emergency exists and such determination and the reasons therefor are entered in the minutes of the proceedings of the board, when:

"(1) The estimated cost is less than ten thousand dollars or

"(2) There is actual physical disaster to structures;

"(B) Such purchase consists of supplies or a replacement or supplemental part or parts for a product or equipment owned or leased by the county and the only source of supply for such supplies, part, or parts is limited to a single supplier;

"(C) Such purchase is from the federal government, state, another county or contracting authority thereof, a board of education, township, or municipal corporation;

"(D) Such lease is a renewal of a lease for electronic data processing equipment services or systems."

(Emphasis added)

Since group health insurance would be "purchased", as the

word is used in Section 307.86, supra, and does not fall within the enumerated exceptions to such statute, it follows that competitive bidding would be necessitated, assuming the premium cost was "in excess of two thousand dollars".

There is no time limitation set by statute on such a group health insurance contract, but insurance contracts of this type are generally for a one-year term and renewable automatically upon payment of premium after the one year elapses.

You ask next whether certain groups of employees are "county employees" within the scope of Section 305.171, supra. Employees of the community mental health and retardation board are hired by the executive director of such board, pursuant to Section 340.04 (E), Revised Code. The executive director is appointed by the aforementioned board itself, consisting of three members, two-thirds of whom are appointed by the county commissioners and one-third of whom is appointed by the director of the state department of mental hygiene, pursuant to Section 340.02, Revised Code. Primary responsibility for appropriating money for the salaries of such employees is vested with the county commissioners pursuant to Section 340.07, Revised Code, although the state reimburses the community board for appropriation in certain specialized areas. But primary control and remunerative responsibility for employees of a community mental health and retardation board remains with the county. From this, I can only conclude that employees of a community mental health and retardation board are "county employees", within the scope of Section 305.171, supra.

Section 903.09, Revised Code, provides:

> "The board of county commissioners of any county may establish an experiment farm within such county."

Funds are appropriated for such farm by means of a county-wide property tax levied by the county commissioners, pursuant to Section 903.12, Revised Code, and by the issuance of notes or bonds of the county by the county commissioners pursuant to Section 903.13, Revised Code. The experiment farm is then purchased with the approval of the majority of the county commissioners and the majority of the board of control of the state agricultural experiment station, pursuant to Section 903.14, Revised Code. Section 903.15, Revised Code, provides:

> "The equipment of an experiment farm shall consist of such buildings, drains, fences, implements, livestock, stock feed, and teams as shall be deemed necessary by the board of control of the Ohio agricultural experiment station at any time for the successful work of such farm, and the initial equipment shall be provided by the county in which the farm is established, together with a sufficient fund to pay the wages of the laborers required to conduct the work of such farm during the first season. The board of county commissioners shall appropriate for the payment of the wages of laborers employed in the management of such farms and for the purchase of supplies, materials, implements, livestock, stock feed, and teams, and for the construction of buildings, drains, and fences necessary to the proper

conduct of such farms, such sums not exceeding two thousand dollars annually for any farm, as may be agreed upon between such board of county commissioners and the board of control." (Emphasis added)

Section 903.17, Revised Code, vests in the director of the state agricultural experimental station the management and power of appointing the employees of a county experiment farm. But the county commissioners are still vested with the responsibilities of establishing and appropriating funds for such a farm. Since the initiative for an experiment farm and the source of farm employee salary payments are county oriented, I believe they are properly classified as "county employees" for the purposes of Section 305.171, supra.

The seven member county board of mental retardation is created pursuant to Section 5126.01, Revised Code, which provides that five members of such board shall be appointed by the county commissioners and the other two shall be the probate judge of such county or his delegate and one other person appointed by such probate judge. Section 5126.03 (C), Revised Code, provides that a county board of mental retardation shall:

> "Employ such personnel and provide such service, facilities, transportation, and equipment as are necessary;"

Section 5126.03 (D), supra, provides:

> "(D) Provide such funds as are necessary for the operation of training centers and workshops.
>
> "Any county board of mental retardation may enter into a contract with another such board of another county or with a public or nonprofit agency or organization of the same or another county, to provide the training center, workshop facilities and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.
>
> "The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section."

Thus, principal control of the composition of the county mental retardation board and responsibility for appropriating funds for the functioning of such board is vested in the county commissioners. The retardation board, in turn, appoints all employees, but in all its activities is subject to the rules and regulations, and standards of the state commissioner of mental hygiene, pursuant to Section 5126.03, supra. This situation is another instance of a board primarily county oriented and funded, but subject to state directives. I conclude that employees of the county mental retardation board are county employees within the scope of Section 305.171, supra. This result is tacitly assumed in Opinion No. 68-140, Opinions of the Attorney General for 1968, which considered a related question.

The status of non-teaching employees of a county school board

with respect to Section 305.171, supra, need not be considered as such employees' group health insurance coverage is authorized by Section 3313.202, Revised Code, which provides:

> "The board of education of a school district may procure and pay all or part of the cost of group term life hospitalization, surgical, or major medical insurance, or a combination of any of the foregoing types of insurance or coverage, whether issued by an insurance company or a hospital service association duly licensed by this state, covering the teaching or nonteaching employees of the school district, or a combination of both, or in the case of hospitalization, surgical, or major medical insurance, the dependent children and spouses of such employees; provided if such coverage affects only the teaching employees of the district such coverage shall be with the consent of the majority of such employees of the school district, or if such coverage affects only the nonteaching employees of the district such coverage shall be with the consent of a majority of such employees. If such coverage is proposed to cover all the employees of a school district, both teaching and nonteaching employees, such coverage shall be with the consent of a majority of all the employees of a school district. As used in this section 'teaching employees' means any person employed in the public schools of this state in a position for which he is required to have a certificate pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code. 'Nonteaching employees' as used in this section means any person employed in the public schools of the state in a position for which he is not required to have a certificate issued pursuant to sections 3319.22 to 3319.31, inclusive, of the Revised Code."

Therefore, it is my opinion and you are advised:

1. It is necessary to have competitive bidding, pursuant to Section 307.86, Revised Code, before entering into a group health insurance contract authorized by Section 305.171, Revised Code, if the premium cost for such insurance is in excess of two thousand dollars.

2. There is no statutory limitation on the term of a group health insurance contract authorized by Section 305.171, Revised Code.

3. Community mental health and retardation board employees (when such board is within a single county), county agricultural experiment farm employees, and county mental retardation board employees, are all "county employees" for the purposes of Section 305.171, Revised Code.

4. Non-teaching employees of a county school board are not within the scope of Section 305.171, Revised Code, as they may receive group health insurance pursuant to Section 3313.02, Revised Code.

OPINION NO. 69-046

Syllabus:

1. A board of township trustees may, pursuant to Section 505.60, Revised Code, purchase hospitalization, surgical, major medical or sickness and accident insurance or any combination thereof for township officers and employees and their immediate dependents on a group basis only.

2. When a board of township trustees purchases group insurance in accordance with Section 505.60, Revised Code, the word "group" refers to the township officers and employees and their immediate dependents.

3. Section 505.60, Revised Code, does not authorize the purchase of life insurance by a board of township trustees, however, the inclusion of an accidental death benefit in a sickness and accident policy does not make the policy one of life insurance. Further, a fixed monthly total disability accident indemnity, a fixed monthly partial disability accident indemnity, a fixed monthly total disability and confinement sickness indemnity, or a fixed monthly total disability and non-confinement sickness indemnity are permissible sickness and accident insurance benefits which may be included in a plan purchased by township trustees pursuant to Section 505.60, Revised Code.

4. Disability insurance covering "loss of time" due to a disability is authorized under the provisions of Section 505.60, Revised Code.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, May 16, 1969

Before me is your request for my opinion which raises several questions concerning the construction and interpretation of Section 505.60, Revised Code, which provides as follows:

> "The board of township trustees of any township may procure and pay all or any part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for township officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state."

Your questions will be considered in the order set forth in the request.

> "1. If the township elects to purchase insurance under the provisions of the above statute, is the township limited to purchasing group insurance for hospitalization, surgical, major medical, or sickness and accident insurance, or may the word 'group' as used in section 505.60, Revised Code,

be interpreted to modify only the word 'hospitalization,' so that, as for example, the sickness and accident policy purchased need not be a group sickness and accident policy?"

In my opinion a township may only purchase the enumerated coverages or combinations thereof on a group basis. Each of the coverages set forth are available on a group basis or group plan. Group insurance is a multi-party contract involving the insurer, an employer or analogous person, the insured and the beneficiaries. (See Section 3917.01, et seq., Revised Code, relating to life insurance and Section 3923.12, Revised Code, infra, relating to sickness and accident insurance.) Thus the word "group" when used to describe insurance has a special or significant meaning. The legislature is presumed to have used the word "group" in the technical or special sense when there is no indication that another meaning was intended. (See 50 O. Jur. 2d Statutes, p. 180, Sec. 201.) Therefore, as used in Section 505.60, supra, it permits a township to purchase the named coverages on a group basis only.

"2. In either event, if group insurance is purchased by the township for the officers and employees of the township and their immediate dependents, may the group for which the insurance premium is paid consist of (a) only the township officers and employees and their immediate dependents, or may the group consist of (b) the Ohio State Association of Township Trustees and Clerks, or (c) any group of which the officer or employee of the township is a member such as the employees of the plant at which the officer or employee is also employed?"

It appears clear that the "group" in Section 505.60, supra, means the township officers and employees. This is the traditional employer-employee "group" as authorized, defined and provided for in Section 3923.12 (A) (1), Revised Code, as follows:

"(A) Group sickness and accident insurance is that form of sickness and accident insurance covering groups of persons, with or without one or more of their dependents and members of their immediate families, and issued upon one of the following bases:

"(1) Under a policy issued to an employer, who shall be deemed the policyholder, insuring at least ten employees of such employer, for the benefit of persons other than the employer;

"* * * * * * * * *

"(B) As used in this section:

"(1) 'Employees' includes the officers, managers, and employees of the employer, the partners, if the employer is a partnership, the officers, managers, and employees of subsidiary or affiliated corporations of a corporation employer, and the individual proprietors, partners, and employees of indi-

viduals and firms, the business of which is controlled by the insured employer through stock ownership, contract, or otherwise.

"(2) 'Employer' includes any municipal or governmental corporation, unit, agency, or department thereof, as well as private individuals, partnerships, and corporations."

It is obvious that the legislature intended to make a fringe benefit available to township officers and employees. Amended Substitute House Bill No. 586 (132 Ohio Laws, S 586), effective November 24, 1967, states the purpose of Section 505.60, supra, as follows:

"* * * to permit boards of * * * township trustees * * * to pay all or part of the cost of group hospitalization, surgical, major medical, or sickness and accident insurance or any combination thereof for * * * township officers and employees * * * and their dependents."

(Emphasis added)

In the furtherance of this purpose, it is my opinion that the "group" must consist of a township's officers and employees. This interpretation provides the most direct way of accomplishing the legislative purpose, i.e., to make available fringe benefits for officers and employees.

"3. If it is possible to purchase group insurance with the Ohio State Association as a group, in addition to the premium paid to the insurance company, may the township pay to the secretary of the county chapter of the association a certain sum of money as compensation to cover the cost of collecting and forwarding the premiums from the various townships whose officers are members of the county chapter of the Ohio Association of Township Trustees and Clerks, as well as postage and other related costs?"

My answer to question two (2) above makes consideration of this question unnecessary.

"4. May the policy of insurance purchased include an accidental death benefit, or does such a benefit convert the policy into a policy of life insurance, and if so, would this be a type of insurance for which provision is not made under section 505.60 of the Revised Code? If it can be assumed that a township is not authorized by section 505.60, R.C., to purchase life insurance, may a sickness and accident policy provide for one or more of the following for a period of time limited as to each in the policy: (1) a fixed monthly total disability accident indemnity, (2) a fixed monthly partial disability accident indemnity, (3) a fixed monthly total disability and confinement sickness indemnity, (4) a fixed monthly total disability and non-confinement sick-

ness indemnity. If life insurance may not be purchased under the terms of section 505.60 of the Revised Code, how is it possible to determine that the sickness and accident insurance policy purchased is not a life insurance policy with sickness and accident benefits?"

Section 505.60, supra, does not authorize the purchase of life insurance. The inclusion of an accidental death benefit in a sickness and accident policy does not make the policy one of life insurance. On the contrary, Section 3923.01, Revised Code, provides as follows:

> "As used in sections 3923.01 to 3923.22, inclusive, of the Revised Code, 'policy of sickness and accident insurance' includes any policy or contract of insurance against loss or expense resulting from the sickness of the insured, or from the bodily injury or death of the insured by accident, or both." (Emphasis added)

Thus it is clear that a contract or provision providing a benefit for death by accident is sickness and accident insurance.

The benefits enumerated in question four, namely;

(1) a fixed monthly total disability accident indemnity,

(2) a fixed monthly partial disability accident indemnity,

(3) a fixed monthly total disability and confinement sickness indemnity,

(4) a fixed monthly total disability and non-confinement sickness indemnity

are permissible sickness and accident insurance benefits and any or all of them could be included or provided in a plan purchased by township trustees pursuant to Section 505.60, supra.

If a policy purports to insure a life or the lives of persons within the group other than for accidental death, such insurance is life insurance. The fact that the company issuing the policy is a life insurance company is not controlling because many life companies write sickness and accident insurance. The policy provisions control. If you have any doubts you should contact the Department of Insurance which has the policy forms on file.

> "5. May disability insurance covering loss of income as well as hospital, medical and gap filler medicare coverage be purchased under the provisions of Section 505.60 of the Revised Code?"

If by "loss of income" you mean loss of time due to a disability, such coverage is authorized as noted in my answer to question four (4) above. If you mean insurance against a loss of income due to labor disputes, job interruption, dismissal or similar causes, it is my opinion that such insurance is not a permissible purchase under Section 505.60, supra, because there is no provision therefor.

Therefore, it is my opinion and you are hereby advised that:

1. A board of township trustees may, pursuant to Section 505.60, Revised Code, purchase hospitalization, surgical, major medical or sickness and accident insurance or any combination thereof for township officers and employees and their immediate dependents on a group basis only.

2. When a board of township trustees purchases group insurance in accordance with Section 505.60, Revised Code, the word "group" refers to the township officers and employees and their immediate dependents.

3. Section 505.60, Revised Code, does not authorize the purchase of life insurance by a board of township trustees, however, the inclusion of an accidental death benefit in a sickness and accident policy does not make the policy one of life insurance. Further, a fixed monthly total disability accident indemnity, a fixed monthly partial disability accident indemnity, a fixed monthly total disability and confinement sickness indemnity, or a fixed monthly total disability and non-confinement sickness indemnity are permissible sickness and accident insurance benefits which may be included in a plan purchased by township trustees pursuant to Section 505.60, Revised Code.

4. Disability insurance covering "loss of time" due to a disability is authorized under the provisions of Section 505.60, Revised Code.

OPINION NO. 69-047

Syllabus:

The requirements for publication of the annual financial report of a county are to be found in Section 319.11, Revised Code, rather than Section 117.06, Revised Code.

To: Robert Webb, Ashtabula County Pros. Atty., Jefferson, Ohio
By: Paul W. Brown, Attorney General, May 19, 1969

I am in receipt of your request for my opinion relative to the financial report required to be prepared by a county auditor for the preceding fiscal year. You ask whether the requirements for publication of said report are to be found in Section 319.11, Revised Code, or Section 117.06, Revised Code. You point out that one of the essential differences is whether said report should be published in two newspapers in the county or one.

Section 319.11, Revised Code, became effective in its present form September 18, 1961, and provides as follows:

> "The county auditor shall, on or before the thirty-first day of March of each year, prepare a financial report of the county for the preceeding fiscal year in such form as prescribed by the bureau of inspection and

supervision of public offices. The auditor shall publish such report once in two newspapers of general circulation published in the county, except in cases where only one newspaper is published in a county then only one publication is required, and if there are no newspapers in such county, then in the newspaper of an adjoining county having the largest circulation in such county.

"No county auditor shall fail or neglect to make or publish the report as required of him by this section. The prosecuting attorney of any such county shall prosecute any auditor who so neglects or refuses to make or publish the required report." (Emphasis added)

Section 319.99, Revised Code, provides for a fine of not more than one hundred dollars for violation of Section 319.11, supra.

Section 117.06, Revised Code, became effective in its present form November 21, 1967, and provides as follows:

"'A financial report of each public institution or taxing district for each fiscal year shall be made in accordance with forms prescribed by the chief inspector and supervisor of public offices.'

"The report shall be certified by the proper officer or board and filed with the bureau of inspection and supervision of public offices within sixty days after the close of the fiscal year. At the time of filing of the report with the bureau of inspection and supervision, the chief fiscal officer shall publish such report in a newspaper published in the political subdivision or taxing district and if there is no such newspaper, then in a newspaper of general circulation in the political subdivision or taxing district.

"The report shall contain the following:

"(A) Amount of collections and receipts, and accounts due from each source;

"(B) Amount of expenditures for each purpose;

"(C) Income of each public service industry owned or operated by a municipal corporation and the cost of such ownership or operation;

"(D) Amount of public debt of each taxing district, the purpose for which each item of such debt was created, and the provision made for the payment thereof. The substance of the report shall be published at the expense of the state in an annual volume of statistics, which shall be submitted to the governor. The auditor

of state shall transmit the report to the general assembly at its next session."

(Emphasis added)

It will be noted that the reports required by both statutes, supra, are to be on such forms as are prescribed by the Bureau of Inspection and Supervision of Public Offices. The Bureau of Inspection and Supervision of Public Offices is an entity created pursuant to the provisions of Chapter 117, Revised Code, and has as its principal function the inspection and supervision of the accounts and reports of all state offices, as provided in said Chapter, including every state educational, benevolent, penal, and reformatory institution, and the offices of each taxing district or public institution in the state. The Auditor of State is by statute the Chief Inspector and Supervisor of Public Offices. Section 117.01, Revised Code.

Present Section 319.11, supra, resulted from the repeal of former Sections 319.09 and 319.10, Revised Code, which latter statutes formerly established the requirements of a financial report to be prepared by the county auditor and established the requirements for publication of said report. Section 319.11, supra, as it existed prior to the incorporation of some of the provisions of Sections 319.09 and 319.10, supra, into same, contained only the provision requiring the county prosecutor to prosecute a county auditor who neglected or refused to make or publish the required report.

The emphasized portion of present Section 117.06, supra, resulted from the repeal of former Section 117.19, Revised Code, the publication requirements of said letter statute being incorporated into the then existing Section 117.06 to form present Section 117.06, Revised Code.

Section 117.19, Revised Code, as it existed prior to repeal, specifically stated in its last sentence that said section (and therefore the publication requirement contained therein) did not apply to a county auditor.

The clear intention of the General Assembly prior to November 21, 1967, therefore, was to exempt the county auditor from the publication requirements of Chapter 117, Revised Code, realizing that the Auditor was subject to the requirements of Sections 319.09 and 319.10, Revised Code. When Section 117.19 became, in part, present Section 117.06, supra, the punitive provisions of the former statute were not carried over into the new law, nor was the exemption as to the county auditor.

The legislative history of the present statutes under consideration indicates a desire on the part of the General Assembly to combine some of the former statutes for purposes of clarification. The fact that the exemption contained in former Section 117.19, Revised Code, was not carried over into present Section 117.06, supra, does not, in my opinion, imply that the legislative intent was to place the reporting and publication obligations of the county auditor under said section, which holding would result in a repeal of present Section 319.11, supra, by implication. Rather, the two statutes involved can be construed in pari materia.

Section 117.06, supra, deals with financial reports

from "public institutions" or "taxing districts". Research has failed to disclose any authority in Ohio for the proposition that a county could be considered a "public institution". The statutory definition of a "taxing district" is contained in Section 5711.01 (E), Revised Code, and reads as follows:

> "'Taxing District' means, in the case of property assessable on the classified tax list and duplicate, a municipal corporation of the territory in a county outside the limits of all municipal corporations therein; in the case of property assessable on the general tax list and duplicate, a municipal corporation or township, or part thereof, in which the aggregate rate of taxation is uniform."

It is clear that a county, as such, is not a "taxing district" within the above definition and therefore is not within the meaning or intent of Section 117.06, supra.

In connection with this subject, I note two Opinions issued by predecessors of mine in office; Opinion No. 1758, Opinions of the Attorney General for 1928, and Opinion No. 120, Opinions of the Attorney General for 1957. Both Opinions noted concerned themselves with special statutes regarding annual reports vis a vis the general requirements of Section 117.06, Revised Code, or the General Code predecessor to said statute. The former Opinion held that the general statute controlled because of language in the special statute relating to publication of notices and reports by municipal corporations to the effect that publication was to be made in accordance with said special statute "unless otherwise specifically directed by statute," the predecessor to Section 117.06, Revised Code, relating to financial reports being held to "otherwise direct." The latter Opinion held that Section 507.07, Revised Code, relating to reports by township clerks, had been rendered obsolete in light of certain other sections of the Code and that therefore Section 507.07, supra, should be regarded as being repealed by implication and Section 117.06, supra, should be regarded as controlling as far as the financial report of townships was concerned. Neither of these Opinions affects the rationale or holding of this Opinion, since it is possible to give full effect to Section 319.11, Revised Code, without doing violence to either the letter or spirit of Section 117.06, Revised Code.

It is therefore my opinion, and you are hereby advised that the requirements for publication of the annual financial report of a county are to be found in Section 319.11, Revised Code, rather than Section 117.06, Revised Code.

OPINION NO. 69-048

Syllabus:

If a county proposes to purchase insurance, competitive bidding is required if the cost is in excess of two thousand dollars. (Opinion No. 69-045, Opinions of the Attorney General for 1969, approved and followed.)

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, May 26, 1969

Before me is your request for my opinion concerning the necessity for competitive bidding when a county proposes to purchase insurance. Section 307.86, Revised Code, provides in pertinent part as follows:

> "Anything to be purchased, leased, leased with an option or agreement to purchase, or constructed, including, but not limited to, any product, structure, construction, reconstruction, improvement, maintenance, repair, or service, except the services of an accountant, architect, attorney at law, physician, professional engineer, surveyor, or appraiser by or on behalf of the county or contracting authority, as defined in section 307.92 of the Revised Code, at a cost in excess of two thousand dollars, except as otherwise provided in section 307.02, 3501.301, 3505.13, 5543.19, 5555.71, 5713.01, or 6137.05, of the Revised Code, shall be obtained through competitive bidding.* * *
>
> "* * * * * * * * *"
>
> (Emphasis added.)

Insofar as purchases of group insurance coverage pursuant to Section 305.171, Revised Code, are concerned, Section 307.86, supra, requires competitive bids if the cost is in excess of $2000.00. (See Opinion No. 69-045, Opinions of the Attorney General for 1969.)

There is no reason why insurance purchases should be exempt from competitive bidding unless there is a specific statutory exemption. The exemption in Section 307.86, supra, relate to personal or professional services requiring special skills or abilities. However, the thing or product being purchased is "insurance" not "professional services" and insurance purchases are not exempt.

Therefore, it is my opinion and you are hereby advised that if a county proposes to purchase insurance, competitive bidding is required if the cost is in excess of two thousand dollars. (Opinion No. 69-045, Opinions of the Attorney General for 1969, approved and followed.)

OPINION NO. 69-049

Syllabus:

1. The county commissioners may not authorize a county board of mental retardation to enter into a group health insurance contract, since only the county commissioners themselves may enter into a group health insurance contract pursuant to Section 305.171, Revised Code.

2. The county commissioners may enter into only such a group health insurance contract which is uniform for all county employees in all departments pursuant to Section 305.171, Revised Code.

To: J. Warren Bettis, Columbiana County Pros. Atty., Lisbon, Ohio
By: Paul W. Brown, Attorney General, May 26, 1969

I have before me your request for my opinion which reads in pertinent part:

> "1. May the county commissioners authorize the Board of Mental Retardation to enter into a contract with an insurance company other than the one now in force and applicable to other county employees? Or on the other hand, must there be a uniform policy for all county employees in all departments?
>
> "2. In the event your answer to the first question is in the affirmative, may the Board of Mental Retardation provide for coverage of sickness and accident insurance as provided by Revised Code Section 305.171 when the same type of coverage is not provided and paid for by the county commissioners for other county employees?
>
> "3. In the event your answer to both questions 1 & 2 is in the affirmative, may the county auditor pay the premium for the insurance from the moneys collected by the county commissioners from the levy now in full force and effect or must the commissioners pay for this coverage from the general fund of the county?"

Section 305.171, Revised Code, provides as follows:

> "The board of county commissioners of any county may procure and pay all or any part of the cost of <u>group</u> hospitalization, surgical, major medical, or sickness and accident insurance or a combination of any of the foregoing types of insurance or coverage for county officers and employees and their immediate dependents, whether issued by an insurance company or a hospital service association duly authorized to do business in this state." (Emphasis added.)

Section 305.171, supra, makes it clear that only county commissioners may enter into a contract for the purchase of group insurance for county employees. Since a county board of mental health and retardation has no statutory authority to purchase group health insurance, such group insurance may be purchased for employees of a board of mental health and retardation by the county commissioners only. I have recently opined that employees of a county mental health and retardation board are "county employees" within the meaning of Section 305.171, supra. Opinion No. 69-045, Opinions of the Attorney General for 1969.

The next related question is whether the county commissioners may enter into a group insurance contract other than the one now in force for the benefit of employees of a mental health and retardation board, or whether there must be a uniform policy for all county employees in all departments, pursuant to Section 305.171, supra.

"Group insurance" is defined as the coverage of a number of individual persons by one comprehensive policy. Adkins v. Aetna Life Insurance Co., 310 W. Va. 362, 43 S.E. 2d, 372. I can conclude only that the group referred to in Section 305.171, supra, is the entire number of county employees. I am convinced that the legislature desired one uniform group health insurance policy for all county employees, without regard to the various health insurance policy terms which may be negotiated by the county commissioners pursuant to Section 305.171, Revised Code. This result is dictated because of the possible iniquities which would arise with respect to different groups of county employees if several policies were purchased. Also, if more than one policy were contracted for by the county commissioners, there would be increased premium cost per person as each policy would encompass fewer people.

Section 3923.12 (C) (3), Revised Code, provides:

> "(C) Each such [sickness and accident insurance] policy shall contain in substance the following provisions:
>
> "* * * * * * * * *
>
> "(3) A provision that to the group originally insured may be added from time to time eligible new employees or members, their dependents, or members of their immediate families, in accordance with the terms of the policy."

Thus, provision is made for the mandatory coverage of any new county employees under any policy now in force, which negates a possible justification for having another policy for new county employees.

Since the response to your first question is in the negative, your second and third questions need not be considered, but I call your attention to Opinion No. 68-140, Opinions of the Attorney General for 1968, which is relevant to your third question.

Therefore, it is my opinion and you are advised that:

1. The county commissioners may not authorize a county

board of mental retardation to enter into a group health insurance contract, since only the county commissioners themselves may enter into a group health insurance contract pursuant to Section 305.171, Revised Code.

2. The county commissioners may enter into only such a group health insurance contract which is uniform for all county employees in all departments pursuant to Section 305.171, Revised Code.

OPINION NO. 69-050

Syllabus:

County commissioners and township trustees have no authority to require an individual to remove hedges, fences, or trees located entirely on private property that obstruct the view at intersections.

To: Neil M. Laughlin, Licking County Pros. Atty., Newark, Ohio
By: Paul W. Brown, Attorney General, May 27, 1969

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

> "What rights other than by appropriation proceedings does the County Commissioners or the Township Trustees have to require an individual to remove hedge fences, trees, etc. located on private property that obstruct the view at intersections?"

Your specific question relates to obstructions located on private property. However, in order to establish a frame of reference, a discussion of obstructions located within or along the boundaries of public roadways is necessary.

Section 971.27, Revised Code, allows the cultivation of hedges or line fences "on the line" of public highways, together with a protective fence and reads as follows:

> "An owner or occupant of land bordering upon a public road or highway, except a street or alley in a municipal corporation, or through which a public road or highway passes, may set, plant, and cultivate a hedge or live fence on the line of such road or public highway, and place on the margin of such road a protection fence, not to occupy more than six feet of such margin. Such protection fence, when placed opposite a live fence or hedge, set or planted, may remain for seven years.
>
> "The board of township trustees may grant permission in writing to the owner of the hedge or live fence, described in this section, to continue the protection fence as long as is necessary."

The height and width of said objects are restricted by Section 971.28, Revised Code, which states in pertinent part:

> "The owner of a hedge fence on a partition line, or along a public highway, shall not permit it to remain of a greater height or width than six feet, for a longer period than six months, or leave the cuttings from it on the public highway for more than ten days.

Likewise, the planting of trees and shrubs is permitted by Section 5529.11, Revised Code, subject to approval by the county engineer or township trustees. This section reads as follows:

> "The director of highways may, by a permit in writing, authorize the owners of property adjoining inter-county and state highways, at their own expense, to locate and plant trees and shrubs along such highways, subject to his approval as to kind, size, and location. The county engineer shall have the same authority on county roads and the board of township trustees on township roads."
> (Emphasis added)

It may be noted that wherever the code provides for removal of highway obstructions, the particular section refers to the obstruction as being either wholly or partially within the public right-of-way. Nowhere in the code is there mention of the removal of obstructions on private property, with the singular exception of Section 5547.04, Revised Code, to which you referred in your letter. This section provides as follows:

> "The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.
>
> "* * * * * * * * *
>
> "All advertising or other signs and posters erected, displayed, or maintained on, along, or near any public highway, and in such a location as to obstruct, at curves or intersecting roads, the view of drivers using such highway, are obstructions, but this section has no application to crossing signs erected in compliance with section 4955.33 of the Revised Code, at the crossings of highways and railroads.
>
> "* * * * * * * * *"
> (Emphasis added)

Be that as it may, Opinion No. 1751, Opinions of the Attorney General for 1928, clearly states that the above section of the code relates only to posters and signs. Indeed, even where Section 971.28, supra, has been violated, my predecessor, in Opinion No. 535, Opinions of the Attorney General for 1917, Volume 2, stated that the only remedy under that section is damages.

It is well established that the owner of land abutting on a

highway possesses the same rights in a tree located within a public right-of-way as he has in the land itself, so long as the purpose thereof is not incompatible with the use of the right-of-way. Phifer v. Cox, 21 Ohio St. 248, 8 Am. Rep. 58. And the court in Schuerzler v. Cleveland, Medina, 2d, S.E.R.C., 25 O.C.C. (N.S.) 401, 35 CD 292, held that where a fence, located within a public highway, does not interfere with public travel on the highway, one does not have the right to abate the nuisance unless he can show a peculiar injury. This is precisely the point in issue here.

Therefore, it is my opinion and you are hereby advised that county commissioners and township trustees have no authority to require an individual to remove hedges, fences, or trees located entirely on private property that obstruct the view at intersections.

OPINION NO. 69-051

Syllabus:

1. A probate court may not require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to the issuance of a marriage license.

2. A probate court may not refuse to issue a marriage license on the ground of a present inability to support a family.

3. A probate court may not refuse to issue a marriage license for the reason that there is money due for child support of a previous marriage.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, May 27, 1969

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

> "1. May the Probate Court require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to issuing a marriage license? If so, may the court require the applicant to furnish the evidence?
>
> "2. May the court refuse to issue a marriage license to persons who already have more than one child being supported by the government and may the court require evidence of some reasonable present ability to support under the clause, 'no legal impediment to their marriage'.
>
> "3. May the court require those persons previously married to prove an arrearage for child support of a previous marriage as a prerequisite for a license?"

The right to marry is a basic and sacred right long recognized and regulated by the laws of civilized nations. The most

recent decision in this area affirming this right was the U.S. Supreme Court landmark case of Loving v. Virginia, 388 U.S. 1 (1967), 18 L. Ed. 2d, 1010, 87 S. Ct. 1817, wherein the anti-miscegenation laws of Virginia were declared unconstitutional as being repugnant to the Fourteenth Amendment. This right is subject to regulation by the state, but only in certain cases where one of the license applicants is under a "legal disability." See, for example, State v. Wilcox, 26 Ohio N.P. (n.s.) 343, regarding the prohibition against the marriage of a juvenile.

The "legal disabilities" involved in your first question are set forth in Title 31, Revised Code, specifically in Section 3101.06, which provides as follows:

> "No marriage license shall be granted when either of the applicants is a habitual drunkard, imbecile or insane person, is under the influence of an intoxicating liquor or narcotic drug, or is infected with syphilis in a form that is communicable or likely to become communicable."

You have asked whether a probate court may require the evidence of an I.Q. test or other similar test as a prerequisite to the issuance of a marriage license. I believe the reply must be in the negative and may be answered forthrightly by referring to the powers of the court to issue or deny a marriage license based on the results of certain tests as authorized in Chapter 3101, Revised Code. The only examination required by the Revised Code as a prerequisite to the issuance of a marriage license is found in Section 3101.05, Revised Code, which requires that a serological test be given to determine the existence or nonexistence of syphilis. Nowhere in the statutes do I find authority for any other type of prerequisite test.

I do not deny the court's jurisdiction to inquire of an individual's competency to marry in a proceeding properly before the court; however, I must conclude that an I.Q. or other similar test is not contemplated by the Revised Code and may not be required prior to the issuance of a marriage license.

Regarding your second question, the term "no legal impediment to their marriage", found in the marriage certificate, anticipates only those impediments referred to in Section 3101.01, Revised Code, concerning minors and persons with a living spouse, and Section 3101.06, supra.

The answer to your third question, likewise, can be answered by again utilizing the authority of Sections 3101.01 and 3101.06, supra. Obviously, the impediments listed in these two sections do not include the situation where there is money due for child support of a previous marriage.

Therefore, it is my opinion and you are hereby advised:

1. A probate court may not require the evidence of an I.Q. test or other similar test to prove mental capacity as a prerequisite to the issuance of a marriage license.

2. A probate court may not refuse to issue a marriage license on the ground of a present inability to support a family.

3. A probate court may not refuse to issue a marriage license for the reason that there is money due for child support of a previous marriage.

OPINION NO. 69-052

Syllabus:

1. When a re-elected County Treasurer dies more than fifteen days before the end of his term of office, the vacancy shall be filled pursuant to Subsection (A) of Section 305.02, Revised Code.

2. For the reason that there is no provision made in the law to permit an appointment to be made for the purpose of filling vacancies in the office of County Treasurer spanning more than part of one term, the county central committee shall appoint someone to fill such second vacancy if it occurs because of death before the term began, pursuant to Subsections (A) and (B) of Section 305.02, Revised Code.

To: David A. Cutright, Ross County Pros. Atty., Chillicothe, Ohio
By: Paul W. Brown, Attorney General, May 28, 1969

You have directed two questions to me for my opinion. They are as follows:

> "First, where a county treasurer is elected in November, 1968, and dies in April, 1969, prior to the commencement of this term on September 1, 1969, under the provisions of subsection (B) of Section 305.02, Ohio Revised Code, does the county central committee make two appointments in such case, one for the period ending August 31, 1969 (the unexpired term) and one for the period commencing September 1, 1969 (the beginning of the new term)?
>
> "Second, if a new county treasurer is elected for the unexpired term in the general elections to be held in November, 1970, when would his term commence? Would it commence on the first Monday of September, 1971, under the provisions of Section 321.01, Ohio Revised Code?"

Section 27, Article II, Constitution, provides as follows:

> "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in this Constitution; and in these cases, the vote shall be taken 'viva voce.'"

There appear to be no constitutional specifications for the filling of vacancies in the office of County Treasurer other than Section 1, Article X, Constitution, which reads as follows:

> "The General Assembly shall provide by general law for the organization and government of counties and may provide by general law alternative forms of county government.* * *"

Pursuant thereto, the General Assembly has provided the only answer to your questions and it is complete in Section 305.02, Revised Code. This being a very difficult factual situation to apply the law, which has in this case been made and provided, we must, at the outset, emphasize the fact that you have a vacancy presently existing in the office of County Treasurer for an unexpired term which ends August 31, 1969. Dealing with the term of an appointee to the office of County Treasurer, the Constitution provides in Section 2, Article XVII:

> "* * *All vacancies in other elective offices shall be filled for <u>the unexpired term</u> in such manner as may be prescribed by law." (Emphasis added.)

On the day following, there will be another vacancy occurring.

In the first instance you are required to invoke Subsection (A) of Section 305.02, Revised Code, which reads as follows:

> "(A) If a vacancy in the office of county commissioners, prosecuting attorney, county auditor, county treasurer, clerk of the court of common pleas, sheriff, county recorder, county engineer, or coroner <u>occurs more than forty days before the next general election for state and county officers, a successor shall be elected at such election for the unexpired term unless such term expires within one year immediately following the date of such general election</u>.
>
> "In either event, the vacancy shall be filled as provided in this section and the appointee shall hold his office until a successor is elected and qualified." (Emphasis added.)

Having accomplished this act, the office has an incumbent until the expiration of the term as is required above. (Section 2, Article XVII, <u>supra</u>.)

On the first of September, 1969, another vacancy occurs for which is provided Subsection (B) of Section 305.02, Revised Code, which reads in pertinent part as follows:

> "* * *<u>except that if such vacancy occurs because of the death, resignation, or inability to take office of an officer-elect whose term has not yet begun</u>, an appointment to take such office at the beginning of the term shall be made by the central committee of the political party with which such officer-elect was affiliated." (Emphasis added.)

This last quotation makes no mention of the time to be served by the appointee, but Subsection (A) is in pari materia with Subsection (B) and must be considered applicable.

It is, therefore, my opinion, in answer to your questions, that:

1. When a re-elected County Treasurer dies more than fifteen days before the end of his term of office, the vacancy shall be filled pursuant to Subsection (A) of Section 305.02, Revised Code.

2. For the reason that there is no provision made in the law to permit an appointment to be made for the purpose of filling vacancies in the office of County Treasurer spanning more than part of one term, the county central committee shall appoint someone to fill such second vacancy if it occurs because of death before the term began, pursuant to Subsections (A) and (B) of Section 305.02, Revised Code.

OPINION NO. 69-053

Syllabus:

The County Recorder may index a Notice of Cancellation of Articles of Incorporation in a fashion to be decided by him in the exercise of sound discretion, and the instrument may be recorded in any existing record or in one established by the County Recorder for the express purpose of recording the Notice of Cancellation of Articles of Incorporation.

To: Rudolph E. Battista, Carroll County Pros. Atty., Carrollton, Ohio
By: Paul W. Brown, Attorney General, May 28, 1969

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

> "1. When the County Recorder receives, pursuant to Section 5733.20, Ohio Revised Code, a Notice of Cancellation of Articles of Incorporation by the Secretary of State properly certified by him, is this a recordable instrument, or one entitled to record in the County Recorder's Office?
>
> "2. If this is a recordable instrument how should this instrument be indexed and in what record should the same be recorded?"

Section 317.06, Revised Code, provides that the County Recorder shall keep five separate sets of records: (A) a record of deeds; (B) a record of mortgages; (C) a record of powers of attorney; (D) a record of plats, and (E) a record of leases. This Section also provides that certain instruments shall be recorded therein. The instrument in question is not mentioned.

Provision is also made in various sections of the Code for

recording certain instruments. With respect to the corporation law, for example, Section 1701.80, Revised Code, pertaining to the adoption of a merger agreement, provides that a copy of the certificate evidencing said merger agreement "may be filed for record in the office of the county recorder of any county in this state, * * *. Such copy shall be recorded in the records of deeds."

The statute in question, however, i.e., Section 5733.20, Revised Code, does not provide for either mandatory or permissive recording of a Notice of Cancellation of Articles of Incorporation, but states merely that the Notice shall be filed. The document in question, therefore, is a proper one for permanent record in the sense that that term is used in ordinary usage as meaning a written memorandum of an official action which memorandum is maintained as evidence of the action taken. The document in question is such a "record" and is entitled to be treated as such by the County Recorder quite apart from its status as constructive notice vel non.

Your second question relating to how should this instrument be indexed and in what record should the same be recorded is not answered by a reading of the statutes or decisional law of this state. There are no restrictions placed upon the County Recorder with respect to the filing of a document such as the one in question.

Accordingly, it is my opinion and you are hereby advised that the County Recorder may index a Notice of Cancellation of Articles of Incorporation in a fashion to be decided by him in the exercise of sound discretion, and the instrument may be recorded in any existing record or in one established by the County Recorder for the express purpose of recording the Notice of Cancellation of Articles of Incorporation.

OPINION NO. 69-054

Syllabus:

It is not necessary for a board of township trustees to advertise, in accordance with Sections 5549.21 and 5575.01, Revised Code, for the purchase of gasoline in bulk for consumption in township vehicles even though such purchases may exceed $1000.00 within the course of one year.

To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio
By: Paul W. Brown, Attorney General, June 4, 1969

Your request for my opinion reads as follows:

> "Several of the Board of Township Trustees in our county have contracted with oil companies for the bulk purchase of gasoline in operating the township trucks, graders and other vehicles. These contracts have been entered into by soliciting quotations and the State Examiner's Office has questioned the propriety of township purchasing bulk gasoline in this manner, and have advised

some of the township clerks that it is necessary for them to purchase gasoline pursuant to Section 5749.21 /sic/ of the Revised Code of the State of Ohio and to advertise for the purchase of this gasoline if the amount is in excess of $1000.00 in any one year.

"Would you please furnish us with your opinion as to whether or not it is necessary for the Board of Township Trustees to advertise for the purchase of bulk gasoline to be used in the various township vehicles when such purchases exceed $1000.00 with the course of one year."

I assume that the statutory provision to which you intend to refer in your letter is Section 5549.21, Revised Code, relating to the purchase of machinery, materials and supplies, and the employment of labor, necessary in constructing, reconstructing, maintaining and repairing roads and culverts within a township. I further assume that you intend to use the word "gasoline" in your letter in the broader sense of "fuel" for motor vehicles, and that all the motor vehicles in question are used within a township for the purposes enumerated in Section 5549.21, supra, which provides in pertinent part as follows:

"The board of township trustees may purcase or lease such machinery and tools as are necessary for use in constructing, reconstructing, maintaining and repairing roads and culverts within the township * * *. It may purchase such material and employ such labor as is necessary for carrying into effect this section, or it may authorize the purchase or employment of such material and labor by one of its number, or by the township highway superintendent, at a price to be fixed by the board. All payments on account of machinery, tools, material and labor shall be made from the township road fund. All purchases of materials, machinery, and tools, shall, where the amount involved exceeds one thousand dollars, be made from the lowest responsible bidder after advertisement as provided in Section 5575.01 of the Revised Code. * * *"

Section 5575.01, Revised Code, establishes the requirements of competitive bidding as follows:

"In the maintenance and repair of roads the board of township trustees may proceed either by contract or force account. When it proceeds by contract the contract shall, if the amount involved exceeds one thousand dollars, be let by the board to the lowest responsible bidder after advertisement for bids once, not leter than two weeks prior to the date fixed for the letting of such contract, in a newspaper published in the county but if there is no such paper published in the county, then in one having general circulation in the township. If the amount involved is one

thousand dollars or less, the contract may be let without competitive bidding.* * *

"Before undertaking the construction or reconstruction of a township road, the board shall cause to be made by the county engineer an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost.* * *"
(Emphasis added.)

Motor vehicle fuel might arguably fall within the meaning of "material", as that word is used in Section 5549.21, supra, if that statute were read alone. However, when it is read in conjunction with Section 5575.01, Revised Code, which statute not only prescribes the procedure for competitive bidding to be followed pursuant to Section 5549.21, supra, but relates generally to the same subject area, i.e., the maintenance and repair of roads, as Section 5549.21, supra, it becomes apparent that the Legislature did not intend the word "material" to include motor vehicle fuel. As the above excerpt of Section 5575.01, supra, indicates, "material" and "fuel" are listed separately in that statute, and I must presume that the Legislature imtended to treat these two enumerated categories separately, not only in Section 5575.01, supra, but also in Section 5549.21, supra. "Fuel" is not listed as one of the categories subject to competitive bidding pursuant to Section 5549.21, supra.

It is, therefore, my opinion and you are hereby advised that it is not necessary for a board of township trustees to advertise, in accordance with Sections 5549.21 and 5575.01, Revised Code, for the purchase of gasoline in bulk for consumption in township vehicles even though such purchases may exceed $1000.00 within the course of one year.

OPINION NO. 69-055

Syllabus:

1. Tax levies made under authority of Section 509.01, Revised Code (township police constable), Section 5705.06 (F), Revised Code (township road and bridge), Section 5573.13, Revised Code (township road fund), and Section 5573.21, Revised Code (township road district fund), are to be made upon all the taxable property within the township, including the taxable property within any municipal corporations within such township. Such levies are subject to the ten-mill limitation prescribed by Section 5705.02, Revised Code.

2. Tax levies made under authority of Section 5575.10, Revised Code, are to be made upon all the taxable property of the township outside any municipal corporation or part thereof, not exceeding, in the aggregate, two mills in any one year upon each dollar of the valuation of such property.

To: Richard J. Wessel, Butler County Pros. Atty., Hamilton, Ohio
By: Paul W. Brown, Attorney General, June 4, 1969

Your letter requesting my opinion states in part:

"The trustees of Lemon Township in Butler County, Ohio, have requested that this office seek an opinion from your office regarding the interpretation of the law regarding taxes to be collected within the ten mill limitation.

"It appears that the full inside millage is assessed and collected only in the Village of Monroe, which lies within Lemon Township. Beyond the corporate limits of the village, only 9.18 mills is being collected.

"The trustees' specific question is: Is there a method whereby the trustees may levy all or some part of the remaining 0.82 mills for the benefit of the township police, and/or the township road and bridge fund."

Your letter refers to a levy or levies within the ten-mill limitation. Section 5705.02, Revised Code, reads:

"The aggregate amount of taxes that may be levied on any taxable property in any subdivision or other taxing unit shall not in any one year exceed ten mills on each dollar of tax valuation of such subdivision or other taxing unit, except for taxes specifically authorized to be levied in excess thereof. The limitation provided by this section shall be known as the 'ten-mill limitation,' and wherever said term is used in the Revised Code, it refers to and includes both the limitation imposed by this section and the limitation imposed by Section 2 of Article XII, Ohio Constitution."

Section 5705.01, Revised Code, reads in pertinent part:

"As used in sections 5705.01 to 5705.47, inclusive, of the Revised Code:

"(A) 'Subdivision' means any county, municipal corporation, township, township police district * * *

"(B) 'Municipal corporation' means all municipal corporations, including those which have adopted a charter under Article XVIII, Ohio Constitution.

"(C) 'Taxing authority' * * * means, * * * in the case of a municipal corporation, the council or other legislative authority of such municipal corporation; * * * in the case of a township, the board of township

trustees; and in the case of a township police district, * * * the board of township trustees of the township in which such district is located.

"* * * * * * * * *

"(H) 'Taxing unit' means any subdivision or other governmental district having authority to levy taxes on the property in such district, * * * including * * * road districts * * *.

"* * * * * * * * *

"(J) 'Tax list' and 'tax duplicate' mean the general tax lists and duplicates prescribed by sections 319.28 and 319.29 of the Revised Code.

"(K) 'Property,' as applied to a tax levy, means taxable property listed on such general tax lists and duplicates."

A village is a municipal corporation. A village, a township, and a township police district are each a subdivision, and a road district is a taxing unit within the meaning of such terms as defined by Section 5705.01, Revised Code.

Any tax authorized and levied by a subdivision or taxing unit must be levied uniformly upon all taxable property within such subdivision or taxing unit unless otherwise provided by law. The ten-mill limitation refers to the aggregate amount that may be levied by all subdivisions and taxing units collectively upon the taxable property located within such subdivisions and taxing units.

Assuming the facts stated in your letter, the taxable property located within the village which is within the township is being taxed the full ten mills. No further tax may be levied within the ten-mill limitation upon all the taxable property within a subdivision when a portion of that subdivision is already being taxed at the full ten mills. It is therefore necessary to consider whether the 0.82 millage may be levied upon the property within the township except for

the property located within the village for either of the purposes mentioned in your question. Each of the purposes mentioned in your question will be considered separately.

A board of township trustees is authorized to appoint police constables for the township but such board has no authority to appoint any other police officers, cf. Opinion No. 259, Opinions of the Attorney General for 1963.

Section 509.01, Revised Code, reads in pertinent part:

> "* * * The board may pay each police constable, from the general funds of the township, such compensation as the board by resolution prescribes for the time actually spent in keeping the peace, protecting property, and performing duties as a police constable. Such police constable shall not be paid fees in addition to the compensation allowed by the board for services rendered as a police constable. * * *" (Emphasis added)

Any levy for the general fund of the township must be made upon all of the taxable property within the township which would necessarily include the taxable property located within the village which is already being subjected to the full ten mills. At the present time there is no additional millage available within the ten-mill limitation which may be levied for township general fund purposes. The township police constable is authorized to be paid from the general funds of the township, but under the present circumstances no additional levy may be made within the ten-mill limitation for such purpose.

The trustees of any township may create a township police district comprised of all or a portion of the unincorporated territory of the township pursuant to Section 505.48, Revised Code.

Section 505.51, Revised Code, reads:

> "The board of trustees of a township police district may levy a tax upon all

of the taxable property in the township police district pursuant to sections 5705.19 and 5705.25 of the Revised Code to defray all or a portion of expenses of the district in providing police protection."

Such sections mentioned in Section 505.51, Revised Code, relate to levies which are outside the ten-mill limitation and therefore not within the scope of your question. Specifically, no part of the 0.82 mills can be used for the benefit of a township police district if such a district now exists or if such a township police district were now created pursuant to Section 505.48, Revised Code.

Consideration will now be given to the second part of your question which refers to the levy of 0.82 mills for the township road and bridge fund.

Section 5705.05, Revised Code, reads in pertinent part:

> "The purpose and intent of the general levy for current expenses is to provide one general operating fund derived from taxation from which any expenditures for current expenses of any kind may be made, and the taxing authority of a subdivision may include in such levy the amounts required for carrying into effect any of the general or special powers granted by law to such subdivision, including the acquisition or construction of perminent improvements and the payment of judgments, <u>but excluding the construction, reconstruction, resurfacing, or repair of roads and bridges in counties and townships</u> and the payment of debt charges. The power to include in the general levy for current expenses additional amounts for purposes for which a special tax is authorized shall not affect the right or obligations to levy such special tax. * * *"
> (Emphasis added)

Section 5705.06, Revised Code, reads in pertinent part:

> "The following special levies are hereby authorized without vote of the people:
>
> "(F) In the case of a township, a levy for the construction, reconstruction, resurfacing, and repair of roads and bridges, excluding state roads and bridges on such roads, including the township's proportion of the cost of the construction, improvement, maintenance, and

repair of county roads and bridges;

"* * * * * * * * *

"Each such special levy shall be within the ten-mill limitation and shall be subject to the control of the county budget commission, as provided by sections 5705.01 to 5705.47, inclusive, of the Revised Code.

"Except for the special levies authorized in this section any authority granted by the Revised Code to levy a special tax within the ten-mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses."

Sections 5705.05 and 5705.06, Revised Code, relate to levies upon all the taxable property within the township which necessarily must include the taxable property within the village. Upon the facts heretofore mentioned, there is no remaining unlevied millage within the ten-mill limitation available at the present time for an additional levy pursuant to Section 5705.06, Revised Code.

Section 5573.13, Revised Code, reads in pertinent part:

"* * * For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, and costs of constructing, reconstructing, resurfacing, or improving roads under sections 5571.01, 5571.06, 5571.07 5571.15, 5573.01 to 5573.15, inclusive, and 5575.02 to 5575.09, inclusive, of the Revised Code, and for the purpose of maintaining, repairing, or dragging any public road or part thereof under their jurisdiction in the manner provided in sections 5571.02 to 5571.05, inclusive, 5571.08, 5571.12, 5571.13, and 5575.01 of the Revised Code, the board of trustees may levy, annually, a tax not exceeding three mills upon each dollar of the taxable property of said township. Such levy shall be in addition to all other levies authorized for township purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force. * * *" (Emphasis added)

Tax levies made under authority of Section 5573.13, Revised Code, are to be made upon all the taxable property of a township, including that of municipal corporations therein, cf. Opinion No. 207, Opinions of the Attorney

General for 1919. See also Section 5573.07 (B) (1), Revised Code. For reasons already given, no millage is available for an additional levy within the ten-mill limitation pursuant to Section 5573.13, Revised Code.

Section 5573.21, Revised Code:

> "The board of township trustees of a township in which there is located a municipal corporation or a part thereof, may, by resolution, erect that portion of the township not included within the corporate limits of such municipal corporation into a road district, whenever in its opinion it is expedient and necessary and for the public convenience and welfare, for the purpose of constructing, reconstructing, resurfacing, or improving, the public roads within such district. The district so created shall be given an appropriate name by which it shall be designated.
>
> "After such district has been created, the board shall have all the powers and duties which it has under sections 5571.01, 5571.06, 5571.07, 5571.15, 5573.01 to 5573.14, inclusive, and 5575.02 to 5575.09, inclusive, of the Revised Code, and it shall proceed in like manner in the constructing, reconstructing, resurfacing, improving, maintaining, repairing, and dragging of township roads, or part thereof, in such cases as provided for the board in township road construction."

A road district, created pursuant to Section 5573.21, Revised Code, does not include the territory within the corporate limits of a municipal corporation. However, the powers and duties of such road district (including the power to levy taxes) must be found within the sections specified. As hereinbefore mentioned, the power to levy a tax upon taxable property must include all the taxable property within the township, including the taxable property within the municipal corporation. See also Opinion No. 207, Opinions of the Attorney General for 1919. Under the circumstances, no millage is available for an additional levy within the ten-mill limitation pursuant to Section 5573.21, Revised Code.

Section 5575.10, Revised Code:

"After the annual estimate for each township has been filed with the board of township trustees by the county engineer, such board may increase or reduce the amount of any items contained in the estimate, and at its first meeting after such estimate is filed the board shall make its levies for the purposes set forth in the estimate and for creating a fund for dragging, maintenance, and repair of roads, upon all the taxable property of the township outside of any municipal corporation or part thereof, not exceeding, in the aggregate, two mills in any one year upon each dollar of the valuation of such property. Such levies shall be in addition to all other levies authorized for township purposes, and subject only to the limitation upon the combined maximum rate for taxes now in force. This section does not prevent the expenditures of any portion of the regular levy of two mills for township purposes, but is in addition thereto. The board shall provide annually by taxation, under this section or under section 5573.13 of the Revised Code, or under both, an adequate fund for the maintenance and repair of township roads.

"The maintenance and repair fund so provided shall not be less than one hundred dollars for each mile of improved township road and twenty dollars for each mile of unimproved township road. Such levies for maintenance and repair purposes shall be separately set forth in the annual budget of the board presented to the budget commission, and the maintenance and repair levies made by the board, pursuant to this section, shall be preferred levies as against any others made for township road purposes by the board. Should the budget commission of any county be unable to allow all of the road levies made by the board, such reductions as are necessary shall be first made in levies other than for maintenance and repair purposes made under this section. The fund produced by such levies for maintenance and repair purposes shall not be subject to transfer, by order of court or otherwise, and shall be used solely for the maintenance and repair of the township roads within the township. This section does not prevent the board from using any other available road funds for the maintenance and repair of township roads."

(Emphasis added)

Section 5575.10, Revised Code, provides for a levy upon all property outside any municipal corporation or part thereof. Assuming that the other conditions exist and such a levy does not violate any of the limitations provided,

the 0.82 mills remaining within the ten-mill limitation are available within the territory of the township and outside the village for levy by the board of township trustees pursuant to the provision of Section 5575.10, Revised Code.

It should be noted that levies pursuant to Chapters 5573 and 5575, Revised Code, are for road fund purposes which differ from levies for road and bridge purposes. Each of such funds is separately maintained and must be used only for the purpose authorized. Although your letter of request referred only to the road and bridge fund, the purposes of the road funds are sufficiently similar to also be given consideration with reference to the question presented.

In summary, you are advised that:

1. Tax levies made under authority of Section 509.01, Revised Code (township police constable), Section 5705.06 (F), Revised Code (township road and bridge), Section 5573.13, Revised Code (township road fund), and Section 5573.21, Revised Code (township road district fund), are to be made upon all the taxable property within the township, including the taxable property within any municipal corporations within such township. Such levies are subject to the ten-mill limitation prescribed by Section 5705.02, Revised Code.

2. Tax levies made under authority of Section 5575.10, Revised Code, are to be made upon all the taxable property of the township outside any municipal corporation or part thereof, not exceeding, in the aggregate, two mills in any one year upon each dollar of the valuation of such property.

OPINION NO. 69-056

Syllabus:

1. Where a private, non-profit foundation has contracted to build a hospital facility on foundation property, it is not compatible for its chairman who negotiates at arms length a long-term lease of the facility to a county hospital to serve at the same time as a member of the county hospital's board of trustees.

2. It is incompatible for a physician to serve simultaneously as chief of staff and on the board of county hospital trustees.

To: Richard E. Parrott, Union County Pros. Atty., Marysville, Ohio
By: Paul W. Brown, Attorney General, June 5, 1969

I have before me your request for my opinion in which you ask two questions which read as follows:

> "1. Where a private, non-profit foundation has contracted to build a hospital facility on foundation property, is it compatible for its chairman who negotiates at arms length a long-term lease of the facility to a County Hospital to serve at the same time as a member of the County Hospital's Board of Trustees?
>
> "2. Is it compatible for a physician to simultaneously serve as Chief of Staff and on the Board of Trustees of a County Hospital?"

Section 339.06, Revised Code, provides in part as follows:

> "The board of county hospital trustees shall, upon completion of construction or leasing and equipping of the county hospital, assume and continue the operation of such hospital. The board of county hospital trustees shall have the entire management and control of the hospital, and shall establish such rules for its government and the admission of persons as are expedient.
>
> "The board of county hospital trustees has control of the property of the hospital, and all funds used in its operation. The board of county hospital trustees shall deposit all moneys received from the operation of the hospital or appropriated

for its operation by the board of county commissioners, or resulting from special levies submitted by the board of county commissioners as provided for in section 5705.22 of the Revised Code, to its credit in banks or trust companies designated by it, which fund shall be known as the hospital operating fund. Such banks or trust companies shall furnish security for every such deposit to the extent and in the manner provided in section 135.18 of the Revised Code, but no such deposit shall otherwise be subject to the provisions of sections 135.01 to 135.21, inclusive, of the Revised Code. The board of trustees shall not expend such funds until its budget for that calendar year is submitted to and approved by the board of county commissioners. Thereafter such funds may be disbursed by the board of county hospital trustees for the uses and purposes of such hospital, for the replacement of necessary equipment, or for the acquiring of, leasing, or construction of permanent improvements to county hospital property, on a voucher signed by the administrator, provided for in this section, regularly approved by the board of county hospital trustees and signed by two members of the board of county hospital trustees." (Emphasis added)

It thus appears that the board of county hospital trustees may negotiate a lease for a hospital facility with a non-profit foundation. Section 2919.08, Revised Code, reads as follows:

"No person, holding an office of trust or profit by election or appointment, or as agent, servant, or employee of such officer or of a board of such officers, shall be interested in a contract for the purchase of property, supplies, or fire insurance for the use of the county, township, municipal corporation, board of education, or a public institution with which he is connected.

"Whoever violates this section shall be imprisoned not less than one nor more than ten years."

In Opinion No. 2682, Opinions of the Attorney General for 1958, page 694, at page 696, my predecessor held:

"It is my opinion, therefore, that a member of the board of trustees of a county hospital holds an office of trust in a public institution, and under Section 2919.08, Revised Code, he is precluded from being interested in contracts of the hospital."

Accordingly, where a private, non-profit foundation has contracted to build a hospital facility on foundation property, it is not compatible for its chairman who negotiates at arms length a long-term lease of the facility to a county hospital to serve at the same time as a member of the county hospital's board of trustees.

Your second question relates to the compatibility of a physician serving simultaneously as chief of staff and on the board of county hospital trustees. The answer to this question appears to be controlled by Opinion No. 1742, Opinions of the Attorney General for 1958, page 93, which held:

> "The provisions of Section 339.06, Revised Code, make the office of member of the board of county hospital trustees incompatible with the position of employee in the county hospital."

It thus appears that it is incompatible for a physician to serve simultaneously as chief of staff and on the board of county hospital trustees.

It is, therefore, my opinion and you are hereby advised:

1. Where a private, non-profit foundation has contracted to build a hospital facility on foundation property, it is not compatible for its chairman who negotiates at arms length a long-term lease of the facility to a county hospital to serve at the same time as a member of the county hospital's board of trustees.

2. It is incompatible for a physician to serve simultaneously as chief of staff and on the board of county hospital trustees.

OPINION NO. 69-057

Syllabus:

A school bus driver under contract with a board of education is qualified to receive sick leave benefits which he has accumulated under Section 143.29, Revised Code, from the time he fails to pass the required physical examination for bus driver to the date of disability pension approval.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, June 9, 1969

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

> "Can a board of education pay sick leave provision to a bus driver from the date he was

denied a license renewal due to a physical disability and prior to the date of disability pension approval?"

Section 143.29, Revised Code, reads in pertinent part:

> "* * *each employee of any board of education shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness or death in the employee's immediate family. Unused sick leave shall be cumulative up to ninety work days, unless more than ninety days are approved by the responsible administrative officer of the employing unit."

The statutory right of a non-teaching employee to receive sick leave pay has been confirmed by Opinion No. 67-003, Opinions of the Attorney General for 1967.

The language of Section 143.29, Revised Code, is broad enough to include within sick leave payments the time between denial of a bus driver's license due to a physical disability and the date of disability pension approval. A physical disability which precludes a bus driver from performing his duties should be compensated up to the amount that the non-teaching employee has accumulated as sick leave pay.

Informal Opinion No. 136, Informal Opinions of the Attorney General for 1963, states that when a bus driver under contract with a board of education fails to pass his physical examination due to diabetes, he is entitled to sick leave payments for the amount he has accumulated under Section 143.29, supra.

Therefore, it is my opinion and you are hereby advised that a school bus driver under contract with a board of education is qualified to receive sick leave benefits which he has accumulated under Section 143.29, Revised Code, from the time he fails to pass the required physical examination for bus driver to the date of disability pension approval.

OPINION NO. 69-058

Syllabus:

1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.

2. Where, in the subsequent trial, the defendant pleads "guilty" before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.

3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.

To: Dean E. Curl, Morrow County Pros. Atty., Mt. Gilead, Ohio
By: Paul W. Brown, Attorney General, June 9, 1969

I have before me your request for my opinion regarding the taxability of jury fees arising out of a mistrial and a subsequent retrial where the defendant enters a plea of "guilty" prior to the impanelling of the jury, and whether the court has any discretion in the taxing of said fees.

Section 2947.23, Revised Code, provides as follows:

> "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid."

It is generally conceded that where a mistrial results in no conviction, it is as though no proceeding had ever been brought. A review of case law in other jurisdictions as well as in Ohio establishes authority to include the costs of the original trial. Hill v. State, 21 Ala. App. 310 (1926), 107 So. 789; United States v. Hoxie, 8 Alaska 210 (1920); Nicholson v. State, 24 Wyo. 347 (1916), 157 P. 1013.

In Nicholson v. State, supra, the court interpreted "costs of prosecution" in the Wyoming statute as commencing with the filing of the information and ending with final judgment in the subsequent trial. Thus, both proceedings were considered as one entire case. My predecessor in Opinion No. 28, Opinions of the Attorney General for 1959, in interpreting Section 2949.14, Revised Code, recognized that a retrial is "a part of the continued judicial process to determine the guilt or innocence of the accused party." And the court in Harris v. Protection Ins. Co., Wright 548, imposed the costs on the defendant where he had requested a new trial on account of newly discovered evidence.

Lacking Ohio authority to the contrary, I must concur with the Nicholson holding and the opinion of the Attorney General, supra, and conclude that the costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, supra.

Concerning the subsequent trial where the defendant pleads "guilty" before the jury is impanelled, Section 2947.23, supra, is particularly clear in requiring that the jury be sworn before their fees can be included in the "costs of prosecution." Your example indicated that the jury had not been sworn when the "guilty" plea was made. Therefore, the jury fees in that instance may not properly be included in the "costs of prosecution."

And finally, you ask whether the court has any discretion in the taxing of said jury fees. It appears that it does not. Section 2947.23, supra, reads in pertinent part as follows:

> "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. * * *"
>
> (Emphasis added)

The word "shall" is usually given a mandatory interpretation, particularly where used repetitiously and unless the provision expressed in its entirety indicates a contrary intent. Anderson v. Hancock County Bd. of Ed., 137 Ohio St. 578, 19 Ohio Op. 344, 31 N.E. 2d 850; Dennison v. Dennison, 165 Ohio St. 146, 59 Ohio Op. 210, 134 N.E. 2d 574; Cleveland R. Co. v. Brescia, 100 Ohio St. 267, 126 N.E. 51; State use of Ashland County v. Snyder, 2 Ohio N.P. (n.s.) 261, 14 O.D. 568.

Inasmuch as the word "shall" is repeated in the statute in question, and no contrary intent appearing, I must conclude that the court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.

Therefore, it is my opinion and you are hereby advised:

1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.

2. Where, in the subsequent trial, the defendant pleads "guilty" before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.

3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction.

OPINION NO. 69-059

Syllabus:

Pursuant to Section 5715.02, Revised Code, a member of the County Board of Revision is not disqualified from participating in the hearing of a complaint about the assessment of real property for tax purposes so long as the complaint is not his own and so long as there is no overriding natural inclination to prejudge the complaint.

To: Richard J. Rinebolt, Hancock County Pros. Atty., Findlay, Ohio
By: Paul W. Brown, Attorney General, June 10, 1969

I have before me your request for my opinion on a question in relation to Section 5715.02, Revised Code.

Section 5715.02, Revised Code, reads as follows:

> "The county treasurer, county auditor, and the president of the board of county commissioners shall constitute the county board of revision. Provided, that each such official may, from time to time, appoint a qualified employee from his office to serve on such board in his place and stead for the purpose of hearing complaints as to the value of real property and such other matters which may be presented to the board. Each appointee shall submit in writing to the official for whom he is acting his findings and recommendations with respect to the matter in which he had participated; and such recommendations may, at the option of the appointing official, be adopted or modified by him when formally acting in the matter.
>
> "A majority of the county board of revision shall constitute a quorum to hear and determine any complaint, and any vacancy shall not impair the right of the remaining members of such board to exercise all the powers thereof so long as a majority remains.
>
> "Each member of a county board of revision may administer oaths."

You stated in your letter that approximately 3000 complaints in connection with the assessment of real property in Hancock County have recently been filed with the Hancock County Auditor pursuant to the following part of Section 5715.01, Revised Code:

> "* * * * * * * * *
>
> "There shall also be a board in each county, known as the county board of revision, which shall hear complaints and revise assessments of real property for taxation."

You noted that the President of the Hancock County Board of County Commissioners, who is a member of the County Board of Revision, has filed complaints in connection with assessments of real property which he owns. You correctly assert that he could disqualify himself as far as his complaints are concerned. He should do so because he has a direct pecuniary interest in his own complaint. Such disqualification would not impair the right of the remaining members of the Board of Revision to exercise all of their powers. Section 5715.02, supra, states that "any vacancy shall not impair the right of the remaining members of such board to exercise all the powers thereof so long as a majority remains."

The remaining question is whether or not the President is also disqualified from participating in the hearings of the other complaints that have been filed.

The Court in State, ex rel. Taylor v. Pinney, 13 O.D.N.P. 210 (1902), stated that "It is a doctrine of our law, as old as the principles of equity, that an agent in the execution of his

agency, shall not be permitted to put himself in a position antagonistic to his principal. An agent, by accepting the undertaking committed to his care, impliedly agrees that he will use his best endeavors to further the interest of his principal. This principle of law precludes him absolutely from dealing with himself, either directly or indirectly. * * * This salutary principle of the law applies as well to public as to private agents, and public officials, who are the agents of the public, will not be permitted to put themselves in a position antagonistic to the public interests which are represented and which it is their duty to protect. * * * The self-interest of the public official and the public interests which will be represented must not be brought into conflict."

The conflict of self-interest and public interest is clear in a situation in which a member of the Board of Revision would hear his own complaint. The conflict between these two interests is, however, not as apparent where a member of the Board of Revision hears claims which are not his own, but which are the claims of other persons in his county.

The Supreme Court of Ohio in Probasco v. Raine, 50 Ohio St. 378, 34 N.E. 536 (1893), stated that "almost every officer in this state is more or less, directly or indirectly, interested in the result of the duties by him performed, whether ministerial or judicial, but such interest does not disqualify him from performing his official duties." The Court noted that the defendant in that case, an auditor, "acts under oath, and good faith and an honest purpose in the discharge of his official duties are to be presumed."

In discussing the question of the "interest" of the auditor in the Probasco case, supra, the Court stated at page 392 that a "judge who is a large taxpayer in his county or city, is not thereby disqualified from sitting in judgment in cases against his county or city * * *. The rule insisted upon in the case by plaintiff, as to the interest of the auditor, would disqualify every member of this court from sitting as a judge in the decision of this case."

The case of The State, ex rel. Turner v. Marshall, 123 Ohio St. 586 (1931), bears discussion in reference to the problem before us. The syllabus of that case reads as follows:

> "A judge is disqualified to preside in the trial of a case when his relation to the parties therein or to the subject matter of the action is such that a natural inclination to prejudge the case arises therefrom."

Judge Allen stated at page 587 of this decision that "under the ramification of the social and business interests conceded to exist between the judge of the Court of Common Pleas and the defendants in the four actions covered by this record, any one, whether consciously or unconsciously, would have a natural inclination to prejudge the several cases."

Applying the reasoning found in the Probasco case, supra, to the situation at hand, it can be said that the President of the Hancock County Board of County Commissioners, as a member of the County Board of County Commissioners, as a member of the County Board of Revision, will have some "interest" in the re-

sult of the decisions he makes in regard to the complaints that he hears. The fact that a member of the Board of Revision will hear claims which are somewhat similar to his own raises the issue of his good faith and his honesty, but, as the Probasco Court pointed out, good faith and an honest purpose in the discharge of his official duties are to be presumed since he acts under his oath of office. This presumption may, however, be overcome, as the Turner case, supra, seems to indicate, if there are "business interests" between the parties that produce an overriding "natural inclination to prejudge the case."

In conclusion, it is my opinion and you are hereby advised that pursuant to Section 5715.02, Revised Code, a member of the County Board of Revision is not disqualified from participating in the hearing of a complaint about the assessment of real property for tax purposes so long as the complaint is not his own and so long as there is no overriding natural inclination to prejudge the complaint.

OPINION NO. 69-061

Syllabus:

1. Section 4513.39, Revised Code, does not prohibit a peace officer who is excluded from making arrests under said Section from swearing out an affidavit for the issuance of an arrest warrant for the arrest of persons who have, in the presence of such peace officer, violated any of the sections enumerated in Section 4513.39, Revised Code.

2. A peace officer, other than the state highway patrol and sheriffs or their deputies, can not execute arrest warrants for violations of the sections enumerated in Section 4513.39, Revised Code, when such violations have not occurred within municipal corporations.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: Paul W. Brown, Attorney General, June 16, 1969

I am in receipt of your request for my opinion which reads in pertinent part as follows:

> "Would peace officers, other than state highway patrol, and sheriffs or their deputies, be prohibited from preparing and filing affidavits for the issuance of arrest warrants for the arrest of persons who have, in the presence of such peace officers, violated any of the sections enumerated in Section 4513.39 of the Ohio Revised Code?
>
> "Can such a peace officer execute such warrants for arrest whether issued as a result of his affidavit or as a result of an affidavit prepared and filed by another officer?"

Before proceeding to answer your request, I invite your attention to the pertinent Revised Code Sections. Section 4513.39, Revised Code, states as follows:

> "The state highway patrol and sheriffs or their deputies shall exercise, to the exclusion of all other peace officers except within municipal corporations, the power to make arrests for violations, on all state highways, of sections 4503.11, 4503.21, 4511.14 to 4511.16, inclusive, 4511.20 to 4511.24, inclusive, 4511.26 to 4511.40, inclusive, 4511.42 to 4511.48, inclusive, 4511.58, 4511.59, 4511.62 to 4511.72, inclusive, 4513.03 to 4513.13, inclusive, 4513.15 to 4513.22, inclusive, 4513.24 to 4513.34, inclusive, 4549.01, 4549.04, and 4549.07 to 4549.12, inclusive, of the Revised Code."

Section 2319.02, Revised Code, defines "affidavit" as "a written declaration under oath, made without notice to the adverse party."

Section 2935.09, Revised Code, reads as follows:

> "In all cases not provided by sections 2935.02 to 2935.08, inclusive, of the Revised Code, in order to cause the arrest or prosecution of a person charged with committing <u>an offense in this state</u>, a peace officer, or a <u>private citizen</u> having knowledge of the facts, shall file with the judge or clerk of a court of record, or with a magistrate, an affidavit charging the offense committed, or shall file such affidavit with the prosecuting attorney or attorney charged by law with the prosecution of offenses in court or before such magistrate, for the purpose of having a complaint filed by such prosecuting or other authorized attorney." (Emphasis added)

Section 2935.10, Revised Code, reads in pertinent part as follows:

> "Upon the filing of an affidavit or complaint as provided by section 2935.09 of the Revised Code, if it charges the commission of a felony, such judge, clerk or magistrate, unless he has reason to believe that it was not filed in good faith, or the claim is not meritorious, shall forthwith issue a warrant for the arrest of the person charged in the affidavit, and directed to a peace officer; otherwise he shall forthwith refer the matter to the prosecuting attorney or other attorney charged by law with prosecution for investigation prior to the issuance of warrant.
>
> "If the offense charged is a misdemeanor or violation of a municipal ordinance, such

judge, clerk, or magistrate may:

> "(A) Issue a warrant for the arrest of such person, directed to any officer named in section 2935.03 of the Revised Code but in cases of ordinance violation only to a police officer or marshal or deputy marshal of the municipal corporation;
>
> "(B) Issue summons, to be served by a peace officer, bailiff, or court constable, commanding the person against whom the affidavit or complaint was filed to appear forthwith, or at a fixed time in the future, before such court or magistrate. Such summons shall be served in the same manner as in civil cases."

The first part of your request concerns whether Section 4513.39, Revised Code, prohibits peace officers from preparing and filing affidavits for violations of the sections thereunder enumerated. By the definition of Section 2319.02, Revised Code, and under Section 2935.09, Revised Code, any person, whether he is a peace officer or a private citizen, may swear out an affidavit. Pursuant to Section 2935.10, Revised Code, such affidavit may be the basis of an arrest warrant. Thereby, the statutes make specific provision for a peace officer to swear out an affidavit.

Section 4513.39, Revised Code, contains no restrictive language as to affidavits concerned with violations of the enumerated Sections. Insofar as an affidavit may be sworn for "an offense in this state" and such action is not precluded under Section 4513.39, Revised Code, the answer to your first question is in the negative. Therefore, peace officers may prepare and file affidavits for the issuance of arrest warrants for the arrest of persons who have, in the presence of such peace officers, violated any of the Sections enumerated in Section 4513.39, Revised Code.

In essence, your second question asks whether a peace officer who is excluded from making an arrest under Section 4513.39, Revised Code, may make such an arrest under power of an arrest warrant. A secondary question involved is whether the peace officer's own affidavit may be the basis of the arrest warrant under which he makes the arrest assuming he can execute arrest warrants.

In Opinion No. 50, Opinions of the Attorney General for 1959, at page 27, concerning whether a municipal policeman would be eligible for disability benefits for injuries sustained outside the municipality, one of my predecessors noted:

> "Generally, the responsibility of a police department does not extend beyond the corporate limits of the municipality which supports it."

State, ex rel. Speller v. Painesville, 13 O.C.C. (N.S.) 577 (1910), aff'd, 85 Ohio St. 483 (1912) and De Romedis v. Yorkville, 21 O.N.P. (N.S.) 340 (1918), ruled that a municipal police officer is an officer of the state, appointed under authority given by the state.

These two factors of extent of responsibility and source of authority establish that extraterritorial authority must be derived from the state. Section 4513.39, Revised Code, does not grant such statutory authority.

The statute in question expressly excludes peace officers other than the state highway patrol and sheriffs or their deputies from making certain arrests. They are precluded from making arrests for violations enumerated in the Section when the violations occur outside a municipal corporation. Your question would ask if such exclusion could be avoided by the peace officer where he is operating under an arrest warrant. To allow such action would be contra the express legislative intent. The legislative directive is that only the state highway patrol and sheriffs or their deputies may make arrests for violations of the enumerated statutes which occur outside municipal corporations.

This is in holding with Opinion No. 6025, Opinions of the Attorney General for 1955, page 650. The syllabus of that opinion states as follows:

> "1. A police constable designated under Section 509.16, Revised Code, does not have authority under Section 4513.39, Revised Code, to make arrests on state highways even though such officer is deputized by the sheriff of the county.
>
> "2. The position of police constable under Section 509.16, Revised Code, and the position of deputy sheriff are incompatible."

The secondary question involved in this final question need not be answered. Although the answer is obvious, the question is not reached because the peace officers in question can not make such arrests even under an arrest warrant.

It is therefore my opinion and you are hereby advised that:

1. Section 4513.39, Revised Code, does not prohibit a peace officer who is excluded from making arrests under said Section from swearing out an affidavit for the issuance of an arrest warrant for the arrest of persons who have, in the presence of such peace officer, violated any of the sections enumerated in Section 4513.39, Revised Code.

2. A peace officer, other than the state highway patrol and sheriffs or their deputies, can not execute arrest warrants for violations of the sections enumerated in Section 4513.39, Revised Code, when such violations have not occurred within municipal corporations.

OPINION NO. 69-062

Syllabus:

1. A board of county commissioners is not authorized to enlarge a county hospital where the use thereof would be for other than general hospital operations.

2. A board of county hospital trustees, acting alone, does not have authority to construct a hospital addition unless county electoral approval is first obtained pursuant to Section 339.01, Revised Code.

3. Section 340.07, Revised Code, does not authorize a board of county commissioners to lease facilities for a community health and retardation center.

To: Reynold C. Hoefflin, Greene County Pros. Atty., Xenia, Ohio
By: Paul W. Brown, Attorney General, June 16, 1969

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

> "1. Does the Greene County Board of County Commissioners under Section 339.01 have the power to enlarge Greene Memorial Hospital in an enlargement program which would include facilities for the Greene County Board of Health and the Greene-Clinton County Community Mental Health and Retardation Center?
>
> "2. Does the Greene County Board of County Hospital Trustees have authority under Section 339.03 to accomplish the same purpose as mentioned in Item 1, in connection with the Greene County Board of County Commissioners, or acting alone?
>
> "3. If it is possible for the above mentioned construction, is it appropriate for the County Commissioners to lease the out-patient part of the building from the Greene County Board of County Hospital Trustees for the out-patient portion of the Greene-Clinton County Community Mental Health and Retardation Center in view of Section 340.07 which specifically authorizes the County Commissioners for the acquisition, construction, reconstruction, maintenance and operation of such a program but at no point therein authorizes the leasing of said property.
>
> "4. In the event said property may be leased to the Mental Health and Retardation Board and the property leased to the Greene County Public Health Department, is it necessary that full compensation for the lease be paid to the Hospital Trustees by the County Commissioners or may a nominal sum be made payable for these leases?"

Regarding question number one, Section 339.01, Revised Code, which clearly authorizes the enlargement of existing hospital facilities, provides as follows:

> "The board of county commissioners may purchase, acquire, lease, appropriate, construct, enlarge, improve, and rebuild a county hospital or hospital buildings. No money shall be expended for the original purchase, appropriation, or construction of such hospital or buildings until a tax levy or bond issue therefor has been submitted to the electors of the county and approved by them. Such hospital may be designated as a monument to commemorate the services of the soldiers, sailors, marines and pioneers of the county."

This section of the Revised Code places the initial responsibility of enlarging existing county hospital facilities with the board of county commissioners. You will note that this section does not contain a purpose clause other than that which would allow such a facility to be dedicated as a commemorative monument.

The purpose for which a county hospital may be leased may be found in Section 339.09, Revised Code, which provides as follows:

> "When the county hospital has been fully completed and sufficiently equipped for occupancy, in lieu of sections 339.06 to 339.08, inclusive, of the Revised Code, the board of county commissioners of any county may, upon such terms as are agreed upon between the board and a constituted and empowered nonsectarian Ohio corporation, organized for charitable purposes and not for profit, a majority of whose members reside in the county, lease <u>for use as a general hospital</u>, the lands, the buildings, and equipment of any general hospital owned by said county."
> (Emphasis added)

Pursuant to this section the board of county commissioners have express authority to lease a county hospital, but only "for use as a general hospital." I can find no authority which would allow the leasing of either an entire hospital, as contemplated by the above cited section, or an addition thereto for a purpose other than as a general hospital.

Since county officials have only such powers and duties as are expressly given them by statute, the acts of such officers which exceed the limits of their powers are void. <u>State, ex rel. Shriver</u> v. <u>Board of Commrs.</u>, 148 Ohio St. 277, 280 (1947). It would seem, therefore, that the construction or use of an addition to a hospital for purposes other than general hospital operations is not authorized by the statute in question.

For a determination of your second question I direct your attention to Opinion No. 330, Opinions of the Attorney General for 1957, wherein the then Attorney General distinguished the various methods of constructing or enlarging a county hospital, pursuant to Section 339.01, <u>supra</u>, and Section 339.03, as follows:

> "1. Construction may be undertaken by a board of county hospital trustees only when

funds therefor have been provided by a bond issue or tax levy approved by the electors of the county, and control of funds from those sources and consequently of the construction is vested in such board.

"* * * * * * * * *

"3. Prospects of enlargement, improvement, and rebuilding, funds for which are appropriated by the board of county commissioners, are under the supervision and control of the board of county commissioners."

The first above quoted paragraph refers to the situation where the "original" construction of a county hospital is submitted to county electors for approval pursuant to Section 339.01, supra. In such a case funds derived from a bond issue or tax levy are placed in a county hospital building fund to be expended on the order of the hospital trustees pursuant to Section 339.04, Revised Code.

This office has ruled that Section 339.04, supra, is likewise applicable to the situation where an addition to an already existing hospital building is to be constructed. Opinion No. 330, Opinions of the Attorney General for 1957. However, again the board of hospital trustees may act only on authority of a bond issue or tax levy. In either case the authority of the county board of hospital trustees to act on their own initiative is substantially restricted inasmuch as county electoral approval is a prerequisite. See Opinion No. 7630, Opinions of the Attorney General for 1957, construing the powers of a county board of hospital trustees under Section 339.03, Revised Code.

The alternative method is pursued via Section 339.01, supra, which provides that a board of county commissioners may "enlarge, improve, and rebuild" existing facilities. According to Opinion No. 4030, Opinions of the Attorney General for 1954, the commissioners may act directly and without the necessary bond issue or tax levy. They may thus proceed on an independent basis, as distinguished from the restrictions imposed on the board of county hospital trustees.

In response to your specific inquiry, therefore, it appears that a board of county hospital trustees, acting alone, does not have authority to construct a hospital addition unless county electoral approval is first obtained pursuant to Section 339.01, Revised Code.

The answer to your third question relates to a recent opinion issued by this office in which a similar problem was encountered. I determined in Opinion No. 69-026, Opinions of the Attorney General for 1969, that the leasing of land for a landfill operation is not authorized under Section 343.01, Revised Code. Section 340.07, Revised Code, contains similar language in that money may be appropriated for the "acquisition, construction, reconstruction, maintenance, and operation" of mental health facilities. According to State, ex rel. Fisher v. Sherman, 21 N.E. 2d 447, 135 Ohio St. 458 (1939), the Ohio interpretation of the word "acquire" does not anticipate a lease arrangement, but rather refers to the purchase of something, or to make property one's own. Consequently, I must conclude that Section 340.07,

supra, does not authorize a board of county commissioners to lease facilities for a community mental health and retardation center.

This conclusion is dispositive of your fourth question. Inasmuch as a board of county commissioners is not authorized to lease county hospital facilities for a community mental health and retardation center, the issue is moot.

Therefore, it is my opinion and you are hereby advised:

1. A board of county commissioners is not authorized to enlarge a county hospital where the use thereof would be for other than general hospital operations.

2. A board of county hospital trustees, acting alone, does not have authority to construct a hospital addition unless county electoral approval is first obtained pursuant to Section 339.01, Revised Code.

3. Section 340.07, Revised Code, does not authorize a board of county commissioners to lease facilities for a community mental health and retardation center.

OPINION NO. 69-064

Syllabus:

The municipal court is without jurisdiction of violations of rules and regulations of state universities and may neither prosecute such violations nor levy fines therefor.

To: Ronald J. Kane, Portage County Pros. Atty., Ravenna, Ohio
By: Paul W. Brown, Attorney General, June 18, 1969

I have your request for my opinion concerning the disposition of fines collected by a municipal court for violations of rules and regulations prescribed by a state university.

The criminal jurisdiction of a municipal court is set forth in Section 1901.20, Revised Code. This section provides as follows:

> "The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory and of any misdemeanor committed within the limits of its territory. In all such prosecutions and cases, the court shall proceed to a final determination thereof. The court has jurisdiction to hear felony cases committed within its territory and to discharge, recognize, or commit the accused."

This section gives the municipal court no jurisdiction over violation of rules and regulations of state universities. The court, therefore, has no jurisdiction to prosecute such violations.

It is, therefore, my opinion, and you are advised that the municipal court is without jurisdiction of violations of rules and regulations of state universities and may neither prosecute such violations nor levy fines therefor.

OPINION NO. 69-066

Syllabus:

1. A village may enter into a contract with a non-profit water corporation whereby the corporation will supply bulk water to the village, to be used and distributed as the village sees fit, without ratification by a vote of the electors under Section 743.24, Revised Code.

2. A village may not enter into a contract with a non-profit corporation whereby the village is to supply water to the corporation, if the village waterworks does not possess a surplus of water.

To: Angus B. Wilson, Brown County Pros. Atty., Georgetown, Ohio
By: Paul W. Brown, Attorney General, June 23, 1969

I have before me your request for my opinion which in pertinent part reads as follows:

> "May a village legislative authority, in lieu of Section 743.24 Revised Code of Ohio, enter into a binding agreement with a private non-profit corporation providing that said corporation will furnish a certain amount of water to the village, for its own use and the use of citizens thereof, without ratification by a vote of the electors of said village?
>
> "The company will furnish treated water and will supply the same by hooking on to the Villages' existing mains. The village and not the citizens will be metered by the company. The village will be required, if necessary, to furnish the company with the same amount of water during any given month, that the village purchases from said company. The contract is for a period of 40 years and the rates charged to the village may be adjusted at five year intervals. The villages' water system is subject to a first and second mortgage which contain no provisions prohibiting the purchase of water elsewhere."

Section 743.24, Revised Code, provides as follows:

> "A municipal corporation may contract with any individual or an incorporated company for supplying water for fire purposes, or for cisterns, reservoirs, streets, squares, and other public places within its limits, or for the purpose of supplying the citizens of such municipal corporation with water for such time, and upon such terms as is agreed upon. Such contract shall not be executed or binding upon the municipal corporation until it has been ratified by a vote of the electors thereof, at a special or general election. The municipal corporation shall have the same power to protect such water supply and prevent the pollution thereof as though the water works were owned by such municipal corporation."

My predecessors have had occasion to consider the proper application of the original version of Section 743.24, Revised Code, (Section 3981, General Code), which is not materially different as it pertains to the question before me. In Opinion No. 484, Opinions of the Attorney General for 1915, page 987, my predecessor concluded that "a contract between a municipal corporation and a private corporation, whereby the latter is to furnish a supply of water to the former, which is to filter and distribute the same is not governed by Section 3981, General Code, and need not be submitted to a vote of the people." In essence, this conclusion draws a distinction between the water supplier who supplies bulk "raw water" to a village and the water supplier who supplies treated water directly to the village citizens. It is the former supplier the Opinion holds who is not subject to the provisions of Section 3981, General Code.

In Opinion No. 2475, Opinions of the Attorney General for 1934, page 424, my predecessor concluded in branch one of the syllabus:

> "Where the council of a city enacts an ordinance authorizing and directing the director of public service of said city to enter into a contract with a private water company for the furnishing of water and service to the city from and at various fire hydrants located on the mains of said company, for the use of the fire department of said city and for other municipal purposes, it is not necessary, that the same be ratified by a vote of the electors of the city unless such ratification is made necessary by reason of charter provision."

The basis for this conclusion was that a contract entered into between a municipality and a private individual or a private water company is controlled by other and later legislation. In this connection, the Opinion cites Section 9324, General Code, now Section 4933.04, Revised Code, as authority to make such a contract without ratification of the voters.

Section 4933.04, Revised Code, provides as follows:

> "The proper officers of any municipal

corporation or the board of township trustees of any township in which a gas, sewage disposal system company, or water company is organized may contract with such company for lighting, disposal of sewage, or supplying with water the streets, lands, lanes, squares, and public places in such municipal corporation or township."

Opinion No. 272, Opinions of the Attorney General for 1945, is the most recent Opinion considering a similar matter. In this case, my predecessor considered whether a village could buy land for the impoundment of water, the water to be used for recreational purposes and as a source of water for the village. Branch one of the syllabus reads as follows:

"Under the powers granted by Section 4 of Article XVIII of the Constitution a municipality may acquire any public utility, including a water system by condemnation or otherwise, and may contract with others for the product or service of any such utility."

Section 4, Article XVIII of the Ohio Constitution, reads as follows:

"Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility."

In interpreting this Section of the Constitution, my predecessor made the following comment:

"This language would seem to give a wide latitude of discretion to the municipalities to make any contract which it finds necessary or advisable for securing its water supply so long as it is not limited by any law which the legislature is authorized to enact; and the courts have declared that a municipality in the exercise of the power given by the section above quoted is left practically free from any possible interference on the part of the legislature."

The Court of Common Pleas, Paulding County, also considered the proper application of Section 743.24, Revised Code, in Cook v. Village of Paulding, 33 Ohio Op. 2d, 165 (1965). It stated in the second branch of the syllabus:

"A 'perpetual lease' for the acquisition of raw water to be processed by the waterworks of the lessee village is not such a contract as was subject to the ratification of the elec-

tors under Section 3981, General Code (now Section 743.24, Revised Code)."

At page 169 of the Opinion, the Court made the following comment:

> "If it be asked what purpose Sec. 3891, General Code (still retained as Sec. 743.24, Revised Code), can then possibly serve, it would seem its purpose is to prevent a privately owned waterworks from entering into a contract with a municipality, binding upon all water users, the obligation of which is forever unimpairable, without a vote of the electors."

It is obvious that when Section 3891, General Code, now Section 743.24, Revised Code, has been considered in the past, it has been strictly construed in order to permit villages to contract with water companies, without requiring that the contracts be submitted to a vote of the electors. I am in agreement with the prior interpretations of Section 743.24, supra.

The facts as presented to me indicate that the water company is to supply bulk water to the village and the village will be metered and charged for the water supplied. The village, in turn, will then utilize the water for whatever purposes it deems desirable and the village will continue to meter the water which it supplies to the village citizens. Under these facts, it is apparent that the proposed contract is not one for supplying water for fire purposes; it is not for supplying water for cisterns, reservoirs, streets, squares, and other public places within the corporate limits; it is not one for supplying water for the citizens, since the bulk water is to be supplied to the village which will then determine for what purpose the water will be used and then distribute it for that purpose.

Therefore, it appears to me that Section 743.24, supra, does not require the proposed contract to be submitted to a vote of the people.

It is noted that the facts also indicate that the proposed contract calls for the village to furnish the water company with the same amount of water during any given month that the village purchases from said company.

Section 743.18, Revised Code, in pertinent part, reads:

> "A municipal corporation which has water works or electric works may contract with any other municipal corporation to supply it or its inhabitants with water or electricity upon such terms as are agreed upon by their respective legislative authorities. A municipal corporation which has a water works may dispose of surplus water, for manufacturing or other purposes, by lease or otherwise, upon such terms as are agreed upon by the director of public service of a city or the board of trustees of public affairs of a village and approved by the legislative authority thereof. Moneys received for such surplus water in either case shall be applied to the payment of the principal and interest of the bonds issued for the construction of such

water works, or for other expenses incident to the maintenance thereof, but no lease shall be made for a longer term than twenty years."

While this Section authorizes municipal corporations to supply water "for manufacturing or other purposes," the authority granted is based upon the fact that the municipal corporation has a surplus of water. It is obvious that the village in this case does not have a surplus of water. Accordingly, the village is without power to make a contract to supply water to the water company.

In conclusion, it is my opinion and you are advised:

1. A village may enter into a contract with a non-profit water corporation whereby the corporation will supply bulk water to the village, to be used and distributed as the village sees fit, without ratification by a vote of the electors under Section 743.24, Revised Code.

2. A village may not enter into a contract with a non-profit corporation whereby the village is to supply water to the corporation, if the village waterworks does not possess a surplus of water.

OPINION NO. 69-067

Syllabus:

1. A village may enter into a contract with a non-profit corporation whereby the corporation will supply water to the village without ratification of the contract by a vote of the electors of the village.

2. A water company may supply water directly to the inhabitants of a village without entering into a contractural arrangement with the village.

To: Elmer Spencer, Adams County Pros. Atty., West Union, Ohio
By: Paul W. Brown, Attorney General, June 23, 1969

I have your request for my opinion as to whether a village may enter into a contract with a non-profit corporation to obtain water without a ratification of the contract by the electors of the village, and also whether such a corporation may supply water directly to the inhabitants of a village without entering into a contractural arrangement with the village.

A village may enter into a contract with a non-profit corporation whereby the corporation will supply water to the village without ratification of the contract by a vote of the electors, Opinion No. 69-066, Opinions of the Attorney General for 1969.

A water company may supply water directly to the

inhabitants of a village without entering into a contractural arrangement with the village. Section 4933.01, Revised Code, provides in pertinent part as follows:

> "* * * [A] company organized for the purpose of supplying the inhabitants of a municipal corporation or township with water may sell and furnish any quantity of water required in such municipal corporation or township for such or other purposes * * * Such companies may lay conductors for conducting * * * water through the streets, lands, alleys, and squares in such municipal corporation with the consent of the municipal authorities or the board of township trustees under such reasonable regulations as such authorities or board prescribes."

This Section specifically gives a water company authority to sell and furnish water to the inhabitants of a village. This Section also gives a water company authority to lay its conductors in the streets of the village with the consent of the village and subject to such reasonable regulations as the village prescribes. Except for the requirement that the water company obtain such consent, there is nothing in this Section or in any other section of the code which requires a water company to enter into a contract with a village in order to furnish water to its inhabitants.

In conclusion, it is my opinion and you are advised:

1. A village may enter into a contract with a non-profit corporation whereby the corporation will supply water to the village without ratification of the contract by a vote of the electors of the village.

2. A water company may supply water directly to the inhabitants of a village without entering into a contractural arrangement with the village.

OPINION NO. 69-068

Syllabus:

Fines paid for violations of a city ordinance to a mayor's court are payable to a law library association under Section 3375.50, Revised Code.

To: Thomas C. Hanes, Darke County Pros. Atty., Greenville, Ohio
By: Paul W. Brown, Attorney General, June 23, 1969

I have before me your request for an opinion, which is basically whether Section 3375.50, Revised Code, authorizes a mayor's court to distribute to a law library association moneys collected from fines and penalties under city ordinances.

Section 3375.50, Revised Code, reads in pertinent part:

> "All moneys collected by a municipal corporation accruing from fines and penalties and from forfeited deposits, forfeited bail bonds, and forfeited recognizances taken for appearances, by a municipal court for offenses and misdemeanors brought for prosecution in the name of a municipal corporation under a penal ordinance thereof, where there is in force a state statute under which the offense might be prosecuted, or prosecuted in the name of the state, except a portion of such moneys, which plus all costs collected monthly in such state cases, equal the compensation allowed by the board of county commissioners to the judges of the municipal court presiding in police court, clerk and prosecuting attorney of such court in state cases, shall be retained by the clerk of such municipal court, and be paid by him forthwith, each month, to the board of trustees of the law library association in the county in which such municipal corporation is located.* * *"

As stated in your letter, Darke County has no municipal court. In attempting to discern the intent of the Legislature, it appears that Section 3375.50, supra, was enacted in order to provide needed funds for local law libraries through fines collected by a municipal corporation for violations of municipal ordinances with respect to which there are similar state statutes. As is the case with the majority of counties and municipal corporations, a municipal court exists to levy fines and penalties. Since a mayor's court in Darke County performs basically the same duties as a municipal court in most counties, it does not seem unreasonable to assume that the Legislature wished to include a mayor's court within the purview of the statute.

The case of Warren County Law Library Association v. Parker, 50 Ohio Op. 161 (1952), states:

> "Since moneys collected by a mayor for fines in a state case never become the property of a municipal corporation and, therefore, are never in the municipal or village treasury, it is our opinion that moneys so collected do not come within the scope of funds collected by a municipal corporation under Section 3056, General Code (now Section 3375.50, Revised Code)."
> (Emphasis added.)

By negative implication, this case lends authority to the intent of the Legislature to include a mayor's court within the statute. Since moneys collected by a mayor's court for fines and penalties under a municipal ordinance accrue to the municipal corporation, it appears that the Legislature intended the mayor's court to be included in the statute.

Your reference to the recent decision of State, ex rel. Akron Law Library Association v. Weil, 16 Ohio App. 2d 151 (1968), points out a recent opinion regarding sources of law library funds. This

case sets out four different sources of library funds. These are: (1) an award from municipal corporations, both cities and villages; (2) an award from county courts; (3) awards from the court of common pleas and probate court and (4) awards from all courts in the county for violations of state traffic laws and state liquor violations. It will be noted that of the four sources, all distinctly refer to particular courts except the first. The first source referred to in the opinion, however, refers to awards from municipal corporations and does not specify "municipal courts". Since a mayor's court performs functions of a municipal court when no municipal court exists, it is reasonable to assume that the Legislature meant to include a mayor's court within the purview of Section 3375.50, Revised Code.

This conclusion is further buttressed by Section 733.40, Revised Code, which refers specifically to a mayor's court and states that all fines, forfeitures, and costs in ordinance cases and all fees collected by the mayor shall be paid into the treasury of the municipal corporation, with the exception of Sections 3375.50 to 3375.52, Revised Code. Thus the law library association is entitled to its share of the fines or forfeitures of a mayor's court.

Therefore, it is my opinion and you are hereby advised that fines paid for violations of a city ordinance to a mayor's court are payable to a law library association under Section 3375.50, Revised Code.

OPINION NO. 69-069

Syllabus:

A local board of education is not required by statute to pay a teacher full increments on the salary schedule for half-time or part-time teaching.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, June 24, 1969

I have before me your request for my opinion regarding whether a local board of education is required by statute to pay a teacher full increments on the salary schedule for half-time or part-time teaching.

Section 3317.13, Revised Code, provides in part as follows:

> "* * * * * * * * *
>
> "Each teacher employed by a board of education in a school district shall be fully credited with placement in the appropriate academic training level column in the salary schedule of the district with years of service properly credited pursuant to this section or Section 3317.14 of the Revised Code. * * *"

It is important at the outset to determine legislative intent

in the matter. Did the General Assembly intend to extend full "tenure" credit for a half-time or part-time teacher? I think it did not.

Section 3319.09 (B), Revised Code, defines "year" as follows:

> "(B) 'Year' as applied to term of service means actual service of not less than one hundred twenty days within a school year* * *."

And in providing eligibility requirements for a continuing service contract, Section 3319.11, Revised Code, provides in part that:

> "Teachers eligible for continuing service status in any school district shall be those teachers qualified as to certification, who within the last five years have taught for at least three years in the district, and those teachers who, having attained continuing contract status elsewhere, have served two years in the district, but the board of education, upon the recommendation of the superintendent of schools, may at the time of employment or at any time within such two-year period, declare any of the latter teachers eligible."

Inasmuch as the statutes above merely infer full-time requirements, I direct your attention to Opinion No. 1165, Opinions of the Attorney General for 1960, branch 3, wherein my predecessor ruled on a correlative issue thusly:

> "For a teacher to receive credit for one year's service as a regular public school teacher outside the district or for service as a member of the Armed Forces, pursuant to Section 3317.06, Revised Code, such service should be for a 'teaching year,' i.e., approximately nine months or for service in the Armed Services, for an 'armed services year,' i.e., twelve months."

Directly on point and conclusive of the issue at hand is a statement contained in Opinion No. 1421, Opinions of the Attorney General for 1964, wherein my predecessor stated:

> "In providing the standards for continuing contract status or 'tenure' the General Assembly must have intended a year of service to mean a full year and not a partial year or a year of service on a part time basis. This is the plain and obvious meaning of the word as used in Section 3319.11, supra."

Therefore, it is my opinion and you are hereby advised that a local board of education is not required by statute to pay a teacher full increments on the salary schedule for half-time or part-time teaching.

OPINION NO. 69-070

Syllabus:

A local school board may not adopt a policy which would allow a teacher to receive full pay for absence resulting from personal injury caused by the assault by a student, such leave of absence not being charged to sick leave or personal leave.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, June 24, 1969

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

> May a local school district adopt a policy which would allow a teacher to receive full pay for absence resulting in personal injury caused by the assault by a student, such leave of absence not being charged to sick leave or personal leave?

Conditions under which employees of boards of education may use sick leave may be found in Section 143.29, Revised Code, which provides in pertinent part as follows:

> "* * * * * * * * *
>
> "Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness or death in the employee's immediate family." (Emphasis added.)

In no other section of the Revised Code is there reference to the use of sick leave as pertaining to employees of boards of education with the exception of Sections 3313.21 and 3319.08, both of which merely require the payment of sick leave compensation for not less than five (5) days annually.

It has been previously established by this office that the latter two statutes above cited provide minimum standards "for time lost due to illness or otherwise." It appears, however, that they do not authorize a local board to designate a new relief category. Opinion No. 1605, Opinions of the Attorney General for 1950. And Branch 4 of the syllabus of the same Opinion stated that sick leave rights of all employees of boards of education should be determined pursuant to Section 486-17a, General Code (Section 143.29, Revised Code), rather than Section 4834-5a, General Code (Section 3313.21, Revised Code).

The fact situation presented in your request clearly falls within the ambit of Section 143.29, supra. For the purpose of a leave of absence, either an individual is sick or injured, or he is not. If compensation for a period of absence due to injury by assault is to be paid, Section 143.29, supra, governs and said compensation must be deducted from accumulated sick leave. Perhaps an extension of the ninety day period would serve essentially

the same purpose as establishing an entirely new relief category. But it is clear, in any case, that accumulated sick leave must be used.

Therefore, it is my opinion and you are hereby advised that a local school board may not adopt a policy which would allow a teacher to receive full pay for absence resulting from personal injury caused by the assault of a student, such leave of absence not being charged to sick leave or personal leave.

OPINION NO. 69-071

Syllabus:

1. The superintendent of schools of the vocational school district, the executive head of the vocational school district board of education, or the principal of the vocational school may properly suspend a student therefrom, but only said superintendent or executive head has the authority to expel a student from the vocational school.

2. A local school superintendent may expel a student from the local school on the same grounds as used by the vocational school superintendent in expelling said student from the vocational school.

3. Section 3313.66, Revised Code, must be interpreted strictly, with the result that the suspension or expulsion of a student may not extend beyond the current semester.

To: Paul E. Work, Erie County Pros. Atty., Sandusky, Ohio
By: Paul W. Brown, Attorney General, June 25, 1969

I have before me your request for my opinion regarding substantially the following questions:

1. Who has the authority to suspend or expel a student from a joint vocational school?

2. May the local superintendent expel the student from the local school on the same grounds as those used by the vocational superintendent?

3. Must Section 3313.66, Revised Code, be interpreted strictly with the effect that "No pupil shall be suspended or expelled from any school beyond the current semester?"

In regard to your first question, I direct your attention to Section 3313.66, Revised Code, which provides in pertinent part as follows:

> "The superintendent of schools of a city or exempted village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school

for not more than ten days. Such superintendent or executive head may expel a pupil from school. * * *"

This section clearly establishes who may suspend and who may expel a local school student. In the case of suspension, the following have been given the proper authority:

1. The superintendent of schools of a city or exempted village.

2. The executive head of a local school district.

3. The principal of a public school.

In the case of expulsion, the following have been given proper authority:

1. The superintendent of schools of a city or exempted village.

2. The executive head of a local school district.

Vocational school officials derive their authority not directly from Section 3313.66, supra, but indirectly from Section 3311.99, Revised Code, which grants them the same authority as is granted city school officials under Section 3313.66, supra:

"* * * * * * * * *

"A joint vocational school district board of education shall have the same powers, duties, and authority for the management and operation of such joint vocational school district as is granted by law to a board of education of a city school district, and shall be subject to all the provisions of law that apply to a city school district.

"* * * * * * * * *

"The superintendent of schools of a joint vocational school district shall exercise the duties and authority vested by law in a superintendent of schools pertaining to the operation of a school district and the employment and supervision of its personnel."

The above quoted statutes, considered together, plainly provide that three officials may suspend (the superintendent, the executive head, or the principal) and that only two officials may expel (the superintendent or the executive head). Inasmuch as a grant of power to do a particular thing is involved, the maxim of expressio unius est exclusio alterius is pertinent. Thus, the statutes operate to exclude any official not specifically named therein; and, in the case of expulsion, excludes a principal.

Your second question asks whether a local school superintendent may expel a student from the local school on the same grounds as those used by the vocational superintendent. The

answer to this question may be determined by referring to Section 3311.21.4, Revised Code, which provides as follows:

> "Pupils in a joint vocational school district continue to be enrolled in the school district of their school residence and should be considered as such in the calculation of approved classroom units under Section 3317.05 of the Revised Code."

This section is interpreted by the state board of education as allowing vocational school students to participate in sports, band and other activities at the local school. Although the vocational and local systems are distinguished at the administrative level, it is apparent that the General Assembly intended that vocational school students remain an important part of the local school system. This office has learned that the vocational student even received his diploma from the local school, rather than from the joint vocational school. It would seem therefore that suspension or expulsion from a joint vocational school would operate automatically as suspension or expulsion from the local school. This procedure obviously anticipates that such a situation could be treated more expeditiously than in the case where the student would immediately enroll in the local school, thus necessitating his removal by the local superintendent. This is not to say that the latter procedure would be improper. Quite the contrary, in response to your question, I find no reason why such a student may not be expelled, or excluded as the case may be, from a local school by a local superintendent on the same grounds as those used by a vocational school superintendent.

This leads us to the matter of how Section 3313.66, Revised Code, is to be interpreted. It was held in Brown v. Board of Education, 6 NP 411, 8 OD 378, that the statutory provisions of General Code Section 7685, the predecessor of the statute in question here, must be complied with strictly. Considering the fact that individuals of a certain age are required to receive an education, the dictum in that case is at least persuasive. Section 3313.66, Revised Code, provides:

> "* * * No pupil shall be suspended or expelled from any school beyond the current semester."

The mandate of this section is clear and it must be followed strictly. Thus, even where the proper authorities deem it appropriate to suspend or expel a student just one day before the end of the current term, he must be allowed nevertheless to return to school at the beginning of the subsequent semester.

However, it is likewise clear that Section 3313.66, supra, does not begin to operate until the suspension or expulsion order is issued.

It is, therefore, my opinion and you are hereby advised:

1. The superintendent of schools of the vocational school district, the executive head of the vocational school district board of education, or the principal of the vocational school may properly suspend a student therefrom, but only said super-

intendent or executive head has the authority to expel a student from the vocational school.

2. A local school superintendent may expel a student from the local school on the same grounds as used by the vocational school superintendent in expelling said student from the vocational school.

3. Section 3313.66, Revised Code, must be interpreted strictly, with the result that the suspension or expulsion of a student may not extend beyond the current semester.

OPINION NO. 69-073

Syllabus:

1. Rules and regulations for the construction and maintenance, protection, and use of garbage and refuse collection, and disposal facilities made by the Board of County Commissioners pursuant to Section 343.01, Revised Code, must be published.

2. The publication which is required by Section 343.01, Revised Code, is any publication which the Board of County Commissioners decides is reasonably likely to inform those affected by the rules and regulations that it makes.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, July 1, 1969

I have before me your request for my opinion on the following matter: Section 343.01, Revised Code, provides for the establishment of county garbage and refuse disposal districts. This section provides, in part, that the Board of County Commissioners may do the following:

"* * * * * * * * *

"The board may make, publish, and enforce rules and regulations for the construction and maintenance, protection, and use of garbage and refuse collection, and disposal facilities. Such rules and regulations shall not be inconsistent with the rules and regulations of the department of health.

"* * * * * * * * *"

Your question in relation to this section are whether publication is necessary to make rules and regulations valid and, if publication is necessary, in what form should it be made.

In relation to your first question, it is clear that once the Board of County Commissioners has made rules and regulations pursuant to Section 343.01, supra, it must enforce such rules and publish them. The General Assembly did

not intend that the rules made pursuant to Section 343.01, supra, should be published but not enforced, or enforced but not published.

The syllabus of State of Ohio v. Nickles, 159 Ohio St. 353, 50 Ohio Op. 322 (1953), reads in pertinent part as follows:

> "In determing the intention of the General Assembly as to the meaning and operation of statutes, a court, if possible, should avoid absurd and grotesque results."

This office, in its attempt to determine the intention of the General Assembly, is under a similar duty to avoid absurd results. Thus, once rules and regulations have been made pursuant to Section 343.01, supra, such rules and regulations must be both published and enforced.

Chapters 305. and 307., Revised Code, which deal with the powers and duties of the Board of County Commissioners, do not provide for the kind of publication that is required in Section 343.01, supra. Under these circumstances, any publication which the Board of County Commissioners decides is reasonably likely to inform those affected by the rules and regulations it makes will comply with the publication requirements of Section 343.01, supra. In this matter the Board of County Commissioners must exercise its own discretion.

In conclusion, it is my opinion and you are hereby advised:

1. Rules and regulations for the construction and maintenance, protection, and use of garbage and refuse collection, and disposal facilities made by the Board of County Commissioners pursuant to Section 343.01, Revised Code, must be published.

2. The publication which is required by Section 343.01, Revised Code, is any publication which the Board of County Commissioners decides is reasonably likely to inform those affected by the rules and regulations that it makes.

OPINION NO. 69-074

Syllabus:

1. A county may expend its portion of funds derived from the county motor vehicle tax levied pursuant to Section 4504.02, Revised Code, for purchase of right-of-way. However, municipalities may not expend funds allocated by Section 4504.05, Revised Code, for the purpose of right-of-way.

2. Funds derived from Section 4504.02, Revised Code, may be used by both the county and municipalities for the removal of ice and snow. However, municipalities are limited in their expenditures to streets designated on the map submitted pursuant to Section 4504.03, Revised Code.

3. Both the county and municipalities may expend funds

derived from Section 4504.02, Revised Code, for the construction and/or maintenance of culverts, bridges and railroad separations.

4. Money received from Section 4504.02, Revised Code, may not be used to pay the salaries of employees of the county engineer's office for inspection work.

5. Money may not be allocated and distributed to municipalities pursuant to Section 4504.04, Revised Code, for projects which have been started or completed prior to application for funds.

To: C. Howard Johnson, Franklin County Pros. Atty., Columbus, Ohio
By: Paul W. Brown, Attorney General, July 1, 1969

I have your request for my opinion which reads as follows:

"In reviewing the new $5.00 Motor Vehicle License Tax, several questions regarding both the County and City funds have arisen as follows:

"1. May this money be used for the following items:

"(a) Purchase of right-of-way.
"(b) Removal of snow and ice.
"(c) The construction and/or maintenance of culverts, bridges and railroad separations.
"(d) Engineering and construction inspection on any eligible work.

"2. Can money be allocated to the cities for projects which have been started before application for funds has been approved?

"3. In the case where the work involved exceeds the allotment of a city, can money be allocated in a succeeding year or years for this project, even though the work has been completed?"

In answering your questions I have taken note of the fact that the tax with which you are concerned is the county motor vehicle license tax levied pursuant to Section 4504.02, Revised Code, as distinguished from the municipal motor vehicle license tax levied by Section 4504.06, Revised Code. I should also mention that in certain of your questions a distinction must be made between county and municipal expenditures, and I have done so where necessary.

Answering your questions in the order in which they are presented:

1. (a)

County:

The pertinent portion of Section 4504.02, Revised Code, states the tax is:

> "For the purpose of paying the costs of enforcing and administering the tax provided for in this section; and for planning, constructing, improving, maintaining, and repairing public roads, highways, and streets, maintaining and repairing bridges and viaducts; paying the county's portion of the costs and expenses of cooperating with the department of highways in the planning, improvement, and construction of state highways; paying the county's portion of the compensation, damages, cost, and expenses of planning, constructing, reconstructing, improving, maintaining, and repairing roads; * * *" (Emphasis added)

Sections 163.01 to 163.22 of the Revised Code set forth the procedure for appropriation of property. Section 163.14, Revised Code, contained therein states in part:

> "In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages * * *" (Emphasis added)

It must, therefore, be concluded that by using the words compensation and damages in Section 4504.02, Revised Code, the legislature intended that money received under Section 4504.02, Revised Code, be spent for appropriation of right-of-way.

Following the reasoning set forth above, it is my opinion that a county may purchase right-of-way with funds derived from Section 4504.02, Revised Code.

Municipalities:

A separate consideration is whether or not a municipality within a county may use funds allocated pursuant to Section 4504.05, Revised Code, for the purchase of right-of-way. Section 4504.04, Revised Code states in pertinent part:

> "Any municipal corporation located within a county levying a county motor vehicle license tax may at any time following adoption by the board of county commissioners of a map prepared pursuant to section 4504.03 of the Revised Code make application in writing to the board for funds available under section 4504.05 of the Revised Code to plan, construct, reconstruct, improve, maintain, or repair any

> of the streets within the municipality shown on such map, to pay the municipal corporation's portion of the cost of cooperating with the county or with the department of highways in the planning, construction, reconstruction, improvement, maintenance, or repairing of any of the roads or highways designated on such map * * *"

Notice that the above-quoted section does not make reference to compensation or damages as did Section 4504.02, Revised Code. You may also note that Section 4504.06, Revised Code, which levies the municipal rather than the county motor vehicle license tax, does include payment of compensation and damages in its purpose clause.

By expressly omitting payment of compensation or damages from Section 4504.04, Revised Code, I must conclude that the legislature meant to exclude municipalities from purchasing right-of-way.

It is therefore my opinion that municipalities may not expend funds allocated by Section 4504.05, Revised Code, for the purpose of purchasing right-of-way.

(b)

The statewide motor vehicle tax which is levied by Section 4503.02, Revised Code, and distributed pursuant to Section 4501.04, Revised Code, states that the fund may be used to "clear and clean public highways." You will notice that neither Section 4504.02, nor Section 4504.04, Revised Code, contains these words.

One of my predecessors considered a question similar to yours in Opinion No. 5661, Opinions of the Attorney General for 1942. The question presented there was whether or not funds from the motor vehicle license tax and the "first" gasoline tax could be used to purchase salt to be used on streets. There also the sections setting forth the distribution of the taxes did not include the words "clean and clear" as had been done in the section distributing the "second" gasoline tax. In deciding that a municipality had the power to expend the proceeds from all three taxes to purchase salt, it was stated:

> "It appears to me that all operations designed to keep a road or street in good and safe condition for the purpose for which it is constructed, may properly be included within the term 'maintenance'. In some cases maintenance may amount to repair; in others it may be of a purely temporary or emergency character. * * *"

The above reasoning was followed in Opinion No. 2283, Opinions of the Attorney General for 1961.

I concur with the reasoning stated above for both the county and municipalities. However, in the case of a municipality the allocation would be contingent upon compliance with the procedures set forth by Section 4504.04, Revised

Code, and would be limited to streets designated on the map submitted pursuant to Section 4504.03, Revised Code.

(c)

County:

Section 4504.02, Revised Code, provides authority to the county for maintaining bridges and viaducts. A viaduct is defined by Webster's Seventh New Collegiate Dictionary as:

> "a bridge esp. when resting on a series of narrow reinforced concrete or masonry arches, having high supporting towers or piers, and carrying a road or railroad over an obstruction (as a valley or river)"

On the basis of the above definition, I would include railroad separations under the general term of viaduct. This conclusion is reinforced by the wording in Section 5561.06, Revised Code, wherein viaducts are spoken of as part of a grade crossing, specifically:

> "The cost of constructing a grade crossing improvement, including the making of * * * viaducts, above or below the railroad tracks * * *"

Therefore, maintenance of railroad separations is authorized by Section 4504.02, Revised Code.

In Opinion No. 101, Opinions of the Attorney General for 1929, at page 151, my predecessor referred:

> "* * * to the established rule that when streets or highways are mentioned, bridges are included within the term unless the statute involved indicates otherwise. * * *"
> (See also 9 C.J. 422)

The logic behind such a rule would seem to be that a "highway" must also include all essential elements unless specifically excluded. The legislature in Section 5501.01, Revised Code, defines "road" or "highway" to include:

> "* * * bridges, viaducts, grade separations, appurtenances and approaches on or to such road or highway."

Admittedly, the county and municipal road and street system is not specifically covered by Section 5501.01, Revised Code. However, a Court of Appeals stated in State, ex rel., v. Vogel, 108 Ohio App. 294, 297 (1958):

> "* * * when the same word ('highway') is employed in different acts by the same legislative body, the word may be determined to mean the same thing in each of the acts. * * *"

It would be ironic that a county could build a road or highway but could not build a bridge to complete the highway.

Therefore, it is my opinion that the county may expend funds derived from Section 4504.02, Revised Code, to construct and/or maintain bridges, culverts and railroad separations.

Municipality:

A separate question is raised as to whether or not a municipality may use funds allocated by Section 4504.05, Revised Code, for the construction and/or maintenance of culverts, bridges and railroad separations. Section 4504.04, Revised Code, does not specifically mention maintenance of bridges or viaducts as did Section 4504.02, Revised Code. However, following the reasoning outlined above and that of the 1929 Opinion No. 101, supra, since the items in question are not specifically excluded they should be included in the word "street" as used in the statute.

Thus, since Section 4504.04, Revised Code, allows expenditures for construction and maintenance of streets, a logical interpretation would also allow expenditures for construction and/or maintenance of bridges, culverts, and railroad separations, and you are so advised.

(d)

Section 325.17, Revised Code, states:

> "The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants * * * or other employees for their respective officers * * * When so fixed, the compensation (shall be paid) * * * from the county treasury * * *"

(Words in parentheses and underlining added)

The county engineer is one of the officers mentioned in Section 325.27, Revised Code, as stated in Opinion No. 4150, Opinions of the Attorney General for 1935, at page 425:

> "* * * Undoubtedly by the words 'county treasury' the legislature means 'the general fund' when no other fund is mentioned."

Section 5543.09, Revised Code, states in pertinent part:

> "The county engineer shall supervise the construction, reconstruction, improvement, maintenance, and repair of the highways, bridges, and culverts under the jurisdiction of the board of county commissioners * * * When the engineer has charge of the highways, bridges, and culverts within his county, and under the control of the state, he shall also supervise their construction, reconstruction, improvement, and repair."
> (Emphasis added)

Therefore, it is my opinion that money received from Section 4504.02, Revised Code, may not be used to pay the salaries of employees of the county engineer's office for inspection work. The same restriction is applicable to municipalities.

However, expense other than salaries would be chargeable to eligible work.

2. and 3.

Your second and third questions are very similar and therefore I will answer them together. The combined question may be stated as: may money be allocated to a municipality for projects which have been started prior to allocation of funds or completed prior to allocation of funds?

Section 4504.05, Revised Code, states in part that moneys received by the county shall be credited to a fund for municipal corporations:

> "(B) (1) * * * to be allocated and distributed as provided in section 4504.04 of the Revised Code."

Section 4504.04, Revised Code, states in pertinent part:

> "* * * the board of county commissioners shall have encumbered the moneys necessary to fulfill awarded contractual or other obligations for approved project costs. The county auditor shall draw a warrant for such encumbered amount, upon notification * * * that work on an approved project has commenced * * *"
>
> (Emphasis added)

Reading the above section in conjunction with Section 5705.41, Revised Code, I conclude that the money allocated must be in the treasury. Therefore, money may not be allocated for a succeeding year if such funds are not in existence at the present time. See also Section 5705.44, Revised Code, as to continuing contracts.

A perusal of the complete statute leads to the conclusion that the statute only refers to new projects not yet undertaken. The statute uses terms such as "proposed construction" or "work to be done." The implication is that the statute does not anticipate the allocation of money to projects which have been started or completed prior to application for funds pursuant to Section 4504.04, Revised Code.

Therefore, it is my opinion that money may not be allocated and distributed to municipalities pursuant to Sections 4504.04 and 4504.05, Revised Code, for projects which have been started or completed prior to application for funds.

OPINION NO. 69-075

Syllabus:

A city council has the continuing authority and duty to redistrict the city into proper wards according to law when an increase in population occurs, as provided by Section 731.06, Revised Code, warranting the same.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, July 2, 1969

Before me is your request for my opinion which reads as follows:

> "In September 1968, the City of Girard passed an ordinance redistricting the City into wards and have now requested the Board of Elections to take the necessary steps to complete the redistricting procedure.
>
> "The City officials of Girard realize that they did not comply with Section 731.06 O.R.C., but they feel that their action was valid in view of the recent United States Supreme Court decisions concerning apportionment.
>
> "Would you be kind enough to furnish us with your opinion on this matter as quickly as possible."

It appears that there is case law and one Opinion of the Attorney General directly in point on this question and subject matter.

In Opinion No. 66-108, Opinions of the Attorney General for 1966, my predecessor said:

> "* * * it is my opinion that the legislative authority must make the redivision required by Section 731.06, Revised Code, within three months after it receives from the Secretary of State a proclamation of the population of the area annexed according to the last federal census, assuming of course that the annexed area population when added to the pre-annexation population of the city requires an increase in the number of councilmen pursuant to Section 731.01, Revised Code."

Pertinent terminology of Section 731.06, Revised Code, is as follows:

> "The legislative authority of a city shall, after each recurring federal census,

> and within three months after the issuance of the proclamation by the secretary of state of the population of the city, and when there is annexed thereto any territory containing, according to the last federal census, such number of inhabitants as will entitle the city to an additional member of the legislative authority, subdivide the city into wards, equal in number to the members of the legislative authority therein to be elected from wards. If the legislative authority fails to make such subdivision within the time required, on the application of its president, it shall be made by the director of public service. * * *" (Emphasis added.)

This section provides for a mandatory duty to be performed by the legislative body, which duty is subject to mandamus. The director of public service is also subject to mandamus following the application by the president of council. The president of council, however, appears to be under no mandatory duty to perform. It is apparent, therefore, that the council has a continuing mandatory duty to act under Section 731.06, Revised Code, at all times.

The Supreme Court of Ohio has stated that where a clear legal duty is imposed on council by municipal charter to redistrict the municipality for voting purposes, mandamus will lie to compel performance of that duty. The same result would be expected for a statutory form of city government under the requirements of Section 731.06, Revised Code. The case just mentioned is The State, ex rel., Scott, et al. v. Masterson, et al., 173 Ohio St. 402 (1962), and the syllabus reads as follows:

> "Where the charter of a city provides that councilmen of the city shall be elected by wards which shall be nearly equal in population and further provides that the city council shall redivide the city after each decennial federal census for that purpose, there is a mandatory duty upon city council to comply with the charter."

From the foregoing, it is my opinion and you are advised that a city council has the continuing authority and duty to redistrict the city into proper wards according to law when an increase in population occurs, as provided by Section 731.06, Revised Code, warranting the same.

OPINION NO. 69-076

Syllabus:

1. Section 5705.41, Revised Code, requires that before any contract involving the expenditure of money is entered into by a county, the county auditor must certify that the amount required to meet the same has been lawfully appropriated for that purpose and is in the treasury or is in the process of

collection to the credit of the appropriate fund free from any previous encumbrances.

2. Section 319.19, Revised Code, prohibits the county auditor from making payments on contracts until five days after the Board of County Commissioners has approved such payments.

To: Thomas C. Hanes, Darke County Pros. Atty., Greenville, Ohio
By: Paul W. Brown, Attorney General, July 2, 1969

I have before me your request for my opinion on the correct procedure for the approval of contracts involving an expenditure of money by a county and for the subsequent payment of money in connection with such contracts.

Section 5705.41, Revised Code, is concerned with certain restrictions upon the appropriation and expenditure of money. It reads, in pertinent part, as follows:

> "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 * * * 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. Every such contract made without such a certificate shall be void and no warrant shall be issued in payment of any amount due thereon.
>
> "* * * * * * * * *"
>
> (Emphasis added)

Section 5705.01 (A), Revised Code, defines "subdivision" and Section 5705.01 (D), supra, defines "fiscal officer" as follows:

> "As used in sections 5705.01 to 5705.47, inclusive, of the Revised Code:
>
> "(A) 'Subdivision' means any county, municipal corporation, township, township fire district, township waste disposal district, or school district, except the county school district.
>
> "* * * * * * * * *"

"(D) 'Fiscal officer' in the case of a county, means the county auditor.

"* * * * * * * * *"

Thus, Section 5705.41, supra, requires that before any contract involving the expenditure of money is entered into by a county, the county auditor must certify that the amount required to meet the same has been lawfully appropriated for that purpose and is in the treasury or is in the process of collection to the credit of the appropriate fund free from any previous encumbrances.

Payments of money in connection with such contract are to be made from the appropriate funds in the county treasury. These funds are controlled by the "taxing authority" of the county. Section 5705.01 (C), Revised Code, states the following:

"* * * * * * * * *

"(C) 'Taxing authority' * * * means, in the case of any county, the board of county commissioners.

"* * * * * * * * *"

Thus the Board of County Commissioners controls the funds in the county treasury.

Section 319.19, Revised Code, reads as follows:

"A bill or voucher for payment of money from any fund controlled by the board of county commissioners must be filed with the county auditor and entered in a book for that purpose at least five days before its approval by the board. When approved, the date of approval shall be entered on such book opposite the claim, and payment of such claim shall not be made until after the expiration of five days after the approval has been so entered."

This section requires the county auditor not to make payments until five days after the Board of County Commissioners has approved such payment.

In conclusion, it is my opinion and you are hereby advised:

1. Section 5705.41, Revised Code, requires that before any contract involving the expenditure of money is entered into by a county, the county auditor must certify that the amount required to meet the same has been lawfully appropriated for that purpose and is in the treasury or is in the process of collection to the credit of the appropriate fund free from any previous encumbrances.

2. Section 319.19, Revised Code, prohibits the county auditor from making payments on contracts until five days after the Board of County Commissioners has approved such payments.

OPINION NO. 69-077

Syllabus:

1. Under Section 143.29, Revised Code, the responsible administrative officer of the employing unit in County government may approve the accumulation of more than ninety days of sick leave and he may, at his discretion, approve this allowance for an individual employee or may adopt a department policy for such allowance, applying to all employees.

2. The responsible administrative officer of the employing unit in the County government may not pay an employee for more sick leave than the employee has earned at the rate provided in Section 143.29, Revised Code.

To: E. Raymond Morehart, Fairfield County Pros. Atty., Lancaster, Ohio
By: Paul W. Brown, Attorney General, July 3, 1969

I have your request for my opinion relative to the interpretation of the sick leave provisions set forth in Section 143.-29, Revised Code. The request reads as follows:

> "1. May the responsible administration officer of the employing unit in County government adopt a policy permitting his employees to accumulate more than ninety days sick leave? If so, may he adopt such a policy on an individual employee basis or must it be a department policy applying to all employees?
>
> "2. May the responsible administration officer of the employing unit in County government pay an employee for more sick leave than that employee has accumulated under the provisions of Section 143.29 of the Ohio Revised Code?"

Section 143.29, Revised Code, provides in part as follows:

> "Each employee, whose salary or wage is paid in whole or in part by the state, and each employee in the various offices of the county service and municipal service, and each employee of any board of education, shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay. Employees may use sick leave, upon approval of the responsible administrative officer of the employing unit, for absence due to illness, injury, exposure to contagious disease which could be communicated to other employees, and to illness or death in the employee's immediate family. <u>Unused sick leave shall be cumulative up to ninety work days, unless more than ninety</u>

> days are approved by the responsible administrative officer of the employing unit. * * * An employee who transfers from one public agency to another shall be credited with the unused balance of his accumulated sick leave. * * * This section shall be uniformly administrated as to employees in each agency of the state government by the director of state personnel." (Emphasis added)

The first part of question one, asking whether the responsible administrative officer of the employing unit may adopt a policy permitting the accumulation of more than 90 days sick leave, I believe is answered by the underlined portion of the statute above quoted. It is expressly provided that the responsible administrative officer may approve the allowance of more than 90 days. The second part of question one asks whether such allowance of greater accumulation of sick leave over and above the specified 90 days sick leave may be on an individual basis or is it required that it be made effective only to apply uniformly to all employees in the unit. It is my opinion that such approval may be granted by the responsible administrative officer on either basis at his election.

As pointed out in Opinion No. 3626, Opinions of the Attorney General for 1954, the words "public agency" as used in Section 143.29, supra, with reference to transfer include the state, the several counties, all municipalities and all boards of education. But the words "each agency of the state government" as used in said section with reference to uniform administration, include the various departments and agencies of the state government, but do not include the several political subdivisions therein mentioned. Your question relates to uniform administration. More in point, this question was considered by one of my predecessors in Opinion No. 2073, Opinions of the Attorney General for 1961, in his interpretation of Section 143.29, supra, and I quote from page 139:

> "* * * the board of education has discretion in determining the method of granting such approval, i.e., general approval for all employees or specific approval for individual employees."

The reasoning and logic behind this holding applies with equal force, in my opinion, to County employees as it does to employees of a Board of Education and I affirm this holding.

As I interpret question No. 2, you ask whether the County government may pay one of its employees for more sick leave than he has earned under the formula set out in said Code Section, being at the rate of four and six-tenths hours of sick leave for each completed eighty hours of service. I am of the opinion that the question thus framed must be answered in the negative. Section 143.29, supra, states that each employee covered "shall be entitled for each completed eighty hours of service to sick leave of four and six-tenths hours with pay." While this section does make provision for an increase in the amount of sick leave that may be accumulated, no provision is made for an increase in the amount of earned sick leave for a given period of service. The legislative intent is stated in exact terms as to the amount earned by each employee, indicating no more and no less. Any

other interpretation would tend to make this statute on rate of usable sick leave earned of little meaning.

I am of the opinion, therefore, and you are so advised:

1. Under Section 143.29, Revised Code, the responsible administrative officer of the employing unit in County government, may approve the accumulation of more than ninety days of sick leave and he may, at his discretion, approve this allowance for an individual employee or may adopt a department policy for such allowance, applying to all employees.

2. The responsible administrative officer of the employing unit in the County government may not pay an employee for more sick leave than the employee has earned at the rate provided in Section 143.29, Revised Code.

OPINION NO. 69-078

Syllabus:

The raising and care of dogs is not animal husbandry and therefore not agriculture within the meaning of Section 519.01, Revised Code, and such activity does not constitute the use of land or buildings for agricultural purposes within the meaning of Section 519.21, Revised Code.

To: Robert Webb, Ashtabula County Pros. Atty., Jefferson, Ohio
By: Paul W. Brown, Attorney General, July 3, 1969

I am in receipt of your request for my opinion as to whether the raising and care of dogs can be properly classified as "animal husbandry" and therefore "agriculture" within the meaning of Section 519.01, Revised Code, so as to constitute an exception to the Township Zoning Law, Chapter 519, Revised Code.

Section 519.21, Revised Code, provides, in pertinent part, as follows:

> "Sections 519.02 to 519.25, inclusive, of the Revised Code confer no power on any board of township trustees or board of zoning appeals to prohibit the use of any land for agricultural purposes or the construction or use of buildings or structures incident to the use for agricultural purposes of the land on which such buildings or structures are located, and no zoning certificate shall be required for any such building or structure."
> (Emphasis supplied)

Section 519.01, Revised Code, defines "agriculture" as follows:

> "As used in sections 519.02 to 519.25, inclusive, of the Revised Code, 'agriculture' includes agriculture, farming, dairying, pasturage, api-

culture, horticulture, floriculture, viticulture, and animal and poultry husbandry."
(Emphasis supplied)

Section 519.21, supra, was construed in Opinion No. 3607, Opinions of the Attorney General for 1954, insofar as the raising of mink was concerned. The second syllabus of that Opinion reads as follows:

"2. The provision of Section 519.21, Revised Code, forbidding the zoning of any land in a township, so as to prohibit its use for agricultural purposes, does not prevent the adoption of zoning regulations limiting the use of such land for raising minks."

The holding in the Opinion, supra, was based on a definition of animal husbandry which limited the term to such animals as are usually incidental to the operation of a farm.

The term "animal husbandry" was construed four years later in the case of Mentor Lagoons, Inc. v. Zoning Board, 168 Ohio St. 113 (1958). The Court in Mentor Lagoons, Inc. held that the keeping of horses in a residential district for use in polo constituted "animal husbandry" within the meaning of Section 519.01, supra, and consequently could not be prohibited by a township zoning resolution, even though under proper circumstances such stabling of horses could be considered a nuisance and could be subject to injunction as such.

The Court in Mentor Lagoons, Inc., supra, adopted the definition of "animal husbandry" contained in Webster's New International Dictionary (2d Ed.) as follows:

"* * * the branch of agriculture which is concerned with farm animals, esp. as regards breeding, judging, care, and production * * *"

An "animal husbandman" is defined as:

"* * * one who keeps or tends livestock."

The Court of Appeals for Butler County, in Davidson v. Abele, 2 Ohio App. 2d 106 (1965) considered the business of a mink ranch or farm in light of Chapter 303, Revised Code, which authorizes county rural zoning. Sections 303.01 and 303.21, Revised Code, are identical to Sections 519.01 and 519.21, supra. The Court recognized Opinion No. 3607, Opinions of the Attorney General for 1954, supra, but held that the phrase "animal husbandry" does include the operation of a mink ranch as an agricultural pursuit and, consequently, it is not within the authority of county commissioners to zone. The holding was based on the definition of the term "animal husbandry" given by our Supreme Court in Mentor Lagoons, Inc., supra.

The question therefore becomes whether the raising and care of dogs can properly be considered "animal husbandry" within the definition of the term set forth in Mentor Lagoons, Inc., supra, and followed in Davidson, supra.

An "animal husbandman", as stated above, is one who keeps or

tends "livestock". Livestock is defined in Section 943.01 (A), Revised Code, for purposes of Chapter 943, Revised Code, as follows:

> "(A) 'Animals' or 'livestock' includes horses, mules, cattle, calves, swine, sheep, or goats."

Section 955.29, Revised Code, establishes the procedure whereby an owner of the therein statutorily enumerated kinds of animals may recover when such animal has been injured or killed by a dog not belonging to such owner nor harbored on his premises. The enumerated animals are: horses, sheep, cattle, swine, mules, goats, domestic rabbits, and domestic fowls or poultry.

A review of the statutes cited, supra, as well as other pertinent provisions of the Revised Code, reveals a legislative intent to separate dogs from those classes of animals normally thought of as livestock or farm-related. See also Mioduszewski v. Saugus, 337 Mass. 140, 148 N.E. 2d 655 (1958). The Court in Mentor Lagoons, Inc. broadened the purposes to which the enumerated animals could be put and still be considered part of animal husbandry. Horses, for example, may be used for recreation and need not be used on a farm or farm-related operation, and the zoning exemption will still apply. The Court did not, however, intend to so broaden the category of animals included within animal husbandry as to place every animal raised commercially therein. The Court in Davidson did include mink as part of animal husbandry, under the theory that the definition of "animal husbandry" should include more than what might ordinarily be thought of as domestic animals. However, mink have, for some years, been considered agricultural products by statute, even though the Court in Davidson did not rest its decision on such statute. Section 901.35, Revised Code, provides, in pertinent part, as follows:

> "For the purpose of all classification and administration of acts of the general assembly, executive orders, administrative orders, and regulations pertaining to mink, the following rules apply:
>
> "(A) Mink raised in captivity for breeding or other useful purposes are deemed domestic animals.
>
> "(B) Mink are deemed agricutlural products.
>
> "(C) The breeding, raising, producing, or marketing of mink or their products by the producer is deemed an agricultural pursuit."

Our General Assembly has never included dogs in the general category of livestock or farm animals, and, in fact, has segregated them as a type of animal apart from all others pursuant to the provisions of Chapter 955, Revised Code, which Chapter is entirely devoted to dogs.

It is therefore my opinion and you are hereby advised that the raising and care of dogs is not animal husbandry and therefore not agriculture within the meaning of Section 519.01, Revised Code, and such activity does not constitute the use of land or buildings for agricultural purposes within the meaning of Section 519.21, Revised Code.

OPINION NO. 69-080

Syllabus:

If for any reason a political party candidate for public office withdraws, dies, or is incapacitated to hold office at any time, not excluded by the time limits specified in Section 3513.31, Revised Code, such candidate vacancy may be filled pursuant to such section.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, July 3, 1969

Your request for my opinion reads in pertinent part as follows:

> "Can the vacancy created by the death of a candidate who filed a declaration of candidacy for nomination as a candidate for a political party be filled by said political party after the May primary date in accordance with the provisions of Section 3513.31 of the Revised Code when said candidate died in April, prior to the date when a primary election would have been held by his political party, although in fact, no such primary election was held due to a lack of contest for the nomination as Republican party candidates to any elective office? We will appreciate your advice on this question so that we can relay the answer to the Belmont County Board of Elections."

The per curiam opinion in The State, ex rel. Gottlieb v. Sulligan, et al., 175 Ohio St. 238 (1963), along with two reasonable assumptions, is, in my opinion, completely dispositive of your question. Random statements of the court are as follows:

> "The sole issue in this case is whether a person selected as a party candidate for an office in a primary election who withdraws his candidacy for that office is eligible for selection as a party candidate by the party committee to fill a vacancy in the nomination for another office created by the withdrawal of the candidate originally nominated.
>
> "The determination of this question rests on the construction of Section 3513.04, Revised Code, which reads in part as follows:
>
> "'No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in.'
>
> "* * * * * * * * *

'* * * an examination of this section reveals that by its very terms its operation is confined to those situations where a candidate seeks a place on the ballot either by a write-in vote or by nominating petition. No reference is made to the present situation whereby a candidate is selected by a party committee under the provisions of Section 3513.31, Revised Code. Thus, there is no direct prohibition of respondent Flask's candidacy by this section unless, as urged by relator, selection by party committee is equivalent to selection by nominating petition.

"* * * * * * * * *

"Inasmuch as Section 3513.04, Revised Code, specifically refers to a 'nominating petition,' it is necessary to determine the meaning of this phrase under the Ohio statutes. An examination of the election laws indicates that the phrase, 'nominating petition,' has a specific meaning. Under our statutes the candidates for public office may gain nomination by two methods: One, by filing a declaration of candidacy accompanied by a petition entitling one to be a participant in the direct party primary wherein candidates from all political parties seek their nomination; or, two, by what is designated as a nominating petition, the method by which the independent candidate may seek his place on the elective ballot. (See Section 3513.252, Revised Code.) In other words, the nominating petition is the method by which the independent candidate seeks his place on the elective ballot. Clearly a selection by a party committee of a party candidate to fill a vacancy on the ballot would not fall within the meaning of a nominating petition. The purpose of Section 3513.31, Revised Code, is to replace a duly nominated party candidate, who, because of death or withdrawal, has created a vacancy in the party ticket. The selection is of a party candidate and not an independent candidate and thus does not constitute a nominating petition or a petition in any sense.

"The purpose of Section 3513.04, Revised Code, clearly is to prevent a disappointed party candidate who has failed to be selected as a nominee in the primary from again trying to be placed on the elective ballot by entering the arena as an independent candidate.

"The operation of Section 3513.04, Revised Code, is confined to a nominating petition within the meaning of such term as used in the Ohio statutes and does not re-

late to persons selected by a party committee under the terms of Section 3513.31, Revised Code.

"* * * * * * * * *

Section 3513.31, Revised Code, relating to the selection of candidates to fill vacancies, is therefore, valid, and a selection thereunder does not constitute a selection by nominating petition. Therefore, inasmuch as Section 3513.04, Revised Code, confines its prohibitions to those seeking candidacy or election by write-in votes or nominating petition, it does not apply to a candidate selected by party committee under the provisions of Section 3513.31, Revised Code."

(Emphasis added.)

My first assumption, if one is indeed necessary, is that if for any reason a political party candidate for public office withdraws, dies, or is incapacitated to hold office at any time, not excluded by the time limits specified in Section 3513.31, Revised Code, such candidate vacancy may be filled pursuant to such section, which provides in pertinent part as follows:

> "If a person nominated in a primary election as a candidate for election at the next general election dies, the vacancy so created may be filled by the same committee in the same manner as provided in the first five paragraphs of this section for the filling of similar vacancies created by withdrawals, except that the certification when filling a vacancy created by death, may not be filed with the secretary of state, or with a board of the most populous county of a district, or with the board of a county in which the major portion of the population of a subdivision is located, later than four p.m. of the tenth day before the day of such general election, or with any other board later than four p.m. of the fifth day before the day of such general election."

My second assumption is that when a person has filed a declaration for candidacy and is nominated pursuant to Section 3513.02, Revised Code, it is tantamount to having been nominated at a primary election for the purposes of Section 3513.31, Revised Code.

It is, therefore, my opinion, and you are advised that when a vacancy is created by the death of a candidate who filed a declaration of candidacy for nomination as a candidate for a political party, it may be filled by said political party after the May primary date in accordance with the provisions of Section 3513.31 of the Revised Code, when said candidate died in April, prior to the date when a primary election would have been held by his political party, although in fact, no such primary election was held due to a lack of contest for the nomination as Republican party candidates to any elective office.

OPINION NO. 69-081

Syllabus:

A defendant acquitted by a jury of a charge is entitled to the return of costs posted by him before the trial.

To: James K. Nichols, Morgan County Pros. Atty., McConnelsville, Ohio
By: Paul W. Brown, Attorney General, July 3, 1969

I am in receipt of your opinion request which reads as follows:

> "I have been contacted concerning the legality of an individual serving at the same time as clerk of the township and clerk of the village.
>
> "The individual serving in this capacity is an elector within the village and within the township. I cannot find any statute specifically prohibiting a person from serving in the mentioned offices. It would appear that these offices are compatible. However, I would appreciate your opinion.
>
> "My second inquiry is in regard to court costs filed in a criminal action in a county court. Specifically, the individual was charged with assault and battery. He requested a jury trial (6 man) and posted $30 in costs. He was acquitted of the charge. However, the court is of the opinion that the posted costs of $30 were forfeited and should not be returned to the individual. I do not share this opinion. Your comments would be appreciated. I might add that the court is aware of this inquiry and will not take exception should your opinion agree with mine."

To answer your first inquiry, I direct your attention to Opinion No. 1075, Opinions of the Attorney General for 1915, which opinion controls the matter in question.

As to your second inquiry, it is necessary to consider Section 2947.23, Revised Code, which reads as follows:

> "In all criminal cases, including violations of ordinances, the judge or magistrate shall include in the sentence the costs of prosecution and render a judgment against the defendant for such costs. If a jury has been sworn at the trial of a case, the fees of the jurors

shall be included in the costs, which shall be paid to the public treasury from which the jurors were paid."

Under this section, jurors' fees where a jury has been sworn are to be included in the sentence upon a defendant. Thereby, in order for the defendant to be responsible for the cost of the jury, he must be found guilty. The converse of this is that if he is innocent or acquitted, then he is not to be charged for the cost.

This is in holding with Opinion No. 4961, Opinions of the Attorney General for 1955. Syllabus number one of that opinion states as follows:

> "Under the provisions of Section 2947.23, Revised Code, the per diem fees of jurors in a criminal case, including the per diem fee of an alternate juror chosen pursuant to Section 2313.37, Revised Code, constitute a part of the costs of prosecution for which judgment shall be rendered against a convicted defendant, and in the event the county is not able to realize such costs on execution against the defendant, they may be certified to the state auditor for payment by the state, pursuant to the provisions of Section 2949.19, Revised Code."

Note that judgment shall be rendered for costs of prosecution "against a convicted defendant." An acquitted or an innocent defendant is not required to pay juror fees.

This is to be distinguished from Opinion No. 69-058, Opinions of the Attorney General for 1969, the syllabus of which reads as follows:

> "1. The costs of prosecution, including jury fees, arising out of a mistrial and subsequent trial and conviction, must be assessed against the defendant pursuant to Section 2947.23, Revised Code.
>
> "2. Where, in the subsequent trial, the defendant pleads 'guilty' before the jury is impanelled, the fees of that jury may not properly be included in the costs of prosecution.
>
> "3. The court has no discretion in the taxing of jury fees in the case where a mistrial is declared resulting in a subsequent trial and conviction."

The present inquiry involves only one trial and no prior trial.

It is, therefore, my opinion, and you are hereby advised that a defendant acquitted by a jury of a charge is entitled to the return of costs posted by him before the trial.

OPINION NO. 69-082

Syllabus:

A county law library association may expend its funds in order to obtain a computer communications console as a means of access to the system of computerized legal research.

To: James B. Patterson, Madison County Pros. Atty., London, Ohio
By: Paul W. Brown, Attorney General, July 8, 1969

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

> "May a County Law Library expend its funds to rent or otherwise obtain a computer communications consol (sic) in order to provide a means of access to the system of computerized law searching for judges and members of the County Law Library Association?"

The funds of a county law library association come from two separate sources. The first source is made up of contributions by private individuals. There is no limitation on the use of these funds. They may be used for any purpose, including obtaining a computer communications console. Van Wert County Law Library Association v. Stuckey, 42 O. O. 1 at 8 (C. P. Van Wert Co. 1949); Opinion No. 5308, Opinions of the Attorney General for 1955; Opinion No. 4856, Opinions of the Attorney General for 1955.

The other funds are court fines allocated to the law library association under the provisions of Sections 3375.50 to 3375.53, inclusive, Revised Code. Section 3375.54, Revised Code, provides for the expenditure of these funds as follows:

> "The money paid to the board of trustees of a law library association under sections 3375.50 to 3375.53, inclusive, of the Revised Code, shall be expended in the purchase of lawbooks and in maintenance of such law library association."

While a system of computerized legal research is not specifically mentioned in this section, it is my opinion that funds may be expended for such a system. Such an expenditure can be authorized either under the authority to purchase law books or under the authority to maintain the law library.

Although a computerized legal research system is not technically a law book, it serves precisely the same purpose. Both are means of legal research; both provide access to the law. The system of computerized legal research is merely a technological improvement over law books. It is the newest development in legal research.

A statute should be construed with reference to its purpose. It should be given the interpretation which will carry out its objective.

> "The primary duty of a court in construing a statute is to give effect to the intention of the Legislature enacting it. In determining that intention, a court should consider the language used and the apparent purpose to be accomplished, and then such a construction should be adopted which permits the statute and its various parts to be construed as a whole and gives effect to the paramount object to be attained." Humphrys v. Winous Co., 165 Ohio St. 45 at 49 (1956).

(See also 2 Sutherland, Statutory Construction, Sections 4704 and 5505.)

The obvious purpose of Section 3375.54, supra, is to authorize the library trustees to expend funds to provide means for legal research for the judges and other specified officials. Computerized legal research is the newest development in legal research. An interpretation of the statute which permits the use of such a system gives effect to the statutory purpose. Any other interpretation would hinder and obstruct the purpose.

The law library association can also obtain this system under its authority to maintain the law library. Under this authority the trustees may expend these funds to provide all services necessary for the maintenance of the law library except those which are required to be furnished by the county commissioners.

> "The word 'maintenance' in Section 3375.54, Revised Code, denotes upkeep and contemplates the use of the fines fund to pay for all services necessary for the maintenance of the law library association, save those required by statute to be furnished by the county." Opinion No. 4856, Opinions of the Attorney General for 1955, at p. 74.

Those items which are required to be furnished by the county commissioners are set forth in Section 3375.49, Revised Code. These include physical facilities such as rooms, bookcases,

heat and light. Such items are of a different nature from a system of legal research. The expenditure of funds for maintenance of the law library was considered in the case of Van Wert County Library v. Stuckey, supra. The Court stated at page 8 of its Opinion as follows:

> "The law library association may expend funds received under Sections 3056 to 3056-3 [General Code] for purchase of books, repair of books, a reasonable amount to any person acting as custodian or performing duties that are not within the usual duties of librarian; the reasonable purchase of furniture, such as tables and chairs for the use of persons using the books; and any other reasonable expenses necessary for the maintenance of the law library such as purchase of library cards, catalogs, indexes, etc."

A system of computerized legal research, while a means of legal research similar to law books, also provides a service similar to library cards, catalogs, and indexes. It operates as as index in that it furnishes citations to cases and statutes. Such a system is reasonable to maintaining a modern up-to-date law library. It would thus be authorized as a reasonable expense necessary for the maintenance of the law library.

It is, therefore, my opinion and you are hereby advised that a county law library association may expend its funds in order to obtain a computer communications console as a means of access to the system of computerized legal research.

OPINION NO. 69-083

Syllabus:

1. A political subdivision may not borrow money pursuant to Section 133.30, Revised Code, in anticipation of an allocation from the local government fund until it is finally determined pursuant to the requirements of Section 5739.22, Revised Code.

2. For the same reasons as above stated, the County Auditor may not make a partial distribution of the county local government fund.

To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio
By: Paul W. Brown, Attorney General, July 8, 1969

Your request for my opinion concerning the borrowing of money by a local subdivision in anticipation of a distribution from the local

government fund presents two specific questions as follows:

> "A. Can a political subdivision entitled to participation in the proceeds of the undivided local government fund borrow from a financial institution against the anticipated distribution when the name fund is under appeal?
>
> "B. Can the County Auditor make a partial distribution of the Local Government Fund to subdivisions entitled to participate when such fund allocation is under appeal?"

Section 133.30, Revised Code, reads in pertinent part as follows:

> "In anticipation of the collection of current revenues in and for any fiscal year, other than the proceeds of taxes levied by the subdivision upon the duplicate of such subdivision, the taxing authority of any subdivision may, in addition to the authority provided in the first paragraph of this section, borrow money and issue notes therefor, but the aggregate of such loans shall not exceed one half of the amount estimated to be received from such sources during such fiscal year, less any advances thereon. The sums so anticipated shall be deemed appropriated for the payment of such notes at maturity. The notes shall not run more than six months, and the proceeds shall be used only for the purposes for which the anticipated revenues are collected and appropriated." (Emphasis added.)

There are explicit instructions in the above quotation with respect to the amount of money which may be borrowed, i.e., not to exceed one-half the amount estimated to be received, and, further, that which is anticipated shall be deemed appropriated to repay the amount borrowed.

Certainly, one cannot say there is any amount appropriated for the repayment of borrowed money in your situation where no definite amount has yet been determined. Especially is this true in view of the fact that the determination is presently interrupted by City of New Boston vs. Scioto Budget Commission, Case No. 69-299, Supreme Court of Ohio.

The present law of Ohio on this point is forcibly stated by the court in Board of County Commrs. vs. Willoughby Hills, 12 Ohio St. 2d 1, as follows:

> "1. The need of a subdivision for revenue, in addition to what it

has, is an essential requirement for any apportionment to that subdivision from the county undivided local government fund. (Paragraph two of the syllabus of Lake County Budget Commission v. Village of Willoughby Hills, 9 Ohio St. 2d 108, approved and followed.)

"2. The Board of Tax Appeals has the same duty as the County Budget Commission to make findings as to the dollar amount of the needs of each subdivision of the county seeking to participate in the fund. (Paragraphs five and six of the syllabus of Lake County Budget Commission v. Village of Willoughby Hills, 9 Ohio St. 2d 108, approved and followed.)

"3. The claim of a subdivision that it needs a certain amount for an expenditure that it is authorized to make for current operating expenses does not require a determination that it needs such amount for such expenditure."

Most parties to litigation anticipate favorable decisions, but the General Assembly did not use the word "anticipation" with such broad connotation as to make it possible for all subdivisions in a county to borrow against the local government fund before the allocation of the estimated local government fund has been determined pursuant to Section 5739.22, Revised Code, which in your situation will hopefully be resolved by the Supreme Court in the New Boston case, supra.

Your first question implies a false premise in that whether or not the City of New Boston is entitled to participation in the fund has not yet been determined (Board of County Commrs. v. Willoughby Hills, supra).

From the foregoing, it is, therefore, my opinion, and you are advised:

1. A political subdivision may not borrow money pursuant to Section 133.30, Revised Code, in anticipation of an allocation from the local government fund until it is finally determined pursuant to the requirements of Section 5739.22, Revised Code.

2. For the same reasons as above stated, the County Auditor may not make a partial distribution of the county local government fund.

OPINION NO. 69-084

Syllabus:

One may be a member of a private, non-profit corporate board and also a member of a Board of Township Trustees that deals infrequently with such private non-profit corporation, if that member does not participate in the resolution of problems concerning that corporation.

To: R. Kenneth Kunkel, Delaware County Pros. Atty., Delaware, Ohio
By: Paul W. Brown, Attorney General, July 9, 1969

I have before me your request for my opinion as to whether there is a conflict between the positions of Township Trustee and member of the Board of Trustees of a non-profit corporation concerned with the development and supply of water resources in rural areas of the county. The point in time at which a conflict may arise is when the Township Trustees are to grant easements along roads and across ditches, etc. The board for the corporation consists of eleven members, two of whom are members of separate Boards of Township Trustees within the county.

The fact that a township trustee is also a member of the corporate board in question does not in and of itself void action taken by the Township Trustees concerning the non-profit corporation. In the case of Richardson v. Sycamore Twp., 6 O.N.P. (N.S.) 505, 18 O.D.N.P., 306 (1908), a Township Trustee was a director and stockholder of a bank making the highest bid for the usage of township funds. It was held that the contract was not thereby rendered void.

It is an established principle that public officers are disqualified from voting on a matter coming before the agency in which they serve if they have a direct, pecuniary interest in the matter in question. Oliver v. Brill, 14 O. App., 312 (1921). This has been applied to Township Trustees under Oliver v. Brill, supra.

The corporate trustees receive no compensation by virtue of their positions. There is no such direct pecuniary interest involved that Oliver v. Brill, supra, would require the Township Trustee to disqualify himself.

However, a public officer is a fiduciary as well as an officer to his constituents. He must perform fairly and in a personally disinterested manner as behooves a fiduciary. Oliver v. Brill, supra. This rule is designed to eliminate particular questions from the consideration of a prejudiced public officer. It is not designed to exclude him from that office altogether.

In light of the fact that the individuals in question do not serve on the same Board of Township Trustees, a given Board of Township Trustees will not be rendered unable to act on the matter in question. It is not a harsh result, thereby, to require the Township Trustees in question to abstain from voting on the granting of easements in order to ensure that there is no breach of fiduciary trust by said individuals.

It is, therefore, my opinion, and you are hereby advised that one may be a member of a private, non-profit corporate board and also a member of a Board of Township Trustees that deals infrequently with such private non-profit corporation if that member does not participate in the resolution of problems concerning that corporation.

OPINION NO. 69-085

Syllabus:

A board of trustees of a county hospital may not make expenditures of hospital funds to pay the premium upon policies of professional malpractice insurance for interns and residents employed at the hospital.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, July 9, 1969

I have before me your request for my opinion which reads as follows:

> "May the Board of Trustees of a County Hospital make expenditure of hospital funds to pay the premiums upon policies of professional malpractice insurance for interns and residents employed at the hospital?"

In Ohio, statutory power to purchase insurance for a county hospital is conferred by Section 339.06 of the Ohio Revised Code. That section reads in pertinent part as follows:

> "The board of county hospital trustees shall upon completion of construction or leasing and equipping of the county hospital, assume the operation of such hospital. The board of county hospital trustees shall have the entire management and control of the hospital and shall establish such rules for its government and the admission of persons as are expedient.
>
> "The board of county hospital trustees has control of the property of the hospital, and all funds used in its operation. * * *
>
> "* * * * * * * * *
>
> "The board of county hospital trustees may designate the amounts and forms of insurance protection to be provided, and the board of county commissioners shall secure such protection.
>
> "* * * * * * * * *"

In the absence of limitations on the power, the above sec-

tion gives a board of county hospital trustees discretionary power in selecting insurance for the hospital or hospitals under its control. At least one limitation on this discretionary power comes from the well settled doctrine in Ohio that a county is not liable in tort in the absence of an express statute creating such liability. The Board of County Commissioners of Portage County v. Gates, 83 Ohio St. 19, 30 (1910), 93 N.E. 255 (1910); Schaffer v. Board of Trustees of Franklin County Veterans Memorial, et al., 171 Ohio St. 228 (1960).

One of my predecessors recognized the impact of the doctrine of county immunity in Opinion No. 2976, Opinions of the Attorney General for 1934. Paragraph one of the syllabus of that opinion reads as follows:

> "A board of county commissioners cannot legally enter into a contract and expend public monies for the payment of premiums on 'public liability' or 'property damage' insurance covering damages to property and injury to persons caused by the negligent operation of county owned motor vehicles."

The opinion bases its reasoning on an earlier opinion from this office which is Opinion No. 494, Opinions of the Attorney General for 1927. The syllabus of that opinion reads the same as Opinion No. 2976, supra, but in addition the latter portion of the syllabus adds the following which was adhered to in the later opinion:

> "* * * there being no liability to be insured against, the payment of premiums would amount to a donation of public moneys to the insurance company."

The fact that there was no liability to be insured against was the key point in Opinion No. 1201, Opinions of the Attorney General for 1960. The opinion covers public liability insurance for physicians and doctors and has a direct bearing on the question you have put forth. The syllabus of the opinion reads as follows:

> "A municipal corporation is without authority to purchase public liability insurance covering physicians and nurses employed in the municipal department of health for liability arising out of such employment."

The opinion discusses the tort liability of a municipal corporation for governmental and proprietary functions and decides that on the facts involved in that opinion the operation of a public health board is a governmental function of the city and thus there is no liability in tort. In your situation we are involved with the tort liability of a county in the operation of a county hospital.

Though there is not an abundance of case law on the subject, in Wiezbicki v. Carmichael, 118 Ohio App. 239 (1963), a demurrer was sustained as against a petition brought against a county hospital. The suit by a former patient sought damages

from the members of the board of trustees of the hospital for personal injury claimed to have been received as a result of the negligence of the members of the board, acting through their servants and employees in the operation of the hospital. In addition, the Ohio Supreme Court has held that a university-owned hospital such as the Ohio State University Hospital is not liable in tort since it is an instrumentality of the state. Wolf v. Ohio State University Hospital, 170 Ohio St. 49 (1959).

Wiezbicki, supra, was cited in Opinion No. 1109, Opinions of the Attorney General for 1964. The syllabus of that opinion reads as follows:

> "1. A joint township district hospital board organized pursuant to Section 513.07 et seq., Revised Code, and operated solely from funds received through charges for services, is not liable in tort to persons injured in the operation of its hospital.
>
> "2. The board of governors of a joint township district hospital has no authority to purchase liability insurance for protection against loss by reason of liability for tort in the operation of the joint township district hospital."

In the opinion my immediate predecessor cited an earlier opinion which stated that it was immaterial whether the operation of the hospital constituted a proprietary or governmental function. Opinion No. 179, Opinions of the Attorney General for 1957. This 1957 Opinion states as follows at page 46:

> "* * * * * * * * *
>
> "* * * The doctrine of governmental and proprietary functions recognized that with regard to some functions municipal corporations act as agents of the sovereign state, and when they do they partake of sovereignty and sovereign immunity. The purpose of the doctrine is to distinguish those functions where the municipal corporation does partake of sovereignty from those where it does not. But counties and townships have never been regarded otherwise than as agents of the state. There has never been any confusion between these governmental and corporate functions, for they are not corporations and are regarded as having governmental functions only. Therefore the doctrine of governmental and proprietary functions does not apply to them.
>
> "* * * * * * * * *"

In addition, I am aware of no statutory provision which waives the immunity of a county from a suit for torts occurring in the operation of a county hospital. I thus must concur in the previously cited opinions of my predecessors. There being no potential liability, the board of trustees has no authority to purchase liability insurance.

It is, therefore, my opinion and you are accordingly advised that a board of trustees of a county hospital may not make expenditures of hospital funds to pay the premiums upon policies of professional malpractice insurance for interns and residents employed at the hospital.

OPINION NO. 69-087

Syllabus:

1. The Board of Building Standards may not certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04, Ohio Revised Code, if said building department contracts with private agencies to perform such work.

2. The Board of Building Standards may not certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04, Ohio Revised Code, if said building department contracts with another certified building department to perform such work.

3. Building departments certified by the Board of Building Standards may charge in excess of the fees prescribed for the inspection of plans in Section 3791.07, Ohio Revised Code.

To: William O. Walker, Director, Dept. Industrial Relations, Columbus, Ohio
By: Paul W. Brown, Attorney General, July 25, 1969

I have before me your request for an opinion on the following questions:

> "1. May the Board of Building Standards certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04 of the Ohio Revised Code, if said building department contracts with private agencies to perform such work?
>
> "2. May the Board of Building Standards certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04 of the Ohio Revised Code, if said building department contracts with another certified building department to perform such work?
>
> "3. May a certified building department charge in excess of the fees prescribed in the Ohio Revised Code 3791.07 for the inspection of plans?"

Section 3781.10 (E), Revised Code, reads as follows:

"The board of building standards shall:

"* * * * * * * * *

"(E) Certify municipal and county building departments to exercise enforcement authority and to accept and approve plans pursuant to sections 3781.03 and 3791.04 of the Revised Code. Said municipal and county building departments shall have jurisdiction within the meaning of said sections only with respect to the types of buildings and subject matters as to which they have been certified under this section and as to which such certification remains in effect. Such certification shall be upon application by the municipal corporation or by the board of county commissioners and approval of such application by the board of building standards. Such application shall set forth the types of building occupancies as to which the certification is requested, the number and qualifications of the staff composing the building department, and the proposed budget for the operation of such department. Such certification may be revoked or suspended with respect to any or all of the building occupancies to which it relates on petition to the board of building standards by any person affected by such enforcement or approval of plans, or by said board on its own motion. Hearings shall be held and appeals permitted on any such proceedings for certification or for revocation or suspension of certification in the same manner as provided in section 3781.101 [3781.10.1] of the Revised Code for other proceedings of the board of building standards. Upon certification, and until such authority is revoked, county building departments shall enforce such regulations over those occupancies listed in the application without regard to limitation upon the authority of boards of county commissioners under Chapter 307. of the Revised Code;"

Your first question is, may the Board of Building Standards certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04 of the Ohio Revised Code, if said building department contracts with private agencies to do such work.

Section 3781.03, Revised Code, reads in pertinent part as follows:

"The chief of the division of factory and building inspection, and building in-

> spector or commissioner of buildings in municipal corporations whose building departments have been certified by the board of building standards under section 3781.10 of the Revised Code and, in the unincorporated territory of counties, the building inspector or commissioner of buildings in counties whose building departments have been certified by the board of building standards under section 3781.10 of the Revised Code, shall enforce all the provisions in such chapters and any regulations adopted pursuant thereto relating to construction, arrangement, and the erection of all buildings or parts thereof, as defined in section 3781.06 of the Revised Code, including the sanitary condition of the same in relations to heating and ventilation."

Section 3791.04, Revised Code, reads in pertinent part as follows:

> "Before entering into contract for or beginning the construction or erection of any building to which section 3781.06 of the Revised Code is applicable, the owner thereof shall, in addition to any other submission of plans or drawings, specifications, and data required by law, submit the plans or drawings, specifications, and data prepared for the construction, erection, and equipment thereof, or the alteration thereof or addition thereto to the municipal or county building department having jurisdiction, and if there is no municipal or county building department, to the chief of the division of workshops and factories, for his approval. No owner shall proceed with the construction, erection, alteration, or equipment of any such building until said plans or drawings, specifications, and data have been so approved. No plans or specifications shall be approved unless the building represented thereby would, if constructed, repaired, or equipped according to the same, comply with Chapters 3781. and 3791. of the Revised Code and any rule or regulation made under such chapters."

It is noteworthy that the Board of Building Standards itself has not been given authority to certify a private agency to perform any of the board's functions. The board's certification powers relate only to municipal and county building departments.

Section 3781.10 (E) of the Ohio Revised Code, which delineates the powers and duties of the board in regard to certification of building departments does not mention contracting with private agencies to do the work of certified boards. There is no indication that

any method of operation was contemplated other than that each certified board would approve plans and exercise enforcement authority by and for itself, using the board's own staff.

If each board were not expected to do its own work, there would be little reason for Section 3781.10 (E), Revised Code, to require (as it does) that each application for certification by a board set forth the number and qualifications of the staff composing the building department.

It is said in Crawford on Statutory Construction, Section 245, at page 478:

> "Legislative grants - whether they be of property, rights, or privileges, or to municipal or private corporations, or individuals - must be strictly construed against the grantee and in favor of the grantor - the government or the public. Where there is any doubt, it must be resolved in favor of the public. Nothing, therefore, will pass by virtue of the grant except what is given in clear and explicit terms."

There is nothing in the language of Section 3781.10 (E), Revised Code, to indicate that the legislature intended the board's certification power to apply to boards who contracted with private agencies to perform their work. The legislature could have specifically given the board certification power for building departments which contracted with private agencies to perform some or all of the work; yet, the legislature did not give the board such powers. I conclude, therefore, that the legislature did not intend that Board of Building Standards have the power to certify municipal or county building departments if the local departments contract private agencies to perform the department's work.

Accordingly, it is my opinion that the Board of Building Standards may not certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Sections 3781.03 and 3791.04, Ohio Revised Code, if said building department contracts with private agencies to perform such work.

Your second question is very similar to the first question in that both concern the power of the Board of Building Standards to certify local boards which do not perform their own work. The first question involved contracting with private agencies. The second question is, may the Board of Building Standards certify local building departments if these departments contract with another certified building department to perform the work.

Section 3781.01 (E), supra, treats certification of departments which contract with other certified departments the same as it treats certification of departments which contract with private agencies. Certification of departments which contract with other certified departments is not mentioned in Section 3781.10 (E), supra.

There is no indication of a legislative intent that the Board of Building Standards should have the power to certify a building department which contracted with another department.

The second sentence of Section 3781.10 (E), supra, expressly states that certified departments shall have jurisdiction only with respect to the types of buildings and subject matter to which they have been certified. Contracting with other departments is a matter for which no county or municipal board is certified since the Board of Building Standards has not been given the authority to certify departments to contract with other departments.

Accordingly, it is my opinion that the Board of Building Standards may not certify a municipal or county building department to exercise enforcement authority and approve plans pursuant to Section 3781.03, supra, and Section 3791.04, Revised Code, if said building department contracts with another certified building department to perform such work.

Your final question is, may a certified building department charge in excess of the fees prescribed in Section 3791.07, Revised Code, for the inspection of plans.

Section 3791.04, Revised Code, provides in pertinent part:

> "Before entering into contract for or beginning the construction or erection of any building . . . the owner thereof shall . . . submit the plans or drawings . . . to the municipal or county building department having jurisdiction, and if there is no municipal or county building department, to the chief of the division of workshops and factories, for his approval."

Section 3791.07, Revised Code, however, speaks of:

> "The fee for the inspection of plans required to be submitted to the division of workshops and factories for approval . . ."
> (Emphasis added.)

It is apparent from a reading of Section 3791.04, Revised Code, that no plans are required to be submitted to the division of workshops and factories unless there exists no municipal or county building department having jurisdiction. Section 3791.07, Revised Code, however, speaks only in terms of fees for the inspection of " . . . plans required to be submitted to the division of workshops and factories." Accordingly, certified local building departments are not restricted as to fee schedules by Section 3791.07, Revised Code.

OPINION NO. 69-088

Syllabus:

The signers of the petition provided for in Section 3311.231, Revised Code, need not themselves have voted in the last general election but the number of qualified electors residing in the local school district affected who sign, must be not less than fifty-five per cent of those who voted in that school district in the last general election.

To: Thomas C. Hanes, Darke County Pros. Atty., Greenville, Ohio
By: Paul W. Brown, Attorney General, July 25, 1969

I have before me your request for my opinion as to interpretation of Section 3311.231, Revised Code, and determination whether petitioners for the transfer of a local school district to the adjoining City of Greenville School District must be fifty-five per cent of the qualified electors residing in the affected local school district who actually voted therein at the last general election, being the general election of November, 1968. You further ask the procedure the County Board of Elections should follow to check the sufficiency of the signatures to such petition.

Section 3311.231, Revised Code, reads in part as follows:

> "A county board of education may propose, by resolution adopted by majority vote of its full membership, or qualified electors of the area affected equal in number to not less than fifty-five per cent of the qualified electors voting at the last general election residing within that portion of a school district proposed to be transferred may propose, by petition, the transfer of a part or all of one or more local school districts within the county to an adjoining county school district or to an adjoining city or exempted village school district." (Emphasis added.)

The emphasized portion of the statute indicates that the signer of the petition need not himself have voted in the 1968 general election, since all that is required is that the number of signatures of qualified electors residing in the local school district affected be not less than fifty-five per cent of those voting in the 1968 general election. This follows the analysis and reasoning of my predecessor in Opinion No. 1043, Opinions of the Attorney General for 1964, and I affirm the context of that opinion.

Section 3311.231, supra, goes on to say that the petition itself shall be filed at the office of the county superintendent of schools who in turn shall cause the board of elections to check the sufficiency of signatures of the petition. Perhaps the primary fact that only the number of those voting at the last election in the affected

local school district need be determined and not that each signator so voted may facilitate the problem for the board of elections.

I am, therefore, of the opinion and you are so advised:

The signers of the petition provided for in Section 3311.231, Revised Code, need not themselves have voted in the last general election but the number of qualified electors residing in the local school district affected who sign, must be not less than fifty-five per cent of those who voted in that school district in the last general election.

OPINION NO. 69-089

Syllabus:

A taxing subdivision, be it a municipality or township, may not pass a levy under the provisions of Section 5705.191, Revised Code, for the support of a general hospital run by a private not-for-profit corporation.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, July 28, 1969

I have received your request for my informal opinion on the following question:

> "May the taxing subdivision, be it a municipality or township, pass a levy under the provisions of Section 5705.191, Revised Code, for the support of a hospital in excess of the one mill limitation set under Sections 749.01 and 513.01, Revised Code?"

Section 5705.191, Revised Code, states in pertinent part:

> "The taxing authority of any subdivision * * * by a vote of two-thirds of all its members, may declare by resolution * * * that it is necessary * * * to supplement the general fund for the purpose of making appropriations for one or more of the following purposes: * * * support of general * * * hospitals * * * the question of such additional tax levy shall be submitted to the electors * * * "

In reviewing the information which you have forwarded to me, I note that the hospital in question is The New London Hospital, a private not-for-profit corporation. I have no evidence before me of any contract between the corporation and any municipality or township for hospital services. Therefore, if money were levied under this statute, it would be for the support of a private not-for-profit corporation with which there is no contract.

I first call your attention to Opinion No. 394, Opinions of the Attorney General for 1945. The question presented in Opinion No. 394, supra, was whether or not the county could levy a tax

under what is now Section 5705.20, Revised Code, for the purpose of paying for the care of tuberculosis patients at hospitals with which the commissioners had contracted. My predecessor at that time ruled that the county could not levy such a tax, stating as follows:

> "* * * 'support of tuberculosis hospitals,' applies only to tax levies for the support of a tuberculosis hospital owned by the county making the levy, or for the support of a district tuberculosis hospital in the erection of which the county has joined, and that it makes no provision for the levying of a tax for the purpose of paying for the care, treatment and maintenance of patients at hospitals with which the county commissioners may have contracted * * *"
>
> (Emphasis added)

You will note that the present Section 5705.191, Revised Code, carries over this language of "support of general or tuberculosis hospitals." The problem inherent in this situation is a possible conflict with Section 6, Article VIII of the Ohio Constitution, which states in part:

> "No laws shall be passed authorizing any * * * city * * * or township, by a vote of its citizens * * * to raise money for * * * any * * * company, corporation, or association * * *"

However, as stated in Opinion No. 180, Opinions of the Attorney General for 1915:

> "* * * a contract between a municipal corporation and a hospital * * * whereby the municipality merely pays the hospital for actual services rendered in the care of the sick poor, would not be prohibited by article 8, section 6 of the constitution. The distinction here is between payment for actual services rendered and the payment of the proceeds of a whole tax levy, regardless of the amount thereof. * * *"

I will agree that the description of The New London Hospital does apparently fit that of a general hospital for medical purposes. See Opinion No. 2070, Opinions of the Attorney General for 1947. However, I conclude that as used in the context of Section 5705.191, Revised Code, support of a general hospital is support of a general hospital owned by a county or municipality or other governmental entity.

It is, therefore, my opinion and you are hereby advised that a taxing subdivision, be it a municipality or township, may not pass a levy under the provisions of Section 5705.191, Revised Code, for the support of a general hospital run by a private not-for-profit corporation.

OPINION NO. 69-090

Syllabus:

1. Section 325.20, Revised Code, specifically prescribes the method to be used in obtaining expense funds for a convention trip or one of like manner. Since Section 325.07, Revised Code, provides for travel expenses, it and not the additional funds provided in Section 325.071, Revised Code, should be looked to by the county commissioners in obtaining such funds.

2. Section 325.07, Revised Code, specifically provides funds for transporting prisoners from penal institutions. Since this section makes available the necessary funds, it is unnecessary to look to Section 325.071, Revised Code, for such funds.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, July 28, 1969

Your request for my opinion reads as follows:

> "Under Section 325.071 of the Revised Code which provides additional funds for a county sheriff, may these funds be expended for the following purposes:
>
> "(1) May the sheriff expend monies from this fund to attend an information conference at the National Sheriff's Association?
>
> "(2) May the sheriff expend monies from this fund for the transportation of prisoners?"

In pertinent part, Section 325.071, Revised Code, reads as follows:

> "There shall be allowed annually to the county sheriff, in addition to all salary and allowances otherwise provided by law, an amount equal to one half of the official salary allowed under section 325.06 of the Revised Code, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice.* * *"

As stated in Opinion No. 120, Opinions of the Attorney General for 1967:

> "In its enactment of the new section of the code the legislature did not put any limitation on the expenses to be incurred other than that they should be 'in the performance of his official duties and in the furtherance of justice.'"

Section 325.071, supra, would thus be looked to for the answer to your specific questions in the absence of some more speci-

fic sections of the Code. Sections 325.07 and 325.20, Revised Code, do provide a more specific answer.

Section 325.07, supra, reads in part as follows:

> "In addition to the compensation and salary provided by section 325.06 of the Revised Code, the board of county commissioners shall make allowances monthly to each sheriff for keeping and feeding prisoners, for his actual and necessary expenses incurred and expended in pursuing within or without the state or transporting persons convicted of crimes and offenses * * *.
>
> "* * * * * * * * *
>
> "For the purpose of making available to the sheriff funds necessary in the performance of the duties required of him under this section, the board may authorize, as an advancement to the sheriff, a sum not exceeding fifty per cent of his annual salary, from appropriations made to him by such board for pursuing prisoners within or without the state, or for transporting such prisoners to penal institutions, or both, and for transporting persons to the institutions enumerated in this section for which sum of money so advanced the necessary expenses for such transportation or pursuance may be paid by the sheriff. * * *" (Emphasis added.)

Thus Section 325.07 of the Revised Code, specifically provides for funds to be allocated to the county sheriff to be used to cover expenses involved in transporting prisoners. Since the necessary funds are provided under this section, there is no need to look to Section 325.071, supra, for these funds.

Section 325.20, supra, reads as follows:

> "Except as otherwise provided by law, no elected county officer, and no deputy or employee of the county, shall attend, at county expense, any association meeting or convention, unless authorized by the board of county commissioners. Before such allowance may be made, the head of the county office desiring it shall make application to the board in writing showing the necessity of such attendance and the probable costs to the county. If a majority of the members of the board approves the application, such expenses shall be paid from the moneys appropriated to such office for traveling expenses." (Emphasis added.)

Since this section directly covers the expenditure of county funds for convention trips by elected county officers, a county sheriff must obtain the prior approval of the county commissioners before making such expenditures. After approval is obtained the monies are to be paid from monies appropriated for travel expenses.

Section 325.07, supra, in addition to those portions quoted earlier, provides as follows in paragraph two:

"The board shall allow the sheriff his actual transportation expense and telephone tolls expended in serving civil processes and subpoenaing witnesses in civil and criminal cases and before the grand jury, and it may allow any other necessary transportation expense for the proper administration of the duties of his office.* * *"

(Emphasis added.)

Thus Section 325.07, supra, provides for such travel expenses and not Section 325.071, supra, which allows an amount equal to one-half of the official salary "in addition to all salary and allowances otherwise provided by law."

It is, therefore, my opinion and you are hereby advised:

1. Section 325.20, Revised Code, specifically prescribes the method to be used in obtaining expense funds for a convention trip or one of like manner. Since Section 325.07, Revised Code, provides for travel expenses, it and not the additional funds provided in Section 325.071, Revised Code, should be looked to by the county commissioners in obtaining such funds.

2. Section 325.07, Revised Code, specifically provides funds for transporting prisoners from penal institutions. Since this section makes available the necessary funds, it is unnecessary to look to Section 325.071, Revised Code, for such funds.

OPINION NO. 69-091

Syllabus:

The restriction of the aggregate amount of stock, bonds and other evidences of indebtedness and commitments which a building and loan association may invest in a development corporation, as provided in Section 1151.342, Revised Code, does not apply to normal real estate loans and the latter are outside of the restriction.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, July 25, 1969

I have your request for my opinion relative to investment of funds by a building and loan association in a development corporation as provided for in Chapter 1726, Revised Code. The question reads as follows:

"May a savings and loan association, which is a member of a development corporation created under Chapter 1726 of the Ohio Revised Code, and which has invested in stock or bonds or debentures of such development corporation, make real estate loans to such development corporation, where the amount of such

real estate loans would be in excess of the lesser of $250,000 or 1% of the total outstanding loans made by such association?"

Section 1151.342, Revised Code, provides in part as follows:

> "An association may subscribe to, buy, own, and hold stock and may invest in the bonds, debentures, notes, or other evidences of indebtedness of development corporations organized under Chapter 1726 of the Revised Code. The aggregate amount of stockholdings, investments, loans, and commitments of any association in or to the corporations authorized by Chapter 1724 and Chapter 1726 of the Revised Code shall not exceed one percent of the total outstanding loans made by such association or two hundred fifty thousand dollars, whichever is the lesser.
>
> "Nothing in this section shall be construed to restrict an association from making real estate loans to such corporations which would be authorized under the lending powers granted the association under Chapter 1151 of the Revised Code."

It is noted that Amended Senate Bill No. 44 has been passed and signed by the Governor and becomes effective September 25, 1969. This act amends Section 1151.342, supra, by striking out the words "or two hundred fifty thousand dollars, whichever is the lesser" so that when the act becomes effective, the limit will be set at one percent of the total outstanding loans, whatever that limit comes to.

Looking at the quoted paragraphs from said Section 1151.342, Revised Code, it will be noted that the first paragraph speaks especially of the unsecured evidences of indebtedness in addition to stock in which the building and loan association may invest and the limits of investment in them. Paragraph two refers to real estate loans, made in the normal course of business, and states that these shall not be restricted in aggregate amount as made to the development corporation.

I am, therefore, of the opinion, and you are so advised that the restriction of the aggregate amount of stock, bonds and other evidences of indebtedness and commitments which a building and loan association may invest in a development corporation, as provided in Section 1151.342, Revised Code, does not apply to normal real estate loans and the latter are outside of the restriction.

OPINION NO. 69-094

Syllabus:

The positions of public health nurse of a city and health commissioner are incompatible offices and one individual may not legally hold both positions.

To: John J. Malik, Jr., Belmont County Pros. Atty., St. Clairsville, Ohio
By: Paul W. Brown, Attorney General, July 31, 1969

I have before me your request for my opinion as to whether the Public Health Nurse of a city can serve concurrently as Health Commissioner.

The duties of a health commissioner of a city or general health district are defined in Sections 3701.53 and 3709.11, Revised Code. These duties, when read with the duties of a health nurse as set out in Section 3709.15, Revised Code, come into conflict.

While the courts have hesitated to announce a comprehensive definition of incompatibility, there are certain well recognized principles that are derived from common law, which by the consensus of authority do render certain offices incompatible. The most significant test as to whether offices are incompatible is found in the principle that incompatibility is recognized whenever one office is subordinate to the other in some of its important and principal duties.

The leading Ohio decision on the compatibility of public offices is State of Ohio ex rel. Attorney General v. Frank Gebert, 12 C.C. (N.S.) 274 (1909). The Court stated as follows at page 275:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or, when it is physically impossible for one person to discharge the duties of both."

The duties of a health commissioner clearly relate to the conservation and preservation of the health of the community. The duties of a public health nurse also clearly follow the same general requirements as do the duties of a health commissioner. In view of the Gebert case, supra, the two positions in question here are incompatible in that the position of public health nurse is subordinate to that of health commissioner in regard to important functions. The general duties of a health commissioner also involve checking upon the duties and performance of a health nurse. This clearly falls

within the purview of the Gebert opinion, supra, and, therefore, creates an incompatibility in the two positions.

This office ruled in Opinion No. 3747, Opinions of the Attorney General for 1954, that the office of coroner was not incompatible with employment as health commissioner. The two situations can be distinguished in light of the Gebert opinion, supra, because the office of coroner is an autonomous and independent office from that of health commissioner. The office of public health nurse, however, is subordinate to the health commissioner and the latter has a check upon the performance by the health nurse.

It is my opinion, therefore, and you are hereby advised that the positions of public health nurse of a city and health commissioner are incompatible offices and one individual may not legally hold both positions.

OPINION NO. 69-095

Syllabus:

Either a city solicitor or law director has the duty, pursuant to Section 1901.34, Revised Code, to prepare affidavits for and prosecute township misdemeanor zoning violation cases to be heard in a municipal court with jurisdiction outside its municipal boundaries.

To: J. Richard McMannis, Medina County Pros. Atty., Medina, Ohio
By: Paul W. Brown, Attorney General, July 31, 1969

I have before me your request for my opinion which asks, in essence, whether the city solicitor, law director, or county prosecuting attorney has the duty to prepare affidavits for and prosecute township misdemeanor zoning violation cases to be heard in a municipal court with jurisdiction outside its municipal boundaries.

Section 1901.34, Revised Code, reads:

> "The city solicitor, city attorney, or director of law for each municipal corporation within the territory shall prosecute all criminal cases brought before the municipal court for violations of the ordinances of the municipal corporation for which he is solicitor, attorney, or director of law or for violation of state statutes or other criminal offenses occurring within the municipal corporation for which he is a solicitor, attorney, or director of law. The city solicitor, city attorney, or director of law of the city in which the court is located shall prosecute

all criminal cases brought before said court arising in the unincorporated areas within said territory, except that in the Portage county municipal court the prosecuting attorney of the county shall prosecute all violations of state law arising within said territories and for assuming said additional duties, shall receive compensation at the rate of four thousand eight hundred dollars per year payable from the county treasury in semi-monthly installments. The city solicitor, city attorney, or director of law shall perform the same duties, as far as they are applicable thereto, as are required of the prosecuting attorney of the county. He or his assistants whom he may appoint shall receive for such services additional compensation to be paid from the treasury of the county as the board of county commissioners prescribes." (Emphasis added)

This section was interpreted by Opinion No. 66-159, Opinions of the Attorney General for 1966, first and second branches of the syllabus:

"1. It is the duty of a city solicitor to prepare affidavits and warrants of arrest for violations of the law which occur in the territorial area of the municipal court of the municipality for which he is solicitor.

"2. It is the duty of a city solicitor to prosecute misdemeanor violations occurring in such area, through to a final verdict; except those violations which are specifically assigned to the prosecuting attorney by statute."

Quoting from the text of Opinion No. 66-159, supra, at 386, it is stated:

"Webster's New World Dictionary (1964 Edition) defines 'prosecute' as follows: 'to institute legal proceedings against or conduct criminal proceedings in court against.'

"Black's Law Dictionary explains that to 'prosecute' an action is not merely to commence it, but includes following it to an ultimate conclusion.

"The preparation of affidavits and warrants of arrest is basic to the conduct of criminal proceedings and by definition, therefore, would be included in the solicitor's duty to 'prosecute.' Also, by definition, the city solicitor must 'prosecute' misdemeanor violations through to a final verdict."

Opinion No. 66-159, supra, interprets Section 1901.34, supra, only with respect to the duties of the city solicitor. The entirety of the above-cited passages would likewise be applicable to the city law director, whose duties are identical

to those of the city solicitor pursuant to Section 1901.34, supra, which tacitly recognizes that most cities would not have both a city solicitor and law director.

I am mindful that Section 309.09, Revised Code, directs the prosecuting attorney to be the legal adviser to all township officers, and more specifically to the township board of zoning appeals, Opinion No. 4893, Opinions of the Attorney General for 1955. Also, the prosecuting attorney, among others, is permitted to institute civil proceedings to prevent violations of zoning regulations pursuant to Section 519.24, Revised Code. But it is an elementary legal proposition that a misdemeanor, being a criminal action, is prosecuted in the name of the government, as a public prosecution. Schultz's Lessee v. Moore, Wright 280 (1833), State v. Clinton, 2 Ohio Dec. Reprint, 725 (1863). Thus, in the prosecution of an alleged township zoning misdemeanor violation no township officer or board would be an actual party.

Section 1901.34, supra, appears controlling with regard to the question you have posed. I believe this result is reinforced by the language in that statute which, in essence, states that the city solicitor or law director shall perform the same duties as the county prosecutor in cases arising before the municipal court.

It is, therefore, my opinion and you are advised that either a city solicitor or law director has the duty, pursuant to Section 1901.34, Revised Code, to prepare affidavits for and prosecute township misdemeanor zoning violation cases to be heard in a municipal court with jurisdiction outside its municipal boundaries.

OPINION NO. 69-098

Syllabus:

1. In an appropriation proceeding the immediate prospect of zoning change to the advantage of a property is material in determining its value upon the day of taking, and any attempt by statute arbitrarily to exclude from jury consideration prospective uses presently prohibited by zoning is an attempt to limit the property owner's right to obtain compensation from a jury as contemplated by Section 19, Article I of the Constitution of Ohio and by the Fifth Amendment to the Constitution of the United States.

2. The purpose of Section 5511.01, Revised Code, is not to exclude from consideration in an appropriation proceeding all competent evidence of prospective uses presently prohibited by zoning, but rather to prevent the actual granting of a zoning change or issuance of a building or other specified permit so as not to shift the burden of proof on the question of likelihood of a zoning or use change from the property owner to the appropriating agency.

To: Pearl E. Masheter, Director, Dept. of Highways, Columbus, Ohio
By: Paul W. Brown, Attorney General, August 5, 1969

You have requested my opinion as to the effect of the Section 5511.01, Revised Code, moratorium on zoning changes and building permits on determination of the value of a property being appropriated, with particular reference to determination of the highest and best use of the property for appraisal purposes.

Section 5511.01, Revised Code, provides in pertinent part as follows:

> "* * * Before any zoning change or subdivision plat is approved and before any permit for land use or the erection, alteration, or moving of a building is granted affecting any land within three hundred feet of the centerline of a proposed new highway or highway for which changes are proposed, as described in the certification by the director, or within a radius of five hundred feet from the point of intersection of said centerline with any public road or highway, the authority authorized to approve the zoning change or subdivision plat or the authority authorized to grant the permit for land use or the erection, alteration, or moving of the building shall give notice, by registered or certified mail, to the director, and shall not approve a zoning change or subdivision plat or grant a permit for land use or the erection, alteration, or moving of a building for one hundred twenty days from date notice is received by the director. During such one hundred twenty day period and any extension thereof as may be agreed to between the director and any property owner, notice of which has been given to the authority to which the application has been made, the director shall proceed to acquire any land needed by purchase or gift, or by initiating proceedings to appropriate, or, make a finding that acquisition at such time is not in the public interest. Upon purchase, initiation of appropriation proceedings, or a finding that acquisition is not in the public interest, the director shall notify the authority from which notice was received of such action. Upon being notified that the director has purchased or initiated proceedings

> to appropriate such land the said authority shall refuse to rezone land or to approve any subdivision plat that includes the land which the director has purchased or has initiated proceedings to appropriate, and such authority shall refuse to grant a permit for land use or the erection, alteration, or moving of a building on the land which the director has purchased or initiated proceedings to appropriate. Upon notification that the director has found acquisition at that time not to be in the public interest, or upon the expiration of the one hundred twenty day period or any extension thereof, if no notice has been received from the director, said authority shall proceed in accordance with law."

This language was added to Section 5511.01, supra, effective August 11, 1967.

The rights of a property owner in an eminent domain proceeding are established by Section 19, Article I, Ohio Constitution, and by the Fifth Amendment to the Constitution of the United States. The latter says simply, "nor shall private property be taken for public use, without just compensation." The Ohio Constitution is somewhat more detailed:

> "Private property shall ever be held inviolate, but subservient to the public welfare. When taken * * * for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money * * *; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

The courts of Ohio, in applying and interpreting these constitutional guarantees, have held that the question to be decided in an appropriation proceeding is the value of the property for any and all uses for which it may be suitable, including the most valuable uses to which the property can lawfully, reasonably and practically be adapted. Sowers v. Schaeffer, 155 Ohio St. 454 (1951); Board of County Commissioners v. Thormyer, 169 Ohio St. 291 (1959).

In determining the most valuable uses to which a property can be put, the zoning classification of the property is a key factor. The question often arises to what extent evidence is admissible in an appropriation trial of the possibility or likelihood of a favorable change in the zoning classification which would make the property more valuable than

under the then existing zoning. Such a question was presented in City of Euclid v. Lakeshore Co., 102 Ohio App. 96 (1956), and the court in that case stated as follows at p. 112:

> "There being no evidence to support the contention that within the reasonable foreseeable future and in the reasonable administration of the zoning laws of the city of Euclid a reduction of the zoning classification of the property taken in these proceedings will be likely to occur and likewise, by reason of the legislative policy of this state in declaring such evidence inadmissible in an appropriation case, we affirm the trial court in limiting the expert evidence as to the value of the several parcels taken to the highest and best use when considered for the uses permitted within the zoning ordinance applicable to such property as of the date of the trial of the case."

The "legislative policy" that the court was referring to was Section 719.09, Revised Code, which at that time provided that "in arriving at such assessment of compensation for such lot or parcel, any use or occupancy which is in violation of any statute or ordinance, shall be excluded from consideration in determining fair market value." That chapter of the Code, of course, was applicable to appropriations by municipal corporations. Moreover, since that time, most of Chapter 719 (including Section 719.09), Revised Code, has been repealed and has been replaced by Chapter 163, Revised Code. Chapter 163, supra, does not contain any provision analogous to Section 719.09, supra.

Subsequent court decisions have indicated, if only by implication, that evidence of the likelihood of a zoning change would be admissible under certain circumstances. For example, in Board of Education v. Graham, 15 Ohio App. 2d, 196 (1968), the court found that there was no competent evidence (such as from officials responsible for administering the zoning laws) to support the property owner's contention that a reduction of the zoning classification would be likely to occur.

I believe that your question was definitively answered in the case of In re Appropriation of Easement for Highway Purposes Over Property of Darrah et al., 118 Ohio App. 315 (1963), where the court held as follows at page 319:

> "Since the immediate prospect of zoning change to the advantage of the property is material in determining its value upon the day of taking, any

> attempt by statute to exclude this evidence or opinions based thereon is an attempt to limit the property owner's right to obtain compensation from a jury as contemplated by Section 19, Article I of the Constitution of Ohio, and by the Fifth Amendment to the Constitution of the United States.
>
> "A constitutional question arises as to what is just compensation compatible with the requirement of the Fifth Amendment to the federal Constitution and Section 19, Article I of the Ohio Constitution when prospective uses presently prohibited by zoning are arbitrarily excluded as matters to be considered in calculating fair market value on the date of taking. United States v. Meadow Brook Club, 259 F. (2d), 41."

It should be noted that the court rendered its opinion notwithstanding the provisions of Section 719.09, supra, which was still in effect at that time.

It is a standard rule of construction that legislative enactments are not to be interpreted in such a way as to be in violation of constitutional provisions, where such a result can be avoided without doing violence to the clear meaning of the words. In conformity with that principle, it is my opinion and you are hereby advised that the purpose of Section 5511.01, Revised Code, as amended effective August 11, 1967, is not to exclude from consideration in an appropriation proceeding all competent evidence of highest and best use of a parcel even where such use might involve a variation from existing zoning, but is rather to maintain the status quo during appropriation proceedings so as not to shift the burden of proof on the question of likelihood of a zoning or use change from the property owner to the appropriating agency. This is not a change in the substantive rights of the property owner but is merely a procedural measure affecting the evidentiary aspects of the determination of just compensation.

OPINION NO. 69-099

Syllabus:

A Board of Township Trustees is not empowered to cooperate with another like Board for the purpose of forming a recreational district for the acquisition and maintenance of recreational facilities. Opinion No. 66-007, Opinions of the Attorney General for 1966, approved and followed.

To: Robert Webb, Ashtabula County Pros. Atty., Jefferson, Ohio
By: Paul W. Brown, Attorney General, August 20, 1969

Your request for my opinion reads as follows:

> "I have been asked by the Geneva Area City School District whether or not they may cooperate in forming a recreational district for the acquisition and maintenance of recreational facilities with the Municipal Corporation of Geneva, City School Districts and Townships. It would seem that a school district, under Revised Code 755.16, can join with municipal corporations in forming a recreational district or perhaps a swimming pool if it was under the jurisdiction and management of the township where the school is located.
>
> "Attorney General's Opinion, 1966-007, says that 755.16 authorized a school district to join with a township in equipping, operating and maintaining recreational facilities, but such authority is not extended to the township with any other taxing district. It would seem that there is implied authority for the townships to cooperate with other townships and area school districts, inasmuch as school districts are given the authority to cooperate with townships. Incidentally, Harpersfield, Trumbull and Austinburg Townships are members of the Geneva City School District, as well as, Geneva Township, and they wish to cooperate if they have implied authority under Section 755.16."

In reviewing all provisions of the Revised Code relative to the authority for Township Trustees to cooperate with other political subdivisions for police services, fire services, hospital services, park facilities and burial grounds, one finds a reluctance of the Legislature to extend the Trustees territorial jurisdiction.

Public officers have only such powers as are expressly delegated to them by statute, and such as are necessarily implied from those delegated to enable them to accomplish the stated purpose, and nowhere, as is emphasized by Opinion No. 66-007, Opinions of the Attorney General for 1966, is a Board of Township Trustees authorized to cooperate with another like Board.

Quoting from Opinion No. 66-007, supra, and explaining the powers granted in Section 755.16, Revised Code, the Attorney General said:

> "It will be noted that this section provides that (a) any two or more municipal corporations, (b) a municipal corporation and a school district may join to operate and maintain playgrounds or recreation centers, and (c) school district and municipal corporation may join for the erection or repair of buildings of recreation facilities and (d) a school district may join with a municipal corporation, township or county in operating and maintaining recreation equipment.

"This section does not authorize a township to join with a county, municipal corporation or another township for the purpose of acquiring or maintaining playground and recreational projects.

"In summary, it is apparent that a township may legally agree with a county board of park commissioners that either may assume control of park or park lands of the other and that a township and an adjacent municipal corporation could join in the operation of a swimming pool.

"In specific answer to your question, you are advised that there is no authority under Section 755.16, Revised Code for a township to join with another township, county or municipal corporation in acquisition or maintaining playground or recreation facilities."

That is not to say, however, that each individual township may not cooperate by separate contract with the Geneva Area City School District.

The maxim "expressio unius est exclusio alterius" which, freely translated, means the express mention of one thing implies the exclusion of another, applies to answer your question, since the Legislature has provided authority to cooperate in certain instances, but not in the instance outlined in your request.

It is my opinion and you are accordingly advised that a Board of Township Trustees is not empowered to cooperate with another like Board for the purpose of forming a recreational district for the acquisition and maintenance of recreational facilities. Opinion No. 66-007, Opinions of the Attorney General for 1966, approved and followed.

OPINION NO. 69-101

Syllabus:

1. Within the ten-mill limitation of Section 5705.02, Revised Code, township trustees may levy for cemetery purposes under Section 517.03, Revised Code, for a cemetery currently being used.

2. Within the ten-mill limitation of Section 5705.02, Revised Code, township trustees may levy for cemetery purposes under Section 517.11, Revised Code, for cemeteries no longer in use but under the control of the township trustees.

To: James K. Nichols, Morgan County Pros. Atty., McConnelsville, Ohio
By: Paul W. Brown, Attorney General, August 20, 1969

I have received your request for my opinion as to the relationship of Sections 517.03 and 517.11, Revised Code, and whether or not the township trustees may levy a tax under Section 517.03, Revised Code, for a sum not exceeding $2,000 for cemeteries within its boundaries

My research has revealed that Sections 517.03 and 517.11, supra, are each for a separate and distinct purpose. What is currently Section 517.03, supra, was first enacted in 1853 (51 Ohio Laws, 489). The 1853 enactment gave the township trustees the power to purchase and improve a cemetery or burying ground and the authorization to levy and assess a tax for paying for and improving such ground.

What is currently Section 517.11, Revised Code, was enacted in 1874 (71 Ohio Laws, 109). The purpose of the 1874 enactment was "For the protection of certain burial grounds" and title to all public graveyards and burial grounds, with exceptions, was vested in the township trustees. The trustees were given the duty to provide for the protection and preservation of such grounds. To carry out this duty the trustees were empowered to levy a tax not exceeding one-half of one mill per year.

In 1878 (75 Ohio Laws, 581), what is now Section 517.11, Revised Code, was amended in part as follows:

> "* * * it shall be the duty of such trustees * * * to prohibit interments in any such grounds when new grounds have been procured for township cemeteries or burial grounds * * *."

Note that this language is still part of Section 517.11, Revised Code. See also Section 517.32, Revised Code.

It is my conclusion that Section 517.03, Revised Code, refers to a township cemetery in current use, while Section 517.11, Revised Code, refers to cemeteries which are no longer being used. Section 517.10, Revised Code, passes title to the trustees of certain public cemeteries. Section 517.11, Revised Code, imposes a duty on the trustees to care for cemeteries under their jurisdiction. For further interpretation of Section 517.11, Revised Code, see Opinion No. 4163, Opinions of the Attorney General for 1954.

Thus, within the ten-mill limitation of Section 5705.02, Revised Code, township trustees may levy a tax under Section 517.03, Revised Code, for the appropriate expenses for a cemetery currently being used. Also within the ten-mill limitation of Section 5705.02, Revised Code, under Section 517.11, Revised Code, the trustees may levy a tax not to exceed one-half mill for the appropriate expenses for cemeteries no longer in use but under the control of the trustees.

OPINION NO. 69-102

Syllabus:

Section 731.02, Revised Code, forbids a member of city council from holding the position of a member of the board of trustees of a school district public library.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, August 21, 1969

I have before me your request for my opinion on the question of the compatibility of the position of a member of city council and the position of a member of the board of trustees of a school district public library.

Section 731.02, Revised Code, reads in pertinent part as follows:

> "* * * * * * * * *
>
> "Each member of the legislative authority shall be an elector of the city, shall not hold other public office, except that of notary public or member of the state militia, and shall not be interested in any contract with the city, and no such member may hold employment with said city.
>
> "* * * * * * * * *"
>
> (Emphasis added)

If the position of a member of the board of trustees of a school district public library can be considered a "public office" then a member of the legislative authority of a city (city council) may not hold such other public office. Section 731.02, supra, would make these positions incompatible.

Section 3375.15, Revised Code, relates to the creation of a board of library trustees:

> "In any school district in which a free public library has been established, by resolution adopted by the board of education of such school district, prior to September 4, 1947, such library shall be under the control and management of a board of library trustees consisting of seven members. No one is eligible to membership on such board of library trustees who is or has been for a year previous to his appointment a member of a board of education making such appointment. A majority of such trustees shall be qualified electors of the county who reside outside the school district, and all shall be appointed by the board of education or the

school district. Such trustees shall serve for a term of seven years and without compensation. All vacancies on such board of library trustees shall be filled by the board of education be appointment for the unexpired term. Such board of library trustees shall organize in accordance with section 3375.32 of the Revised Code. Such board of library trustees shall have the control and management of the school district free public library and in the exercise of such control and management shall be governed by sections 3375.33 to 3375.41, inclusive, of the Revised Code. This section does not affect the term of any member of a board of library trustees of a school district free public library appointed prior to September 4, 1947."
(Emphasis added)

Sections 3375.32 and 3375.40, Revised Code, relate to the meetings and the powers of the board of library trustees:

(Section 3375.32, Revised Code)

"Each board of library trustees appointed pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22 and 3375.30, of the Revised Code shall meet in January of each year and organize by selecting from its membership a president, a vice-president, and a secretary who shall serve for a term of one year. At the same meeting each board shall elect and fix the compensation of a clerk, who may be a member of the board, and who shall serve for a term of one year. The clerk, before entering upon his duties, shall execute a bond in an amount and with surety to be approved by the board, payable to the board, and conditioned for the faithful performance of the official duties required by him."
(Emphasis added)

(Section 3375.40, Revised Code)

"Each board of library trustees appointed pursuant to sections 3375.06, 3375.10, 3375.12, 3375.15, 3375.22 and 3375.30 of the Revised Code may:

"(A) Hold title to and have the custody of all property both real and personal of the free public library under its jurisdiction;

"(B) Expend for library purposes, and in the exercise of the power enumerated in this section, all moneys, whether derived from unclassified property taxes or otherwise, credited to the free public library under its jurisdiction and generally do all things it deems necessary for the establishment, maintenance, and improvement of the public library under its jurisdiction;

"(C) Purchase or lease buildings or parts of buildings and other real property and purchase automobiles and other personal property necessary for the proper maintenance and operation of the free public libraries under its jurisdiction and pay the purchase price therefor in installments or otherwise;

"(D) Purchase, lease, lease with an option to purchase, or erect buildings or parts of buildings to be used as main libraries, branch libraries, or library stations pursuant to section 3375.41 of the Revised Code;

"(E) Establish and maintain a main library, branches, library stations, and traveling library service within the territorial boundaries of the subdivision or district over which it has jurisdiction of public library service;

"(F) Establish and maintain branches, library stations, and traveling library service in any school district, outside the territorial boundaries of the subdivision or district over which it has jurisdiction of free public library service upon application to and approval of the state library board, pursuant to section 3375.05 of the Revised Code; provided the board of trustees of any free public library maintaining branches, stations, or traveling-book service, outside the territorial boundaries of the subdivision or district over which it has jurisdiction of public library service, on September 4, 1947, may continue to maintain and operate such branches, stations, and traveling library service without the approval of the state library board;

"(G) Appoint and fix the compensation of all of the employees of the free public library under its jurisdiction;

"(H) Make and publish rules and regulations for the proper operation and management of the free public library under its jurisdiction;

"(I) Establish and maintain a museum in connection with and as an adjunct to the free public library under its jurisdiction;

"(J) By the adoption of a resolution accept any bequest, gift, or endowment upon the conditions connected with such bequest, gift, or endowment; provided no such bequest, gift, or endowment shall be accepted by such board if the conditions thereof remove any portion of the free public library under its jurisdiction from the control of such board or if such conditions, in any manner, limit the free use of such library or any part thereof by the residents of the counties in which such library is located;

"(K) At the end of any fiscal year by a two-

thirds vote of its full membership set aside any unencumbered surplus remaining in the general fund of the library under its jurisdiction for the purpose of creating a special building and repair fund."

It should be noted that a member of the library board of trustees must be an elector, is appointed rather than elected, serves for seven years without compensation, and may be elected by the board as a clerk who receives compensation and must execute a bond. The board of library trustees under Section 3375.40, supra, exercises independent powers and prerogatives.

The Ohio Supreme Court in State, ex rel., Bricker v. Gessner, 129 Ohio St. 290, 195 N.E. 63 (1935), decided that membership on a county charter commission constitutes the holding of a public office. The Court noted at page 295:

"* * * * * * * * *

"* * * The position is authorized by the organic law of the state, which prescribes the general duties to be performed. A member must be an elector, which assumes importance when considered in connection with Section 4, Article XV of the Constitution of Ohio, which says in part: 'No person shall be elected or appointed to any office in this state unless possessed of the qualifications of an elector'. * * *. He exercises independent prerogatives and is not amenable to superior authority. His tenure is reasonably definite * * *. The nature of his work possesses legislative qualities. His acts are in the public service. While he is not required to take an oath of office, gives no bond, and receives no compensation, these are indicia of public office and lose significance when compared with the other more important criteria which have been noted.

"* * * * * * * * *"

The dicta and conclusion of Judge Zimmerman in the Gessner case, supra, indicate to me that as a matter of law the position of a member of the board of trustees of a school district public library is a "public office" as that term is used in Section 731.02, supra.

In conclusion, it is my opinion and you are therefore advised that Section 731.02, Revised Code, forbids a member of city council from holding the position of a member of the board of trustees of a school district public library.

OPINION NO. 69-103

Syllabus:

School districts which do not have current tax levies of at least seventeen and one-half mills are not eligible to receive funds for services and programs enumerated in Section 3317.06, Revised Code.

To: Martin W. Essex, Supt. of Public Instruction, Dept. of Education, Columbus, Ohio

By: Paul W. Brown, Attorney General, August 21, 1969

Your request for my opinion asks whether school districts in Ohio which do not have a current tax levy of at least seventeen and one-half mills are eligible to receive funds for the services and programs enumerated in Section 3317.06, Revised Code.

Sections 3317.01 through 3317.07 and 3317.10 of the Revised Code were amended and Sections 3317.13 through 3317.16 of the Revised Code were enacted by Amended Substitute Senate Bill No. 350 (132 Ohio Laws, 2308), effective December 1, 1967. Section 3317.01, Revised Code, provides in pertinent part:

> "Chapter 3317. of the Revised Code shall be administered by the state board of education, with the approval of the controlling board. The superintendent of public instruction shall calculate the amounts payable to each district and shall certify the amounts payable to each eligible district to the clerk of the district, as provided for in Chapter 3317. of the Revised Code.
>
> "* * * * * * * * *
>
> "* * * The payments authorized by Chapter 3317. of the Revised Code shall be made only to those school districts in which:
>
> "(A) Beginning January 1, 1969, the district has a current tax levy for school operations of at least seventeen and one-half mills, except that this requirement shall be waived by the superintendent of public instruction for one year if the district has had its total millage reduced below seventeen and one-half mills by action of the county budget commission, board of tax appeals, or county auditor. Levies for joint vocational school districts, limited to or to the extent apportioned to current expenses, may be included in this seventeen and one-half mills qualification requirement."

Prior to January 1, 1969, the eligibility requirement was ten mills. See Section 3 of Senate Bill No. 350, supra, which states:

> "From the effective date of this act through December 31, 1968, the payments authorized by Chapter 3317. of the Revised Code shall be made only to those school districts which meet the qualifications required by divisions (B) to (D), inclusive, of section 3317.01 of the Revised Code, provided the district has a current tax levy for school operations of at least ten mills." (132 Ohio Laws, 2309, 2310)

Section 3317.02, Revised Code, as amended by the afore-

said Senate Bill No. 350, reads in pertinent part:

> "Payments to school districts shall be as provided in this section and in sections 3317.04 and 3317.06 of the Revised Code.
>
> "Out of the moneys appropriated by the general assembly for distribution pursuant to Chapter 3317. of the Revised Code for each fiscal year, each eligible school district shall be allocated the amount of money derived from the calculation in either division (A) or (B) following, whichever is greater, plus the amount in division (C)."

And Section 3317.06, Revised Code, about which you inquire, provides in pertinent part:

> "In addition to the moneys paid to eligible school districts pursuant to section 3317.02 of the Revised Code, there shall be distributed monthly, quarterly, or annually as may be determined by the state board of education, moneys appropriated for Chapter 3317. of the Revised Code for the following education programs:
>
> "* * * * * * * * *"
>
> (Emphasis added)

Pursuant to Section 3317.01, Revised Code, eligibility of a school district for the school foundation payments depends in part upon said district's having, on and after January 1, 1969, current tax levies for school operations of at least seventeen and one-half mills. Further, the moneys distributed pursuant to Section 3317.06, Revised Code, are in addition to those moneys paid to eligible school districts pursuant to Section 3317.02, Revised Code.

Giving effect to the foregoing observations, it is my opinion and you are hereby advised that school districts which do not have current tax levies of at least seventeen and one-half mills are not eligible to receive funds for services and programs enumerated in Section 3317.06, Revised Code.

OPINION NO. 69-104

Syllabus:

1. The offices of a county coroner and superintendent of a state hospital in the same county are incompatible.

2. The appointment of an assistant coroner would not alleviate the problem of incompatibility between the offices.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: Paul W. Brown, Attorney General, August 25, 1969

You have asked my opinion as to whether the Seneca County Coroner, while holding that office, may also be appointed and serve as the Superintendent of the Tiffin State Hospital. You have also asked whether the appointment of an assistant coroner would alleviate any problems of incompatibility that might arise between the offices of coroner and superintendent of the state hospital.

The Ohio Revised Code, except in a few specific instances, has not dictated what occupations are either compatible or incompatible. The common-law rule of incompatability is stated in State of Ohio ex rel. Attorney General v. Frank Gebert, 12 C.C. (N.S.) 274 (1909). The Court stated as follows at page 275:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or, when it is physically impossible for one person to discharge the duties of both."

Physical impossibility to perform the duties of more than one office ordinarily arises from the necessity of the officeholder to devote his full time and service to one office. Consequently, physical impossibility is a question of fact rather than a question of law.

The Ohio Revised Code indicates, however, that at times, the office of coroner would act as a check upon the office of superintendent of a state hospital.

Several state statutes show the rights and duties of the coroner as they might relate to a superintendent of a state hospital.

Section 313.19, Ohio Revised Code, provides:

> "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the court of common pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

Section 3705.27, Ohio Revised Code, states in part:

> "* * * If there is reason to believe that the death was caused by unlawful or suspicious means, the funeral director shall immediately notify the office of the coroner. The coroner shall make inquiry as provided by section 313.17 of the Revised Code, and make the medical certificate of death * * *."

Section 313.13, Ohio Revised Code, makes the following provision as to when an autopsy is performed:

> "The coroner or deputy coroner may go to the dead body and take charge of it. If, in the opinion of the coroner, or, in his absence, in the opinion of the deputy, an autopsy is necessary, such autopsy shall be performed by the coroner, deputy coroner or pathologist. * * *"
>
> (Emphasis added)

The responsibilities of a superintendent are set forth in Section 5123.03 of the Ohio Revised Code and provide:

> "* * * * * * * * *
>
> "The head of any public hospital as defined in section 5122.01 of the Revised Code and operated by the state shall be the guardian of the person of the patients hospitalized to such hospital for the purpose of retaining them therein. The head of the hospital shall have exclusive custody and control of the person of the patient during the period of time he is detained for observation or treatment, or both, whether a guardian of the person of said patient has been appointed or is appointed by any probate court. Such head shall also be guardian of the person of the patient for the purpose of release on trial visit and shall retain the right of custody during the period of such trial visit. * * *
>
> "* * * * * * * * *"
>
> (Emphasis added)

It is apparent that a conflict of interest may arise if a death occurs at the Tiffin State Hospital. A person concurently holding the offices of county coroner and superintendent of a state institution might well be called upon as coroner to investigate his own misfeasance, malfeasance or nonfeasance in connection with a death which occurred within the institution. Therefore, the two positions are incompatible.

The positions will remain incompatible if the coroner hires an assistant coroner to handle situations which make the offices of coroner and superintendent of the state hospital incompatible. Section 313.05 of the Ohio Revised Code, provides for the appointment of assistants to a coroner by stating:

> "The coroner may appoint, in writing, assistant coroners who shall be licensed physicians of good standing in their profession, * * *
>
> "* * * * * * * * *
>
> "For the performance of their duties the deputy coroner, assistant coroners,

> * * * shall receive salaries fixed by the coroner * * *."

Since the appointment and salaries are left to the discretion of the coroner, the coroner directly affects the length of and compensation for employment. Furthermore, an "assistant" can be no more than his superior's alter ego. Consequently, the coroner would still have the primary responsibility and duty for decisions in questions concerning the liability and responsibility of the Superintendent of the Tiffin State Hospital when death occurs at that institution.

For these reasons, in specific answer to your inquiry, it is my opinion that:

1. The offices of a county coroner and superintendent of a state hospital in the same county are incompatible.

2. The appointment of an assistant coroner would not alleviate the problem of incompatibility between the offices.

OPINION NO. 69-105

Syllabus:

1. A resolution levying a motor vehicle license tax pursuant to Section 4504.02, Revised Code, does not have to be adopted each year prior to collecting such tax each year.

2. A resolution levying a motor vehicle license tax pursuant to Section 4504.02, Revised Code, is subject to referendum as provided for by Section 305.31, Revised Code, only for the thirty-day period immediately following its adoption.

To: Richard E. Bridwell, Muskingum County Pros. Atty., Zanesville, Ohio
By: Paul W. Brown, Attorney General, August 25, 1969

I have before me your request for my opinion regarding the following questions:

> (1) Whether a resolution levying an annual county motor vehicle license tax as authorized by Section 4504.02, Revised Code, must be adopted each year prior to the collecting of such tax for that year?
>
> (2) Whether an annual motor vehicle license tax levied pursuant to Section 4504.02, Revised Code, will be subject annually to referendum as provided by Section 305.31, Revised Code?

Section 4504.02, Revised Code, states in pertinent part:

> "* * *[A]ny county by resolution adopted by its board of county commissioners may levy an annual license tax, in addition to the tax levied

by sections 4503.02, 4503.07, and 4503.18 of the Revised Code, upon the operation of motor vehicles on the public roads or highways. Such tax shall be at the rate of five dollars per motor vehicle on all motor vehicles the district of registration of which, as defined in section 4503.10 of the Revised Code, is located in the county levying the tax and shall be in addition to the taxes at the rates specified in sections 4503.04 and 4503.16 of the Revised Code, subject, to quarterly reductions in the manner provided in section 4503.13 of the Revised Code and the exemptions provided in sections 4503.16, 4503.17, and 4503.171 [4503.17.1] of the Revised Code.

"* * * * * * * * *

"No resolution levying a county motor vehicle license tax shall become effective sooner than thirty days following its adoption, and every such resolution is subject to a referendum as provided in sections 305.31 to 305.41, inclusive, of the Revised Code."

The above section makes a direct reference to Section 4503.02, Revised Code, which reads in part:

"An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways * * * Such tax shall be at the rates specified in section 4503.04 of the Revised Code and shall be paid to and collected by the registrar of motor vehicles or deputy registrar at the time of making application for registration."

It is a fundamental rule of statutory construction that statutes or sections of statutes which expressly refer to each other should be construed together. Wrenn Paper Co. v. Glander 156 Ohio St. 583, 591 (1952). The specific language used in Section 4503.02, Revised Code, "An annual license tax is hereby levied," makes it clear that this section provides for a motor vehicle license tax that shall be collected each and every year until such section is repealed. Reading this section in pari materia with Section 4504.02, Revised Code, it becomes evident that Section 4504.02, Revised Code, provides for an annual license tax which once adopted by the county commissioners may be collected each year without annual resolutions providing for such tax. This position is strengthened by the fact that Section 4504.02, Revised Code,provides for a license tax "in addition" to that tax provided for in Section 4503.02, Revised Code. Hence, I conclude that Section 4504.02, Revised Code, requires that the county commissioners adopt only one resolution levying a county motor vehicle license tax, after which such tax may be collected each year without further resolutions.

While county commissioners and legislative bodies of cities have been empowered pursuant to Sections 4504.02 and 4504.06, Revised Code, respectively, to adopt resolutions levying a motor vehicle license tax, the duty to collect the tax is vested with the registrar of motor vehicles pursuant to

Section 4504.09, Revised Code. Since there are eighty-eight counties and innumerable cities, some of which have already levied the tax, the legislature thought it necessary to adopt Section 4504.08, Revised Code, to aid the registrar in collecting the tax. This section reads:

> "A resolution, ordinance, or other measure levying a county motor vehicle license tax or municipal motor vehicle license tax shall not be applicable to motor vehicle registrations for a registration year beginning on the sixteenth day of April unless a copy of such resolution or ordinance is certified to the registrar of motor vehicles not later than the fifth day of January of the calendar year in which such registration year begins."

Compliance with this section is necessary so that the registrar will know in which counties and cities he must collect the license tax as provided by Section 4504.02, Revised Code. Hence, it is clear that the purpose of this section is one of notice to the registrar of motor vehicles. However, as a notice statute this section requires only that a copy of the resolution which provides for the levying of the tax be certified annually to the registrar of motor vehicles. It does not require that a resolution levying the tax be adopted each year.

In regard to your second question, Section 305.31, Revised Code, provides that any resolution adopted by county commissioners pursuant to Section 4504.02, Revised Code, is subject to referendum for thirty days immediately following such adoption. Since only one resolution is required to levy the annual motor vehicle license tax pursuant to Section 4504.02, Revised Code, the period such resolution is subject to referendum is only the thirty days immediately following its adoption.

In conclusion, it is my opinion and you are hereby advised;

1. A resolution levying a motor vehicle license tax pursuant to Section 4504.02, Revised Code, does not have to be adopted each year prior to collecting such tax each year.

2. A resolution levying a motor vehicle license tax pursuant to Section 4504.02, Revised Code, is subject to referendum as provided for by Section 305.31, Revised Code, only for the thirty-day period immediately following its adoption.

OPINION NO. 69-106

Syllabus:

1. The county sales and use taxes authorized to be levied by Sections 5739.021 and 5741.021, Revised Code, respectively, are in addition to the state sales and use taxes levied by Sections 5739.02 and 5741.02, Revised Code, respectively.

2. The county use tax authorized to be levied by Section

5741.021, Revised Code, may be levied only upon the storage, use or other consumption of tangible personal property which storage, use or other consumption of tangible personal property is also subject to the state use tax levied by Section 5741.02, Revised Code.

3. The county use tax authorized to be levied by Section 5741.021, Revised Code, may not be levied by a county upon the storage, use or other consumption of tangible personal property if the transaction by which the tangible personal property was acquired was subjected to the state sales tax levied by Section 5739.02, Revised Code.

4. The clerk of the court of common pleas of a county which has enacted a county use tax pursuant to Section 5741.021, Revised Code, has no authority to refuse to issue a certificate of title to a motor vehicle on the basis of nonpayment of the county use tax if the motor vehicle was purchased in the State of Ohio, and the state sales tax paid thereon irrespective of the county in which it was purchased.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: Paul W. Brown, Attorney General, August 26, 1969

Your request for my opinion in effect asks if residents of a county, which county has enacted the permissive sales and use taxes pursuant to resolution adopted under the authority of Sections 5739.021 and 5741.021 of the Revised Code, can escape liability for the permissive use tax (Section 5741.021, Revised Code) by purchasing automobiles and other items of tangible personal property outside the county, even though the automobile must be registered with the clerk of courts of the county.

Section 5739.021, Revised Code, provides in pertinent part:

> "For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county may levy a tax at the rate of one-half of one per cent <u>in addition to the tax imposed by section 5739.02 of the Revised Code upon every retail sale made in the county. The tax shall be levied pursuant to a resolution</u> of the county commissioners and a certified copy thereof shall be delivered to the tax commissioner either personally or by certified mail not later than the sixtieth day prior to the date on which the tax is to become effective. * * *" (Emphasis added)

Section 5741.021, Revised Code, provides in pertinent part:

> "For the purpose of providing additional general revenues for the county and paying the expenses of administering such levy, any county which levies a tax pursuant to section 5739.021 [5739.02.1] of the Revised Code shall levy a tax at the same rate levied pursuant to section 5739.021 [5739.02.1] of the Revised Code <u>in addition to that imposed by section 5741.02 of the</u>

Revised Code on the storage, use, or other consumption in the county of tangible personal property which is subject to the tax levied by this state as provided in section 5741.02 of the Revised Code. The tax shall be levied pursuant to a resolution of the board of county commissioners which shall be adopted after publication of notice and hearing in the same manner as provided in section 5739.021 [5739.02.1] of the Revised Code. Such resolution shall be adopted and shall become effective on the same day as the resolution adopted by the board of county commissioners levying a sales tax pursuant to section 5739.021 [5739.02.1] of the Revised Code and shall remain in effect until such sales tax is repealed.

"(A) The tax on the storage, use, or other consumption of tangible personal property levied pursuant to this section shall be in addition to the tax levied by section 5741.02 of the Revised Code." (Emphasis added)

The state-imposed sales and use taxes (Sections 5739.02 and 5741.02, Revised Code, respectively) are complementary taxes, The Celina Mutual Insurance Co. v. Bowers, Tax Commr., 5 Ohio St. 2d 12, at 15; and of a complementary sales and use tax, the Florida Supreme Court, in the case of United States Gypsum Co. v. Green, 110 So. 2d 409 (1959), at 412, 4 State Tax Cases, par. 250-033, at page 15,619, stated:

"The primary function of the use tax is to complement the sales tax so as to make uniform the taxation of property subject to tax, whether produced, purchased and used in this State or produced and purchased in another state or country, but used in this State."

However, as can be seen from the above-quoted portion of Sections 5739.021 and 5741.021, Revised Code, the county sales and use taxes are not complementary; rather, they are only in addition to the state sales and use taxes. In other words, a county use tax is only applicable to the storage, use or other consumption of tangible personal property within the county if the state use tax is applicable to that storage, use or other consumption of the tangible personal property.

Obviously, if a motor vehicle or any other item of tangible personal property is purchased in Ohio and the state sales tax paid thereon, the subsequent storage, use or other consumption of that motor vehicle or other item of tangible personal property by the purchaser in any of the other counties of Ohio would not give rise to the state use tax liability, because Section 5741.02, Revised Code, provides in pertinent part:

"(C) The (state use) tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property purchased under the following described circumstances:

"(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, provided said tax has been paid;"
(Matter in parentheses added)

Thus, if a motor vehicle or any other item of tangible personal property is purchased in Ohio, and the state sales tax is paid thereon, the subsequent storage, use or other consumption in any other county in Ohio would not be subject to state use taxation, and since the county use tax is in addition to the state use tax, it must follow that the subsequent storage, use or other consumption of the motor vehicle or other item of tangible personal property in a county, other than the county in which the purchase was made, even though such county has enacted the sales and use taxes, would not be subject to the county use tax.

This conclusion is fortified by the language of Section 5741.03, Revised Code, pertaining to the distribution of use tax revenues originating from counties having the permissive sales and use taxes. Section 5741.03, Revised Code, reads in pertinent part:

"The money collected under sections 5741.01 to 5741.22, inclusive, of the Revised Code, shall be credited as follows:

"(A) In any case where a county has levied a tax pursuant to section 5741.021 [5741.02.1] of the Revised Code, the tax commissioner shall within forty-five days after the end of each month certify to the auditor of the state the amount of such tax paid to the treasurer of the state during that month to be returned to the county levying the tax, which amount shall be <u>one-ninth</u> of the aggregate amount of money collected in such county if the county levies the additional tax at the rate of one-half of one per cent. The auditor of state shall then, on or before the twentieth day of the month, draw a voucher and warrant for such amount payable to the county treasurer of the county levying the tax. <u>The remainder of the aggregate amount of money collected shall be paid into the general fund of the state.</u>" (Emphasis added)

Based on the above language, the General Assembly must have intended that the additional use tax apply only to the same incidents of use as does the state use tax. Otherwise, the general fund of the state would receive a windfall of eight-ninths of the additional use tax collected on <u>intercounty</u> sales.

In regard to the registration of motor vehicles and the collection of sales and use taxes thereon, Section 4505.06, Revised Code, provides in pertinent part:

"Application for a certificate of title shall be made upon a form prescribed by section 4505.07 of the Revised Code, and shall be sworn to before a notary public or other officer empowered to ad-

minister oaths. Such application shall be filed with the clerk of the court of common pleas of the county in which the applicant resides if the applicant is a resident of this state or, if not a resident, in the county in which the transaction is consummated. * * *

"* * * * * * * * *

"The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or the applicant, in cases in which the certificate shall be obtained by the purchaser, submits with the application, payment of the tax levied by or pursuant to section 5739.02 or 5739.021 [5739.02.1] of the Revised Code by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the tax commissioner, or a receipt issued by the commissioner showing the payment of the tax.

"* * * When the transfer to the applicant was made in some other state or in interstate commerce, the clerk, except as provided in this section, shall refuse to issue any certificate of title unless the tax imposed by or pursuant to section 5741.02 or 5741.021 [5741.02.1] of the Revised Code has been paid as evidenced by a receipt issued by the commissioner, or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk. * * *"
(Emphasis added)

As can be seen from the above-quoted language, the clerk of the court of common pleas is only authorized to refuse to issue a certificate of title to a motor vehicle for nonpayment of use taxes if the transfer of the motor vehicle was made in some other state or in interstate commerce. There is no statutory authority for the clerk of the court of common pleas of a county having a county use tax to refuse to issue a certificate of title for a motor vehicle for nonpayment of the county use tax if the motor vehicle was purchased in any other county within the State of Ohio. In reaching this conclusion, I am not unaware of the recent amendment to Section 5739.021, Revised Code, contained in Substitute House Bill No. 531 enacted by the 108th General Assembly (133 Ohio Laws Sub. H.B. No. 531) and signed by the Governor on August 18, 1969, which added the following division to the permissive sales tax law, Section 5739.-021, Revised Code, to wit:

"(D) The county tax on the sale of titled merchandise shall be paid in the manner provided by chapters 4505. and 1548. of the Revised Code to the clerk of the court of common pleas of the county in which the titled merchandise is required by law to be licensed, for purposes of this division, 'titled merchandise' includes all

tangible personal property for which a certificate of title is required as evidence of ownership of the property."

As can be ascertained from an examination of this new division (D), it only applies to the place of payment of the permissive sales tax levied upon items of titled tangible personal property which are purchased in a county which has enacted the resolutions necessary to levy the permissive sales and use taxes. I find nothing in Substitute House Bill No. 531, supra, which would alter the conclusion herein expressed as to the residents' ability to escape liability for the permissive use tax (Section 5741.021, Revised Code) by purchasing automobiles and other items of tangible personal property outside the county, even though the automobiles must be registered with the clerk of courts of the county.

Therefore, it is my opinion and you are hereby advised:

1. The county sales and use taxes authorized to be levied by Sections 5739.021 and 5741.021, Revised Code, respectively, are in addition to the state sales and use taxes levied by Sections 5739 02 and 5741.02, Revised Code, respectively.

2. The county use tax authorized to be levied by Section 5741.021, Revised Code, may be levied only upon the storage, use or other consumption of tangible personal property which storage, use or other consumption of tangible personal property is also subject to the state use tax levied by Section 5741.02, Revised Code.

3. The county use tax authorized to be levied by Section 5741.021, Revised Code, may not be levied by a county upon the storage, use or other consumption of tangible personal property if the transaction by which the tangible personal property was acquired was subjected to the state sales tax levied by Section 5739.02, Revised Code.

4. The clerk of the court of common pleas of a county which has enacted a county use tax pursuant to Section 5741.021, Revised Code, has no authority to refuse to issue a certificate of title to a motor vehicle on the basis of nonpayment of the county use tax if the motor vehicle was purchased in the State of Ohio, and the state sales tax paid thereon irrespective of the county in which it was purchased.

OPINION NO. 69-107

Syllabus:

A position as a member of a board of education of a local school district and the position of administrator of a county mental retardation program are incompatible and may not be held concurrently by the same person.

To: Dominick E. Olivito, Jefferson County Pros. Atty., Steubenville, Ohio
By: Paul W. Brown, Attorney General, August 27, 1969

I have before me your request for my opinion which poses the following questions:

> "1. Is the position of member of a local school board incompatible with the position of Administrator of a mental retardation program, when such position is of the classified position protected under the Civil Service laws?
>
> "2. If the position of member of a local school board (which is a part time job and carries no compensation) is not incompatible on its face with the position of Administrator of a mental retardation program of a county, a position covered and protected by the Civil Service Laws, does it become incompatible by reason of the member of the school board must be elected by the voters of the school district to that position, or must be appointed to fill an unexpired term of another so elected?
>
> "3. If it is unlawful to hold the position of member of a local board, which is filled by a nonpartisan ballot, or in accordance with law and a position under the classified services of the Civil Service law, then would not this prohibition be unconstitutional in light of the Supreme Courts of Ohio and the United States of America decisions expanding the Constitutional guarantees as a restraint in the pursuit of employment and, the right to earn a living, particularly is this so since the position as member of the local board of education is a non-paying position and there is no conflict in the two specified positions that would affect the public's interest?"

With respect to the first question, Section 143.08, Revised Code, reads in part as follows:

> "* * * * * * * * *
>
> "(B) The classified service shall comprise all persons in the employ of the state and the several counties, * * * not specifically included in the unclassified service, * * *.
>
> "* * * * * * * * *"

The position of administrator of a county mental retardation program is not specifically included in the unclassified service and is therefore a classified position.

Section 143.41, Revised Code, provides in part as follows:

> "No officer or employee in the classified service of the state, the several counties * * * shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution * * * for any candidate for public office; * * * nor shall any officer or employee in the classified service of the state, the several counties * * * take part in politics other than to vote as he pleases and to express freely his political opinions."

I would refer you to Opinion No. 3074, Opinions of the Attorney General for 1958, in which my predecessor concluded that:

> "It is my opinion, and you are advised that under the provisions of Section 143.41, Revised Code, a person holding a position in the classified service could not at the same time become a candidate for, be elected to, or hold the office of member of a local board of education."

Therefore, in answer to your first two questions, a position as a member of a board of education of a local school district is incompatible with the position of administrator of a county mental retardation program, a classified position, based on the prohibition set forth in Section 143.41, supra.

With respect to your third question, it is the policy of the Office of the Attorney General to refrain from issuing opinions concerning the constitutionality of enacted statutes.

It is therefore my opinion and you are hereby advised that a position as a member of a board of education of a local school district and the position of administrator of a county mental retardation program are incompatible and may not be held concurrently by the same person.

OPINION NO. 69-108

Syllabus:

The county auditor is not precluded from making payments of salary to the humane society agents, pursuant to Chapter 1717, Revised Code, when such salary is in arrears for prior years, but rather, is obligated by Section 1717.07, Revised Code, to make such payments, when funds have been properly appropriated for such purpose by the county commissioners.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: Paul W. Brown, Attorney General, August 27, 1969

I have before me your request for my opinion which asks:

> "Is the County Auditor precluded from making payments of salary to the Humane Society employees under Chapter 1717, when such salary is in arrears for prior years?"

You have also informed me that the money for these salary payments had been appropriated by the county commissioners in the respective prior years, and that such salary amounts had been approved by the county probate judge in those years, pursuant to Section 1717.07, Revised Code. However, the funds appropriated for such salaries had been exhausted prior to full payment. You mention, finally, that the county commissioners have reappropriated the money this year, and the county auditor doubts the legality of the payment of such arrearages.

Section 1717.07, Revised Code, regarding the salaries of humane society agents, reads:

> "Upon the approval by the mayor of a municipal corporation of the appointment of an agent under section 1717.06 of the Revised Code, the legislative authority of such municipal corporation shall pay monthly to such agent, from the general revenue fund of the municipal corporation, such salary as the legislative authority deems just and reasonable. Upon the approval by the probate judge of a county of such an appointment, the board of county commissioners of such county shall pay monthly to such agent, from the general revenue fund of the county, such salary as the board deems just and reasonable. Such board and such legislative authority may agree upon the amount each is to pay such agent monthly. The salary to be paid monthly to such agent by the legislative authority of a village shall be not less than five dollars; by the legislative authority of a city, not less than twenty dollars; and by the board of county commissioners of a county, not less than twenty-five dollars. Not more than one such agent in each county shall receive remuneration from the board under this section."

Section 319.16, Revised Code, which generally prescribes the functions of the county auditor regarding the outlay of county funds, provides:

> "Except as to moneys due the state which shall be paid out upon the warrant of the auditor of state, the county auditor shall issue warrants on the county treasurer for all moneys payable from the county treasury, upon presentation of the proper order or voucher for the moneys, and keep a record of all such warrants showing the number, date of issue, amount for which drawn, in whose favor, for what purpose, and on what fund. The auditor shall not issue a warrant for the payment of any claim against the county, unless it is allowed by the board of county commissioners, except where the amount due is fixed by law or is allowed by an officer or tribunal so authorized by law."

The courts have long considered the above delineated duties of the county auditor as being ministerial, or nondiscretionary, in character. Putnam County v. Allen County, 1 Ohio St. 322 (1853); Kloeb v. Mercer County, 4 C.C. (N.S.) 565, 26 C.C. 152 (1904). Although the auditor is permitted to exercise reasonable judgment and prudence in issuing warrants, he cannot lawfully refuse to issue a warrant which has been duly and legally allowed and authorized by the county commissioners because he disagrees with the board making the allowance or with the propriety of it. State, ex rel. Manix v. Auditor, 43 Ohio St. 311 (1885); Hoel v. Goubeaux, 110 Ohio St. 287 (1924).

Section 5705.46, Revised Code, authorizes funds to be paid by the county for current payrolls only, and no explicit statutory authority exists for payment of salary arrearages for prior years. But the question of the payment of salary arrearages has been considered by my predecessors. The text of Opinion No. 2616, Opinions of the Attorney General for 1950, accurately summarizes the thought on this problem as expounded by my predecessors until 1950, at pages 835-836.

> "It is a general principal of law that public funds can be disbursed only by clear authority of law and upon compliance with statutory provisions relating thereto. (32 O. Jur. 734, Public Funds § 11.) On this premise, as then embodied in Article X, Section 5, of the Constitution of Ohio, the then Attorney General expressed his opinion in 1931 Opinions of the Attorney General, No.

3729, that the salary of a secret service officer appointed under Section 2915-1, General Code, cannot be paid out of the general fund of the county on the warrant of the county auditor when there has been no appropriation made for his salary by the county commissioners.

In the case of Jenkins v. The State, ex rel. Jackson County Agricultural Society, 40 O. App. 312, the Court of Appeals for Jackson County, in considering a question involving the benefits accorded to an agricultural society by Section 9894, General Code, held as disclosed by the third branch of the syllabus as follows:

"'In preparing an appropriation measure under Section 5625-29, General Code the taxing authority is bound to provide first for all those expenditures made imperative by statute.'

"The holding in the Jenkins case, supra, was in harmony with the case of State, ex rel. Justice v. Thomas, 35 O. App. 250, wherein a distinction was drawn with regard to the appropriation for compensation of employes appointed or employed by county auditors, county treasurers, probate judges, sheriffs, clerks of courts, surveyors, and recorders on the one hand, and that of a criminal court bailiff and court constable of the Common Pleas Court who is appointed and whose compensation is fixed by the Common Pleas Court judge. At page 256 of the aforesaid report the court say:

"'* * * When the common pleas court judge appoints a court constable and criminal bailiff and fixes the compensation, as he is expressly authorized to do under Sections 1541, 1692 and 1693, General Code, it has been fixed by a person or tribunal authorized so to do, and it is an act equivalent to and on a parity with a fixing by law.'"

(Emphasis added.)

I am of the opinion that the payment of the salary for a county humane society agent pursuant to Section 1717.07, Revised Code, would be "made imperative by statute" as the phrase is used in the above-emphasized portion. It should also be noted at this

point, that the phrase "taxing authority" with respect to the county means the board of county commissioners, pursuant to Section 5705.01 (C), Revised Code.

It is subsequently stated in Opinion No. 2616, supra, at pages 836-838:

> "With respect to the problem of the authority of county commissioners to appropriate funds for payment of compensation of county employes for prior years your attention is called to 1927 Opinions of the Attorney General, No. 76; 1933 Opinions of the Attorney General, No. 956; 1939 Opinions of the Attorney General, No. 798 and 1949 Opinions of the Attorney General, No. 290. Each opinion expressed the view that such appropriation could not be made to cover compensation for prior years. In the first three opinions the facts presented for consideration indicated that appropriations had been made to the respective offices for the purposes required during the prior years but that the sums so appropriated had been exhausted prior to the end of the fiscal year and no additional appropriations made. In the latter opinion I was confronted with the factual situation that the sum appropriated had not been used but had reverted to the general fund and had been reappropriated for another purpose. Common to each factual situation, however, was the fact that none of the expenditures sought to be made to cover such prior years were expenditures made imperative by statute.
>
> "In the 1949 Opinion, just referred to, I indicated the possibility of an appropriation for expenditures made imperative by statute which accrued but were not paid in prior years.
>
> "* * * * * * * * *
>
> "In view of the determination in that opinion that the compensation of the coroner under consideration was not an expenditure made imperative by statute and the assump= tion that the amounts appropriated in prior years had been reappropriated after reverting to the general fund it was not necessary for me to express a definite opinion on the point. Upon further consideration of this

> question at this time, particularly in view of the language employed in the Justice case, I am of the opinion that county commissioners are authorized to appropriate unexpended balances in the general fund which have accumulated in or reverted to that fund at the end of any prior fiscal year for salaries of county officers or employes whose salaries are fixed by law and have accrued in such prior fiscal year when such unexpended balance remains in the general fund unexpended or unencumbered in subsequent years."

From this rationale, the conclusion reached is stated in the second and third branches of the syllabus of Opinion No. 2616, supra:

> "2. County commissioners are authorized to appropriate unexpended balances in the general fund which have accumulated in or reverted to that fund at the end of any prior fiscal year for salaries of county officers or employes whose salaries are fixed by law and have accrued in such prior fiscal year when such unexpended balance remains in the general fund unexpended or unencumbered in subsequent years.
>
> "3. County commissioners have no authority to make appropriations for salaries fixed by law, which accrued in prior years, from other funds than those designated in the next preceding paragraph, as moral obligations."

In Opinion No. 472, Opinions of the Attorney General for 1952, after consideration of the rationale and holding of Opinion No. 2616, supra, it was stated at page 473:

> "I am unable to agree with the conclusion that the taxing authority of a subdivision lacks the power to make an appropriation for a fixed liability of this character on their own initiative. It seems to me that the nature and validity of the claim is determinative of the power of the taxing authority in such a case. To hold otherwise would mean that an obligation fixed by statute was subject to the action or no action of the township trustees, the very effect condemned in the case of Jenkins v. The State, ex rel. Jackson County Agricultural Society, supra.

> "The compensation of a township clerk being a liability fixed by law, I see no legal reason why such compensation, unpaid in prior years, cannot be paid in a current year by a board of township trustees out of funds not otherwise earmarked."

I am in full agreement with the above modification of the holding in Opinion No. 2616, supra. Relating this modification to the instant situation, I must necessarily conclude that the compensation of a county humane society agent is a liability fixed by law, and should be paid in a current year out of county funds "not otherwise earmarked."

Therefore, it is my opinion, and you are advised that the county auditor is not precluded from making payments of salary to the humane society agents, pursuant to Chapter 1717, Revised Code, when such salary is in arrears for prior years, but rather is obligated by Section 1717.07, Revised Code, to make such payments, when funds have been properly appropriated for such purpose by the county commissioners.

OPINION NO. 69-109

Syllabus:

1. Section 2335.01, Revised Code, authorizes, as necessary expenses, the imposition of mileage fees for appraisers regardless of whether the compensation paid to the appraisers is the ten dollars per parcel specified in that section or some higher amount fixed by the court pursuant to that section.

2. Such mileage fees should be paid directly to the appraisers in the same manner as the compensation provided for in Section 2335.01, Revised Code.

To: John T. Corrigan, Cuyahoga County Pros. Atty., Cleveland, Ohio
By: Paul W. Brown, Attorney General, August 28, 1969

I have your request for my formal opinion which reads as follows:

> "Does the clerk of courts have legal authority to pay to the appraisers the sheriff's charge of ten cents per mile, when collected, for mileage travelled by his appraisers?"

This question comes up in connection with compensation of appraisers appointed by the Sheriff of Cuyahoga County for lands and tenements upon which he has levied execution

as provided in Section 2329.17, Revised Code. You state that the sheriff has been charging a fee of ten cents per mile for each of his appointed appraisers going to and coming from the lands appraised, under the authority of Section 311.17, Revised Code. These are taxed as part of the costs of the case, collected by the clerk of courts, who then pays them into the General Fund of the county. You state the sheriff now feels these mileage fees should be paid by the clerk directly to the appraisers.

Section 311.17, supra, provides in part as follows:

> "For the services specified in this section, the sheriff shall charge the following fees, which the court or clerk thereof shall tax in the bill of costs against the judgment debtor or those legally liable therefor:
>
> "(A) For the service and return of the following writs and orders:
>
> "(1) Execution:
>
> "* * * * * * * * *
>
> "(b) When levy is made on real property, for the first tract, five dollars, and for each additional tract, one dollar;
>
> "* * * * * * * * *
>
> "(B) In addition to the fee for service and return the sheriff may charge:
>
> "(1) On each summons, writ, order, or notice, a fee of ten cents per mile, going and returning, provided, that where more than one person is named in such writ, mileage shall be charged for the shortest distance necessary to be traveled;
>
> "* * * * * * * * *

A close examination of Section 311.17, supra, indicates that the sheriff may charge the mileage fees only for his own mileage or that of his deputies in connection with service and return of the enumerated writs and orders. There appears nothing in this section indicating authorization for him to charge for mileage costs incurred by the appraisers he appoints in connection with executions levied on and sale of lands and tenements.

However, the fees and compensation of an appraiser of real property on execution are governed by Section 2335.01, Revised Code, which reads in part as follows:

> "* * * Each person called by an officer to appraise real or personal property, on execution, replevin, or attachment, or to fix the value of exempt property shall receive not more than ten dollars per parcel and necessary expenses, provided, that in the appraisal of real estate the court may fix compensation at more than ten dollars per parcel."

This section provides compensation of not to exceed ten dollars per parcel and necessary expenses except that the court may fix compensation of more than ten dollars per parcel. You state in your letter that the Court of Common Pleas of Cuyahoga County has acted to fix the appraisal fees, but that no allowance is made for mileage traveled. The failure of the court, in fixing appraisal fees pursuant to the last clause of Section 2335.01, supra, to include allowance for mileage traveled is not, in my opinion, determinative of the question you have posed. There is nothing in Section 2335.01, supra, to indicate that, in the event the court does fix compensation higher than ten dollars, the appraiser is not also entitled to the "necessary expenses" provided for in that section.

Since, in the particular fact situation you have described in your request for my opinion, the mileage allowance is authorized not by Section 311.17, supra, but rather by Section 2335.01, supra, it follows that such allowance should be paid directly to the appraisers in the same manner as the compensation fixed by the court, rather than being paid by the clerk of courts into the general fund.

Therefore, it is my opinion, and you are so advised, that Section 2335.01, Revised Code, authorizes, as necessary expenses, the imposition of mileage fees for appraisers regardless of whether the compensation paid to the appraisers is the ten dollars per parcel specified therein or some higher amount fixed by the court pursuant to that section, and that such mileage fees should be paid directly to the appraisers in the same manner as the compensation provided for in that section.

OPINION NO. 69-110

Syllabus:

When the court deems it necessary to appoint counsel for a juvenile, pursuant to Section 2151.351, Revised Code, such counsel's services shall be paid for by the county as is stated therein.

To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio
By: Paul W. Brown, Attorney General, September 4, 1969

You have requested my opinion and answer to two questions stated as follows:

> "In Juvenile Court cases for dependency or neglect where permanent custody is the issue, may the Court assign lawyers for indigent dependents and tax their fees as part of the Court costs pursuant to Section 2151.351 - RC, and then obtain reimbursement from the State?
>
> "In Juvenile Court cases where attorneys are appointed in delinquency cases, may their fees also be taxed as part of the cost when reimbursed by the State?"

Section 2151.351, Revised Code, mentioned in your inquiry reads as follows:

> "When a child is brought before the juvenile court for hearing to determine whether or not such child is delinquent, dependent, neglected, or a juvenile traffic offender in cases where it appears that such juvenile traffic offender may be adjudged delinquent, if he and his parents are indigent, the court may assign counsel to such child and his parents. Such counsel shall not be a partner in the practice of law of any attorney representing any interest adverse to the child.
>
> "<u>Counsel so assigned to represent a child and his parents shall be paid for their services by the county</u>, and shall receive therefor such compensation as the juvenile court may approve, not exceeding three hundred dollars and expen-

ses as the trial court may approve.

"The fees and expenses approved by the court under this section shall be taxed as part of the costs." (Emphasis added.)

Section 2949.18, Revised Code, provides for reimbursement by the state for the cost of prosecution and the transportation of a felon to a penal institution. It states that this reimbursement is made only when a felon is delivered; and first requires the issuance of an execution against the felon's property pursuant to Section 2949.15, Revised Code.

Section 2949.19, Revised Code, has similar provisions and both sections are quoted as follows:

Section 2949.18, Revised Code:

"When the clerk of the court of common pleas certifies on a cost bill that execution was issued under section 2949.15 of the Revised Code, and returned by the sheriff 'no goods, chattels, lands, or tenements found whereon to levy,' the person in charge of the penal institution to which the convicted felon was sentenced shall certify thereon the date on which the prisoner was received at the institution and the fees for transportation, whereupon the auditor of state shall audit such cost bill and the fees for transportation, and issue his warrant on the treasurer of state for such amount as he finds to be correct." (Emphasis added.)

Section 2949.19, Revised Code:

"Upon the return of the writ against a convict issued under section 2949.15 of the Revised Code, if an amount of money has not been made sufficient for the payment of costs of conviction and no additional property is found whereon to levy, the clerk of court of common pleas shall so certify to the auditor of state, under the seal of the court, with a statement of the total amount of costs, the amount paid, and the amount remaining unpaid. Only one statement of costs shall be certified to the auditor of state in each case, and such statement of costs shall include all the counts contained in a single indictment

> and payment requested for one count only and no additional costs shall be allowed where there are additional counts contained in the same indictment. Such unpaid amount as the auditor of state finds to be correct shall be paid by the state to the order of such clerk."
>
> (Emphasis added.)

Section 2949.15, Revised Code, mentioned in both of the above sections and to both of which it is a prerequisite, applies to felonies only. It reads as follows:

> "The clerk of the court of common pleas in which a person was convicted of a felony shall forthwith issue to the sheriff of the county in which the indictment was found, and to the sheriff of any other county in which the convict has property, executions against his property for fines and the costs of prosecution, which shall be served and returned within ten days, with the proceedings of such sheriff or the want of property upon which to levy, indorsed thereon.
>
> "When a levy is made upon property under such execution, a writ shall forthwith be issued by the clerk for the sale thereof, and such sheriff shall sell the property and make return thereof, and after paying the cost of conviction, execution, and sale, pay the balance to the person authorized to receive it."
>
> (Emphasis added.)

In the case of In re Agler, 19 Ohio St. 2d 70, decided July 9, 1969, the first branch of the syllabus reads as follows:

> "1. In order to sustain commitment of a juvenile offender to a state institution in a delinquency proceeding, where such commitment will deprive the child of his liberty, the alleged delinquent must have been afforded representation by counsel, appointed at state expense in case of indigency. (In re Gault, 387 U.S. 1. Section 2151.351, Revised Code. Paragraph two of the syllabus of Cope v. Campbell, 175 Ohio St. 475, overruled.)"

It is my opinion that the court expressed the term "state expense" generically and did not intend any amendment to Section 2151.351, Revised Code, which specifically states that the services of counsel shall be paid for by the county.

The General Assembly has not yet assumed for the state the expense of delinquency proceedings. It has permitted the payment of costs only in felony cases. It has not permitted the payment of costs in other criminal cases. The question at hand does not involve criminal prosecution as is apparent in reading the pertinent part of Section 2151.35, Revised Code:

> "The judgment rendered by the court under this section shall not impose any of the civil disabilities ordinarily imposed by conviction, in that the child is not a criminal by reason of such adjudication, nor shall any child be charged or convicted of a crime in any court, except as provided in section 2151.26 of the Revised Code. * * *" (Emphasis added.)

It is, therefore my opinion and you are advised that when the court deems it necessary to appoint counsel for a juvenile, pursuant to Section 2151.351, Revised Code, such counsel's services shall be paid for by the county as is stated therein.

OPINION NO. 69-111

Syllabus:

Pursuant to Section 3327.06, Revised Code, a board of education which admits a non-resident kindergarten pupil under the age of six years into its system must look to the child's parents or guardian for the collection of tuition. Under this section the district of the child's residence is not liable to the district of attendance for the payment of said tuition.

To: Martin W. Essex, Supt. of Public Instruction, Dept. of Education, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 9, 1969

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

> "I respectfully request your opinion as to the responsibility of a school district to collect tuition for non-resident kindergarten pupils, as well as the responsibility of the school district of which the child is a resident, to pay such tuition."

The proper frame of reference may be established by referring to Section 3313.64, Revised Code, which provides in pertinent part as follows:

> "The schools of each city, exempted village, or local school district shall be free to all school residents between six and twenty-one years of age." (Emphasis added.)

In addition, the above section provides for the admission and free schooling of "/I/nmates of the proper age of county, semi-public, and district children's homes" pursuant to Section 3313.65, Revised Code.

I assume that the overwhelming majority of kindergarten pupils are under the age of six years. It necessarily follows that according to Section 3313.64, supra, they are not included in the category of children eligible for free schooling. In fact, the next to last paragraph of this section, in specifically requiring the payment of tuition by those not accorded the privilege of free schooling, provides as follows:

> "The board of education of a city, exempted village, or local school district may admit other persons to the public schools of its respective district upon the payment of tuition within the limitation of law." (Emphasis added.)

Thus, the issue of the payment of tuition by children not "of the proper age" is well defined in the Revised Code.

In answer to your specific inquiry, therefore, I direct your attention to Section 3327.06, Revised Code, concerning the collection of tuition from non-resident pupils and the consequence of a failure to collect. That section provides as follows:

> "When a pupil attends school, pursuant to section 3327.04 of the Revised Code, in a district other than the district in which he is a school resident, tuition for such attendance shall be credited and paid in the manner provided in section 3317.08 of the Revised Code.
>
> "When the board of education of a city, exempted village, or local school district admits to the schools of its district any non-resident pupil for whose attendance tuition is not an obligation of the board of the district of the pupil's residence, such board shall collect tuition, for the attendance of such pupil, from the parents of the pupil and the amount of tuition collected shall be not more nor less than the amount computed in

the manner prescribed by section 3317.08 of the Revised Code.

"If a board admits to the schools of its districts any nonresident pupil for whose attendance tuition is not an obligation of the board of the district of the pupil's residence, and fails to collect tuition as required by this section from the pupil's parents or guardian, the attendance of such pupil is unauthorized attendance, the membership of such pupil shall not be included in the membership figure used in the calculation of approved classroom units as provided by section 3317.-05 of the Revised Code. The membership of such pupil shall be credited to the school district in which such pupil is a local school resident."
(Emphasis added.)

In considering Sections 3313.64 and 3327.06, supra, together, then, it becomes apparent that a board of education is not under a duty to pay another board for the schooling of a child under the age of six years. Section 3313.64, supra, implicitly requires a child under mandatory school age to pay tuition, and Section 3327.06, supra, makes it clear that the district of attendance must look to the parent or guardian for remuneration in the case of a non-resident pupil "for whose attendance tuition is not an obligation of the board of the district of the pupil's residence."

Therefore, it is my opinion and you are hereby advised that, pursuant to Section 3327.06, Revised Code, a board of education which admits a non-resident kindergarten pupil under the age of six years into its system must look to the child's parents or guardian for the collection of tuition. Under this section the district of the child's residence is not liable to the district of attendance for the payment of said tuition.

OPINION NO. 69-113

Syllabus:

A special tax levy in excess of the ten-mill limitation for a county board of mental retardation formed pursuant to Section 5126.01, et seq., Revised Code, should be submitted under the provisions of Section 5705.19 (L), Revised Code, rather than Section 5705.24, Revised Code. Although funds from the levy proposed under Section 5705.19 (L), Revised Code, may be used for substantially the same purposes as the current levy passed under Section 5705.24, Revised Code, the proposed levy will not be a "renewal" of the current levy.

To: James R. Scott, Guernsey County Pros. Atty., Cambridge, Ohio
By: Paul W. Brown, Attorney General, September 10, 1969

Your request for my opinion presents the following fact situation: Prior to 1967 a tax levy was passed pursuant to Section 5705.24, Revised Code, to provide funds for the child welfare board to carry out the training and education of men-

tally retarded children. In 1967, Section 5126.01, et seq., Revised Code, became effective, creating a county board of mental retardation to carry out some of the duties formerly handled by the child welfare board. Your main question has two parts as follows:

> 1. Should the next levy for this purpose be submitted under the provisions of Section 5705.24 or Section 5705.19 (L), Revised Code?
>
> 2. Would this be a "renewal" of an existing levy?

Section 5705.24, Revised Code, sets forth the provisions for a special levy in excess of the ten-mill limitation for child welfare services. Subsequent to the enactment of Section 5705.24, Revised Code, Section 5126.01, et seq., Revised Code, was enacted, transferring certain functions of the child welfare board to the county board of mental retardation but not replacing the child welfare board. See Opinion No. 67-088, Opinions of the Attorney General for 1967.

Section 5126.03, Revised Code, states in pertinent part:

> "The county board of mental retardation, subject to the rules, regulations and standards of the commissioner of mental hygiene shall:
>
> "(A) Administer and supervise sections 5127.01 to 5127.04, inclusive, of the Revised Code and exercise such powers and duties as prescribed by the commissioner;
>
> "* * * * * * * * *
>
> "(D) Provide such funds as are necessary for the operation of training centers and workshops.
>
> "* * * * * * * * *
>
> "The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section."

Section 5705.19 (L), Revised Code, states in pertinent part:

> "The taxing authority of any subdivision * * * may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient * * * and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:
>
> "* * * * * * * * *
>
> "(L) For the maintenance and operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons. * * *"

The purpose of the proposed levy as stated in your letter is for:

> "* * * maintenance and operation of schools, training centers, or workshops for mentally retarded persons * * *."

Notice that the scope of the purpose clause set forth above in Section 5126.03, Revised Code, is also that set forth in Section 5705.19 (L), Revised Code. Thus, Section 5705.19 (L), Revised Code, presents a method by which money may be obtained for the county board of mental retardation outside the ten-mill limitation, rather than Section 5705.24, Revised Code. Since the proposed levy is not to be levied pursuant to Section 5705.24, Revised Code, as was the previous levy, this will not be a "renewal" of an existing levy and should not be stated as such on the ballot prescribed by Section 5705.25, Revised Code. See Opinion No. 68-051, Opinions of the Attorney General for 1968.

Your remaining question pertains to the wording of the purpose clause of the commissioners' resolution and the notice of election. Section 5705.19, Revised Code, provides in pertinent part:

> "The taxing authority of any subdivision * * * by vote of two-thirds of all the members * * * may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient * * * and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:"

The purpose with which you are concerned is set forth in paragraph (L) of Section 5705.19, Revised Code, as follows:

> "(L) For the maintenance and operation of schools, training centers, workshops, clinics, and residential facilities for mentally retarded persons. * * *"

Section 5705.19, Revised Code, further states:

> "Such resolution shall be confined to a single purpose, and shall specify the amount of increase in rate which it is necessary to levy, the purpose thereof, and the number of years during which such increase shall be in effect, which may or may not include a levy upon the duplicate of the current year. * * *"

When the requirements of the above-quoted Section 5705.19, Revised Code, have been complied with, the resolution will be satisfactory.

OPINION NO. 69-114

Syllabus:

Under the Uniform Depository Act the awarding of active deposits can be made only to eligible and qualifying institutions that file an application for such award.

To: Harry A. Sargeant, Jr., Sandusky County Pros. Atty., Fremont, Ohio
By: Paul W. Brown, Attorney General, September 12, 1969

I have your request for my opinion on a question arising under the Uniform Depository Act, Chapter 135 of the Revised Code. Your request reads as follows:

> "In your opinion, does Section 135.04 of the Revised Code require that every qualifying institution be awarded its share of active deposits of public monies, or is the awarding of such active deposits to be made only to those institutions which file an application?"

The portion of Section 135.04, Revised Code, which you have set out in your letter, is quoted as follows:

> "The governing board of a subdivision shall award * * * the active deposits of public monies subject to its control in excess of twenty-five thousand dollars to the eligible institution or institutions <u>applying or qualifying</u> therefor in proportion to their respective award quotes * * *."
> (Emphasis added)

Section 135.03, Revised Code, defines the banks which are eligible for deposits and reads in part as follows:

> "Any national bank located in this state and any bank as defined by section 1101.01 of the Revised Code, subject to inspection by the superintendent of banks, is eligible to become a public depository, subject to sections 135.01 to 135.21, inclusive, of the Revised Code."

This section then continues with language which may be deemed to prescribe the qualification of a bank for deposits, as the word "qualifying" is used in the quoted portion of Section 135.04, <u>supra</u>. This further language reads as follows:

> "No such institution shall receive or have on deposit at any one time public moneys in an aggregate amount in excess of thirty per cent of non-public moneys on deposit as shown in its latest report to the superintendent of banks or comptroller of the currency."

Certain language contained in the third paragraph of Section 135.04, supra, appears to me to be dispositive of the question of whether only an eligible banking institution that makes application can be designated as a public depository and receive an award of public funds. This language reads as follows:

> "* * * except that no such public depository shall thereby be required or permitted to receive and have at any one time a greater amount of active deposits of such public moneys than that specified in the application of such depository."

If the institution did not make application, there would necessarily be no amount specified in the application and therefore it could not, under this provision, receive any amount as an award.

The question arises as to the meaning contemplated by the legislature in using the words: "applying or qualifying" in the first quoted part of Section 135.04, supra. Section 1.02, Revised Code, under the title "definitions", provides that the word "or" may be read as the word "and" if the sense requires it. I think the sense and logic of the respective code sections in question does in this instance require that the word "or" be read as the word "and". Thus, to receive an award a bank that applies must be eligible as provided in the first quoted portion of Section 135.03, supra, and it must also qualify as provided in Section 135.03, supra, by not having on deposit public money in excess of thirty per cent of non-public moneys.

The conclusion is certain that an award of public moneys can not be made to an institution, even though eligible and qualifying, unless that institution makes application.

I am, therefore, of the opinion and you are so advised that under the Uniform Depository Act the awarding of active deposits can be made only to eligible and qualifying institutions that file an application for such award.

OPINION NO. 69-115

Syllabus:

The office of county recorder and the position of county veterans' service officer are incompatible because of their respective statutory requirements, and they may not be held concurrently by the same person.

To: Edward D. Mosser, Harrison County Pros. Atty., Cadiz, Ohio
By: Paul W. Brown, Attorney General, September 12, 1969

I have before me your request for my opinion as to whether the office of county recorder is compatible with the office of county veterans' service officer, employed on a part-time basis and appointed under the authority of Section 5901.07, Revised Code.

Chapter 317 of the Revised Code describes the office and duties of the county recorder. Nothing contained therein specifically makes the office of county recorder incompatible with any other office.

Section 5901.07, Revised Code, sets out the duties of the county veterans' service officer. It provides in pertinent part as follows:

> "The soldiers' relief commission may employ a 'county veterans' service officer' who must be an honorably discharged veteran of the United States armed forces. The duties of such officer shall be to advise and assist persons in the armed forces of the United States, veterans of any war, and the wives, widows, children, parents, and dependants of such veterans in presenting claims or obtaining rights or benefits under any law of the United States or of this state.
>
> "The commission may employ such service officer on a part or full time basis. No county commissioner or member of the commission shall be employed as service officer * * *. The compensation of the service officer * * * shall be paid out of funds appropriated to the commission, as provided in section 5901.11 of the Revised Code."

Public offices are subject to two types of incompatibility, statutory and common law. Statutory incompatibility arises when some provision of law establishes criteria for one of the jobs that cannot be met by the person if he holds the other job at the same time. The common law rule on incompatibility in Ohio is stated in State, ex rel. Attorney General, v. Gebert, 12 C.C. (N.S.) 274, at page 275, as follows:

> "Offices are considered incompatible when one is subordinate to, or in any way a check upon, the other; or when it is physically impossible for one person to discharge the duties of both."

Under the common law definition above, there is no incompatibility between the offices of county recorder and county veterans' service officer. Section 5901.07, supra, assigns to the veterans' service officer the duties of advising and assisting servicemen, veterans, and their dependents in presenting claims or obtaining rights or benefits under law. The duties of the county recorder, as set forth in Chapter 317 of the Revised Code, are generally to make a public record of various types of documents. An examination of the statutes pertaining to the county recorder and to the county veterans' service officer does not reveal any provisions which would constitute one superior or subordinate to the other, or which would provide either any form of check upon the other. As to physical possibility, the county recorder is not required to devote his full time to the duties of the office. Obviously, from the provisions of Section 5901.07, supra, the office of veterans' service officer does not necessarily require full time service, and in fact your question pertains to a service officer employed on a part-time basis. Thus, there is no common law incompatibility between

the two offices.

There is, however, a clear statutory incompability. Section 143.08, Revised Code, provides in part as follows:

> "The civil service of the state and the several counties * * * shall be divided into the unclassified service and the classified service.
>
> "* * * * * * * * *
>
> "(B) The classified service shall comprise all persons in the employ of the state and the several counties * * * not specifically included in the unclassified service * * *."

Since the position of county veterans' service officer is not listed in the unclassified civil service under Section 143.08, supra, it must be concluded that it is a classified service position. This conclusion was also reached in Opinion No. 4130, Opinions of the Attorney General for 1948, and Opinion No. 1116, Opinions of the Attorney General for 1952.

Section 143.41, Revised Code, reads in part as follows:

> "No officer or employee in the classified service of the state /or/ the several counties * * * shall directly or indirectly, orally or by letter, solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription, or contribution for any political party or for any candidate for public office; * * * nor shall any officer or employee in the classified service of the state /or/ the several counties * * * be an officer in any political organization or take part in politics other than to vote as he pleases and to express freely his political opinions."

Section 317.01, Revised Code, provides in pertinent part as follows:

> "There shall be elected quadrennially in each county a county recorder * * *."

Clearly one who holds an elective public office such as that of county recorder would be "tak/ing/ part in politics other than to vote as he pleases and to express freely his political opinions", and such a person could not also hold an office or position under the classified service without being in violation of Section 143.41, supra.

It is, therefore, my opinion and you are hereby advised that the office of county recorder and the position of county veterans' service officer are incompatible because of their respective statutory requirements, and they may not be held concurrently by the same person.

OPINION NO. 69-117

Syllabus:

A mayor of a village presiding over a mayor's court may sentence a person to imprisonment for violation of a village ordinance if such person in writing waives a jury and consents to be tried by the mayor as magistrate.

To: Richard B. McQuade, Fulton County Pros. Atty., Wauseon, Ohio
By: Paul W. Brown, Attorney General, September 19, 1969

I have your request for my opinion which reads as follows:

> "May a mayor of a village presiding over a Mayor's Court sentence a person to imprisonment for a violation of a village ordinance?"

The answer to your question involves the consideration of Sections 1905.01, 2938.04, 2937.08, 2931.01 and 2945.07 of the Revised Code. The jurisdiction of a mayor's court is provided in Section 1905.01, Revised Code, as follows:

> "In all municipal corporations not having a police court and not being the site of a municipal court nor a place where Portage county municipal court sits as required pursuant to section 1901.021 [1901.02.1] of the Revised Code or by designation of the judges pursuant to section 1901.021 [1901.02.1] of the Revised Code, the mayor of such municipal corporation has jurisdiction to hear and determine any prosecution for the violation of an ordinance of the municipal corporation, and has jurisdiction in all criminal causes involving moving traffic violations occuring on state highways located within the boundaries of the municipal corporation, subject to the limitations of sections 2937.08 and 2938.04 of the Revised Code.
>
> "* * * * * * * * *"

Section 2938.04, Revised Code, provides in pertinent part as follows:

> "* * * In courts not of record jury trial may not be had, but failure to waive jury in writing where right to jury trial may be asserted shall require the magistrate to certify such case to a court of record as provided in section 2937.08 of the Revised Code."

Section 2937.08, Revised Code, provides in pertinent part as follows:

> "* * * * * * * * *
>
> Upon the entry of such pleas [not guilty or once in jeopardy] to a charge of misdemeanor in a

> court not of record the magistrate shall forthwith set the matter for future trial or, with the consent of both state and defendant may set trial forthwith, both pursuant to Chapter 2938. of the Revised Code, provided that if the nature of the offense is such that right to jury trial exists, such matter shall not be tried before him unless the accused, by writing subscribed by him, waives a jury and consents to be tried by the magistrate.
>
> "If the defendant in such event does not waive right to jury trial, then the magistrate shall require the accused to enter into recognizance to appear before court of record in the county, set by such magistrate, and the magistrate shall thereupon certify all papers filed, together with transcript of proceedings and accrued costs to date, and such recognizance if given, to such designated court of record. * * *"

Section 2931.01, Revised Code, defines a magistrate as including mayors of municipal corporations.

Section 2945.07, Revised Code, provides for the right of trial by jury:

> "At any trial in any court for the violation of any statute of this state or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of $50.00, the accused has the right to be tried by jury."

A mayor's court is not a court of record. Opinion No. 21, Opinions of the Attorney General for 1965; Opinion No. 1208, Opinions of the Attorney General for 1960. Thus a jury trial may not be had therein. In any prosecution for the violation of a municipal ordinance in which the penalty involved is imprisonment, the accused has the right to be tried by jury. Under the provisions of Sections 2937.08 and 2938.04, supra, the mayor must certify such a case to a court of record unless the accused, by writing, subscribed by him, waives a jury and consents to be tried by the mayor as a magistrate. If the accused does waive in writing his right to a jury trial, the mayor may proceed as in any other case wherein he has jurisdiction. The mayor, in such a case, has authority to impose the penalty prescribed for violation of the ordinance even if the penalty involves imprisonment.

It is, therefore, my opinion and you are hereby advised that a mayor of a village presiding over a mayor's court may sentence a person to imprisonment for violation of a village ordinance if such person in writing waives a jury and consents to be tried by the mayor as magistrate.

OPINION NO. 69-118

Syllabus:

(1) A municipal corporation located in two counties which wishes to annex territory must follow the procedures set forth in Section 709.11, Revised Code; (2) the fact that adult freeholders in the territory to be annexed reside in only one county does not preclude the annexing municipal corporation from following Section 707.22, Revised Code; (3) the municipal corporation which wishes to annex territory which is situated within three miles of two or more municipal corporations must follow Sections 707.01 through 707.14, Revised Code, so far as practicable in order to insure that the annexation procedure is not negated by a strict reading of the procedural requirements.

To: John J. Malik, Jr., Belmont County Pros. Atty., St. Clairsville, Ohio
By: Paul W. Brown, Attorney General, September 19, 1969

I have before me your opinion request wherein you ask three related questions which are paraphrased below:

(1) Does an annexation procedure by a municipal corporation located within two counties follow Section 709.02 or Section 709.11, Revised Code?

(2) Does Section 707.22, Revised Code, apply when adult freeholders residing in the territory to be annexed all reside in one county?

(3) Should it be decided that Section 709.11, Revised Code, is applicable, is it mandatory for an annexation proceeding to follow literally the requirements of Section 707.02 (D), Revised Code, as referred to in Section 707.22, Revised Code?

Section 709.02, Revised Code, reads as follows:

"The inhabitants residing on territory adjacent to a municipal corporation may, at their option, cause such territory to be annexed thereto, in the manner provided by sections 709.03 to 709.11, inclusive, of the Revised Code. Application for such annexation shall be by petition, addressed to the board of county commissioners of the county in which the territory is located, signed by a majority of the adult freeholders residing in such territory. If the territory sought to be annexed is completely surrounded by a municipal corporation and there are no adult freeholders residing in such territory, the petition may be signed by a majority of the owners of real estate in such territory. Such petition shall contain:

"(A) A full description and accurate map or plat of the territory sought to be annexed;

"(B) A statement of the total number of adult

freeholders residing in the territory sought to be annexed, or of the number of owners of real estate in the territory proposed to be annexed together with a statement that there are no adult freeholders residing in the territory sought to be annexed;

"(C) The name of a person or persons to act as agent for the petitioners."

Section 709.11, Revised Code, reads as follows:

"If a municipal corporation is situated in two or more counties, or the territory to be annexed is situated in a different county from that in which the municipal corporation or some part of it is situated, the annexation proceedings, so far as practicable, shall be as provided by section 707.22 of the Revised Code." (Emphasis added.)

Since Section 709.11, supra, is specifically mentioned in Section 709.02, supra, the obvious answer to your first question is that the former section must be followed here because the municipal corporation in question is located in two counties. Therefore, the proper procedural starting point in annexing new territory is Section 709.11, supra.

Section 707.22, Revised Code, referred to in Section 709.11, supra, reads as follows:

"When adult freeholders residing in two or more counties, desire the organization of such territory into a village, the petition shall be made to the board of county commissioners of the county in which the largest number of qualified voters of the proposed municipal corporation reside, and a statement to that effect shall be set forth in the petition. The transcript of the proceedings of the board, and the other papers relating to the incorporation shall be recorded in the county in which the petition is filed in the manner provided by section 707.09 of the Revised Code. Within ten days after such recording the county recorder shall make a certified transcript of such record for each of the other counties in which any portion of the territory is situated, and shall forward such transcript to the recorders of such counties, who shall record them in the manner required for original papers.

"In all other respects, the proceedings to establish such municipal corporation, or review the action of the board, shall be as provided in sections 707.01 to 707.14, inclusive, of the Revised Code."

The answer to your second query is more difficult because, as you point out in your opinion request, all of the adult freeholders reside in one county. In order to answer this question we must return to the language of the controlling statute, which indicates that Section 707.22, Revised Code, be followed so far as practicable. This language seems to indicate that the intent of the legislature was to require annexation proceedings under Section 707.22, supra, whenever the municipal corporation involved

is situated in two or more counties. Thus the fact that the freeholders reside in but one county should not take the annexation procedure out of the purview of Section 707.22, supra.

In answer to your third question, we must look at the last paragraph of Section 707.22, supra. This paragraph refers to Sections 707.01 through 707.14, Revised Code, as the proper sections to follow. Section 707.04, Revised Code, reads as follows:

> "Prior to fixing the time and place of the public hearing pursuant to section 707.05 of the Revised Code, the board of county commissioners shall determine whether any of the area proposed to be incorporated includes territory within three miles of any portion of the boundary of an existing municipal corporation. If the board so finds, it shall make an order in its journal of such finding and forward a copy of such entry to the clerk of the legislative authority of such municipality. The board shall therefore take no action on the incorporation petition so long as any of the area proposed to be incorporated includes territory within three miles of the boundary limits of any existing municipality. However, the board may proceed with the incorporation petition even though some or all of the territory proposed to be incorporated would be within the three mile area if the board finds either of the following:
>
> "(A) An annexation proceeding which included the territory within three miles of an existing municipality has been attempted within two years preceding the date of filing of the incorporation petition under section 709.02 of the Revised Code but failed because the existing municipality took unfavorable action, or because the existing municipality took no action on the petition for a period of one hundred twenty days after the petition was presented to the legislative authority of the municipality as required in section 709.04 of the Revised Code.
>
> "(B) There is furnished the board of county commissioners a copy of a resolution, passed by the legislative authority of each existing municipal corporation within the three mile area approving the petition for incorporation.
>
> "If the board determines that none of the territory within the incorporation petition is within three miles of any portion of the boundary of an existing municipal corporation, the board shall proceed as provided in section 707.05 of the Revised Code."

Section 707.02, Revised Code, reads in pertinent part:

> "The petition required by section 707.01 of the Revised Code shall be signed by a majority of the adult freeholders residing within the terri-

tory proposed to be incorporated and shall contain or have attached thereto:

"* * * * * * * * *

"(D) A statement that the area consists of not less than two square miles, includes a population of not less than six hundred persons per square mile, and has an assessed valuation of real, personal, and public utility property subject to general property taxation of at least two thousand dollars per capita; provided that if the territory proposed to be incorporated contains a population of not less than twenty-five persons and immediately surrounds a resort, ski area, park, lake, or picnic ground, kept regularly for outing and pleasure, the statements provided for in this division shall not be required."

I am of the opinion that the board of county commissioners must determine whether any of the area proposed to be annexed to a village includes territory within three miles of any portion of the boundary of an existing municipal corporation. As you have indicated in your letter, the board of county commissioners has already determined that the area to be annexed is located within three miles of an existing corporation. This being the case, the board must, pursuant to the statute, make an entry of such finding in its journal and forward a copy of the entry to the clerk of the annexing village.

In regard to Section 707.02, Revised Code, it should be emphasized that the controlling statute, Section 709.11, Revised Code, clearly states that the annexing parties should follow the procedures of Sections 707.01 to 707.14, Revised Code, so far as practicable. Chapter 707, Revised Code, is referred to in annexation proceedings as a procedural requirement and not a substantive requirement and therefore may not prevent the annexation. It was the intent of the legislature to provide a procedural section of the code in regard to annexation but not to hinder the annexation procedure to the point of legislating against a territory or municipality involved in annexation.

Therefore, it is my opinion and you are hereby advised that (1) a municipal corporation located in two counties which wishes to annex territory must follow the procedures set forth in Section 709.11, Revised Code; (2) the fact that adult freeholders in the territory to be annexed reside in only one county does not preclude the annexing municipal corporation from following Section 707.22, Revised Code; (3) the municipal corporation which wishes to annex territory which is situated within three miles of two or more municipal corporations must follow Sections 707.01 through 707.14, Revised Code, so far as practicable in order to insure that the annexation procedure is not negated by a strict reading of the procedural requirements.

OPINION NO. 69-119

Syllabus:

When a child is an inmate of a private, county, semi-public or district children's home located in one school district, and when, prior to being admitted to said institution, he was a "ward" of an "actual resident" of another school district, this latter school district, in accordance with Section 3313.64, Revised Code, is financially responsible for the education of the child in the public schools of the county in which the children's home is located.

To: Harry Friberg, Lucas County Pros. Atty., Toledo, Ohio
By: Paul W. Brown, Attorney General, September 22, 1969

I have before me your request for my opinion regarding the liability of a board of education for the payment of tuition for a pupil, without parents or legally appointed guardian, who was sent by his aunt and uncle to a school for the mentally disturbed in another county subsequently attending the public schools in that county.

The issue may be resolved by referring directly to the wording of Section 3313.64, Revised Code, which provides in pertinent part as follows:

> "* * * The board may admit the inmates of a private children's home or institution located in the district, provided any child who is an inmate of such a home or institution and previous to admission was a school resident of the school district in which such home or institution is located shall be entitled to free education; and, provided <u>any such inmate who attends the public schools was, prior to admission to such home or institution, a school resident of another school district of the state, tuition shall be paid by such school district in the manner provided for the payment of tuition by section 3317.08 of the Revised Code</u>. * * *
>
> "* * * * * * * * *
>
> "* * * A child who is an inmate of a county, semipublic, or district children's home and who at the time of placement in such home was a school resident of the district in which such home is located shall be entitled to an education at the expense of such school district; <u>any other inmate of such home shall be educated at the expense of the school district in which he was a school resident at the time of placement</u>. The district of school residence shall pay tuition in such amount as shall be computed pursuant to the formula pro-

> vided in section 3317.08 of the Revised Code, excepting that such formula shall be calculated as though the pupil were in attendance in the district of his school residence, and the tuition cost shall be computed by applying the factors in such formula to the district of school residence. * * *"
>
> (Emphasis added.)

The above section of the Revised Code clearly establishes the tuition liability of a board of education in the case where the student was a "school resident" of another school district prior to his admission to the children's home. It is likewise clear that tuition liability exists whether the child is an inmate of a county, a semi-public, a district or a private children's home. The tenor of your request, however, indicates a concern about the more pointed issue of the pupil's school residency in the situation where he has neither parents nor legal guardian.

This office has heretofore ruled that a child's school residency is that of the district in which the child was found, if the residency of the parents could not be determined. Opinion No. 2044, Opinions of the Attorney General for 1961. And, more precisely, the question of school residency may be answered by determining whether the person or persons with whom he resides stand in loco parentis to him. Opinion No. 4864, Opinions of the Attorney General for 1932. To this end my predecessor, in Opinion No. 545, Opinions of the Attorney General for 1963, ruled that for the purpose of Section 3313.64, Revised Code, such a child is a "ward" if the facts show that an "actual resident" of a school district stands in loco parentis to him.

And finally, Opinion No. 545, supra, while addressing itself solely to the instance where a child is an inmate of a semi-public children's home, is at least persuasive if not dispositive of the issue of tuition liability, whether the children's homes involved are privately endowed and administered or are county, semi-public, or district children's homes. Branch one of the syllabus provides as follows:

> "1. When a child resides in a semi-public children's home located in one school district, and when the child, prior to being admitted to said institution, was the 'ward' of an 'actual resident' of another school district, this latter school district, in accordance with Section 3313.64, Revised Code, is financially responsible for the education of the child while he is an inmate of the semi-public children's home."

Therefore, it is my opinion and you are hereby advised that when a child is an inmate of a private, county, semi-public or district children's home located in one school district, and when, prior to being admitted to said institution, he was the "ward" of an "actual resident" of another school district, this latter school district, in accordance with Section 3313.64, Revised Code, is financially responsible for the education of the child in the public schools of the county in which the children's home is located.

OPINION NO. 69-121

Syllabus:

1. Pursuant to Section 5713.081, Revised Code, inheritance tax revenues are a proper source of monies for the payment of delinquent taxes owed by the state to the county, as contemplated in Section 5713.081, Revised Code.

2. Section 5a of Article XII of the Ohio Constitution precludes monies derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles from being expended for the satisfaction or payment of delinquent taxes owed by the state, as contemplated in Section 5713.081, Revised Code.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 23, 1969

I have before me your request for my opinion in which you ask the following questions:

> 1. Is the action of the Auditor of Lucas County in withholding a sum of $89,105.26 on the February inheritance tax settlement due the state, in accordance with the provisions of Section 5713.081 of the Revised Code and shall the Auditor of State accept the offered settlement?
>
> 2. Since the properties involved have been taken by the state for highway purposes, is it more appropriate that the Lucas County Auditor use highway user monies to set off the delinquent taxes rather than funds due the General Fund of the State?

My opinion is that the offered settlement should be accepted.

Along with your request, you have informed me that the $89,105.26 withheld includes no payments of delinquent special assessments. Section 5713.081, Revised Code, deals only with the remission and the collection of delinquent taxes and no authority is given to the Board of Tax Appeals or to county auditors to exempt from, remit or withhold monies for the payment of special assessment by Section 5713.081, Revised Code. See Carney v. State, 158 Ohio St. 348 (1952); State v. Carney, 166 Ohio St. 81 (1956).

Along with Section 5713.081, Revised Code, an uncodified temporary statute, Section 2 of Amended Senate Bill No. 351 (132 Ohio Laws, 2325), was passed. This temporary section was held to be unconstitutional in Park v. City of Euclid, 17 Ohio St. 2d 4 (1969). This decision has no effect upon Section 1 of Amended Senate Bill No. 351, codified as new Section 5713.081, Revised Code, as was specifically stated in the Park case, supra, at page 6.

The only part of Section 5713.081, Revised Code, that needs to be interpreted reads in pertinent part:

> "* * * Such official shall deduct from each distribution made by him, the amount necessary to pay the tax delinquency from any revenues or funds to the credit of the state * * *."
> (Emphasis added)

Though the above language "any revenues or funds" is broad and apparently unrestricted, the term must be construed in the light of pre-existing restrictions, both constitutional and statutory that exist on expenditures of tax revenues. Clearly there is a constitutional restriction placed on highway user tax revenues as to use. See Section 5a of Article XII of the Ohio Constitution, which reads:

> "No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways."

In short, constitutional restrictions on the use of revenues and funds must have been contemplated as an implied limitation on the term "any revenues or funds." Therefore, the term "any revenues or funds" means those revenues or funds that are not limited as to purpose or use by the Ohio Constitution. As to inheritance tax settlement revenues, I can find no particular purpose or use limitation of such funds either in the Constitution or the statutes and the settlement should be accepted. However, as above noted, Section 5a of Article XII of the Ohio Constitution would preclude the proposed setoff by the application of highway user tax revenues.

Therefore, it is my opinion and you are so advised:

1. Pursuant to Section 5713.081, Revised Code, inheritance tax revenues are a proper source of monies for the payment of delinquent taxes owed by the state to the county, as contemplated in Section 5713.081, Revised Code.

2. Section 5a of Article XII of the Ohio Constitution precludes monies derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles from being expended for the satisfaction or payment of delinquent taxes owed by the state, as contemplated in Section 5713.081, Revised Code.

OPINION NO. 69-123

Syllabus:

A board of township trustees may utilize funds acquired under Section 505.39, Revised Code, and Section 5705.19 (I), Revised Code, for the purpose of furnishing ambulance service to its citizens and such funds may be used when the service is furnished directly through the township fire department under Section 505.37, Revised Code, or indirectly by contract under Section 505.443, Revised Code.

To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio
By: Paul W. Brown, Attorney General, September 24, 1969

I am in receipt of your opinion request wherein you ask the following:

> "May tax levy funds for fire protection voted under Section 5705.19 (I) of the Revised Code be used for the purpose of providing and maintaining ambulance service to residents of the township:
>
> "(a) when such service is furnished by a township fire department;
>
> "(b) when such service is contracted with a private life squad company or another township or municipality."

Section 505.37, Revised Code, states in pertinent part:

> "The board of township trustees may establish all necessary regulations to guard against the occurrence of fires, protect the property and lives of the citizens against damage and accidents and may, with the approval of the specifications by the prosecuting attorney, purchase or otherwise provide such fire apparatus, mechanical resuscitators or other equipment, appliances, materials, fire hydrants, and water supply for fire-fighting purposes as seems advisable to the board. Such board shall provide for the care and maintenance of fire equipment, and, for such purposes, may purchase, lease, or construct and maintain necessary buildings, and it may establish and maintain lines of fire-alarm communications within the limits of the township. * * *"

Section 505.39, Revised Code, states:

> "The board of township trustees may, in any year, levy a sufficient tax upon all taxable property in the township or in a fire district, to provide protection against fire, to provide and maintain fire apparatus and appliances, buildings and

sites for apparatus and applicances, sources of water supply, lines of fire-alarm telegraph, and to pay permanent, part-time, or volunteer fire-fighting companies to operate such equipment."

Section 5705.19, Revised Code, states in pertinent part:

"The taxing authority of any subdivision at any time prior to the fifteenth day of September, in any year, by vote of two-thirds of all the members of said body, may declare by resolution that the amount of taxes which may be raised within the ten-mill limitation will be insufficient to provide for the necessary requirements of the subdivision, and that it is necessary to levy a tax in excess of such limitation for any of the following purposes:

"* * * * * * * * *

"(I) For the purposes of providing and maintaining fire apparatus, appliances, buildings, or sites therefor, or sources of water supply and materials therefor, or the establishment and maintenance of lines of fire alarm telegraph or the payment of permanent, part-time, or volunteer firemen or fire fighting companies to operate the same;

"* * * * * * * * *"

It seems clear that if funds acquired for fire protection under Section 505.39, supra, may be expended for ambulance service, funds acquired for fire protection under Subsection (I), Section 5705.19, supra, may be expended likewise as both sections are concerned with the same subject matter, the latter section merely providing a procedure for raising additional revenue if those acquired under Section 505.39, supra, are insufficient.

In Opinion No. 3331, Opinions of the Attorney General for 1962, my predecessor discussed the question of purchasing and maintaining an ambulance under Section 505.37, supra, and concluded that the wording of this section was sufficiently broad in scope to authorize ambulance service, although ambulances were not expressly mentioned in the statute. It was further concluded that revenues acquired under Section 505.39, supra, could be used for ambulances purchased and maintained under Section 505.37, supra.

In 1967 the legislature enacted Section 505.443, Revised Code, which reads as follows:

"In order to obtain ambulance service, or to obtain additional ambulance service in times of emergency, any township may enter into a contract, for a period not to exceed three years, with one or more townships, municipal corporations, or private ambulance owners, regardless of whether such townships, municipal corporation, or private ambulance owners are located within or without the state, upon such terms as are agreed to by them to furnish

or receive ambulance services or the interchange of ambulance services within the several territories of the contracting subdivisions, if such contract is first authorized by respective boards of township trustees or other legislative bodies.

"Such contract may provide for a fixed annual charge to be paid at the times agreed upon and stipulated in the contract, or for compensation based upon a stipulated price for each run, call or emergency, or the elapsed time of service required in such run, call, or emergency, or any combination thereof."

In Opinion No. 69-038, Opinions of the Attorney General for 1969, I discussed this statute in connection with the following question:

"* * *whether* * *a fire department, volunteer or hired, maintained by a township, may operate an ambulance purchased under authority of Section 505.-37, Revised Code, for any emergency situation or whether such ambulance may be used only in emergency situations in conjunction with fire protection."

I concluded that a fire department maintained by a township could properly operate ambulances to protect property and lives against damages and accidents and such use was not limited to situations in conjunction with fire protection.

This opinion states in pertinent part:

"The legislature could have placed but did not place words of limitation on the kind of ambulance service for which the township might contract under the provisions of Section 505.443, supra, and thereby limit such ambulance service to service in conjunction with fire protection. In reflecting upon the legislative intent, it would appear inconsistent that the township itself could acquire and operate rescue vehicles or ambulances only in conjunction with fire protection, but could contract under Section 505.443, supra, for ambulance service not limited to fire protection. As heretofore indicated, Section 505.37, supra, provides that the board of township trustees may establish all necessary regulations to protect the property and lives of the citizens against damage and accidents."

Although the question of funds for the operation of ambulances was not discussed in the above opinion, it follows that if an activity is authorized under Section 505.37, supra, revenues acquired under Section 505.39, supra, may be used to support the activity.

To summarize, ambulances may be purchased and operated under Section 505.37, supra, and when they are so purchased and operated, funds acquired under Section 505.39, supra, may be used for this purpose the same as they are used for normal fire protection purposes. In view of Section 505.443, supra, it is clear that a board of township trustees may operate an ambulance service through a fire department or contract for this service with other agencies or individuals.

Section 505.443, supra, does not, in my opinion, change the source of revenue needed to operate an ambulance service, it merely authorized the board of township trustees to contract for this service in lieu of or in addition to furnishing such service directly.

In view of the above, it is my opinion and you are hereby advised that a board of township trustees may utilize funds acquired under Section 505.39, Revised Code, and Section 5705.19 (I), Revised Code, for the purpose of furnishing ambulance service to its citizens and such funds may be used when the service is furnished directly through the township fire department under Section 505.37, Revised Code, or indirectly by contract under Section 505.443, Revised Code.

OPINION NO. 69-125

Syllabus:

The Bureau of Motor Vehicles does not have the power to suspend the license of a driver who has refused to submit to a chemical test pursuant to the provisions of Section 4511.191, Revised Code, when such driver, within ten days, appears in the forum where charged and pleads guilty as his first advised plea to the offense for which he was arrested.

To: Daniel T. Spitler, Wood County Pros. Atty., Bowling Green, Ohio
By: Paul W. Brown, Attorney General, September 24, 1969

I am in receipt of your opinion request concerning the validity of Section 4511.191 (D), Revised Code, as it pertains to individuals who have refused to submit to a chemical test to determine the percentage of alcohol in the blood but have nonetheless entered a plea of guilty to the offense of driving while under the influence of alcohol.

Section 4511.191 (D), Revised Code, provides as follows:

> "(D) If a person under arrest for the offense of driving a motor vehecle while under the influence of alcohol refuses upon the request of a police officer to submit to a chemical test designated by the law enforcement agency as provided in division (A) of this section, after first having been advised of the consequences of his refusal as provided in division (B) of this section, no chemical test shall be given, but the registrar of motor vehicles upon the receipt of a sworn report of the police officer that he had reasonable grounds to believe the arrested person had been driving a motor vehicle upon the public highways of this state while under the influence of alcohol and that the person refused to submit to the test upon the request of the police officer and upon the receipt of the form as provided in division (C) of this section certifying that the arrested person was advised of the consequences of his refusal, shall suspend his

license or permit to drive, or any nonresident operating privilege for a period of six months, subject to review as provided in this section; or if the person is a resident without a license or permit to operate a motor vehicle in this state, the registrar shall deny to the person the issuance of a license or permit for a period of six months after the date of the alleged violation."

In the case of In Re Williamson, 18 Ohio Misc. 67 (1969), the Common Pleas Court of Paulding County reversed the action of the Bureau of Motor Vehicles in suspending a driver's license for refusing to submit to a chemical test and restored the license. The Court's holding in the Williamson case, supra, was limited to the facts of the case, as stated by the Court at 18 Ohio Misc. 77:

"Consequently, I hold that in a case where (1) a police officer arrests a licensed driver on a charge of driving while under the influence of alcohol, (2) such driver is asked to take a chemical test to determine the percentage of alcohol in his body after full explanation of the consequences of his refusal but nevertheless refuses to take the test, (3) such driver is then prosecuted for the offense for which he was arrested, (4) appears in court at his first arraignment with counsel and within ten days of his arrest, (5) enters a plea of 'guilty' to the offense for which he was arrested, and (6) notice of such a plea of guilty reaches the Bureau of Motor Vehicles with 15 days of his arrest * * *."

Based on the foregoing narrow facts, the Court stated its conclusion, as follows, at 18 Ohio Misc. 76:

"Now when, as here, the first advised plea of the accused is 'guilty' and is made within ten days of his arrest and refusal to take the test, it seems to me that he has obviated every legitimate purpose the 'implied consent' statute can have."

I concur with the reasoning and holding of the Common Pleas Court in the Williamson case, supra. It is difficult to imagine any legitimate legislative intent or purpose which would be served or could have been intended by the General Assembly by the administrative suspension of a driver's license pursuant to Section 4511.191, Revised Code, when a driver refuses to submit to the chemical test, but promptly thereafter appears in the forum where charged and pleads guilty to the offense for which he was arrested. Two well-known and accepted maxims of statutory construction are that the manifest intent of the General Assembly is to be determined in the event a statutory enactment requires interpretation and that such statutory enactment will be interpreted so as to avoid "absurd results." Humphrys v. The Winous Co., et al., 165 Ohio St. 45 (1956); The State of Ohio v. Nickles, 159 Ohio St. 353 (1953). It is equally clear that "manifest reason and intention of the law should prevail, although at variance with the literal import of the language employed." Slater v. Cave, 3 Ohio St. 80 (1853), Syllabus. Finally, if a statute is capable of two interpretations, one of which is constitutional and the other unconstitutional, the constitutional interpretation must prevail. The State, ex rel. Mack v. Guckenberger, 139 Ohio St. 273 (1942). To determine that the Bureau of Motor Vehicles has the administrative

power to revoke a driver's license under the factual situation described in the Williamson case, supra, might well raise grave constitutional questions. For example, assume a factual situation where two persons are arrested for driving while under the influence of alcohol. One of such persons submits to the chemical test and the other refuses to take the chemical test. Both persons subsequently appear in the forum where charged on the same day and plead guilty to the offense charged. The only function to be served by suspension under Section 4511.191 (D), supra, with respect to the person refusing to take the test is an administrative "punishment" for his failure to take the test.

Based on the foregoing, therefore, it is my opinion and you are so advised that the Bureau of Motor Vehicles does not have the power to suspend the license of a driver who has refused to submit to a chemical test pursuant to the provisions of Section 4511.191, Revised Code, when such driver, within ten days, appears in the forum where charged and pleads guilty as his first advised plea to the offence for which he was arrested.

OPINION NO. 69-126

Syllabus:

1. Although the owner of a building located on leased land has the right of removal, for purposes of taxation the land and the lessee's building should be carried on the real estate tax list and duplicate as real property and land pursuant to Section 5701.02, Revised Code. (Opinion No. 66-089, Opinions of the Attorney General for 1966, approved and followed.)

2. The county auditor pursuant to Section 5713.03, Revised Code, must include in the taxable value of a lot, tract, or parcel of real estate the value of the buildings and improvements on the real estate.

3. The county auditor should send out only one tax bill, to the owner of the real property and land; no separate tax bill should be sent to the owner of a building located on leased land who has the right of removal.

To: James W. Freeman, Coshocton County Pros. Atty., Coshocton, Ohio
By: Paul W. Brown, Attorney General, September 25, 1969

I have your request for my opinion on the following fact situation: The city of Coshocton owns cottage sites along the east side of Coshocton Lake which it leases to private individuals for a term of five years. The cottages are owned by the individuals who according to the terms of the lease (Section (C) (2)), which you have supplied me, have the right to remove the cottages at the expiration of the lease. Based upon Opinions Nos. 66-089 and 66-090, Opinions of the Attorney General for 1966, your office informed the Coshocton County Auditor that he had an obligation to carry the real property on the tax duplicate in the name of

the owner (city) and not to be concerned with the collection of real estate taxes from the lessee. Prior to this time the Auditor had sent out separate tax bills to the cottage owners (lessees) and to the city of Coshocton (lessor). Specifically your question is whether separate tax bills are to be sent to the city and to the lessee or is just one tax bill to be sent to the city? Your situation differs from that discussed in the 1966 opinions, supra, only in that there is public ownership of the land rather than private ownership.

The Ohio Supreme Court in an early case, Cincinnati College v. Yeatman, Auditor, 30 Ohio St. 276 (1876), held that a permanent leasehold in the second story of a building was sufficient to create a separate estate in land and thus was liable to taxation in the name of the owner, according to its true value in money. The "lessee" was therefore an owner and his interest taxable as real property.

In the case of Reed v. County Board of Revision of Fairfield County, et al., 152 Ohio St. 207 (1949), the Court held that cottages owned by individuals and erected on land leased from the state were real property as defined by the applicable statute rather than personal property. The Court stated in branches numbers 3 and 4 of the syllabus:

> "3. Even if a structure or building located on land is personal property, such structure or building will, for purposes of taxation, be included within the definition of 'real property' as that term is defined in Section 5322, General Code, unless the General Assembly has otherwise specified.
>
> "4. A cottage, erected on land leased from the state and situated on the banks of Buckeye Lake, is a structure or building located on land and is, therefore, real property within the definition of that term in Section 5322, General Code."

See also Parkbrook Golf Corp. v. Donahue, Tax Commr., 6 Ohio St. 2d 198 (1966).

This office has consistently held that in situations where the lessee leases a building for a definite term or owns a building on leased land which it has the right to remove, only one tax bill is to be sent out and that is to the owner of the land. Such bill is to include the value of any improvements; see Opinion No. 1852, Opinions of the Attorney General for 1921, Vol. I, page 124; Opinion No. 3453, Opinions of the Attorney General for 1938, page 2349; Opinion No. 5841, Opinions of the Attorney General for 1943, page 89; plus the 1966 Opinions Nos. 66-089 and 66-090, supra.

A question has been raised of possible conflict between the opinions and cases cited above and the case of City of Toledo v. Jenkins, et al., 143 Ohio St. 141 (1944). In that case "A" built a building on land owned by "B." "A" then leased the building to "B." The Court held the land owned by "B" to be exempt from taxation and stated that the building annexed to the realty in

the way it was was essentially real estate. The Court then went on to state:

> "* * * The county auditor therefore correctly placed the building on the tax duplicate as real property separately from the land; but should have listed the structure in the name of * * * [A]."
> (page 158) (Bracketed matter added)

Admittedly at first blush the opinions and cases cited previously may appear to be at odds with Toledo v. Jenkins, supra; however a review of the theory in these cases will show them to be in accord.

The criteria for distinguishing between personalty and realty was first set forth in the case of Teaff v. Hewitt, 1 Ohio St. 511 (1853). This case set forth that one of the criteria for determining what is realty is the intention of the party making the annexation to make it a permanent accession to the freehold. Thus if there is no intention to make a permanent accession to the freehold, as between the owner of the land and the person making the accession, the property would be personalty. However while an object may be personalty between the lessor and lessee, it need not be personalty, but may be realty as regards a third person; see Holland Furnace Co. v. The Trumbull Savings & Loan Co., 135 Ohio St. 48 (1939); Case Manufacturing Co. v. Garven, 45 Ohio St. 289 (1887). This concept is set forth as regards property taxation in Section 5713.03, Revised Code, which reads in pertinent part as follows:

> "The county auditor * * * shall determine * * * the taxable value of each separate tract, lot, or parcel of real property and of buildings, structures, and improvements located thereon * * *
>
> "* * * He shall record * * * the value of each building, structure, or improvement to land, which value shall be included as a part of the value of each tract, lot, or parcel of real property."

Going back to Cincinnati College v. Yeatman, supra, that portion of the building which was permanently leased was a separate real property interest and therefore listable as such; see Section 5713.04, Revised Code. In Reed v. Board of Revision, supra, the cottages, while personalty between the cottage owners and the leasing authority, were real property for tax purposes, but not a separate realty interest, because the owners had no intention of the cottages' becoming permanently annexed to the land. Therefore the cottages were listable only on the landowners' duplicates.

In Toledo v. Jenkins, supra, the hangar there in question had the aspects of real property as between the lessor and the lessee of the land to which it was annexed. Therefore the hangar was real property and the Mevon Corporation, the owner, had a separably listable real property interest.

In your particular situation, since there is no intention on the part of the cottage owners that the cottages should become permanently annexed to the land, the cottages are personalty as

between the city and the owners. However, since the cottages are placed upon the land they are real property as respects taxation. Because the owners' interests do not represent realty they are not separately listable.

Therefore, it is my opinion and you are hereby advised that:

1. Although the owner of a building located on leased land has the right of removal, for purposes of taxation the land and the lessee's building should be carried on the real estate tax list and duplicate as real property and land pursuant to Section 5701.02, Revised Code. (Opinion No. 66-089, Opinions of the Attorney General for 1966, approved and followed.)

2. The county auditor pursuant to Section 5713.03, Revised Code, must include in the taxable value of a lot, tract, or parcel of real estate the value of the buildings and improvements on the real estate.

3. The county auditor should send out only one tax bill, to the owner of the real property and land; no separate tax bill should be sent to the owner of a building located on leased land who has the right of removal.

OPINION NO. 69-127

Syllabus:

A village cannot compensate either a contractor or the contractor's supplier for materials purchased and used by the contractor pursuant to an invalid contract with the village.

To: James K. Nichols, Morgan County Pros. Atty., McConnelsville, Ohio
By: Paul W. Brown, Attorney General, September 25, 1969

I have before me your request for my opinion which sets out a situation in which the Village of McConnelsville had authorized, in a verbal contract, the repair of one or two streets. While repairing the streets the contractor noticed that several connecting streets also needed repair and contacted one of the village councilmen, who authorized the additional improvements. With the purchase of additional material, the entire work for the repair of these roads involved an amount exceeding $1500, and, in fact, amounted to approximately $3000.

Your concern is with Section 731.14, Revised Code, which requires advertisement for bids when an expenditure is to exceed $1500. You ask how the village council can make payments to the contractor or the contractor's supplier for materials purchased and used by the contractor pursuant to its contract with the village.

Section 731.14, Revised Code, reads as follows:

> "All contracts made by the legislative authority of a village shall be executed in the name of

the village and signed on its behalf by the mayor and clerk. When any expenditure, other than the compensation of persons employed therein, exceeds one thousand five hundred dollars, such contracts shall be in writing and made with the lowest and best bidder after advertising for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the village. The bids shall be opened by the clerk of such village at twelve noon on the last day for filing them, and shall be publicly read by him. This section does not apply to those villages that have provided for the appointment of a village administrator under section 735.271 [735.27.1] of the Revised Code."

With respect to the provisions of Section 731.14, supra, it is clear that there was a violation of the competitive bidding requirement. It is also apparent that both the verbal contract and the village councilman's authorization of additional improvements violated the requirement that all contracts made by the legislative authority of a village be executed in the name of the village and signed by the mayor and clerk. Consequently the contract is invalid.

I would refer you to The Frisbie Company v. The City of East Cleveland, 98 Ohio St. 266 (1918) where the court declared that:

"* * * * * * * * *

"It is well settled in this state that where the statute prescribes the mode by which the power therein conferred upon a municipal body shall be exercised, the mode specified is likewise the measure of the power granted, and that a contract made otherwise than as expressly prescribed and limited by statute is not binding or obligatory as a contract.* * *

"* * * * * * * * *"

This view was also set forth in the case of Wellston v. Morgan, 65 Ohio St. 219 (1901) where it was decided that:

"* * * * * * * * *

"3. To state a good cause of action against a municipality in matters ex contractu the petition must declare upon a contract agreement, obligation or appropriation made and entered into according to statute. A petition on an account merely, or quantum meruit, in such cases, is not sufficient.

"* * * * * * * * *"

Therefore, it becomes clear that there can be no legal obligation on the part of a village to make any payments based on an invalid contract.

Your letter raises the question of whether the village council may authorize payments based on a moral obligation. With respect to the contractor I would cite you Welch v. City of Lima, 89 Ohio App. 457 (1950). In that case the court declared a contract invalid and stated that:

> "* * * * * * * * *
>
> "Persons dealing with municipal corporations are charged with notice of all limitations upon the authority of the municipality or its agents, and they are required, at their peril, to ascertain whether statutory requirements relating to the subject of the transaction have been complied with.
>
> "* * * * * * * * *"

I would also refer you to Wellston v. Morgan, supra, in which the syllabus reads in part as follows:

> "4. Persons dealing with officers of municipalities must ascertain for themselves and at their own peril that the provisions of the statutes applicable to the making of the contract, agreement, obligation or appropriation have been complied with."

This was followed in Philip Castner v. Village of Pleasant Ridge, et al., 7 N.P. (N.S.) (1907). In that case the court found a "total and careless disregard" of the statutory requirements by all parties concerned. Because of this, the Court decided that:

> "* * * * * * * * *
>
> "* * * While it is a hardship on the firm which furnished the stone, yet a recognition of 'moral obligations' such as these would open the door to such unwarranted proceedings on the part of municipal officers that much evil would inevitably result.
>
> "* * * * * * * * *"

In the situation which you have outlined in your letter it is clear that both the contractor and the village councilman acted with total disregard for the provisions in Section 731.14, supra. Therefore, I can see no way that the village council can make payments to the contractor, based on a moral obligation.

With respect to the supplier who sold the materials to the contractor, you have stated that he was completely innocent of any wrong-doing, that to his knowledge he simply sold the material to the contractor who picked up the material at the disbursement center of the supplier. If the understanding was that the sale was merely one of material passing from a vendor (the supplier) to a purchaser (the contractor), then the sale was just that, and the supplier's legal remedy is against the

contractor and not against the village which was not a party to the transaction.

In Opinion No. 1330, Opinions of the Attorney General for 1939, the syllabus reads in part as follows:

> "3. A claim based on a moral obligation may not lawfully be allowed and paid by a political subdivision unless such claim has a legal basis on which to stand. Such a claim must be acted upon by the proper legislative authority with a full knowledge of the facts and there must be a complete absence of any fraud or collusion."

In effect, a moral obligation is unenforceable unless also based on a claim which would provide a legal cause of action. In this case, however, the village was not a party to the transaction between the supplier and the contractor. Therefore, a claim on the part of the supplier against the village for the value of materials sold to the contractor has no legal basis. It is apparent, then, that the village council cannot compensate the supplier for materials purchased by the contractor on the basis of a moral obligation.

Therefore, it is my opinion and you are hereby advised that a village cannot compensate either a contractor or the contractor's supplier for materials purchased and used by the contractor pursuant to an invalid contract with the village.

OPINION NO. 69-128

Syllabus:

1. A house trailer can cease to be an item of personal property and can instead become a part of real property under the law of fixtures.

2. Whether a house trailer has in fact become a part of the real property is a question of fact in each case, depending upon the temporal as well as the physical character of the foundation upon which the house trailer rests.

3. The term "dwelling" as used in Sections 5520.01 to 5520.07, inclusive, of the Revised Code does not exclude house trailers from consideration as replacement housing except where the term "comparable dwelling" is used, in which case a house trailer would be excluded as a replacement dwelling when the property appropriated was improved with a dwelling which was not and had never been a house trailer.

To: P. E. Masheter, Director of Highways, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 26, 1969

I have before me your request for my opinion, which request reads as follows:

> "We have been requested by the Bureau of Public Roads to secure a legal opinion from your office as to the conditions under which mobile homes would be considered as real property and as to whether under Ohio law a mobile home can be considered as replacement housing under the provisions of recently enacted House Bill No. 475."

House Bill No. 475, to which you refer in your request, was enacted by the 108th General Assembly. That bill enacted Sections 5520.01 to 5520.07, inclusive, Revised Code, and repealed Section 5519.06, Revised Code, relating to relocation assistance payments and assistance in connection with state highway projects. The provisions of that bill in pertinent part are as follows:

> "Sec. 5520.01. As used in Sections 5520.01 to 5520.07, inclusive, of the Revised Code:
>
> "* * * * * * * * *
>
> "(C) 'Displaced person' means any person who moved from real property on or after the effective date of Sections 5520.01 to 5520.07, inclusive, of the Revised Code as a result of the acquisition or reasonable expectation of acquisition of such real property, which is subsequently acquired, in whole or in part, for a state highway or federal-aid highway project, or as the result of the acquisition for a state highway or federal-aid highway project of other real property on which such person conducts a business or farm operation.
>
> "* * * * * * * * *
>
> "Sec. 5520.02. (A) Upon application approved by the Department of Highways, a person displaced by any state highway or federal-aid highway project may elect to receive actual reasonable expenses in moving himself, his family, his business, or his farm operation, including personal property, for a reasonable distance not to exceed fifty miles.

"(B) Any displaced person who moves from a dwelling who elects to accept the payments authorized by this division in lieu of the payments authorized by division (A) of this section may receive:

"* * * * * * * * *

"Sec. 5520.03. (A) In addition to amounts otherwise authorized by Sections 5520.01 to 5520.07, inclusive, of the Revised Code, the Department of Highways shall make a payment to the owner of real property acquired for a project which is improved by a single, two, or three-family dwelling actually owned and occupied by the owner for not less than one year prior to the initiation of negotiations for the acquisition of such property. Such payment not to exceed five thousand dollars, shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Director of Highways, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of employment and available on the private market. Such payment shall be made only to a displaced owner who purchases and occupies a dwelling within one year subsequent to the date on which he is required to move from the dwelling acquired for the project. * * *

"(B) In addition to amounts otherwise authorized by Sections 5520.01 to 5520.07, inclusive, of the Revised Code, the Department of Highways shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under Division (A) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than ninety days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed one thousand five hundred dollars, shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed two years; or to make the down payment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate

such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.

"Section 5520.04. In addition to amounts otherwise authorized by Sections 5520.01, to 5520.07, inclusive, of the Revised Code, the Department of Highways shall reimburse the owner of real property acquired for a project for reasonable and necessary expenses incurred for recording fees, and similar expenses incidental to conveying such property, and any penalty costs for repayment of any mortgage entered into in good faith encumbering such real property if such mortgage is on record or has been filed for record on the date of final approval by the state of the location of such project.

"Section 5520.05. The Department of Highways shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order:

"* * * * * * * * *

"(B) To assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Director of Highways for decent, safe, and sanitary dwellings, equal in number to the number of, and available to, such displaced families and individuals and reasonably accessible to their places of employment;

"* * * * * * * * *"

Your first question concerns the conditions under which mobile homes would be considered as real property. The answer to that question requires an examination of the term "real property" in relation to a mobile home or house trailer. (For the purposes of this opinion, the term "house trailer" will be used exclusively hereafter.)

The terms "property", "real property", and "real estate"

are variously defined in different sections of the Revised Code of Ohio. For example, in Section 701.01, Revised Code, the term "property" is defined for the purposes of its use in Title 7 of the Revised Code (Municipal Corporations). In Section 1775.01, Revised Code, the term "real property" is defined for the purposes of its use in Chapter 1775, Revised Code (Uniform Partnership Law).

The term "real estate" is defined in Section 4735.01, Revised Code, as it will be used in Chapter 4735 of the Revised Code (Real Estate Brokers). The terms "real property" and "land" are defined in Section 5701.02, Revised Code, for purposes of use in Title 57 of the Revised Code (Taxation). The latter section contains, perhaps, the most comprehensive definition and provides as follows:

> "As used in Title LVII of the Revised Code, 'real property' and 'land' include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and unless otherwise specified, all buildings, structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto."

While that particular definition is not controlling for the purposes of this opinion, it is nevertheless helpful as a starting point. Clearly, a house trailer begins its existence as a chattel, or an item of personal property, as opposed to real property. The Ohio Revised Code refers to house trailers in several sections. Section 4501.01 (I), Revised Code, defines house trailer thusly:

> "(I) 'House trailer' means any self-propelled and non self-propelled vehicle so designed, constructed, reconstructed, or added to by means of accessories in such manner as will permit the use and occupancy thereof for human habitation, when connected to indicated utilities, whether resting on wheels, jacks, or other temporary foundation and used or so constructed as to permit its being used as a conveyance upon the public streets or highways."

Section 4503.06, Revised Code, provides for a special tax on house trailers. Section 4503.061, Revised Code, provides for the registration of house trailers with the county auditor. These three sections are, of course, parts of Title 45 of the Revised Code, which deals with motor vehicles, aeronautics, and water craft. Moreover, Section 4503.06, Revised Code, provides

that a house trailer is not subject to the tax provided for in that section when it is taxable as personal property pursuant to Section 5709.01, Revised Code. Thus initially a house trailer is, in the eyes of Ohio law, an item of personal property or chattel as opposed to real property.

However, through the law of fixtures, a chattel can be transformed into part of the real estate. Fortman vs. Goepper, 14 Ohio St. 558 (1863). A fixture is an article which was a chattel but which by being affixed to the realty has become accessory to it and parcel of it. Teaff vs. Hewitt, 1 Ohio St. 511 (1852). The question of when a house trailer ceases to be an item of personal property and becomes, in the eyes of Ohio law, a part of the real estate has been previously discussed in Opinion No. 1445, Opinions of the Attorney General for 1964. In that Opinion my predecessor, referring to Opinion No. 1470, Opinions of the Attorney General for 1952, said as follows:

> "The syllabus of the 1952 opinion, supra, states:
>
> > '1. A house trailer as defined in Section 6290, General Code, does not lose its classification as such solely by reason of the removal of the chassis as an incident to the mounting of the body on a foundation.
> >
> > '2. A house trailer loses its statutory classification as such when it has been so reconstructed as to render it unfit for use as a conveyance without further reconstruction; but mere disassembly of the several parts of the structure does not cause such loss of classification.
> >
> > '3. The question in particular cases of whether a change in the structure of a house trailer is a disassembly or a reconstruction is one of fact, and should be determined in the first instance by the county auditor.'
>
> "This opinion would appear to be dispositive of your inquiry but for the recent amendment of the house trailer definition which inserted the word 'temporary' before the word 'foundation'.
>
> "In light of the recent amendment of the house trailer definition, your question in effect is whether a structure which would otherwise be a house trailer ceases to be a house trailer solely

by reason of its being 'set upon a permanent foundation with footer, etc.'

"The language 'temporary foundation' is susceptible of two interpretations, to wit: (1) that the foundation is temporary in the sense that the foundation can be removed or disassembled at a moment's notice, or (2) that the foundation is temporary in the sense that the owner of the house trailer, and the owner of the land, if the trailer is upon another's land, do not intend that the house trailer remain on the foundation permanently.

"A close examination of the definition of a house trailer, particularly the phrase 'whether resting on wheels, jacks or other temporary foundation', convinces me that the term 'temporary' refers to the temporal character of the use rather than the physical character of the foundation. This interpretation of the above-quoted phrase is in harmony with the law pertaining to fixtures and gives full consideration to the intention of the owner of the house trailer and also the intention of the owner of the land upon which such a structure might happen to be placed.

"* * * * * * * * *

"Therefore, it is my opinion and you are hereby advised that:

"1. A 'temporary' foundation within the meaning of Section 4501.01 (I), Revised Code, is a foundation which is to serve for a limited period of time.

"2. The county auditor must consider those facts and circumstances indicative of the temporal as well as the physical character of the foundation when determining whether a house trailer, resting upon a foundation with footers, has ceased to be a house trailer and has become an improvement to real estate for real estate tax purposes."

Your second question asks whether, under Ohio law, a mobile home can be considered as replacement housing under the provisions of House Bill No. 475. House Bill No. 475 enacted Sections 5520.01 to 5520.07, inclusive, of the Revised

Code. Nowhere in those sections are the terms "real property" or "dwelling" defined. Your question as to replacement housing concerns in particular Sections 5520.03 and 5520.05 (B), supra, which in pertinent part provide as follows:

> "Sec. 5520.03. (A) In addition to amounts otherwise authorized by Sections 5520.01 to 5520.07, inclusive, of the Revised Code, the Department of Highways shall make a payment to the owner of real property acquired for a project which is improved by a single, two, or three-family dwelling actually owned and occupied by the owner for not less than one year prior to the initiation of negotiations for the acquisition of such property. Such payment not to exceed five thousand dollars, shall be the amount, if any, which, when added to the acquisition payment, equals the average price required for a comparable dwelling determined, in accordance with standards established by the Director of Highways, to be a decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of employment and available on a private market. * * *
>
> "(B) In addition to amounts other wise authorized by Sections 5520.01 to 5520.07, inclusive, of the Revised Code, the Department of Highways shall make a payment to any individual or family displaced from any dwelling not eligible to receive a payment under division (A) of this section which dwelling was actually and lawfully occupied by such individual or family for not less than ninety days prior to the initiation of negotiations for acquisition of such property. Such payment, not to exceed one thousand five hundred dollars, shall be the amount which is necessary to enable such person to lease or rent for a period not to exceed two years; or to make the down payment on the purchase of, a decent, safe, and sanitary dwelling of standards adequate to accommodate such individual or family in areas not generally less desirable in regard to public utilities and public and commercial facilities.
>
> "* * * * * * * * *
>
> "Sec. 5520.05. The Department of Highways shall provide a relocation advisory assistance program which shall include such measures, facilities, or services as may be necessary or appropriate in order:

"* * * * * * * * *

"(B) To assure that, within a reasonable period of time, prior to displacement there will be available, to the extent that can reasonably be accomplished, in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced, housing meeting the standards established by the Director of Highways for decent, safe, and sanitary dwellings, equal in number to the number of, and available to such displaced families and individuals and reasonably accessible to their places of employment;

"* * * * * * * * *"

It will be noted that nowhere in the above sections is the term "dwelling" defined. Webster's New International Dictionary (Second Edition Unabridged) defines dwelling as "habitation; abode; residence; domicile." With that definition in mind, and in view of tha fact that the term "dwelling" is not defined or limited in the statutes involved, there would seem to be no legal basis for excluding house trailers from being considered as dwellings within the meaning of the statute cited above. However, the ultimate determination must be made by you as Director of Highways under the provisions of House Bill No. 475 authorizing you to establish standards by which to determine what is a "decent, safe, and sanitary dwelling adequate to accommodate the displaced owner, reasonably accessible to public services and places of employment and available on the private market." In exercising the authority granted to you by House Bill No. 475, you are not prohibited by the terms of that Bill or by any other provisions of Ohio law from considering house trailers to be included within the term "dwelling", with one exception to be discussed below.

In Section 5520.03 (A), Revised Code, the term "comparable dwelling" is used. This is the only place in House Bill No. 475 where that term is used. It must be presumed that the General Assembly in enacting House Bill No. 475 used the term "comparable dwelling" in this particular section for a specific reason. That reason seems clear from the purpose of Section 5520.03 (A), supra. That section is an attempt to guarantee that the owner of property acquired for a highway project will receive enough money to be able to replace what has been taken from him with a comparable dwelling. It is my opinion that the use of the term "comparable" in this section would exclude a house trailer as a replacement dwelling when the property appropriated by the Department of Highways was improved with a dwelling which was not and had not been a house trailer.

Therefore, it is my opinion and you are hereby advised that a house trailer can cease to be an item of personal property and can instead become a part of real property under the law of fixtures, and it is a question of fact in each case, depending upon the temporal as well as the physical character of the foundation upon which the house trailer rests; and that the term "dwelling" as used in House Bill No. 475 (Sections 5520.01, to 5520.07, inclusive, of the Revised Code) does not exclude house trailers from consideration as replacement housing, except where the term "comparable dwelling" is used, in which case a house trailer would be excluded as a replacement dwelling when the property appropriated was improved with a dwelling which was not and had never been a house trailer.

OPINION NO. 69-129

Syllabus:

The phrase "residence district" as used in Section 4301.32, Revised Code, means any two or more contiguous election precincts within a municipal corporation. Opinion No. 850, Opinions of the Attorney General for 1959, is hereby overruled.

To: Ted W. Brown, Secretary of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 26, 1969

Your request for my opinion regarding local option as to the sale of intoxicating liquors reads as follows:

> "A protest has been lodged against a local option petition in Washington County requesting that the Board of Elections determine that said petitions are not valid for the reason that the petitions seek an election in two or more contiguous election precincts in a municipal corporation and that said precincts are more than one-half commercial in use.
>
> "We question whether the Opinion of the Attorney General, 1959 OAG 850, should be followed as it relates to the interpretation of 'residence district' as used in Section 4301.32 of the Revised Code. It appears that the General Assembly, in enacting Amended House Bill No. 616 authorizing a local option election on the Sunday sale of liquor, probably intended such elections to be held within a residence district essentially commercial in character.
>
> "Would you please give me your opinion as to whether the two or more contiguous election precincts referred to in Section 4301.32 (B) of the Ohio Revised Code must have more than one-half of their area devoted to residential use as opposed to an industrial or commercial use."

Section 4301.32, Revised Code, provides:

> "The privilege of local option as to the sale of intoxicating liquors is hereby conferred upon the electors of the following districts:
>
> "(A) A municipal corporation;

"(B) A residence district in a municipal corporation consisting of two or more contiguous election precincts, as defined by the petition authorized by section 4301.33 of the Revised Code;

"(C) A township, exclusive of any municipal corporation or part thereof located in such township."

The Syllabus of Opinion No. 850, Opinions of the Attorney General for 1959, page 550, holds:

"The term 'residence district' as contained in Section 4301.32, Revised Code, should be reasonably interpreted to mean any district composed of two or more contiguous election precincts in which more than one-half of the area is devoted to residential use as opposed to an industrial or commercial use."

It is apparent that the General Assembly intended to grant the right of local option under Section 4301.32, supra, to three distinct geographical areas. The first of these is a municipal corporation, the boundaries of which are established by Chapter 707, Revised Code; the second is a township (exclusive of any municipal corporation or part thereof located in such township), the boundaries of which are established pursuant to Chapter 305, Revised Code; and the third of such geographic areas is a "residence district" within a municipal corporation. It is this latter geographic area, i.e., a "residence district", that is the subject of your opinion request and which is not otherwise specifically defined or described in the Revised Code. My predecessor, in Opinion No. 850, supra, interpreted the intent of the General Assembly to be that a "residence district" should consist of two or more contiguous election precincts in which more than one-half of the area is devoted to residential use. In support of his opinion, my predecessor relied upon former Sections 6068, 6161 and 6162 of the General Code. The General Code Section 6068 referred to in the preceding sentence read as follows:

"The phrase 'residence district,' as used in this chapter and in the penal statutes of this state means a clearly described, contiguous, compact section or territory in a municipal corporation bounded by street, corporation or other well recognized lines or boundaries and containing not less than three hundred qualified electors, nor more than five thousand qualified electors."

Sections 6161 and 6162, General Code, provided in detail as to the length, width, proportion of commercial and other business use, and the proportion of residential, educational, religious and other like uses, on a front footage basis, which could be contained

in a "residence district". These Sections were repealed by the General Assembly and were never re-enacted. In place of the above quoted Section 6068, General Code, we now have Section 4301.32, supra (formerly Section 6064-31, General Code). Notwithstanding the fundamental distinction between the tests provided for the establishment of a "residence district" between Sections 6068, 6161, 6162 of the General Code and Section 4301.32 of the Revised Code, my predecessor concluded that such General Code provisions "provide a useful reference as to how much business or commercial property may be included in a 'residence district' without changing its character." Opinion No. 850, supra, at page 554. I cannot agree with my predecessor. The General Assembly, in enacting present Section 4301.32, supra, abandoned the type of test prescribed in the General Code sections referred to above and adopted a new and different test. I do agree with my predecessor, however, that the one pertinent case, Fleaka v. Craver, 25 Ohio Law Abs. 12 (1937), cannot be looked to for a determination of the intent of the General Assembly.

This leaves then the question as to what test the General Assembly did intend by its use of the phrase "residence district" in Section 4301.32, supra. I think it significant that the General Assembly provided that a "residence district" must consist of two or more contiguous election precincts. A precinct is defined, in Section 3501.01 (K), Revised Code, as follows:

> "'Precinct' means a district within a county established by the board of elections of such county within which all qualified electors having a voting residence therein may vote at the same polling place."

Voting residence is defined, in the same section at subparagraph (J) as follows:

> "'Voting residence' means that place of residence of an elector which shall determine the precinct in which he may vote."

Section 3501.18 of the Revised Code provides that a board of elections may divide a political subdivision into precincts and that each precinct "shall contain as nearly as practicable not more than four hundred nor less than two hundred fifty electors." It is obvious from the foregoing that an elector shall vote in the precinct in which his place of residence is located. It is equally obvious that a precinct must contain, as nearly as practicable, the residences of at least two hundred fifty and not more than four hundred electors. Since the General Assembly has already, by statute, established the number of residences and the method of determining the geographic area which must be contained in a precinct and, in addition, has then required that a "residence district" must contain at least two (or more) contiguous precincts, it follows that the General Assembly has likewise established the number of residences and the geographic area which must be contained in a "residence district". It is both un-

reasonable and illogical to engraft an additional requirement as to the number of residences which must be contained in a "residence district" on the sole premise that the General Assembly must have intended some additional test, without spelling out what that test should be, by the use of the word "residence".

Based upon the fact that prior General Code sections spelled out with great specificity the definition of a "residence district", which sections were then repealed and never subsequently re-enacted, and the fact that the General Assembly has established a new test of the number of residences and geographic area which must be contained in a "residence district" by requiring such district to consist of at least two election precincts, I can only conclude that the General Assembly used the phrase "residence district" as a phrase of no independent legal significance and that such phrase means any two or more contiguous precincts within a municipality.

Therefore, it is my opinion and you are hereby advised that the phrase "residence district" as used in Section 4301.32, Revised Code, means any two or more contiguous election precincts within a municipal corporation. Opinion No. 850, Opinions of the Attorney General for 1959, is hereby overruled.

OPINION NO. 69-130

Syllabus:

The sale of excess property, real or personal, by a municipality is the exercise of home rule powers. If the municipality is a noncharter municipality then such sales must be accomplished as required by Section 721.03, Revised Code, with respect to real property and Section 721.15, Revised Code, with respect to personal property. Opinion No. 140, Opinions of the Attorney General for 1966 and Opinion No. 787, Opinions of the Attorney General for 1957, are hereby overruled.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, September 29, 1969

You have requested my opinion on the following question:

> "May a municipality operating without charter and under the statutes of Ohio sell its property, real or personal, without advertising for bids?"

As you pointed out in your opinion request, Opinion No. 140, Opinions of the Attorney General for 1966, appears to be in conflict with recent decisions with respect to the powers of municipalities. The issue involved, of course, is the interpre-

tation of Article XVIII, Section 3, Constitution of Ohio. This is the commonly referred to "home rule" provision. Article XVIII, Section 3, supra, in conjunction with Article XVIII, Section 7, Constitution of Ohio, has been the source of the substantial and often times confusing court decisions.

The confusion was recognized by the Ohio Supreme Court in 1958 in the case of The State, ex rel. Canada v. Phillips, 168 Ohio St. 191. Then Justice Taft, at page 199 of that decision, stated as follows:

> "Apparently, however, we are confronted with two lines of our own decisions which cannot be fully reconciled on any reasonable basis. To the extent that we can reconcile those cases on any reasonable basis, we should endeavor to do so, especially where overruling them would disturb long established and recognized administrative and legislative practices. However, to the extent that they cannot be reconciled, we believe it is our duty to determine and pronouncements of law we will follow, and then overrule our other decisions and pronouncements to the extent that they cannot be reconciled with those which we are now following. Otherwise, we will create an impossible situation for courts that are supposed to follow our decisions and for lawyers who must base their advice to clients on decisions which we render."

The Canada case, supra, involved a charter municipality which had passed an ordinance regarding the selection of a chief of police for the municipality, which ordinance was in conflict with than Section 143.34, Revised Code. With its decision in the Canada case, supra, the Ohio Supreme Court embarked upon a course of bringing some order out of the confusion existing as a result of prior decisions in the home rule area. In light of decisions subsequent to the Canada case, supra, I believe that the Court has now adopted a single line of authority which is determinable and which, as will be pointed out, governs the answer to the question you have asked.

The Canada decision, supra, endorsed the proposition that Article XVIII, Section 3, supra, provides for two broad types of powers to be exercised by municipalities. That section reads as follows:

> "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The two broad types of powers are the powers of local self-government and local police, sanitary and other similar regulations. In the Canada case, supra, the ordinance in question was determined to fall within the powers of local self-government as opposed to being a police, sanitary or other similar regulation. Having made this determination, the next issue to be decided was whether or not the municipality in question had adopted a charter pursuant to Article XVIII, Section 7, supra, which section reads as follows:

> "Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

The city of Columbus was the municipality in question in the Canada case, supra, and had adopted a charter. Having so found as a question of fact, the Supreme Court then determined that a charter city may adopt ordinances with respect to the exercise of the powers of local self-government which are inconsistent with state statutes and "if it does, the mere interest or concern of the state, which may justify the state in providing similar police protection, will not justify the interference with such exercise by a municipality of its powers of local self-government." The State, ex rel. Canada v. Phillips, supra, Syllabus No. 7.

In 1960, the Ohio Supreme Court rendered the next decision which continued to develop the consistent line of authority being adopted by that Court. The case in which that decision was rendered was the case of State, ex rel. Petit v. Wagner, 170 Ohio St. 297. The facts in this case were very similar to the facts in the Canada case, supra, with exception that the municipality involved was a noncharter municipality. Again, the Court found that the power being exercised was a power of local self-government as opposed to being a local police, sanitary or other similar regulation. On the basis, however, of the recognized distinction between the powers of charter and noncharter municipalities as provided by Article XVIII, Section 7, supra, the Court held that the municipality did not have the power to adopt an ordinance which was "at variance" with a state statute. It should be noted, at this point, that the Petit case, supra, is the first case in which the court is establishing the test to be applied when the exercise of power is the exercise of local home rule power and a noncharter municipality is involved. The test is stated at page 303 of the Petit decision, supra, as follows:

> "* * * There is in the present case a direct variance between the statute permitting only members of a police department to take an examination of the type here under consideration and the ordinance which contains no such limitation, and it is our conclusion that such variance renders the ordinance invalid. Dif-

> ferently stated, a noncharter municipality is without authority under the provisions of Section 3, Article XVIII of the Constitution, to prescribe less restrictive qualifications for civil-service-examination applicants than are prescribed by statute, since such municipal action would be at variance with the general law."

Thus, as a result of the Petit case, supra, when the exercise of power by a municipality is the exercise of local home rule power and the municipality is a noncharter municipality, the ordinance will be invalid if at variance with a state statute.

In December 1964 and March 1965, the Ohio Supreme Court decided two cases which affirmed, in the first instance and amplified, in the second instance, the Court's current approach to the home rule problem. The first case decided was Leavers, et al. v. City of Canton, et al., 1 Ohio St. 2d 33 (1964). This case was similar to the Petit case, supra, and the Court specifically held, at page 37 of the Opinion, as follows:

> "In the case before this court, Canton, a noncharter city, passed an ordinance dealing with a local government regulation which is at a variance with a state statute, and the ordinance is, therefore, invalid under the provisions of Section 3, Article XVIII of the Ohio Constitution."
>
> (Emphasis added)

The second case was Village of West Jefferson v. Robinson, 1 Ohio St. 2d 113 (1965). This case dealt with the enactment of an acknowledged police power ordinance (a "Green River" ordinance). The Court specifically held, in Syllabus No. 1 as follows:

> "The power of any Ohio municipality to enact local police regulations is derived directly from Section 3 of Article XVIII of the Ohio Constitution and is no longer dependent upon any legislative grant thereof, as it was prior to the adoption in 1912 of that section of the Constitution."

The argument in that case was that because the General Assembly had provided, in then Sections 715.63 and 715.64, Revised Code, for the licensing by municipalities of exhibitors and transient sellers, that the Green River Ordinance of the Village of West Jefferson was in direct conflict with such state statutes. The Court, in Syllabus No. 3 of its decision in the West Jefferson case, supra, held as follows:

> "The words 'general laws' as set forth in Section 3 of Article XVIII of the Ohio Constitution means statutes setting forth police, sanitary or similar regulations and not statutes

which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations."

The West Jefferson case, supra, stands for the proposition that when the attempted exercise of power is a local police, sanitary or other regulation, then it makes no difference whether the municipality enacting the ordinance is a charter or noncharter municipality. The local ordinance will stand or fall on the sole test of whether or not such ordinance is in conflict with general law.

Most recently, the Ohio Supreme Court rendered its decision in the case of Young v. City of Dayton, et al., 17 Ohio St. 2d 71 (1967). In this case, the Supreme Court acknowledged that the sale of surplus property by a municipality is the exercise of a power of local self-government. The Court did find, however, that the charter of the city of Dayton had not been complied with in the sale and, therefore, voided the sale. In determining that the power to convey property no longer needed for municipal purposes was a power of local self-government, the Court quoted Babin V. City of Ashland, et al, 160 Ohio State 328 (1953). This was the case, as you pointed out, upon which the opinion of my predecessor relied for authority in Opinion No. 140, supra.

By way of summary, and to clarify my opinion, the current tests being applied by the Ohio Supreme Court with respect to home rule issues may be summarized as follows:

1. The exercise of a home rule power by a charter municipality is proper notwithstanding the ordinance may be at variance with state statutes. The State, ex rel. Canada v. Phillips, supra.

2. The exercise of a home rule power by a noncharter city is improper and not effective when the ordinance is at variance with a state statute. State, ex rel. Petit v. Wagner, supra.

3. The exercise of local police, sanitary and other similar regulations (police power) is valid and effective, without consideration as to whether or not the municipality is a charter or noncharter municipality, only if the ordinance is not in conflict with general laws. Village of West Jefferson v. Robinson, supra.

The Babin case, supra, is consistent with the foregoing tests presently being applied by the Ohio Supreme Court in that the exercise of power was the exercise of a local home rule power and the municipality of Ashland was a charter city. Babin v. Ashland, supra, at page 350.

Therefore, based upon the foregoing, it is my opinion and you are so advised that the sale of excess property, real or personal, by a municipality is the exercise of home rule powers. If the municipality is a noncharter municipality then such sales must

be accomplished as required by Section 721.03, Revised Code, with respect to real property and Section 721.15, Revised Code, with respect to personal property. Opinion No. 140, Opinions of the Attorney General for 1966 and Opinion No. 787, Opinions of the Attorney General for 1957, are hereby overruled.

OPINION NO. 69-131

Syllabus:

A judge of a county court may not be a referee in the probate division nor a referee in a division of domestic relations of a court of common pleas.

To: Lee C. Falke, Montgomery County Pros. Atty., Dayton, Ohio
By: Paul W. Brown, Attorney General, October 2, 1969

I have before me your request for my opinion on the compatibility of a judge of the county court also holding the position of a referee in either the probate division or in the division of domestic relations of the court of common pleas.

Section 6, Article IV of the Ohio Constitution, became effective May 7, 1968. Euclid v. Heaton, 15 Ohio St. 2d 65 (1968). It provides in pertinent part as follows:

> "* * * Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. * * *"

A similar prohibition was contained in former Section 14, Article IV of the Ohio Constitution. It reads in pertinent part as follows:

> "The judges of the supreme court, and of the court of common pleas, shall, at stated times, receive, for their services, such compensation as may be provided by law, which shall not be diminished, or increased, during their term of office; but they shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or the United States. * * *"

The present prohibition is much broader. The provisions of former Section 14, Article IV, supra, are limited to judges of the supreme court and of the court of common pleas. See Opinion No. 269, Opinions of the Attorney General for 1928. The prohibition in the present Section 6, Article IV, supra, covers all judges without limitation. Under the provisions of the new amendment no judge may hold another office of profit or trust under the authority of the State of Ohio or of the United States. A judge of the county court is therefore prohibited from holding such an office.

Webster's Third International Dictionary defines "office" as "a special duty, charge or position conferred by an exercise of governmental authority and for a public purpose."

The Supreme Court of Ohio in State, ex rel., v. Brennan, 49 Ohio St. 34 (1892) has defined an office as follows:

> "* * * * * * * * *
>
> "It is not important to define with exactness all the characteristics of a public office, but it is safely within bounds to say that where, by virtue of law, a person is clothed, not as an incidental or transient authority, but for such time as denotes duration and continuance, with independent power to control the property of the public, or with public functions to be exercised in the supposed interest of the people, and the service to be compensated by a stated yearly salary, and the occupant having a designation or title, the position so created is a public office. * * *"

The functions of a referee are set forth by statute. Section 2315.26, Revised Code, provides that any issue in an action may be referred to a referee by the court upon the written consent of the parties. Section 2315.27, Revised Code, provides for referral of cases to referees where the parties do not consent. This section provides as follows:

> "When the parties do not consent to the reference mentioned in section 2315.26 of the Revised Code, the court, or a judge thereof in vacation, upon the application of a party, or on its own motion, may direct a reference in any case in which the parties are not entitled by the constitution to a trial by jury, including any of the issues in an action for divorce, alimony, or annulment of marriage, other than a trial upon the merits

of such action, notwithstanding any provision of Chapter 3105. of the Revised Code.

"The court may appoint such number of referees as it deems necessary. Such referees shall be attorneys at law, admitted to practice in this state, and shall not engage in the practice of law in the division of the court in which they are employed."

A referee has broad powers. When a case is referred to him, he conducts the trial as if it were tried by the court. He may summon witnesses and compel their attendance. He makes findings of facts and conclusions of law. Judgment may be entered upon the decision of the referee as if the court had tried the action. See Sections 2315.28 through 2315.36, Revised Code. The probate division has the same authority to refer matters to referees and the probate referees have the same authority as other referees 2315.37, Revised Code.

A referee, in either the division of domestic relations or the probate division of the court of common pleas, holds a position involving broad powers and serious responsibilities. A referee holds a position conferred by an exercise of governmental authority for a public purpose. He also has a title and exercises public functions. He, therefore, holds an "office" both in the popular sense of the term and within the definition of the Supreme Court. A person holding the position of a referee in either the probate division or the division of domestic relations of the court of common pleas holds an "office" within the meaning of Section 6, Article IV of the Ohio Constitution. A judge of the county court would, therefore, be prohibited from holding either position.

It is, therefore, my opinion and you are hereby advised that a judge of a county court may not be a referee in the probate division nor a referee in a division of domestic relations of a court of common pleas.

OPINION NO. 69-132

Syllabus:

1. If a township building is to be constructed or enlarged, the major portion of the cost of which is allocated to the meeting hall therein, the same would be considered a town hall and subject to the provisions of Section 511.01, Revised Code.

2. If a township building is to be constructed or enlarged, the major portion of the cost of which is allocated to the office space designed therein, the same would be considered an office

building and subject to the provisions of Section 505.26, Revised Code.

To: David M. Griffith, Trumbull County Pros. Atty., Warren, Ohio
By: Paul W. Brown, Attorney General, October 6, 1969

Your request for my opinion reads as follows:

> "Must the Trustees of a Township, under Sections ORC 505.26 and 511.01 through 511.04, submit to the electorate the question of the construction of a town hall where there are sufficient funds in the treasury therefor."

An exerpt from Opinion No. 2408, Opinions of the Attorney General for 1961, states that:

> "It was the general interpretation prior to September 9, 1957, that a township hall could not be purchased, built, removed, or enlarged at a cost over $2000.00 without submitting the question of purchase etc., to the electors. Opinion No. 330, Opinions of the Attorney General for 1929, Volume I, page 517; Opinion No. 1103, Opinions of the Attorney General for 1949, page 753; Opinion No. 2404, Opinions of the Attorney General for 1934, Volume I, page 341."

In 1961, Section 505.26, Revised Code, was enacted, and with a 1965 amendment it reads as follows:

> "The board of township trustees may purchase, appropriate, construct, enlarge, improve, rebuild, repair, furnish, and equip a township hall, a township park, and bridges and viaducts over streets, streams, railroads, or other places where an overhead roadway or footway is necessary, and such board may acquire sites <u>by lease or otherwise</u> for any of such improvements, <u>including lands and buildings for recreational purposes</u>.
>
> "If sufficient space for township offices is not available, the board of township trustees may purchase, lease, or construct, and furnish, equip, and maintain office space. When such offices are to be provided by construction, a site upon which to erect such offices may be acquired by purchase, lease for twenty-five years or longer, or otherwise. The cost of providing such office space shall be

> paid out of funds in the township treasury. If sufficient funds are not available the board shall proceed as provided in sections 511.01 to 511.04, inclusive, of the Revised Code." (Emphasis added.)

Section 511.01, Revised Code, as amended in 1967, reads as follows:

> "If, in a township, a town hall is to be built, improved, enlarged, or removed at a cost greater than ten thousand dollars, the board of township trustees shall submit the question to the electors of such township, shall certify their resolution to the board of elections not later than four p.m. of the ninetieth day before the day of the election, and shall cause the township clerk to give notice of an election on such question and of the estimated cost of the improvement, by written notices, posted, at least forty days prior to such election, in not less than three public places within the township."

The amendment changed the cost limitation from $2,000 to $10,000.

The annual budgets of the townships of Ohio range from less than $7,000 to over $640,000. There are eight or ten under $10,000, and three over one half million dollars.

The conventional town hall in Ohio will range from a single room building, costing less than $10,000 to a modern office building adequate to accommodate the administration of a half million dollar business. If a distinction is not made between a town hall and a town office building, there would appear to be an implied repeal of paragraph two of Section 505.26, Revised Code, by the later enactment of Section 511.01, Revised Code, which places the monetary limitation on the cost of a town hall. I do not think that was intended. Section 511.01, Revised Code, provides for a vote of the people if a town hall is to be enlarged at a cost exceeding $10,000. The General Assembly certainly did not intend to require a vote of the electorate if office space was being added to the township building because that would be in direct conflict with the provisions of Section 505.26, Revised Code.

Webster's Third New International Dictionary defines town hall as follows:

> "Town Hall - (A) The chief public building of a town used for public office and for meetings (as of the town council and the courts). (B) A large hall for public assemblies."

Part (A) of the definition is a village building as the council meets in it. Part (B) more nearly describes a town (township) hall which is the subject of your request. For well over a century, this typical town hall has been, with few exceptions, a one room building for public meetings and election purposes. The fact that the General Assembly has treated the construction of town halls and office space differently and separately requires the recognition by this office.

To give a satisfactory answer to your question, it is incumbent upon the Attorney General to define or distinguish between types of structures constituting a town hall or a township office building.

It is, therefore, my opinion and you are accordingly advised that if a township building is to be constructed or enlarged, the major portion of the cost of which is allocated to the meeting hall therein, the same would be considered a town hall and subject to the provisions of Section 511.01, Revised Code.

Conversely, if a township building is to be constructed or enlarged, the major portion of the cost of which is allocated to the office space designed therein, the same would be considered an office building and subject to the provisions of Section 505.26, Revised Code.

OPINION NO. 69-133

Syllabus:

The positions of an assistant prosecuting attorney and a member of a board of education are not compatible and may not be concurrently held by the same individual.

To: Vincent E. Gilmartin, Mahoning County Pros. Atty., Youngstown, Ohio
By: Paul W. Brown, Attorney General, October 6, 1969

Your request for my opinion is an inquiry as to the compatibility of the offices of an assistant prosecuting attorney and a member of a board of education as mentioned in the following quotation from your letter:

> "A member of the staff of the Prosecuting Attorney of Mahoning County has filed petitions for the Office of Board of Education of the City of Campbell, Ohio. The City of Campbell has its own Solicitor."

I shall assume you are referring to an assistant prosecuting attorney in your question which states "a member of the staff of the Prosecuting Attorney."

Section 3313.13, Revised Code, states as follows:

> "No prosecuting attorney, city solicitor,

or other official acting in a similar capacity shall be a member of a board of education."

In reading this statute, it is obvious that a prosecuting attorney shall not be a member of any board of education. Therefore, we must now determine whether an assistant prosecuting attorney would be included under this statute.

Opinion No. 25, Opinions of the Attorney General for 1963, held that an assistant prosecuting attorney holds the same duties and responsibilities as the prosecuting attorney. A quotation from the pertinent part of that opinion reads as follows:

> "* * * I find no specific language in the law which directs that the duties of a duly appointed assistant prosecuting attorney shall be other than to assist in all of the duties of the office of the elected official by whom he has been appointed, such duties to be carried out under the supervision of his superior. * * *"

Therefore, it is my opinion and you are hereby advised that the positions of an assistant prosecuting attorney and a member of a board of education are not compatible and may not be concurrently held by the same individual.

OPINION NO. 69-134

Syllabus:

A county auditor is permitted to pay deputies for work on specified holidays if an overall plan has been established fixing compensation for holiday periods and the sheriff certifies to him that such payments are due and owing.

To: Lawrence S. Huffman, Allen County Pros. Atty., Lima, Ohio
By: Paul W. Brown, Attorney General, October 8, 1969

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

> "Regularly appointed deputy sheriffs of Allen County, Ohio, have submitted claims for payment of holidays on which they worked during years before 1969. Assuming that these deputy sheriffs are able to prove that they worked on one or more of the holidays as set forth in Section 1.14, Revised Code of Ohio, for which they were not granted a compensatory day off, would the County Auditor be permitted to pay them for these holidays?"

"A search of the Revised Code reveals only one section which deals with vacation leave and holiday pay for county employees." Opinion No. 3464, Opinions of the Attorney General for 1962. The particular section of the Code, with

which my predecessor dealt, is Section 325.19, Revised Code. Paragraph two of that section states:

> "In addition to such vacation leave, such county employee, working on a per diem basis, hourly basis, or salary basis, is entitled to eight hours of holiday pay for New Year's Day, Lincoln's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veteran's Day, Thanksgiving Day, and Christmas Day, of each year, if he is a regular employee with at least six months full time county service prior to the month when such holiday occurs, except that interruption of service due to illness or injury caused or induced by the actual performance of official duties and not by an employee's negligence shall not affect such employee's right to holiday pay. * * *."

It is evident that nothing in this section deals with the issue of additional pay to county employees who have worked upon the specified holidays. While Section 143.12 of the Revised Code does provide for employees who work on the listed holidays, those employees must receive their salaries in whole or in part, from the state. Since deputy sheriffs are compensated only by county funds, Section 143.12, supra, does not apply to them.

The provisions of Section 325.19, supra, fail to deal with the issue of county employees who work upon listed holidays. In the absence of specific statutory direction, attention must be directed to Section 325.17, Revised Code, which reads in part as follows:

> "The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, * * *." (Emphasis added)

Within the limits of funds appropriated by the county commissioners, the sheriff may fix the compensation his deputies are to receive. In re Diemer, 17 O.N.P. N.S. 369, 25 O.D. N.P. 517 (1915). The use of the sheriff's discretion in fixing compensation was expressed in Opinion No. 1405, Opinions of the Attorney General for 1964:

> "I can conceive of no reason why county employees may not be paid an overtime rate or be given compensatory time off for time worked in excess of an established work week or work day so long as such overtime rate or compensatory time off is part of a uniform plan."

The opinion of my predecessor is an expression of the latitude given county sheriffs by Section 325.17, supra, in fixing the compensation of their deputies. The wording of Section 325.19, Revised Code, indicates that the listed holidays are not a part of the established work week.

Therefore, it is my opinion, and you are hereby advised,

that a county auditor is permitted to pay deputies for work on specified holidays if an overall plan has been established fixing compensation for holiday periods and the sheriff certifies to him that such payments are due and owing.

OPINION NO. 69-136

Syllabus:

A township's zoning authority under Chapter 519, Revised Code, is not inconsistent with the requirement under Section 4737.07, Revised Code, of a license issued by the county auditor prior to the establishment of a junk yard. The county auditor's licensing power, with respect to junk yards, and the township's zoning authority are mutually independent and separately enforceable.

To: E. Raymond Morehart, Fairfield County Pros. Atty., Lancaster, Ohio
By: Paul W. Brown, Attorney General, October 9, 1969

I have before me your request for my opinion which asks the following questions:

> "(1) Is the County Auditor authorized or required to issue a license for a junk yard under Sections 4737.05 to 4737.99 incl. of the Revised Code of Ohio if the application therefor contains the information required under Section 4737.07 and .08, regardless of the existence of a township zoning resolution forbidding junk yards in the area described in the application?
>
> "(2) If the County Auditor is required to, or does issue such license, are the appropriate township officials, under the Zoning Resolution, authorized to enforce such Zoning Resolution (as authorized in Chapter 519, and especially Section 519.24 of the Revised Code of Ohio), regardless of the fact that such junk yard license was issued?
>
> "(3) That is, has the State of Ohio preempted the entire field of 'junk yard' regulation by enacting the law requiring the licensing of junk yards so that they cannot be regulated or prohibited by township zoning?"

Section 4737.07, Revised Code, in providing for the issuance of licenses by the county auditor states in part as follows:

> "No person shall operate and maintain a junk yard outside of a municipality without first obtaining a license to do so from the county auditor of the county in which such junk yard is located or in which such junk yard is to be established. * * *
>
> "* * * * * * * * *"

There is nothing in Chapter 4737, Revised Code, which expressly refers to or conflicts with the provisions in Chapter 519, Revised Code. Considering the duties of the county auditor, it becomes apparent that the licensing power of the county auditor is designed basically as a revenue measure. In effect, the county auditor's licensing power presents an independent condition precedent to the establishment of a junk yard, which is in no way affected by a township's capacity to prohibit junk yards in certain areas by adopting zoning resolutions.

It consequently becomes clear that the county auditor is authorized to issue a license for a junk yard under Chapter 4737, supra, if the application is proper, regardless of the existence of a township zoning resolution forbidding junk yards in the area described in the application. The responsibility lies with the applicant to ensure that there are no other restrictions which might prevent the establishment of the junk yard.

Your second and third questions focus on the effect of the county auditor's licensing power as to a township's ability to restrict the establishment of junk yards through zoning regulations. I would refer you to Opinion No. 1178, Opinions of the Attorney General for 1964, which concerned a similar problem, where the object of control through zoning regulations was the drilling for and production of gas and oil. The syllabus in that opinion stated in part that;

> "1. Counties and townships may control the drilling for gas and oil and the production of gas and oil through comprehensive zoning regulations adopted pursuant to Chapter 303, Revised Code, and Chapter 519, Revised Code, respectively, so long as such zoning regulations do not conflict with state statutes on the subject or with administrative rules or regulations adopted pursuant to statutory authority.
>
> "* * * * * * * * *"

In the present case, it has been established that a township's zoning regulation of junk yards does not conflict with a county auditor's power to license junk yards. Therefore, it is clear that the township's power to control junk yards through their zoning resolution is not affected by the licensing power granted to county auditors in Chapter 4737, supra.

It is, therefore, my opinion and you are hereby advised that a township's zoning authority under Chapter 519, Revised Code, is not inconsistent with the requirement under Section 4737.07, Revised Code, of a license issued by the county auditor prior to the establishment of a junk yard. The county auditor's licensing power, with respect to junk yards, and the township's zoning authority are mutually independent and separately enforceable.

OPINION NO. 69-138

Syllabus:

1. A county is not liable for additional hospital costs resulting from the private room of a municipal prisoner.

2. A county is not liable to a municipality for expenses incurred in guarding a municipal prisoner at a hospital.

To: James V. Barbuto, Summit County Pros. Atty., Akron, Ohio
By: Paul W. Brown, Attorney General, October 14, 1969

I have before me your request for my opinion based upon the following facts:

On January 18, 1969, a murder suspect was arrested by the Cuyahoga Falls Police Department. The suspect had attempted suicide and was removed to a hospital where he was guarded twenty-four hours a day by Cuyahoga Falls police officer. A private room, as opposed to a semi-private room, was required for the suspect - the suspect's hospitalization plan would pay the costs of a semi-private room only. An affidavit was filed on January 20, 1969, charging the suspect with murder. On February 13, 1969, the suspect was released from the hospital and on March 18 was indicted for murder.

Bills have been presented to the county by the hospital seeking the difference in rates between a semi-private room and a private room; and by the Cuyahoga Falls Police Department for maintaining a guard on the suspect. You specifically ask:

> "1. Is the county liable for the additional hospital costs resulting from the private room for the suspect?
>
> "2. Is the county liable to the Cuyahoga Falls Police Department for the services of the policeman for guarding the suspect at the hospital?"

From your letter, it would appear that no preliminary hearing was held in municipal court but that an indictment was returned against the suspect based upon facts presented directly to the grand jury. The jurisdiction of the common pleas court is invoked by "the return of a valid indictment and is not based on the process by which an accused is taken into custody or the findings made on the preliminary examination." Dowell v. Maxwell, Warden, 174 Ohio St. 289, 290 (1963); Opinion No. 68, Opinions of the Attorney General for 1967, pages 120, 124. The inference can be drawn that since the suspect in this case was not indicted until

March 18, and since the common pleas court had no jurisdiction over him until that date, he was not in any way a county prisoner; rather, since he was arrested and guarded by municipal authorities, the suspect was a municipal prisoner. The question then becomes whether a county is liable for services furnished a municipal prisoner by a hospital and for expenses incurred by a municipal police department in maintaining guards on the suspect's room.

Counties are political subdivisions liable only to the extent the statutes prescribe. The board of county commissioners acts in a political capacity and is clothed only with those powers delegated by statute. Portage County v. Gates, 83 Ohio St. 19, 30, 93 N.E. 255 (1910); Elder v. Smith, 103 Ohio St. 369 (1921). Public funds may only be disbursed by clear authority of law. The State, ex rel. Smith v. Maharry, 97 Ohio St. 272, 119 N.E. 822 (1918). In Ohio, the legislature has granted the board of county commissioners the power to expend public funds to pay the hospitalization costs of individuals in certain instances only. I refer you to an opinion by one of my predecessors which states:

> "A board of county commissioners has no authority to expend public funds to pay hospital bills, except hospital bills for those persons mentioned in Sections 311.20, 339.11, and 5106.01, Revised Code." Opinion No. 2565, Opinions of the Attorney General for 1961, page 607.

Section 339.11, Revised Code, deals with caring for the indigent, sick and disabled. Section 5106.01, Revised Code, is related to caring for "needy persons who are permanently and totally disabled." Finally, Section 311.20, Revised Code, deals with the sheriff's duty to furnish all prisoners or other persons confined in the county jail certain health necessities, including washing and nursing at county expense. None of these three statutes enables the county to expend public funds to pay the hospitalization costs of a municipal prisoner.

Since the subject involved here is not indigent, or needy and permanently and totally disabled, or confined in the county jail, there is no authority for allowing a board of county commissioners to pay his hospital costs.

As previously noted, county commissioners may only expend public funds when there is a clear legislative grant. In the case of a municipal police department employing municipal police officers to stand guard on a municipal prisoner in his hospital room, there is no statutory authority allowing the county to disburse public funds to compensate the Cuyahoga Falls Police Department for maintaining such guard.

Therefore, it is my opinion and you are accordingly advised

that:

1. A county is not liable for additional hospital costs resulting from the private room of a municipal prisoner.

2. A county is not liable to a municipality for expenses incurred in guarding a municipal prisoner at a hospital.

OPINION NO. 69-139

Syllabus:

1. A county auditor must accept for transfer on the tax duplicate any conveyance of real estate which enables him to identify the property to be transferred.

2. A county recorder must accept for filing any instrument which purports to transfer an interest in real estate.

To: James W. Freeman, Coshocton County Pros. Atty., Coshocton, Ohio
By: Paul W. Brown, Attorney General, October 14, 1969

I have before me your request for information on the following questions:

> 1. May a county auditor refuse to accept for transfer on the tax duplicate a conveyance of real estate which does not contain a legal description of the property to be transferred in either the Certificate of Transfer or the Warranty Deed?
>
> 2. May a county recorder refuse to accept for recording a conveyance of real estate which does not contain a legal description of the property to be transferred in either the Certificate of Transfer or the Warranty Deed?

Copies of both the "Certificate for Transfer of Real Estate" issued by the probate court and the Warranty Deed which gives rise to your questions were attached to your request and each contains the following statement with respect to the properties which each purports to transfer:

> "/A/n* * *interest in and to all of the parcels and tracts of real property situated in the State of Ohio, Coshocton County, to which reference is hereinafter made, and the legal descriptions as contained in the conveyance hereinafter referred to being incorporated herein by reference as though fully rewritten herein:
>
> "* * * * * * * * *"

Thereafter appears a listing of each of the parcels and tracts and the following information with respect to each such listing: the volume and page of the Coshocton County Records

of Deeds reflecting the last previous transfer, the grantor(s) and grantees involved and the date upon which the instrument accomplishing the transfer was received for record.

It would appear that your first question is answered in the pertinent portion of Section 319.20, Revised Code, which reads:

> "After complying with section 319.202 /319.20.2/ of the Revised Code and on application and presentation of title, with the affidavits required by law, or the proper order of a court, bearing the last known address of the grantee, or of any one of the grantees named in the title, and a reference to the volume and page of the recording of the next preceding recorded instrument by or through which the grantor claims title, the county auditor shall transfer any land or town lot or part thereof, minerals therein, or mineral rights thereto, charged with taxes on the tax list, from the name in which it stands into the name of the owner, when rendered necessary by a conveyance, partition, devise, descent, or otherwise.* * *"

Section 319.202, Revised Code, which modifies the foregoing does not bear upon our problem as it deals only with conditions precedent to filing, such as declarations of value, fees and exemptions therefrom.

I am not unmindful of certain cases which would seem to either ignore or at least do violence to the foregoing statutory provision. However, close examination reveals that these decisions turned on points extraneous to Section 319.20, supra. For instance, State, ex rel., v. Shaver, 172 Ohio St. 111 (1961), held in substance that it is not error for a court to deny a writ of mandamus to compel the recording of a deed where the evidence is such as to support the court's finding that the description of the property is not definite, accurate and detailed. In its opinion, the Supreme Court pointed out at page 114: "We are dealing here with registered land, and Section 5309.79, Revised Code, provides that in every voluntary instrument used to transfer a part of land conveyed by a certificate of title 'an accurate description of such part enabling it ot be definitely located and platted shall be given.'" Similarly, in State, ex rel., v. McKelvey, 124 N.E. 2d 124 (1961), the decision hinged on ability to identify the particular parcel involved. Neither of the foregoing fact situations is presented in our problem.

The following statements are made in 17 Ohio Jurisprudence 2d, Section 92, Deeds:

> "The description is sufficient if it is such as to indicate the land intended to be conveyed, so as to enable a person to locate it."
> (Citing Cunningham v. Walker, Wright 366 (1833).)

And in 17 Ohio Jurisprudence 2d, Section 93:

> "The description in a deed is sufficiently certain where it refers to another deed for the description of the land conveyed, if the land can be ascertained by such reference."
> (Citing McChesney v. Wainwright, 5 Ohio 452 (1832).)

The responsibility of the auditor with respect to real property is to compile and make up a general tax list and general duplicate of real and public utility property. Section 319.28, Revised Code. For this he need only be able to identify the tract involved and its owner.

In response to your second question, Section 317.33, Revised Code, provides in part:

> "If a county recorder refuses to receive a deed or other instrument of writing presented to him for record, the legal fee for recording it being paid or tendered; or refuses to give a receipt therefor, when required; or fails to number consecutively all deeds or other instruments of writing upon receipt thereof, or fails to index a deed or other instrument of writing, by the morning of the next day after it is filed for record; or neglects, without good excuse, to record a deed or other instrument of writing within twenty days after it is received for record;* * *he shall be liable to a suit on his bond, at the instance and for the use of the party injured by such improper conduct." (Emphasis added.)

Section 317.08, Revised Code, further provides:

> "The county recorder shall keep five separate sets of records as follows:
>
> "(A) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices, as provided for in sections 5301.47 to 5301.56, inclusive, of the Revised Code; all declarations and bylaws as provided for in sections 5311.01 to 5311.22, inclusive, of the Revised Code; and all certificates as provided for in section 5311.17 of the Revised Code.
>
> "* * * * * * * * *"

There is no specific or implied duty placed upon the county recorder by either of the above quoted statutes or by any other language of the Revised Code that I have found which would require that he examine the legal sufficiency of each instrument filed. The mere receiving and recording of instruments of writing is a ministerial function of the office specifically required by Section 317.08, supra.

In the early case of Samuel Ramsey v. Zachariah Riley, 13 Ohio 157 (1844), the Supreme Court had before it a question of whether a county recorder who, without corrupt intent, recorded a forged receipt, could be held liable to a person who relied upon such recorded instrument. The court said, beginning at page 166 of the Riley case, supra:

> "* * *It is the duly of the recorder to enter of record all deeds, mortgages, and other instruments of writings, required by law to be recorded, and which are presented to him for that purpose.

Swan's Sta. 778. It is not his duty to determine the validity of such instruments as may be presented for record, or to ascertain whether they are genuine or forged. But even if it were, and he should act honestly and fairly, according to the best of his ability, he would not be responsible. Yet, undoubtedly, if regardless of his duty he should willfully and maliciously, with full knowledge, enter a false and forged instrument upon record, whereby some person was misled and injured, he would be responsible."

It is therefore my opinion and you are hereby advised:

1. A county auditor must accept for transfer on the tax duplicate any conveyance of real estate which enables him to identify the property to be transferred.

2. A county recorder must accept for filing any instrument which purports to transfer an interest in real estate.

OPINION NO. 69-140

Syllabus:

A board of county commissioners is authorized by Section 307.09, Revised Code, to lease a portion of the county home farm to an Ohio charitable hospital corporation after a hospital has been erected thereon by the hospital commission, following submission of the issue to the electorate, pursuant to Section 339.14, Revised Code.

To: Robert A. Jones, Clermont County Pros. Atty., Batavia, Ohio
By: Paul W. Brown, Attorney General, October 23, 1969

You have requested my opinion on the legality of the construction of a hospital on the county home farm, pursuant to the provisions of Section 339.14, Revised Code. That section may be invoked by the application of an Ohio corporation organized for charitable hospital purposes, and not for profit, to operate a hospital to be constructed with funds arising from a bond issue authorized by the electors of the county as is provided in said section.

Section 5155.33, Revised Code, authorizes the board of county commissioners to sell or lease any part of the county home farm and deposit the receipts from the same in the general county fund.

It is specifically provided in Section 339.021, Revised Code, that the buildings and facilities of a county home may be converted into a county hospital as follows:

> "Whenever the building and facilities of a county home are suitable for use as a hospital, the board of county commissioners may designate said county home a county

> hospital. Thereafter the provisions of Chapter 339. of the Revised Code shall govern the operation of such facility, provided, that the members of the board of county commissioners shall serve ex-officio as members of the board of trustees; that the board of county commissioners shall establish such rules and regulations as may be expedient for the admission of persons to such facility requiring or in need of hospital, medical, or nursing services and the compensation to be paid by them or on their behalf for all services and treatment rendered by or in such facility; and that the expenditures annually by the board of trustees for the use and purposes of such facility shall not exceed, in the aggregate, the amount fixed by the board of county commissioners in their annual budget for such facility. * * *"

This section also provides for the method of appointment of board members and their power to expend county funds. This demonstrates the propriety of the use of the county home farm for hospital purposes, but it is not directly applicable to your situation. Section 339.14, Revised Code, is the only authority for a private, non-profit corporation to operate a hospital on land owned by the county and constructed with funds arising from a bond issue authorized by a majority of the electors voting on the issue. This section provides for the acceptance of a gift of land for this express purpose, although the language of the statute does not indicate this to be mandatory.

Opinion No. 3, Opinions of the Attorney General for 1961, states in its syllabus, the following:

> "Under Section 339.14, Revised Code, a county hospital commission may request the board of county commissioners to place on the ballot a bond issue to cover the costs of construction of hospital facilities, even though there has been no conveyance of land by a person as contemplated by that section, provided the person concerned is bound by agreement with the county hospital commission to make such conveyance in the event the bond issue is approved by the voters."

Section 339.14, Revised Code, makes it legally possible to lease county-owned land to a non-profit corporation for the operation of a general hospital; likewise does Section 307.09, Revised Code, in almost identical language, provide for leasing county land as follows:

> "* * *(T)o corporations not for profit for hospital or charitable purposes, may be for such length of time, upon such terms, for such purposes, and may provide for such renewals thereof as the board deems for the best interests of the public. * * *"

I deem these statutes to be in para materia for they deal with the same general subject, for the same purpose, accomplishing identical results, all within specific grants of power.

Opinion No. 3, supra, is to be distinguished from our present situation in that the construction of a hospital in that case was dependent upon an available site. In our present case, land is already available physically and lawfully.

Accordingly, it is my opinion and you are advised that upon application to the board of county commissioners by an Ohio corporation, organized for charitable hospital purposes and not for profit, the board may lease a portion of the county home farm to said corporation, pursuant to the provisions of Section 307.09, Revised Code, after the construction of a hospital by the county hospital commission, as authorized and financed, pursuant to the provisions of Section 339.14, Revised Code.

OPINION NO. 69-141

Syllabus:

The 108th General Assembly, by its enactment of Amended Substitute House Bill No. 531, and specifically Section 19 thereof, intended that the determination of rate reduction for school operating levies as provided by such section, whether as a result of an equalization order or increase in value from a sexennial reappraisal, is to be calculated on the basis of increase in value, excluding the value of new construction.

To: Francis B. Douglass, Chairman, Board of Tax Appeals, Columbus, Ohio
By: Paul W. Brown, Attorney General, October 23, 1969

I have before me your request for my opinion which reads essentially as follows:

> "To comply with Section 19 of Am.Sub. H.B. 531, as recently enacted by the 108th General Assembly, is the value of new construction in the year of a reappraisal or of an equalization order to be included in determining the increase in value for purposes of calculating the rate reduction in a given school district?"

Amended Substitute House Bill No. 531 was adopted by the 108th General Assembly as an emergency measure, approved by the Governor and filed in the Office of the Secretary of State on August 18,

1969. Being an emergency measure, it is effective as of such filing. Section 19 of that enactment reads as follows:

> "Notwithstanding sections 5705.31, 5705.331, and 5713.11 of the Revised Code, and until January 1, 1971, after an increase in any school district in the real and public utility property tax list under the sexennial reappraisal required by section 5713.01 of the Revised Code or as a result of an equalization or the application of a uniform taxable value percent of true value pursuant to a rule or order of the board of tax appeals, the county budget commission shall not certify for collection any voted operating tax rate for such district until the commission has first reduced the voted operating millage authorized to be levied for that year and the subsequent year only to such a level as will, when certified for collection, produce the same amount of local voted operating revenue for such district as would have been produced had the real and public utility tax list not been increased in such manner, except that, in determining the amount of an increase resulting from sexennial reappraisal required by section 5713.01 of the Revised Code, the budget commission shall attribute only one-half of such increase in calculating the amount of local voted operating revenue which would have been produced had the real and public utility tax list not been so increased.
>
> "During the fiscal year 1970-71, no school district whose millage is reduced under this section shall receive under division (A) of section 3317.02 of the Revised Code less than the amount it would have received under division (A) of section 3317.02 of the Revised Code, if there had been no valuation increase causing such millage reduction.
>
> "Until July 1, 1971, any school district which had in effect on the effective date of this act a total operating levy for current expenses of at least 17 1/2 mills and which has its millage reduced under this section shall be deemed to comply with division (A) of section 3317.01 of the Revised Code provided such millage is reduced no further than the amount required under this section."

The issue with which your request for an opinion deals is whether or not the value of new construction is to be included as part of the increase in value, as a result of a sexennial reappraisal or as a result of an equalization order, for purposes of determining the reduction in voted operating millage authorized to be levied for the year in question (and subsequent year) as provided by Section 19, supra.

If it were not for Section 19, supra, there is no question as to the treatment of the value of new construction for the purposes of determining rate reduction as the result of a reappraisal or an increase pursuant to a rule or order of the Board of Tax Appeals for equalization purposes. Section 5713.11, Revised Code, provides in pertinent part as follows:

> "When the people of any taxing subdivision have

voted additional levies for any purpose in the year of reassessment or any year prior thereto, or when the board of tax appeals of Ohio has increased the aggregate value of the real property in any taxing subdivision in any year under the provisions of sections 5715.24 to 5715.26, inclusive, of the Revised Code, and said additional levies are effective in the year of reassessment or thereafter or when the valuation is increased by order of the board of tax appeals to be effective in any year, and the levies are to be calculated on a total valuation of property higher than that of the year before reassessment, or the year before the valuation is increased by order of the board of tax appeals, the rate of said additional levy shall be reduced in the same proportion in which the total valuation of property in said taxing subdivision is increased by the reassessment or is increased by order of the board of tax appeals over the total valuation of the year preceding the reassessment or the order of the board of tax appeals, * * *."

Section 5705.331, Revised Code, in dealing with a limitation on the reduction under Section 5713.11, supra, of additional levies for current expenses for school districts, specifically provides as follows:

"* * *No reduction shall be made in the rates of such levies because of additions to the total valuation of property within the school district which have resulted from improvements which have added to the tax duplicate since the year preceding the reassessment."

In 1963, The Supreme Court of Ohio had before it the case of Board of Education of Campbell City School District, v. Mahoning County Budget Commission et al., 174 Ohio St. 294. In a per curiam decision, the Court specifically held as follows:

"The Board of Tax Appeals held that the reduction should be affected by all changes in the real, public utility and personal property duplicates excepting, because of the specific provisions of Section 5705.331, new construction on real property. The appellant contends that the reduction should be affected only by the increase caused by the reassessment.

"In our opinion, the words of Section 5713.11 plainly indicate that appellant's contention must be sustained. There is nothing in Section 5705.331, Revised Code, which would reasonably support a different conclusion."

Thus the Ohio Supreme Court recognized the propriety of excluding the value of new construction and, in addition, limited the increase in value to be utilized, for purposes of adjusting the tax rate, to that increase in value caused by the reassessment.

It seems quite clear, that were it not for Section 19, supra, the value of new construction would not be included in the increased value for purposes of determining rate reduction. The

authority for excluding such value is contained in Section 5705.331, supra.

Section 19, supra, however, was enacted into law and, as can be seen by reference to that Section as quoted above, the first sentence begins: "Notwithstanding Sections 5705.31, 5705.331, and 5713.11 of the Revised Code". The problem presented is a determination of the intent of the General Assembly in enacting Section 19, supra. To be more precise, did the General Assembly, by beginning Section 19, supra, with "Notwithstanding Sections * * * 5705.331 * * * Revised Code" intend to make completely inoperative the provision in that section that no reduction is to be made in rates of operating levies in school districts because of additions to total valuation of property resulting from new construction.

The Ohio Supreme Court, in State, ex rel. Carmean et al., v. Board of Education of Hardin County, 170 Ohio St. 415 (1960), had before it the question of the meaning of the word "notwithstanding" as used in an enactment by the General Assembly, and specifically held, at page 422 of the opinion, as follows:

> " 'Notwithstanding' is defined in Webster's New International Dictionary (2 Ed.) as meaning "without prevention or obstruction from or by; in spite of." See State, ex rel. Morse, v. Christianson, 262 Wis., 262, 55 N.W. (2d), 20.
>
> "It is axiomatic in statutory construction that words are not inserted into an act without some purpose. The General Assembly enacted Sections 3311.26 and 3311.261, Revised Code, at the same time. With full knowledge that these acts had been adopted and that conflicts might arise thereunder, the General Assembly inserted the word, 'notwithstanding,' and by so doing clearly indicated its intent that proceedings under Section 3311.261, Revised Code, should take precedence over pending proceedings previously instituted under the other enumerated sections."

Based on the foregoing, the Ohio Supreme Court has interpreted the phrase "notwithstanding" when used in statutory enactments to mean that if there is a recognized inconsistency between two or more statutory enactments, the enactment which provides "notwithstanding" the other enactments, would prevail. Applying this reasoning to Section 19, supra, the General Assembly intended that in the event of any inconsistency between such Section 19, supra, and Sections 5705.31, 5705.331, and 5713.11 of the Revised Code, Section 19, supra, is to prevail. Thus, in order to answer your question, we must look to such sections, including Section 19, supra, to determine whether or not an inconsistency exists with respect to the exclusion of the value of new construction for purposes of determining rate reductions.

Section 5705.31, supra, deals with powers of budget commissions to reduce certain tax levies and, among other things, provides for the determination a certain level or floor below which operating levies for school districts shall not be reduced. Section 5705.331, supra, likewise, provides, among other things, for the determination a level or floor below which operating levies for school districts shall not be reduced under the terms of Section 5713.11, supra. Section 5713.11, supra, in addition to those

provisions already discussed, provides for a floor or level below which current school operating levies shall not be reduced (except as provided in Sections 5705.31 and 5705.331, Revised Code).

Section 19, supra, on the other hand, provides for reduction of school operating levies different than those reductions provided for in Sections 5705.31, 5705.331, and 5713.11, supra, and, in addition, provides for floors with respect to receipts from the school foundation program (Section 3317.01, et seq., Revised Code) so that no school district shall receive less from the school foundation program than it would have received had there been no valuation increase. It also provides that no school district shall be affected in the event the total operating levy for current expenses in that school district was at least 17 1/2 mills and as a result of the operation of Section 19, supra, was subsequently reduced below 17 1/2 mills insofar as receipts from the school foundation program are concerned.

Thus there were clear inconsistencies between the provisions of Section 19, supra, and certain provisions of Sections 5705.31, 5705.331, and 5713.11, of the Revised Code, with respect to lower limits of reduction of school operating levies. The General Assembly, in its wisdom, was fully aware of such inconsistencies and obviously intended and provided that Section 19, supra, is to control insofar as such inconsistencies are concerned. Nowhere in Section 19, supra, however, is there any provision or any mention of the treatment of the value of new construction during the year of reappraisal, or during the year of an equalization order, insofar as the inclusion or exclusion of such value for purposes of determining rate reduction. There can scarcely be an inconsistency between the provision of Section 5705.331, supra, requiring that such value not be included for purposes of determining rate reduction and Section 19, supra, since nothing is said in Section 19, supra, with respect to that issue. I can only conclude that the General Assembly intended no change with respect to the treatment of the value of new construction for purposes of determining rate reductions by its enactment of Section 19, supra. This conclusion is supported by the fact that the General Assembly provided in Section 19, supra, that the purpose of the reduction and method of computing same, as a result of an equalization order, is to "produce the same amount of local voted operating revenue for such district as would have been produced had the real and public utility tax list not been increased in such manner." (Emphasis added.) I have already analyzed the treatment of the value of new construction in the event there had been no reappraisal of equalization order.

To conclude that the General Assembly intended the value of new construction in the appropriate year to be included as a part of the increased value for purposes of rate reduction would require a conclusion that the General Assembly intended to make Sections 5705.31, 5705.331, and 5713.11, supra, completely inoperative, at least for the purposes of Section 19, supra. To so conclude, in view of the foregoing, would require a much clearer statement of the intent of the General Assembly then the mere use of the word "notwithstanding", especially in view of the interpretation of that term, as used in statutory enactments, by the Ohio Supreme Court in the Carmean case, supra.

Therefore, it is my opinion and you are hereby advised that the 108th General Assembly by its enactment of Amended Substitute

House Bill No. 531, and specifically Section 19 thereof intended that the determination of rate reduction for school operating levies as provided by such section, whether as a result of an equalization order or increase in value from a sexennial reappraisal, is to be calculated on the basis of increase in value, excluding the value of new construction.

OPINION NO. 69-142

Syllabus:

The Ohio Department of Public Works may lease submerged land of Lake Erie to a port authority within the latter's territorial jurisdiction for all purposes not inconsistent with the powers granted to it in Section 4582.06, Revised Code, but limited by the provisions of Section 123.03, Revised Code.

To: Alfred C. Gienow, Director, Dept. of Public Works, Columbus, Ohio
By: Paul W. Brown, Attorney General, October 23, 1969

Your request for my opinion reads in pertinent part as follows:

> "Attached hereto are reproduced copies of letters dated July 16 and August 1, 1969 to me from the Cleveland-Cuyahoga County Port Authority, requesting I advise the authority whether the State will lease to it submerged Lake Erie land within the boundaries of Cuyahoga County.
>
> "I respectfully request your opinion as to whether this may be done pursuant to Section 123.01 (A) (9), Revised Code, * * *."

To answer your question, it is necessary to analyze the respective powers of the Ohio Department of Public Works and those of the Cleveland-Cuyahoga County Port Authority.

Section 123.01 (A) (9), Revised Code, was specifically directed to me for my consideration and to the extent it is pertinent, reads:

> "To lease or grant easements or licenses <u>for unproductive and unused lands or other property under the control of the state</u>, or any department, office, or institution thereof, excepting school and ministerial lands, such leases, easements, or licenses to be granted for a period not to exceed fifteen years and shall be exe-

> cuted for the state by the director of public works and the governor and shall be approved as to form by the attorney general; * * *." (Emphasis added.)

An amendment to this section which became effective September 25, 1969, provides for a term not to exceed 40 years, if the lease is granted to a political subdivision or taxing district including a port authority and shall be for the lessee's exclusive use without any right of sublease or assignment. The recent amendment immediately follows the above quotation and it is as follows:

> "* * * (P)rovided, that leases, easements, or licenses may be granted to any county, township, municipal corporation, port authority, water or sewer district, school district, library district, health district, park district, soil and water conservation district, conservancy district, or other political subdivision or taxing district, or agency of the United States government, for the exclusive use of such agency or political subdivision or taxing district, without any right of sublease or assignment, for a period not to exceed forty years; * * *."

Complementary to this are parts of Section 123.03, Revised Code, which reads:

> "It is hereby declared that the waters of Lake Erie consisting of the territory within the boundaries of the state, extending from the southerly shore of Lake Erie to the international boundary line between the United States and Canada, together with the soil beneath and their contents, do now and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state, <u>for the public uses to which it may be adapted, subject to the powers of the United States government</u>, to the public rights of navigation, water commerce and fishery, and further subject to the property rights of littoral owners, including the right to make reasonable use of the waters in front of or flowing past their lands. * * *
>
> "<u>The department of public works is hereby designated as the state agency in</u>

all matters pertaining to the care, protection, and enforcement of the state's rights designated in this section." (Emphasis added.)

I concede that the submerged land of Lake Erie and the "public uses to which it may be adapted" may well include aids to navigation, public utilities in the form of cables, conduits, aqueducts and possibly others, within the jurisdiction and territorial limits of a port authority. The Department of Public Works is also empowered "to exercise general custodial care of all real property of the state" (Section 123.01 (A) (12), Revised Code). It would appear, however, that this power is limited by a pertinent part of Section 123.03, Revised Code, which distinguishes the use of any areas of the lake recognized as navigable channels. It reads as follows:

> "* * * Any artificial encroachments by public or private littoral owners, which interfere with the free flow of commerce in navigable channels, whether in the form of wharves, piers, fills, or otherwise, beyond the natural shore line of said waters, not expressly authorized by the general assembly, acting within its powers, or pursuant to section 123.031 (123.03.1) of the Revised Code, shall not be considered as having prejudiced the rights of the public in such domain. This section does not limit the right of the state to control, improve, or place aids to navigation in the other navigable waters of the state or the territory formerly covered thereby."

I wish to emphasize that the General Assembly has reserved to itself all power to permit interference by obstructions of any kind, to the free flow of commerce in navigable channels, excepting that power of the Department of Public Works found in Section 123.031, Revised Code.

The powers of a port authority are found in Section 4582.06, Revised Code, and those of importance for our immediate purpose are quoted:

> "(c) Acquire, own, hold, sell, lease, or operate real or personal property for the authorized purposes of the port authority:
>
> "* * * * * * * * *
>
> "* * * Pursuant to Section 13 of Article VIII, Ohio Constitution, and in order to create jobs and employment opportunities and improve the economic welfare, the port

authority may acquire, construct, enlarge, improve, equip, sell, exchange, lease, and lease with a contract or option to purchase at such amount as the board of directors in its sole discretion may determine, real property, * * *

"* * * * * * * * *

"(H) Enjoy and possess the same rights, privileges, and powers granted municipal corporations under sections 721.04 to 721.11, inclusive, of the Revised Code;

"* * * * * * * * *

"(K) Sell or lease real and personal property not needed for the operation of the port authority and grant easement or rights-of-way over property of the port authority;

"* * * * * * * * *"

Notwithstanding that the Attorney General has held in a specific instance that the power to acquire real property means to purchase and excludes leasing of the same, the second quote from this section containing the words "lease, and lease with a contract or option to purchase" definitely empowers a port authority to acquire property by lease.

A port authority has all power granted to municipal corporations by Sections 721.04 to 721.11, inclusive, Revised Code. This power operates within the municipal corporation and extends into Lake Erie to a distance of two miles from the natural shore line. This power is not coextensive with the boundaries of the county. This section, however, does not permit a city or port authority to make "any artificial encroachments * * * which interfere with the free flow of commerce in navigable channels." (Section 123.03, Revised Code). For all other purposes, special authorization of the General Assembly would not be necessary. For the reason that federal power supersedes state authority with respect to commerce in navigable channels of the lake, concurrence by the United States Army Engineers is necessary to categorize the uses for which the submerged soils of the lake may be leased. Whether any structure in the lake is an obstruction or an aid to navigation is a question of fact to be determined in its final analysis by the United States Army Engineers.

From the foregoing, it is my opinion and you are advised that pursuant to the provisions of Section 123.01 (A) (9), Revised Code, the Ohio Department of Public Works may lease submerged land of Lake Erie to a port authority within the latter's territorial jurisdiction, which in this instance is coextensive with the boundaries of Cuyahoga County, for all purposes not inconsistent with the powers granted to it in Section 4582.06, Revised Code, but limited by the provisions of Section 123.03, Revised Code.

OPINION NO. 69-143

Syllabus:

A county recorder is not required to file options to purchase real estate.

To: Thomas R. Spellerberg, Seneca County Pros. Atty., Tiffin, Ohio
By: Paul W. Brown, Attorney General, October 28, 1969

Your request for my opinion presents the following question:

> "Our County Recorder has had presented to him for filing, Options to purchase Real Estate and has been unable to find any authority for the filing of such options and is also in doubt as to which set of books such options should be filed in, if they are entitled to record."

Section 317.08, Revised Code, provides in substance that the following five separate sets of records shall be kept by the county recorder: "(A) A record of deeds * * *"; "(B) A record of mortgages * * *"; "(C) A record of powers of attorney"; "(D) A record of plats * * *"; and "(E) A record of leases * * *".

With the exception of (C), above, all of such records are concerned with an existing interest in real property. The same is true of the notice of a claimed interest in land which may be filed for record under Section 5301.51, Revised Code.

On the other hand, "An option has been defined to be 'an unaccepted offer to sell.' It transfers no title or right in rem, but creates a right in personam, and that right is to accept or reject a present offer within a limited or reasonable time in the future." Standiford et ex. v. Thompson, CCA 4th Cir. (1905), 135 F. Rep. 991, 996. The same principle has been enunciated in Ohio:

> "3. A written optional contract for a nominal consideration given by the owner to sell his real estate is not a sale thereof, but only a standing offer to sell to the person, at the price named and within the time stated in the contract, and the holder of the option does not acquire any title to the real estate unless he accepts the offer prior to its expiration." Sause v. Ward, et al., 7 Ohio App. 446 (1917), Headnote, 3rd branch.

> "* * *Such instruments are merely contracts by which one party in consideration of the payment of a certain sum to the other party, acquires the privilege of buying from or otherwise acquiring, or selling to such other party an interest in specified property at a fixed price within a stated time.* * *" Brewing Co. v. Maxwell, 78 Ohio St. 54, 63 (1908).

From the foregoing it is apparent that (1) the legislature intended that documents should be recorded which involve an existing interest in real property, and (2) that an option does not involve such interest.

It has been suggested that Section 317.08 (B), Revised Code, might well include options. This section details one of the five sets of records to be kept by a county recorder and provides:

> "* * * * * * * * *
>
> "(B) A record of mortgages, in which shall be recorded:
>
> "(1) All mortgages, including amendments, supplements, modifications, and extensions thereof, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;
>
> "(2) All executory installment contracts for the sale of land executed after September 29, 1961, which by the terms thereof are not required to be fully performed by one or more of the parties thereto within one year of the date of such contract;
>
> "* * * * * * * * *"

In State, ex rel. v. Cullen, 5 Ohio App. 2d, 13 (1966), the court considered the foregoing section and held that even an executed contract to purchase is not entitled to recording.

I am aware that there is a rather general belief among attorneys that a recorder must file any document submitted to him if accompanied by the proffer of the appropriate fee. Also, I am advised that some recorders have so-called "Miscellaneous Records" in which are filed any documents which may be submitted and which do not fall within the categories of the records prescribed by statute. I do not here address myself to what a recorder may file for whatever value, if any, it may have, but rather to the sole question of whether he must file an option to purchase real estate.

It is therefore my opinion and you are hereby advised that a county recorder is not required to file options to purchase real estate.

OPINION NO. 69-146

Syllabus:

1. A community mental health and retardation board established pursuant to Chapter 340, Revised Code, is without authority to supervise or control a county board of mental retardation established pursuant to Section 5126, Revised Code, or the functions thereof, or the establishment or operation of any facilities provided by Chapter 5127, Revised Code.

2. The educational facilities of the training center or workshop established pursuant to Section 5127.01, Revised Code, are only for the special training of mentally deficient persons, as a person of this classification is defined by such section.

To: Fred V. Skok, Lake County Pros. Atty., Painesville, Ohio
By: Paul W. Brown, Attorney General, November 10, 1969

Your letter of request states that the board of county commissioners created a county board of mental retardation pursuant to the requirements of Chapter 5126, Revised Code. To provide a training center or workshop for the special training of mentally deficient persons of the county, as required by Section 5127.01, Revised Code, the board of county commissioners, by resolution, submitted a proposed 2-mill levy for five years to electors of the county which the electorate approved. The wording of the ballot submitted to the electorate was in pertinent part as follows:

> "An additional tax for the benefit of Lake County for the purpose of constructing, furnishing, and equipping a Training Center, Workshops, Clinic, and Residential Facilities for Mentally Retarded Persons, including the acquisition and improvement of a site, therefor, at a rate not exceeding 2.0 mill for each one dollar of valuation, which amounts to 20 cents for each One Hundred Dollars of valuation, for five years."

Your letter further states that subsequent to the creation of the county board of mental retardation and approval of the levy, a community mental health and retardation service program was established and a community mental health and retardation board was appointed pursuant to the requirements of Chapter 340, Revised Code.

Your letter requests my opinion relative to the following questions:

1. Should the community mental health and retardation board exercise any supervision or control over the expenditure of funds raised by the levy referred to above? This would extend to such questions as the selection of a site, the priority of the type of facility to be constructed and the necessity of a particular type of facility.

2. Can any facilities for the mentally ill be included as a part of the facilities to be financed by the above levy? There are no facilities in the county for in-patient care of the mentally ill, and it has been suggested that the two boards cooperate by including facilities for the mentally ill as a part of the facilities to be constructed with the proceeds of the approved levy.

In response to your first question, it is necessary to consider the powers and duties of each board as prescribed by statutory law.

Section 5126.03, Revised Code, reads:

"The county board of mental retardation, subject to the rules, regulations, and standards of the commissioner of mental hygiene shall:

"(A) Administer and supervise sections 5127.01 to 5127.04, inclusive, of the Revised Code and exercise such powers and duties as prescribed by the commissioner;

"(B) Submit an annual report of its work and expenditures, pursuant to section 5127.01 of the Revised Code, to the commissioner and to the board of county commissioners at the close of the fiscal year and at such other times as may be requested;

"(C) Employ such personnel and provide such services, facilities, transportation, and equipment as are necessary;

"(D) Provide such funds as are necessary for the operation of training centers and workshops.

"Any county board of mental retardation may enter into a contract with another such board of another county or with a public or nonprofit agency or organization of the same or another county, to provide the training center, workshop facilities and services authorized in section 5127.01 of the Revised Code, upon such terms as may be agreeable.

"The board of county commissioners shall levy taxes and make appropriations sufficient to enable the county board of mental retardation to perform its functions and duties as provided by this section."

Section 340.03, Revised Code, reads in pertinent part:

"Subject to rules and regulations of the commissioner of mental hygiene, the community mental health and retardation board, with respect to its area of jurisdiction, <u>and except for programs and facilities conducted pursuant to Chapter 5127. of the Revised Code</u>, shall: * * *."

(Emphasis added)

The county board of mental retardation, by statutory provision, was given the responsibilities relative to the providing and operation of a training center or workshop for the special training of mentally deficient persons, which facilities are established pursuant to Chapter 5127, Revised Code.

The powers and duties of a community mental health and retardation board provided by Section 340.03, Revised Code, expressly excludes from such powers and duties any authority with reference to programs and facilities conducted pursuant to Chapter 5127, Revised Code. Further, a community mental health and retardation board, not having been given statutory power or authority to supervise or control the organization

or functions at a county mental retardation board, is without authority to exercise any control over the levying, collecting or expenditure of any funds pertaining to facilities established and operated pursuant to Chapter 5127, Revised Code. See Opinion No. 69-015, Opinions of the Attorney General for 1969.

It would appear, therefore, that a community mental health and retardation board established pursuant to Chapter 340, Revised Code, is without authority to supervise or control a county board of mental retardation established pursuant to Section 5126, Revised Code, or the functions thereof, or the establishment or operation of any facilities provided by Chapter 5127, Revised Code.

Section 5127.01, Revised Code, provides that the commissioner of mental hygiene, with the approval of the director of mental hygiene and correction, shall establish in any county or district a training center or workshop for the special training of mentally deficient persons. Such section further provides that the commissioner shall be the final authority in determining the nature and degree of mental deficiency and decide all questions relative or incidental to the establishment and operation of each training center or workshop.

A training center or workshop for the special training of mentally deficient persons contemplates a type of facility for the special training of a particular group of persons, i.e., mentally deficient persons, a "mentally deficient person" being defined within Section 5127.01, Revised Code. See Terteling Bros., Inc., v. Glander, Tax Commr., 151 Ohio St. 236, Syllabus No. 1. The term "mentally ill" is not used within the provisions of Chapters 5126 and 5127, Revised Code, and therefore such term is without significance with reference to the educational program or facility authorized, established and operated pursuant to said chapters.

Generally, "mental illness" and "mental deficiency" are considered to be contradistinctive terms. The General Assembly has used "mental illness" and "mental deficiency" as contradistinctive terms for group classification purposes, e.g., Sections 2947.25 and 5123.63, Revised Code.

The proceeds of the approved levy may be appropriated and used only for the purpose of establishing a training center or workshop as authorized by Section 5127.01, Revised Code. Although the ballot submitted to the voters used the term "mentally retarded persons," such term and the term "mentally deficient persons" in the present instance are considered synonymous. Compare Amended House Bill No. 688, enacted by the 108th Ohio General Assembly, effective November 21, 1969.

I am therefore of the opinion and you are advised that a community mental health and retardation board established pursuant to Chapter 340, Revised Code, is without authority to supervise or control a county board of mental retardation established pursuant to Section 5126, Revised Code, or the functions thereof, or the establishment or operation of any facilities provided by Chapter 5127, Revised Code, and that the educational facilities of the training center or workshop established pursuant to Section 5127.01, Revised Code, are only for the special training of mentally deficient persons, as a person of this classification is defined by such section.

OPINION NO. 69-147

Syllabus:

1. A firm of professional engineers, incorporated under Chapter 1785, Revised Code, may offer to practice, i. e., advertise, professional engineering services under its corporate name.

2. A firm of professional engineers incorporated under Chapter 1785, Revised Code, may negotiate and fulfill all lawful contracts for engineering services.

3. A firm of professional engineers may not certify in the firm name plans, specifications, plats, reports and other engineering documents which must be stamped with the seal of a registered engineer.

To: Charles B. Sloan, Exec. Sec., State Board of Registration for Professional Engineers and Surveyors, Columbus, Ohio
By: Paul W. Brown, Attorney General, November 12, 1969

I have before me your opinion request as to whether a firm of professional engineers incorporated under Chapter 1785, Revised Code, may offer to practice, i. e., advertise, professional engineering services under its corporate name and whether such a firm may negotiate and fulfill contracts for engineering services and certify engineering documents.

Chapter 1785, supra, specifically authorizes the organization of a professional association to render services which may be performed only by a professional engineer. Section 1785.02, Revised Code, provides in pertinent part as follows:

> "An individual or group of individuals each of whom is licensed or otherwise legally authorized to render the same kind of professional service within this state may organize and become a shareholder, or shareholders, of a professional association. * * *"

Other requirements concerning professional associations are contained in Sections 1785.03 and 4733.16, Revised Code. Section 1785.03, supra, provides in pertinent part as follows:

> "A professional association may render professional service only through officers, employees, and agents who are themselves duly licensed or otherwise legally authorized to render professional service within this state. * * *"

Section 4733.16, supra, provides as follows:

> "A firm, copartnership, or an association may engage in the practice of professional engineering or surveying in this state, provided only such practice is carried on by or under the supervision of a principal of the firm, copartnership, or association, who is a registered engineer or surveyor, respectively, in the state, * * *."

An individual or a group of individuals, each of whom is legally authorized to practice professional engineering may therefore organize under Chapter 1785, supra, for the sole purpose of providing professional engineering service. Such service, however, must be carried on under the supervision of a principal of the association who is a registered engineer in this state. In addition, the professional service must be rendered through officers, employees, or agents, who are themselves duly authorized to render such service.

Section 4733.02, Revised Code, limits the practice of engineering to those who have been registered. This section provides as follows:

> "Any person practicing or offering to practice the professions of engineering or of surveying shall submit evidence that he is qualified to practice and shall be registered. No person shall practice or offer to practice the professions of engineering or of surveying, or contract for such services, or use in connection with his name or otherwise, assume, use, or advertise any title or description tending to convey the impression that he is an engineer or a surveyor, unless such person has been registered or exempted under sections 4733.01 to 4733.23, inclusive, of the Revised Code."

Ordinarily the term "person" would include a corporation or other artificial person. See e. g., Sections 1.02(B) and 1701.01(G), Revised Code. However, when this section is read in context with Sections 4733.09 through 4733.13, inclusive, Revised Code, it is clear that the General Assembly intended this requirement to apply only to natural persons. Such matters as an examination, good moral character, and educational requirements can be applicable only to natural persons. See Potomac Engineers, Inc. v. Walser, 127 F. Supp. 41 (1954); affirmed 233 F. 2d 356 (1955); Fletcher's Encyclopedia of Corporations. Section 2523.

Section 1785.08, Revised Code, specifically provides that the provisions of Chapter 1701, Revised Code, apply to professional associations. The name of a professional association must therefore end with or include the term "company", "co.", "corporation", "corp.", "incorporation", or "inc.". Section 1701.04(1), Revised Code. The only other restriction on the use of the name of a professional association is that the word "engineer" or "engineering", or any modification or derivative may not be used in the name of such an association. Section 4733.16, Revised Code. (Opinion No. 2531, Opinions of the Attorney General for 1961, approved and followed). There are no other restrictions or limitations on the use of the corporate name of a professional association.

A firm of professional engineers incorporated under Section 1785, Revised Code, may therefore practice and offer to practice professional engineering under its corporate name.

Section 1701.13(F), Revised Code, provides that a corporation shall have the following authority:

> "(F) In carrying out the purposes stated in its articles and subject to limitations prescribed by law or in its articles, a corporation may:
>
> "* * * * * * * * *
>
> "(2) Make contracts;
>
> "* * * * * * * * *
>
> "(7) Do all things permitted by law and exercise all authority within the purposes stated in its articles or incidental thereto.
>
> "* * * * * * * * *."

A firm of professional engineers incorporated under Chapter 1785, Revised Code, in carrying out its purposes may therefore negotiate and fulfill all lawful contracts for engineering services and subject to the limitations of law, it may certify engineering documents. By statute, certain engineering documents such as plans, specifications, plats and reports must be stamped with the seal of a registered engineer. See Section 4733.17, Revised Code. Only a registered professional engineer would hold such a seal. Since a professional association cannot comply with the requirements for registration, a firm of professional engineers could not hold a seal in the firm name. Thus, engineering documents which must be stamped with such a seal could not be certified by the professional firm itself.

It is my opinion, and you are advised:

1. A firm of professional engineers, incorporated under Chapter 1785, Revised Code, may offer to practice, i.e., advertise, professional engineering services under its corporate name.

2. A firm of professional engineers incorporated under Chapter 1785, Revised Code, may negotiate and fulfill all lawful contracts for engineering services.

3. A firm of professional engineers may not certify in the firm name plans, specifications, plats, reports and other engineering documents which must be stamped with the seal of a registered engineer.

OPINION NO. 69-148

Syllabus:

Municipal and county building departments should be represented at adjudication hearings and in court proceedings by the city attorney and county prosecuting attorney, respectively.

To: William O. Walker, Director, Department of Industrial Relations, Columbus, Ohio

By: Paul W. Brown, Attorney General, November 12, 1969

I have before me your request for my opinion which reads as follows:

> "When a certified municipal or county building department undertakes to enforce Chapters 3781 and 3791 of the Ohio Revised Code and the rules and regulations adopted pursuant thereto, is the Attorney General of the State of Ohio, the municipal attorney, or the county prosecutor to represent the certified building department at the adjudication hearings and, if necessary, in the Court of Common Pleas."

Section 3781.10, Revised Code, provides in pertinent part:

> "The board of building standards shall:
>
> "* * * * * * * * *
>
> "(E) certify <u>municipal and county building departments</u> to exercise enforcement authority and to accept and approve plans pursuant to sections 3781.03 and 3791.04 of the Revised Code.
>
> "* * * * * * * * *"
>
> (Emphasis added.)

It is important to note that the above statutory reference to building departments on the municipal or county level designates such departments as "municipal and county building departments." In other words, Section 3781.10, supra, presumes that such departments shall be operated and controlled by their respective political subdivisions, although these departments must comply with a standard set by the State Board of Building Standards in order to be certified.

Section 309.09, Revised Code, provides:

> "The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections and all county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board directs or to which it is a party, and no county officer may employ any other counsel or attorney at the expense of the county, except as provided in section 305.14 of the Revised Code."
> (Emphasis added.)

Section 309.09, supra, clearly mandates that the prosecuting attorney should represent a county building department in all legal actions. It might be advanced that under the Administrative Procedure Act (Chapter 119, Revised Code), particularly pursuant to Section 119.10, Revised Code, the Attorney General should represent any agency whose functions arguably come within the scope of such Act. But Section 119.01, Revised Code, provides in pertinent part:

> "* * * (A)ny official, board or commission having authority to promulgate rules or make adjudications in the bureau of unemployment compensation, the civil service commission, the department of liquor control, the department of taxation, the industrial commission, the functions of any administrative or executive officer, department, division, bureau, board, or commission of the government of the state specifically made subject to sections 119.01 and 119.13, inclusive, of the Revised Code, and the licensing functions of any administrative or executive officer, department, division, bureau, board or commission of the government of the state * * *." (Emphasis added.)

Implicit in this definition is that Chapter 119, Revised Code, ap-

plies only to agencies at the state level of government. In Karrick v. Board of Education, 174 Ohio St. 467 (1963), the Supreme Court of Ohio stated, at page 469: "A careful reading of the * * * statutory language clearly indicates that only agencies at the state level of government are covered by the act."

The prosecuting attorney, therefore, pursuant to Section 309.09, supra, is the proper legal representative of a county building department.

The same rationale would also apply to the municipal building department situation. Section 733.53, Revised Code, provides:

> "The city solicitor, when required to do so by resolution of the legislative authority of the city, shall prosecute or defend on behalf of such city, all complaints, suits, and controversies in which the city is a party, and such other suits, matters, and controversies as he is, by resolution or ordinance, directed to prosecute. He shall not be required to prosecute any action before the mayor of such city for the violation of an ordinance without first advising such action."

"City," as used in the above section, has been historically interpreted to mean all city boards and officers. Yaple v. Police Commissioners, 2 C.C. 406 (1887). Therefore, the legislative authority of a municipality, upon its municipal building department being certified, is empowered to make provision for its city attorney or solicitor to represent such building department in all legal actions pursuant to Section 733.53, supra.

Therefore, it is my opinion and you are advised that municipal and county building departments should be represented at adjudication hearings and in court proceedings by the city attorney and county prosecuting attorney, respectively.

OPINION NO. 69-149

Syllabus:

One who is appointed to serve until the next general election following the resignation of a judge of a municipal court, and one who is elected at such election to serve for the remainder of the unexpired term, are entitled to a salary increase authorized by Section 1901.11, Revised Code, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election of his successor to serve for the remainder of the unexpired term.

To: Frederick E. Markley, Hardin County Pros. Atty., Kenton, Ohio
By: Paul W. Brown, Attorney General, November 17, 1969

Your letter of request for my opinion reads in part as follows:

> "* * *The Kenton Municipal Court judge resigned effective September 2 and there was an appointment made to serve until November 4th election and the qualifying of his successor which will be for the balance of the two years.
>
> "During the term of the previous Judge, under Section 1901.11, Revised Code of Ohio, there was an increase made in the salary of the Municipal Judge and the same was effective on June 10, 1968.
>
> "The question here is really two-fold: Does the Judge appointed for the two month term and also the Judge that is elected in November for the balance of the two year term, become eligible to receive the increase in salary?
>
> "* * * * * * * * *"

The specific question of whether one who is appointed or elected to the remainder of an unexpired term of a judge of a municipal court is entitled to an increase in salary, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election to the remainder of the unexpired term, has not been previously considered by the courts of this state or by this office. However, the general question has been considered in connection with officers other than municipal judges.

In Opinion No. 1101, Opinions of the Attorney General for 1949, the then Attorney General was asked whether one appointed to fill the unexpired term of a deceased county commissioner would be eligible to receive an increase in salary authorized during the deceased commissioner's term, but prior to the appointment of his successor. In that instance it was concluded that such an increase was not authorized, but only because the statute granting the increase was interpreted to apply to the <u>term of office</u> rather than the incumbent of the office. At page 748 of Opinion No. 1101, <u>supra</u>, it is stated:

> "<u>The judicial decisions of Ohio indicate unquestionably that the salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term he is to complete</u>.
>
> "See: State ex rel. Pugh v. Tanner, 27 O.C.A. p. 385; State ex rel. Glander v. Ferguson, 148 O.S. p. 581; Opinions of the Attorney General for 1943, p. 35." (Emphasis added.)

Opinion No. 5791, Opinions of the Attorney General for 1943 (cited above as "Opinions of the Attorney General for 1943, p. 35") also concerns an appointee to fill the unexpired term of a county commissioner, and concludes that, under the circumstances disclosed by that request, the appointee is entitled to receive the increased salary. We find the following, beginning at page 38 of that opinion:

"The question as to the right of one who is appointed to fill the vacancy in an office for the remainder of the term * * * to have the benefit of the increased salary is one upon which the courts and authorities generally have not been wholly in agreement.

"In 43 Am. Jur., 'Public Officers', Section 351, it is said:

"'The courts have experienced some difficulty in applying the foregoing constitutional prohibitions against changing salaries of public officers to persons elected or appointed to fill out the balance of an unexpired term. Some courts have held that the successor so chosen to fill out the term after the death, resignation, or removal of his predecessor stands for all purposes in the latter's shoes, and cannot claim the increased compensation provided for during that officer's incumbency. Other cases have taken a different view and have allowed the increased salary to the person filling the balance of the term. The lack of uniformity upon this point is perhaps due to difference in the wording of the constitutional restriction.'

"In 46 Corpus Jur. p. 1023, the same uncertainty and divergence of opinion are also noted and cases are cited on both sides of the proposition. However, the Ohio courts seem to have settled the question rather definitely in favor of the right of an appointee to fill a vacancy under such circumtsances to have the benefit of the increase in salary which was made after the beginning of the original term to which he succeeds but before his appointment to fill the vacancy.

"In the case of State ex rel. v. Tanner, 27 O. C.A., 385, it was held:

"'The salary of an appointee to a vacancy in a public office is controlled by the law in effect at the time his appointment was made, and not by the law in effect at the time his predecessor was elected for the term he is to complete.'

"This case related to a municipal officer and arose directly under the provisions of Section 4123, General Code, which provided:

"'The salary of any officer, clerk or employee shall not be increased or diminished during the term for which he was elected or appointed.'

"The court said at page 386 of the opinion:

"'In the investigation made we have failed to find that the question here made has been passed upon by the courts of this state, although it appears to have been the subject of judicial action by the courts in some other states, not, however, with unvarying unanimity of view and decision, to which we will refer later on.

"'* * *All the authorities seem to agree that the constitutional and statutory inhibition against a change in the compensation of an officer during his incumbency of an office is founded upon considerations of public policy in guarding and protecting the public against a possible combination of office-holding interests and log-rolling Legislatures in an effort to raise their salaries. With the limitation of power laid upon the law-making body as if to prevent such influences and abuses, it would seem that the Legislature in framing this law had in mind the incumbent of the office rather than the office itself.' (Emphasis mine.)

"* * * * * * * * *"

The conclusion of Opinion No. 5791, supra, is in accord with Ohio cases generally. It is clear that Ohio has taken the position that one who fills a vacancy is entitled to an increase in salary authorized after the beginning of the original term to which he succeeds but before his appointment to fill the vacancy, because the restriction on an increase in salary during term is personal to the incumbent of the office, and does not apply to his successor, except when the statute granting the increase specifically applies to a term of office as distinguished from the incumbent of the office. The same must also be true in regard to one who is elected to fill an unexpired term under these circumstances.

No restriction of the kind heretofore noted appears in Section 1901.11, supra. It is, therefore, my opinion, and you are hereby advised, that one who is appointed to serve until the next general election following the resignation of a judge of a municipal court, and one who is elected at such election to serve for the remainder of the unexpired term, are entitled to a salary increase authorized by Section 1901.11, Revised Code, when such increase is authorized during the existing term of a judge who has resigned, but prior to the appointment or election of his successor to serve for the remainder of the unexpired term.

OPINION NO. 69-150

Syllabus:

A classified position in a county engineer's office is incompatible with an elected membership in a village board of trustees of public affairs and such positions may not be held concurrently by the same person.

To: Gene Henry, Geauga County Pros. Atty., Chardon, Ohio
By: Paul W. Brown, Attorney General, November 17, 1969

Your request for my opinion reads as follows:

"An employee of the Geauga County Sanitary Engineer's office is a candidate for the Board of Public Affairs of Chardon Village. Said em-

ployee is in charge of waste and water treatment plants under the county's jurisdiction, and further, under the present month to month agreement between the Village and the County, the County Sanitary Engineer's office makes the necessary tests required by the State regarding the Village of Chardon' Sanitary Sewer Plant. Said employee has an active part in making such tests and recommendations.

"My question is: 'Is it compatible for such an employee to hold such office on Board of Public Affairs, Chardon Village?'"

At the outset I note that your opinion request mentions factors that are pertinent to the common law rule on incompatibility, i.e., offices are considered incompatible when one is subordinate to, or in any way a check upon, the other.

In a recent opinion, Opinion No. 69-115, Opinions of the Attorney General for 1969, I was concerned with the compatibility of the office of county recorder with the office of county veterans' service officer, and in that Opinion I called attention to the fact that public offices are subject to two types of incompatibility, statutory and common law. Statutory incompatibility arises when some provision of law establishes criteria for one of the jobs that cannot be met by the person if he holds the other job at the same time. If your situation fails to pass the statutory test, the common law test would be immaterial.

Section 10, Article XV, Constitution of Ohio, states:

"Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision."

Section 143.08, Revised Code, provides in part as follows:

"The civil service of the state and the several counties * * * shall be divided into the unclassified service and the classified service.

"* * * * * * * * *

"(B) The classified service shall comprise all persons in the employee of the state and the several counties * * * not specifically included in the unclassified service * * *."

You have advised me that the employee in question works in the office of the county engineer and is considered to be in the unclassified service.

The Court of Appeals, Franklin County, stated in Henslee v. State Personnel Board of Review, 44 O.O. 2d, 206 (1968), that the mere fact that a state employee was carried on the payroll as in the unclassified service did not establish that classification.

I fail to find employees of a county engineer listed in the unclassified civil service under Section 143.08, Revised Code.

If the employee in question were exempt from the classified service, the exemption would have to be based on the provisions of subparagraph (9) of the statute and as the court noted in Henslee, supra, the exemptions of job positions of the types described in subparagraph (9) are not self-executing, but must be obtained in accordance with procedures prescribed by the Director of State Personnel.

Henslee was concerned with a state employee, but Section 143.08, supra, pertains equally to county employees and the Department of State Personnel advises that their regulations apply equally to county employees.

In the absence of evidence supporting an exemption from the classified service, I must conclude that the employee in question occupies a classified service position.

Section 735.28, Revised Code, reads as follows:

> "In each village in which a water works, electric light plant, artificial or natural gas plant, or other similar public utility is situated, or when the legislative authority thereof orders a water works, electric light plant, natural or artificial gas plant, or other similar public utility, to be constructed, or to be leased or purchased from any individual, company, or corporation, or when such legislative authority determines to establish a schedule of rates or charges of rents for use of the sewerage system and sewage pumping, treatment, and disposal works of the village, such legislative authority shall establish a board of trustees of public affairs, which shall consist of three members who are residents of the village.
>
> "In the year 1967 one member shall be elected for a term of two years. In the year 1967 and quadrennially thereafter, two members of the board of trustees of public affairs shall be elected for a term of four years; in the year 1969 and quadrennially thereafter, one member of the board of trustees of public affairs shall be elected for a term of four years; and thereafter all members shall have four year terms, except that members of boards of trustees of public affairs established after July 26, 1967 shall be elected as follows: at the next regular election of municipal officials occurring more than one hundred days after the appointment of the first members of such board as provided in this section, one member shall be elected for a term of two years and two members shall be elected for terms of four years each; and thereafter all such members shall be elected for terms of four years.
>
> "When the legislative authority establishes such board, the mayor shall appoint the members thereof, subject to the confirmation of the legislative authority. The successors of such appointed members shall be elected at the next regular elec-

tion of municipal officers held in the village which occurs more than one hundred days after the appointment.

"In case of a vacancy in such board from death, resignation, or otherwise, it shall be filled for the unexpired term by appointment by the mayor, subject to confirmation by the legislative authority.

"The board shall organize by electing one of its members president. Unless the office of clerk of the board has been concolidated with the office of clerk of the village, as authorized by section 733.28 of the Revised Code, it may elect a clerk, who shall be known as the clerk of the board of trustees of public affairs."

Section 735.29, Revised Code, states in pertinent part:

"The board of trustees of public affairs, appointed under section 735.28 of the Revised Code shall manage, conduct, and control the water works, electric light plants, artificial or natural gas plants, or other similar public utilities, furnish supplies of water, electricity, or gas, collect all water, electric, and gas rents, and appoint necessary officers, employees, and agents.

"* * * * * * * * *"

Section 143.41, Revised Code, provides in part as follows:

"No officer or employee in the classified service of the state, the several counties * * * shall directly or indirectly, orally or by letter solicit or receive, or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution * * * for any candidate for public office; * * * nor shall any officer or employee in the classified service of the state, the several counties * * * take part in politics other than to vote as he pleases and to express freely his political opinion."

One who becomes a candidate for, is elected to, or holds an elective public office such as that as a member of a village board of trustees of public affairs would be taking part in politics other than to vote as he pleases and to express his political opinion, and such person could not also hold an office or position under the classified service without being in violation of Section 143.41, supra.

It is, therefore, my opinion and you are so advised that a classified position in a county engineer's office is incompatible with an elected membership in a village board of trustees of public affairs and such positions may not be held concurrently by the same person.

OPINION NO. 69-151

Syllabus:

Personnel of the Ohio Youth Commission may be considered specially appointed police officers under Section 2923.01, Revised Code, and permitted to carry firearms when discharging their duties under newly enacted Section 5139.191, Revised Code.

To: Daniel W. Johnson, Director, Ohio Youth Commission, Columbus, Ohio
By: Paul W. Brown, Attorney General, November 20, 1969

I am in receipt of your request for my opinion in which you specifically inquire whether the Ohio Youth Commission may issue firearms to Commission personnel under newly enacted Section 5139.191, Revised Code, when such personnel are utilized in the apprehension of escapees from institutions under the jurisdiction of the Youth Commission.

Section 5139.191, Revised Code, provides as follows:

> "Any sheriff, deputy sheriff, constable, officer of state or local police, or employee of the youth commission shall apprehend any child who has escaped from an institution under the jurisdiction of the youth commission and return him. The written request of the superintendent of the institution from which the child has escaped shall be sufficient cause to authorize the apprehension and return of the child to the institution. Such request shall state the name and description of the child, that the child is under the jurisdiction of the youth commission, and that the superintendent has personal knowledge that the child has escaped. A child so apprehended may be confined in the detention home of the county in which he is apprehended until removed to the proper institution."

Ohio law enforcement personnel are permitted by the state to carry firearms in the performance of their duties under Section 2923.01, Revised Code, the concealed weapons statute.

Said section provides as follows:

> "No person shall carry a pistol, bowie knife, dirk, or other dangerous weapon concealed on or about his person. This section does not affect the right of sheriffs, regularly appointed police officers of municipal corporations, regularly elected constables, and special officers as provided by sections 311.07, 737.10, 1717.06, 1721.-14, and 2917.32 of the Revised Code, to go armed when on duty. Deputy sheriffs and specially appointed police officers, except as are appointed or called into service under said sections may go armed if they first give bond to this state, to be approved by the clerk of the court of common pleas, in the sum of one thousand dollars,

conditioned to save the public harmless by reason of any unlawful use of such weapons carried by them. Persons injured by such improper use may have recourse on said bond.

"Whoever violates this section shall be fined not more than five hundred dollars, or imprisoned in the county jail or workhouse not more than one year or both.

"Whoever violates this section, having previously been convicted of or pleaded guilty to the commission of carrying a concealed weapon or of any felony contained in sections 2901.01 to 2901.06, inclusive, 2901.08 to 2901.13, inclusive, 2901.19 to 2901.34, inclusive, 2905.01, 2905.02, 2905.031 [2905.03.1], 2905.041 [2905.04.1], 2907.02 to 2907.21, inclusive, and section 3719.20 of the Revised Code, shall be imprisoned not less than three nor more than ten years."

I am aware that this Section has been amended by Amended House Bill No. 288 and that the amended act is effective November 25, 1969. However, the changes in the act in no way affect the decision or reasoning of this opinion.

Manifestly, Ohio Youth Commission employees are not included in the first provision of Section 2923.01, supra. Therefore, any exception of Youth Commission employees from the proscription of Section 2923.01, supra, must arise by force of the second proviso contained therein which permits "deputy sheriffs and specially appointed police officers" to be armed if they first give bond to the state.

My predecessors in office have been called upon on a number of occasions to determine what constitutes a "specially appointed police officer" under the concealed weapons statute.

In Opinion No. 471, Opinions of the Attorney General for 1913, it was held that railway policemen appointed by the governor were "special police officers" under the second proviso of the concealed weapons statute because they possessed and exercised the powers of municipal policemen while discharging their duties. This Opinion was reaffirmed by Opinion No. 723, Opinions of the Attorney General for 1915, and Opinion No. 4444, Opinions of the Attorney General for 1935.

Likewise it has been held that a probation officer of the juvenile court, deputy game warden, dog warden, and game protectors are specially appointed police officers within the meaning of the concealed weapons statute and may be permitted to carry firearms in the discharge of their official duties. Opinion No. 496, Opinions of the Attorney General for 1913; Opinion No. 884, Opinions of the Attorney General for 1915; Opinion No. 1008, Opinions of the Attorney General for 1933; and Opinion No. 2074, Opinions of the Attorney General for 1950.

My predecessors in office observed in these opinions that the individuals involved were charged with the duty to enforce the laws of Ohio pertaining to their departments, and in order to do so, each was specifically authorized by the General Assembly to exercise certain police functions and duties by statute.

Given these facts, my predecessors reasoned that the General Assembly having assigned various police functions to these individuals, intended that one called upon to discharge these functions be accorded the same exceptions granted police officers under Section 2923.01, supra. By the use of such reasoning, these individuals were determined to be "specially appointed police officers" under Section 2923.01, supra, and accordingly permitted to carry firearms when acting within the scope of their statutory duties.

This same rationale was utilized in Opinion No. 66-184, Opinions of the Attorney General for 1966, which found a probation officer of the court of common pleas authorized to carry firearms in situations when they were accorded by statute the duty, along with other law enforcement officers, to arrest parole violators.

Shifting to your specific inquiry, newly enacted Section 5139.191, supra, directs any sheriff, deputy sheriff, constable, state or local police officer or employee of the Youth Commission to apprehend any escapee from an institution under the jurisdiction of the Youth Commission.

Manifestly, the General Assembly has seen fit to direct Youth Commission employees to perform certain police functions concurrently with regular law enforcement personnel.

Combining the reasoning of the previously cited Opinions of the Attorney General and my conclusion that the legislature intended that state employees engaged in hazardous police work, concurrently with regular police officials, be suitably prepared to perform their statutory duties effectively and safely, I find that Ohio Youth Commission personnel so designated by the Youth Commission may be considered as specially appointed police officers under Section 2923.01, supra, and entitled to carry firearms when discharging their duties under Section 5139.191, supra.

Accordingly, it is my opinion and you are hereby advised that personnel of the Ohio Youth Commission may be considered specially appointed police officers under Section 2923.01, Revised Code, and permitted to carry firearms when discharging their duties under newly enacted Section 5139.191, Revised Code.

OPINION NO. 69-153

Syllabus:

Sections 325.01 and 325.17, Revised Code, require common pleas judges, prosecuting attorneys and county commissioners to be paid biweekly. Since there is no statutory authority specifying when the employees of these officers shall be paid, it is, therefore, such officers' sole responsibility to voucher their salaries or wages for payment at reasonable intervals.

To: Bernard W. Freeman, Huron County Pros. Atty., Norwalk, Ohio
By: Paul W. Brown, Attorney General, November 21, 1969

Your request for my opinion reads as follows:

> "Section 325.17 of the Revised Code establishes biweekly pay for County employees, effective on November 14, 1969. In it, it refers to the officers mentioned in Section 325.27 as the ones who would be paid biweekly. The officers listed in 325.27 are the employees of the Auditor, Treasurer, Probate Judge, Sheriff, Clerk of Courts, Engineer and Recorder. I have been asked to get your opinion as to the method of paying employees of the Prosecuting Attorney, Common Pleas Court and County Commissioners. I assume that they would be on a semimonthly basis. I further assume that all elected officials would be paid on a semimonthly basis. Therefore my question is this:
>
> "Do the elected County officials and employees of the County Commissioners, County Prosecutor and Common Pleas Judge still remain on a semimonthly payroll basis?"

The pertinent part of Section 325.17, Revised Code, as it became effective November 14, 1969, reads as follows:

> "The officers mentioned in section 325.27 of the Revised Code may appoint and employ the necessary deputies, assistants, clerks, bookkeepers, or other employees for their respective offices, fix the compensation of such employees and discharge them, and shall file certificates of such action with the county auditor. Such compensation shall not exceed, in the aggregate, for each office, the amount fixed by the board of county commissioners for such office. When so fixed, the compensation of each such deputy, assistant, bookkeeper, clerk, and other employee shall be paid biweekly from the county treasury, upon the warrant of the auditor.* * *"

The officers mentioned in Section 325.27, Revised Code, are the county auditor, county treasurer, probate judge, sheriff, clerk of the court of common pleas, county engineer and county recorder as you stated in your request.

Your last assumption is incorrect. Section 325.01, Revised Code, as amended in 1965, now provides that the officials named therein be paid in the same manner as county employees are required to be paid by Section 325.17, Revised Code. It reads as follows:

> "Each county auditor, county treasurer, clerk of the court of common pleas, sheriff, county recorder, county commissioner, prosecuting attorney, and coroner shall receive, out of the general county fund, the annual salary provided by sections 325.03 to 325.-11, inclusive, and 325.15 of the Revised Code, payable in the same manner as provided for county employees in section 325.17 of the Revised Code."

Before amendment, Section 325.17, supra, permitted the board of county commissioners, at their discretion, to require payment to employees of officials mentioned in Section 325.27, Revised

Code, either semimonthly or biweekly. The board of county commissioners is no longer allowed a discretionary choice in the matter.

Looking to the authority to hire employees, the county auditor has the power granted in Section 319.05, Revised Code, to employ one or more deputies, but there is no provision for time for payment of salary. The same power is granted to the sheriff, treasurer, and recorder in Sections 311.04, 321.04, and 317.05, Revised Code, respectively. The county engineer is empowered to pay employees by Section 315.21, Revised Code, but nothing is said about payroll periods.

There is no statutory provision specifying payroll periods for employees of the county offices of which you inquire. The responsibility to employ personnel carries with it a like responsibility, by implication, to voucher the salaries or wages of such personnel for payment.

Therefore, it is my opinion and you are hereby advised that Sections 325.01 and 325.17, Revised Code, require common pleas judges, prosecuting attorneys and county commissioners to be paid biweekly. You are also advised that there is no statutory authority specifying when the employees of these officers shall be paid. It is, therefore, such officers' sole responsibility to voucher their salaries or wages for payment at reasonable intervals.

OPINION NO. 69-157

Syllabus:

Under the provisions of Section 169.05, Revised Code, a bank has the option of determining whether or not the balance of the unclaimed funds reported to the Director of Commerce shall be retained by it as a deposit in the name of the mortgage insurance fund. Once that option is exercised, however, the State of Ohio, on behalf of the mortgage insurance fund, as owner, has the right and prerogative of designating the form and classification in which the deposit shall be carried, as these forms and classifications are offered to the public at large, and to receive the same rate of interest that is normally paid on the selected form of deposit.

To: J. Gordon Peltier, Director, Dept. of Commerce, Columbus, Ohio
By: Paul W. Brown, Attorney General, November 24, 1969

You have requested my opinion on the question of what interest rate a bank should pay on deposits retained by it under the provisions of Section 169.05, Revised Code. Chapter 169 of the Revised Code, comprises the Unclaimed Funds Act of Ohio. Section 169.05, supra, provides that within sixty days after making its report of unclaimed funds to the Director of Commerce, each bank shall pay over to the Director ten percent for the use of the rotary fund and the balance of ninety percent, less certain specified deductions, shall be dealt with under one of several ways at the option of the bank. The statutory option in which we are particularly interested is the one permitting the bank to retain the balance as one of

its deposits to the credit of the mortgage insurance fund created under Section 122.561, Revised Code.

Your question presented reads as follows:

> "Since most banks have several forms of deposits with varying interest rates, once the financial organization has determined to retain these funds, does the right exist on the part of the State of Ohio, on behalf of the mortgage insurance fund to designate which type and/or classification of accounts offered on similar terms to the public by that organization, shall be used?"

Section 169.05 (A), Revised Code, reads in pertinent part as follows:

> "* * * The remainder of such aggregate amount of unclaimed funds * * * shall, at the option of the holder, be retained by * * * a financial organization * * * such funds to be in an income-bearing account to the credit of the mortgage insurance fund * * *."

Section 169.05 (C), Revised Code, reads in pertinent part as follows:

> "Earnings on the accounts in financial organizations to the credit of the mortgage insurance fund shall at the option of such a financial organization be credited to such accounts at such times and at such rates as earnings are paid on other accounts of the same classification held in the financial organization or paid to the director of commerce. * * *"

Thus, the statutes expressly provide that the deposits retained by a bank shall be in an income-bearing account and that the rate of interest shall be at the same rate as earnings are paid on other accounts of the same classification. You have indicated in your letter that banks normally pay different rates of interest on different classes of accounts, depending upon the amount invested, the form of the deposit, and the duration, if in the form of a certificate of deposit. You ask specifically whether Ohio, on behalf of the mortgage insurance fund, has the right and prerogative of designating the classification of the deposit in which the funds shall be held by the bank.

The statute provides that the income bearing account shall be to the credit of the mortgage insurance fund. Thus, the State of Ohio, on behalf of the mortgage insurance fund, becomes in fact the owner of the account. One of the incidents of ownership is the right to determine the form of the deposit in which the funds are invested. The bank offers a selection of the forms of deposits it is prepared to issue to each prospective individual depositor who is then free to select the

one he wants. There is no reason why the State of Ohio, once the account is transferred to the name of the mortgage insurance fund, should not be entitled to that same privilege of selection.

I am of the opinion and you are, therefore, advised that under the provisions of Section 169.05, Revised Code, the bank has the option of determining whether or not the balance of the unclaimed funds reported to the Director of Commerce shall be retained by it as a deposit in the name of the mortgage insurance fund. Once that option is exercised, however, the State of Ohio, on behalf of the mortgage insurance fund, as owner, has the right and prerogative of designating the form and classification in which the deposit shall be carried, as these forms and classifications are offered to the public at large, and to receive the same rate of interest that is normally paid on the selected form of deposit.

OPINION NO. 69-158

Syllabus:

A board of elections is not required to request a board of county commissioners for a transfer of funds within its appropriation from one class to another class of expenditures.

To: Everett Burton, Scioto County Pros. Atty., Portsmouth, Ohio
By: Paul W. Brown, Attorney General, November 25, 1969

Your request for my opinion is as follows:

> "The Board of Commissioners of Scioto County has refused a request of the Scioto County Board of Elections to transfer funds within its appropriation. The request was to transfer $700.00 from A3A2 (Salary) to A3A4 (Equipment) to cover the cost of repairs to the locks and covers of forty-two precinct registration binders. The Board of Elections has not supplied the Board of County Commissioners with any estimates of the cost of such repairs.
>
> "The position of the Board of Elections is that the transfer is mandatory under Section 3501.17 of the Revised Code and that it is not required to furnish an estimate of the cost of repairs.
>
> "The Board of Commissioners has advised the Board of Elections to proceed with the repairs and that the funds necessary to pay the cost will be transferred when the amount is determined. Their position is that this complies with said section.
>
> "I respectfully request your opinion as to whether or not the request by the Board of Elections to the Board of County Commissioners for a transfer of funds as above set forth is mandatory."

My research reveals that there has been nothing intervening which vitiates the reasoning and the conclusions reached by one of my predecessors in Opinion No. 1961, Opinions of the Attorney General for 1930, page 887. That opinion dealt with Section 4785.20, General Code, which has been succeeded by Section 3501.17, Revised Code, which you reference. The two sections contain substantially the same provisions. At page 891 of the cited opinion, the comments were made:

> "In analyzing the section last quoted, it will appear that such election expenses are paid in the same manner that other county expenses are paid, upon vouchers of the board certified to by the chairman or acting chairman and the clerk or acting clerk upon warrants of the auditor * * *. It is clear that such payments are not required to be submitted to the county commissioners, excepting, of course, the county commissioners are required to make appropriations."

Branch 3 of the syllabus of the foregoing opinion reads:

> "When the election board orders necessary supplies or makes proper contracts for the printing of the ballots, payments therefor shall be made upon vouchers of the board certified to by its chairman or acting chairman and the clerk or deputy clerk upon warrants of the auditor."

Likewise, the syllabus in Opinion No. 4023, Opinions of the Attorney General for 1932, page 154, states:

> "County commissioners do not have authority to arbitrarily change the amounts requested and submitted in the budget of the board of elections for the necessary and proper expenses of the board and substitute their own arbitrary figures in lieu of the amounts requested."

The facts which gave rise to the foregoing opinion were that the commissioners had made certain changes in the request of the board of elections which request was "classified in accordance with their financial needs along various lines." "In the course of time certain funds were exhausted and the county commissioners were asked to transfer funds from the surplus in the fund allocated to precinct judges and clerks, and place same in part to the credit of the fund for office supplies."

Also, the question was posed, "If the county commissioners have the authority lodged within themselves, or in conjunction with the county auditor, is it their duty, upon request of the board of elections, to transfer money from a fund provided for a certain purpose wherein there may be a surplus to a fund provided for a different purpose?" Unfortunately, my predecessor considered that an answer to this question was unnecessary in view of the above syllabus. However, in commenting on Section 4785.20, General Code (Section 3501.17, Revised Code), he pointed out, "Here again the legislature has used the word 'shall' in expressly giving to the boards of elections the right to fix the amount of revenue they are to receive from the subdivision. This right is only limited as to the amount being sufficient to provide for the necessary and proper expenses of the board." With such right im-

posed in the boards of elections there would appear to be no reason for requiring a board to return to the commissioners for transfers from one item to another of its appropriation.

It is therefore, my opinion and you are hereby advised that a board of elections is not required to request a board of county commissioners for a transfer of funds within its appropriation from one class to another class of expenditures.

OPINION NO. 69-159

Syllabus:

The General Assembly intended the Prosecuting Attorney to determine, in his discretion, the expenditures to be made from the fund established pursuant to Section 325.12, Revised Code, and that his discretion is limited only by the purposes for which such fund may be expended, as set forth in such section.

To: Thomas C. Hanes, Darke County Pros. Atty., Greenville, Ohio
By: Paul W. Brown, Attorney General, December 8, 1969

Your request asks my opinion as to whether or not you, as Prosecuting Attorney, can purchase closed circuit T.V. for utilization in taking statements from accused persons so as to have an exact record of such person having been advised lawfully, utilizing your "Furtherance of Justice Fund" to provide the cost of such equipment? The fund with which your request is concerned is provided for by Section 325.12, Revised Code, which reads as follows:

> "There shall be allowed annually to the prosecuting attorney, in addition to his salary and to the allowance provided for by section 309.06 of the Revised Code, an amount equal to one half of the official salary, to provide for expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice. Upon the order of the prosecuting attorney, the county auditor shall draw his warrant on the county treasurer, payable to the prosecuting attorney or such other person as the order designates, for such amount as the order requires, not exceeding the amount provided by this section to be paid out of the general fund of the county.
>
> "Nothing shall be paid under this section until the prosecuting attorney has given bond to the state in a sum, not less than his official salary, to be fixed by the court of common pleas or the probate court, with sureties to be approved by either of said courts, and such bond shall be conditioned that he will faithfully discharge all the duties enjoined upon him, and pay over all moneys received by him in his official capacity. Such bond, with the approval of such court of the amount thereof and sureties thereon, and his oath of office enclosed therewith shall be deposited with the county treasurer.

> "The prosecuting attorney shall, annually, before the first Monday of January, file with the auditor an itemized statement, verified by him as to the manner in which such fund has been expended during the current year, and shall if any part of such fund remains in his hands unexpended, forthwith pay such remainder into the county treasury."

On numerous occasions in the past, my predecessors have been asked whether or not certain expendutures could be made from the Prosecuting Attorney's Furtherance of Justice Fund. Opinions were accordingly rendered with respect to the specific expenditures in question. Upon careful review of such opinions and of the statute itself, I am not persuaded that it is the proper function of this office to advise as to whether or not specific expenditures can be made from such fund. The General Assembly, in enacting Section 325.12, supra, clearly established the purposes for which such fund might be used, i.e., "to provide for expenses which may be incurred by him [prosecuting attorney] in the performance of his official duties and in the furtherance of justice." It is my opinion that the General Assembly intended discretion to be exercised by the prosecuting attorney in the expenditure of this fund limited only by the purposes for which the fund might be expended, as set forth in Section 325.12, supra.

Section 325.12, supra, requires payment from the fund upon the order of the prosecuting attorney limited only by the amount of the fund as provided for by this section. In addition, the statute requires that the prosecuting attorney post bond before any amount is paid under this section. Finally, an annual itemized statement must be verified by the prosecuting attorney, filed by him with the auditor and he must pay over the unexpended balance in the Furtherance of Justice Fund at the end of the year to the county treasurer. It seems quite clear to me that the legislative scheme was to provide a fund, with adequate safeguards to the county in the form of bond for faithful performance and annual accountings, with the determination as to whether or not a given expenditure is consistent with the purposes of the fund to be made by the appropriate prosecuting attorney. A continuation of past practices of this office ruling on specific requests can only result in the placing of artificial restrictions upon the use of the fund which were not intended by the General Assembly. There is simply no way that the Attorney General can put himself in the position of any given prosecuting attorney in making the determination as to whether or not a given expenditure would constitute "expenses which may be incurred by him in the performance of his official duties and in the furtherance of justice."

Support for this conclusion is found in the case of State, ex rel. v. Kearns, 70 Ohio L. Abs. 534 (CP). As the Court stated at page 536 of that opinion:

> "The spirit of the law is that the prosecutor shall have the utmost freedom in the use of such funds for the purposes authorized by law."

This case was ultimately affirmed by the Ohio Supreme Court at 165 Ohio St. 573 (1956).

The Common Pleas Court had earlier held, in quashing the original indictment in the Kearns case, at 70 Ohio L. Abs. 71,73, as

follows:

> "The examiner of public offices may not be permitted to question the judgment of the prosecutor in the spending of such funds, but this does not justify the use of such funds for his own needs and pleasure."

Therefore, it is my opinion and you are hereby advised that the General Assembly intended the Prosecuting Attorney to determine, in his discretion, the expenditures to be made from the fund established pursuant to Section 325.12, Revised Code, and that his discretion is limited only by the purposes for which such fund may be expended, as set forth in such action.

OPINION NO. 69-163

Syllabus:

1. A board of county commissioners is required, to the extent that funds are available, by Section 325.07, Revised Code, to make a monthly allowance to the sheriff for all expenses of maintaining transportation facilities necessary to the proper conduct of his official duties. (Syllabus No. 1 of Opinion No. 3039, Opinions of the Attorney General for 1958, approved and followed)

2. The board of county commissioners cannot allow less than fifty cents per meal where during the year next preceding the daily average of persons confined or prisoners did not exceed twenty in number.

3. The allowance for prisoners' meals does not include the salary of a cook appointed pursuant to Section 341.20, Revised Code.

4. There is no provision for the board of county commissioners on its own initiative to contract out to a private party the duty of feeding the prisoners in the county jail.

5. Food purchases made by the sheriff are subject to the approval of the board of county commissioners but only after the monthly account statement has been submitted to them.

To: William D. Kennedy, Lawrence County Pros. Atty., Ironton, Ohio
By: Paul W. Brown, Attorney General, December 23, 1969

I have before me your request for my opinion on the following series of questions:

> "No.1: Is the Board of County Commissioners required to make allowances or pay all bills for necessary expenses incurred or expended by the Sheriff of the County, in the operation of the cruisers of the Sheriff's Department patrolling the county in the administration of the duties of

his office; said expenses being for gas, oil, tires and repairs when the Sheriff has already exhausted the allowances made in the budget for that office; said budget being prepared before the present Sheriff's term in office began?

"No.2: May the Board of County Commissioners limit the allowances or actual costs reimbursed to less than 50¢ per meal, made to the Sheriff of the County, for feeding the prisoners held in the county jail, when the average number of prisoners per day for the preceding year was sixteen (16) and the average number of prisoners per day so far this year is eighteen (18) and the Sheriff has exhausted the money allowed for this purpose in the budget prepared before the present Sheriff took office?

"No.3: In 311.20 O.R.C., does the allowance for prisoners' meals include the salary of the cook hired by the Sheriff to feed the said prisoners under § 341.20 O.R.C.?

"No.4: May the Board of County Commissioners on their own initiative, contract out to a private party the duty of feeding the prisoners in the county jail, in lieu of making any allowances to the Sheriff of the county for feeding said prisoners, without the consent of the Sheriff?

"No.5: May the Board of County Commissioners restrict the purchase of food by the Sheriff, for the purpose of feeding the prisoners held in county jail to such purchases as those met with the express approval of the commissioners; said approval to be made on each purchase?"

The answer to your first question is found in Syllabus No. 1 of Opinion No. 3039, Opinions of the Attorney General for 1958, page 676:

"1. A board of county commissioners is required, to the extent that funds are available, by Section 325.07, Revised Code, to make a monthly allowance to the sheriff for all expenses of maintaining transportation facilities necessary to the proper conduct of his official duties."

Your second question is answered by Section 311.20, Revised Code, which states in pertinent part:

"* * * In counties where the daily average number of prisoners or other persons confined in the county jail during the year next preceding, as shown by the statistics compiled by the sheriff under sections 341.02 and 341.03 of the Revised Code, did not exceed twenty in number, the board shall allow the sheriff not less than fifty cents per meal. * * *" (Emphasis added)

Based upon the preceding statutory authority, the answer to your second question is in the negative. The board cannot allow less than fifty cents per meal where during the year next pre-

ceding the daily average of persons confined or prisoners did not exceed twenty in number.

Question No. 3 requires an interpretation of the two sections cited in your question. Section 341.20, Revised Code, states in pertinent part:

> "* * * * * * * * *
>
> "The sheriff shall appoint a cook who shall have charge over the preparation of food for the feeding of prisoners and other persons placed in the sheriff's charge. * * * The compensation of the cook shall be payable semi-monthly from the general fund of such county, upon the warrant of the county auditor."

The pertinent part of Section 311.20, Revised Code, reads as follows:

> "* * * * * * * * *
>
> "On the fifth day of each month the sheriff shall render to the board an itemized and accurate account, with all bills attached, showing the actual cost of keeping and feeding prisoners and other persons placed in his charge * * *. Such bills, when approved by the board, shall be paid out of the county treasury on the warrant of the county auditor. * * *"

To be shown in the accounting, required by Section 311.20, supra, there would have to be submitted a bill for the cook's salary. However, Section 341.20, supra, states that the compensation of the cook shall be payable from the general fund upon warrant of the county auditor. The cook's salary need not be approved each month by the board. Therefore, it is my opinion and you are so advised that the allowance for prisoners' meals does not include the salary of a cook appointed pursuant to Section 341.20, supra.

Your fourth question involves Section 341.06, Revised Code, which states in pertinent part:

> "The court of common pleas shall prescribe rules for the regulation and government of the county jail upon the following subjects:
>
> "* * * * * * * * *
>
> "(C) Food and its preparation;
>
> "* * * * * * * * *"

Section 341.19, Revised Code, states in part:

"The board of county commissioners, at the expense of the county, shall provide:

"* * * * * * * * *

"(D) Suitable means for the preparation or purchase of food and the serving thereof;

"(E) Food for the prisoners and other persons placed in the sheriff's charge;

"* * * * * * * * *"

However, Section 341.20, Revised Code, states in part:

"* * * * * * * * *

"The sheriff shall appoint a cook who shall have charge over the preparation of food * * *."

Only the Common Pleas Court has the power to prescribe rules for the regulation of food and its preparation. It is the sheriff who appoints a cook who shall have charge over the preparation of food and the county commissioners provide suitable means for preparation or purchase of food and the serving thereof. Thus, it is my opinion and you are so advised that there is no provision for the board of county commissioners on its own initiative to contract out to a private party the duty of feeding the prisoners in the county jail.

Your fifth and last question is answered by Section 311.20, Revised Code, which plainly states in reference to the cost of feeding prisoners:

"* * * Such bills, when approved by the board, shall be paid out of the county treasury * * *."

There is no provision that expenses of the sheriff must be approved prior to the purchase. It is therefore my opinion and you are so advised:

1. A board of county commissioners is required, to the extent that funds are available, by Section 325.07, Revised Code, to make a monthly allowance to the sheriff for all expenses of maintaining transportation facilities necessary to the proper conduct of his official duties. (Syllabus No. 1 of Opinion No. 3039, Opinions of the Attorney General for 1958, approved and followed)

2. The board of county commissioners cannot allow less than fifty cents per meal where during the year next preceding the daily average of persons confined or prisoners did not exceed twenty in number.

3. The allowance for prisoners' meals does not include the salary of a cook appointed pursuant to Section 341.20, Revised Code.

4. There is no provision for the board of county commissioners on its own initiative to contract out to a private party the duty of feeding the prisoners in the county jail.

5. Food purchases made by the sheriff are subject to the approval of the board of county commissioners but only after the monthly account statement has been submitted to them.

OPINION NO. 69-164

Syllabus:

A "satisfactory affidavit", as the phrase is used in Section 143.29, Revised Code, as amended, requires a written or printed statement under oath administered by a notary public pursuant to Section 147.07, Revised Code, containing sufficient facts so that the appointing authority is satisfied that the use of sick leave is justified.

To: Roger Cloud, Auditor of State, Columbus, Ohio
By: Paul W. Brown, Attorney General, December 24, 1969

I have before me your request for my opinion which asks, in essence, what the requirements are for a "satisfactory affidavit" as used in Section 143.29, Revised Code.

Section 143.29, Revised Code, as amended by the 108th General Assembly, (Amended Substitute Senate Bill 297) reads in pertinent part:

> "The appointing authority for each employing unit shall require an employee to furnish a satisfactory affidavit to justify the use of sick leave."

The term "affidavit" is defined in Black's Law Dictionary, Fourth Edition, at page 80 as:

> "A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath."

Essentially the same definition is contained in 57 O. Jur. 2d, Words and Phrases, at page 34.

In Ohio, the authority to administer an oath for an affidavit to be used for purposes other than in judicial proceedings is solely and expressly conferred on notaries public by Section 147.07, Revised Code, which reads in pertinent part:

> "A notary public may, within the county for which he is appointed, or if commissioned for the whole state, throughout the state, administer oaths required or authorized by law. * * *"

Therefore, it is my opinion and you are advised that a "satisfactory affidavit", as the phrase is used in Section 143.29, Revised Code, as amended, requires a written or printed statement under oath administered by a notary public pursuant to Section 147.07, Revised Code, containing sufficient facts so that the appointing authority is satisfied that the use of sick leave is justified.

OPINION NO. 69-165

Syllabus:

The Zoning Board of Jefferson Township may not deny the application of the City of Galion for a permit to construct a water tower, such water tower being part of a public utility and within the purview of Section 519.21, Revised Code, and as such exempt from the regulations of the Township Zoning Act.

To: Robert L. Brown, Crawford County Pros. Atty., Bucyrus, Ohio
By: Paul W. Brown, Attorney General, December 24, 1969

Your request for my opinion asks the following question:

> "Can the Zoning Board of Jefferson Township properly deny the application of the City of Galion for a Permit to construct the water-tower, or is this a Public Utility within the purview of Section 519.21 of the Ohio Revised Code, and as such exempt from the regulations of the Township Zoning Act?"

Section 519.21, Revised Code, reads in pertinent part:

> "* * * * * * * * *
>
> "Such sections [519.02 to 519.25 inclusive, Revised Code] confer no power on any board of township trustees or board of zoning appeals in respect to the location, erection, construction, reconstruction, change, alteration, maintenance, removal, use, or enlargement of any buildings or structures of any public utility or railroad, whether publicly or privately owned, or the use of land by any public utility or railroad, for the operation of its business."

The question of whether a concern is a public utility is one of law and fact and can be determined by the nature of the operation. Motor Cargo, Inc. v. Board of Township Trustees, 52 Ohio Ops. 257, 117 N.E. 2d 224 (1953). There must be such a

devotion to public use that services and products are available to the public generally and indiscriminately. Southern Ohio Power Co. v. Public Utilities Commission, 110 Ohio St. 246, 143 N.E. 700 (1924). Hence, the term "public utility" implies service to the public, and the principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public. Motor Cargo, Inc. v. Board of Township Trustees, supra.

In the case of a municipality seeking application for a permit to construct a water tower, the question to be answered is whether this is a public utility within the purview of Section 519.21, Revised Code, and as such, exempt from the regulations of a township zoning act. Where a city operates a water supply system for the benefit of its citizens, it is clear that the water supply system would qualify as a public utility under the aforementioned definitions. The entire water system being a public utility and the water tower in question being an integral part of that system, it is my opinion that this structure is a part of a zoning utility.

Therefore, it is my opinion and you are accordingly advised that the Zoning Board of Jefferson Township may not deny the application of the City of Galion for a permit to construct a water tower, such water tower being part of a public utility and within the purview of Section 519.21, Revised Code, and as such exempt from the regulations of the Township Zoning Act.

OPINION NO. 69-166

Syllabus:

School districts which do not have a current tax levy of 17½ mills and thus do not qualify to receive state funds under the foundation program, Chapter 3317, Revised Code, must, nevertheless, provide a vocational education program pursuant to Section 3313.90, Revised Code.

To: Martin Essex, Supt. of Public Instruction, Columbus, Ohio
By: Paul W. Brown, Attorney General, December 30, 1969

I have before me your opinion request in which you ask whether a school district which does not have a current levy of at least 17½ mills as required to receive state funds under the foundation program, Chapter 3317, Revised Code, is compelled to establish and maintain a vocational education program pursuant to Section 3313.90, Revised Code, as amended by the 108th General Assembly.

In answering this question, I direct you to Opinion No. 67-063, Opinions of the Attorney General for 1967, which deals with the requirement of providing vocational education programs pursuant to Section 3313.90, Revised Code. In this

opinion, my predecessor said:

> "This statute places a mandatory duty upon each school district in the state of Ohio to provide a vocational education program. The Legislature has made no exceptions."

It should be noted that at the time Section 3313.90, supra, was enacted, the 17½-mill-levy requirement had already been enacted and the legislature made no exception for school districts that did not meet this requirement.

As to the amendment to Section 3313.90, supra, which was passed by the 108th General Assembly, while it established criteria and methods by which a vocational education program can be provided, it does not except school districts who have a current tax levy of less than 17½ mills from providing a vocational education program.

Therefore, it is my opinion and you are hereby advised that school districts which do not have a current tax levy of 17½ mills and thus do not qualify to receive state funds under the foundation program, Chapter 3317, Revised Code, must, nevertheless, provide a vocational education program pursuant to Section 3313.90, Revised Code.

OPINION NO. 69-167

Syllabus:

The office of township trustee and member of the board of a county health department are incompatible.

To: Roy H. Huffer, Jr., Pickaway County Pros. Atty., Circleville, Ohio
By: Paul W. Brown, Attorney General, December 31, 1969

Your request for my opinion reads, in part, as follows:

> "Can a duly elected, qualified and acting township trustee serve simultaneously as a member of the county board of health to run the general health district?"

Section 301.24, Revised Code, permits the electors of a county to establish, by charter provision, a county health department. If such health department is established, all other health districts are abolished and the county succeeds to all the rights and powers of the abolished districts.

The syllabus of Opinion No. 65-88, Opinions of the Attorney General for 1965, reads as follows:

> "The offices of township trustee and member of the board of health of a general health district are incompatible."

The rationale of Opinion No. 65-88, supra, was that funds nec-

essary to operate a general health district were derived in part from townships and that one serving in both positions might be influenced by the needs of one at the expense of the other. The same rationale is equally applicable here. The position of township trustee is incompatible with a member of the board of a county health department as well as a member of the board of a general health district.

It is, therefore, my opinion and you are accordingly advised that the office of township trustee and member of the board of a county health department are incompatible.