In answering your inquiries I have assumed that you had reference solely to such proceedings as have been initiated since January 2, 1928, the effective date of the Norton-Edwards act, to which the provisions of law contained therein would be applicable. As to those proceedings which were pending at the effective date of the Norton-Edwards act, a different rule would apply, in so far as those improvements are financed by the co-operation of the state and one of its subdivisions. It has been the uniform practice under the provisions of law applicable prior to the Norton-Edwards act to defer securing any certificate from the Director of Finance with respect to a state aid project until bids are ready to be opened. That is to say, no definite commitment of the state is made by way of contract at all until the award of the contract for the improvement itself. In view of the existing practice with reference to state aid projects, I do not feel there is any liability, in the sense that term is used in the appropriation act, until the contract for the improvement is actually executed. Accordingly, so far as proceedings initiated under the statutes in effect prior to the Norton-Edwards act are concerned, the contract must be actually executed prior to January 1, 1929, in order to prevent the lapse of the appropriations from which such improvements are to be made.

In this opinion I have indicated to you that Section 1200, General Code, now requires the execution of a formal contract between the State of Ohio and the board of county commissioners proposing to co-operate with the state. I have also indicated that, in my opinion, a certificate of the Director of Finance is necessary as to state funds from which the improvement is to be made. I feel that, in view of the express language of the statute, a definite contract should, in each instance, be executed by yourself and the county commissioners, which contract is separate and apart from the final resolution determining to proceed with the improvement which is adopted by the county commissioners.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2959.

BALLOT — ELECTION — MARKING DISCUSSED — DETERMINING VOTER'S INTENTION.

SYLLABUS:

Under the provisions of Section 5070, General Code, where a voter makes his cross mark in the circular space above his party ticket on which there is but one nominee for county commissioner when there are two county commissioners to be elected, and said voter makes a cross mark to the left of one of the nominees on another party ticket, the ballot should be counted for the candidate on his party ticket above which he has placed the cross mark in the circular space, and also for the candidate so marked on the other party ticket, the voter having evidenced a clear intention to vote for the two candidates for county commissioners.

COLUMBUS, OHIO, December 1, 1928.

HON. LOUIS H. KREITER, *Prosecuting Attorney, Bucyrus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication requesting my opinion as follows:

"I am herewith respectfully submitting a question which arose out of the recent election in this county for your opinion. The question is as follows:

At the election held on November 6, 1928, there appeared on the State Ballot in this County the names of N. E. G. and A. J. H. as candidates for county commissioners (of which there were to be two elected) on the Democratic ticket. These names appeared on the ballot in the order herein named. On the Republican ticket directly opposite the name of N. E. G. appeared the name of G. T. M., also a candidate for county commissioner.

When a ballot appears marked with a cross within the circle at the top of the Republican ticket and a cross before the name of one of the Democratic candidates for county commissioner and there appears no mark or erasure before the name of G. T. M., the Republican candidate for said office, how shall this ballot be counted as to the office of county commissioner?

Because of the extreme importance of this question and because of the limited time remaining before the ballots are to be burned I respectfully request that this matter be given your earliest possible attention."

Your inquiry involves the consideration of paragraphs 3, 4 and 9 of Section 5070, General Code, which provisions are as follows:

"The elector shall observe the following rules in marking his ballot:

3. When two or more persons for the same office are to be voted for in any precinct, as two or more representatives or other officers, and the names of several candidates therefor appear on each party ticket, grouped under the office for which they are all running, the elector who has marked a ticket in the circular space at its head, and marked one or more of a group of candidates for such office on another ticket or tickets, must in addition to marking the ticket in the circular space at its head, also make a cross mark before each one of the group of candidates for such office for whom he desires to vote on the ticket thus marked; or instead of marking the candidates for such office he desires to vote for on the ticket marked by him, he may erase the names of candidates for such office for whom he does not desire to vote on the ticket thus marked by him to the number of candidates for such office marked by him on other party tickets, in which case his vote shall be counted for the candidates for such office not erased.

4. If an elector who has thus marked a party ticket in the circular space at the head thereof, and has marked one or more candidates on another ticket or tickets for an office for which there is more than one candidate on his own party ticket, fails or neglects to indicate either by individual marks or by erasures which of the several candidates for the same office on his own party ticket he desires to vote for, then the vote shall be counted only for the candidate or candidates for that office that have the distinguishing mark before his or their names.

9. No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice."

In the case of *Bambach* vs. *Markley*, 9 O. C. C. (N. S.) 560, the Court in its opinion on page 567 said:

"It is a rule of construction laid down by all text-writers upon the subject of counting votes that the primary step is to determine if possible the intention of the voter, and where that can be done no vote should be thrown out. * * * The courts, therefore, have construed all those Australian ballot laws in a liberal manner. * * * In obedience to this rule of construction, if from an inspection, and from the evidence it is possible to determine the intention of the voter, you must do so."

Upon a careful consideration of the foregoing authorities and especially the provisions of Section 5070, supra, it is my opinion that the ballot marked as indicated in your letter, should be counted as a straight Republican ticket including the one candidate for county commissioner on the Republican ticket, G. T. M., there being but one nominated on the Republican ticket, and in addition thereto, the candidate on the Democratic ticket, N. E. G., before whose name the voter made the proper cross mark. The voter had the right to vote for two county commissioners but his own party ticket had but one nominee thereon. Since he had the right to vote for two candidates for county commissioner and there being but one nominee on his own party ticket, he evidenced a clear intention to vote for the one Democratic candidate before whom he placed a proper cross mark.

In specific answer to your question you are therefore advised that the ballot as marked should be counted for the Republican candidate for county commissioner and the Democratic candidate for county commissioner before whose name the cross mark was placed.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2960.

BOND ISSUE—SPECIAL ELECTION—NO AUTHORITY FOR SUBMISSION TO VOTERS TO REPLACE SCHOOL BUILDING CONDEMNED BY DEPARTMENT OF INDUSTRIAL RELATIONS WHEN CONDITION OF BUILDING COULD HAVE BEEN ANTICIPATED—CONSENT OF TAX COMMISSION IMMATERIAL.

SYLLABUS:

Where a school building has been condemned by the Department of Industrial Relations, and the use of same for school purposes is prohibited, the condition of such building having resulted from natural processes of its general use and decay, which condition could have readily been foreseen, the question of issuing bonds to repair or rebuild the same may not be submitted at a special election, notwithstanding the Tax Commission may consent thereto.

COLUMBUS, OHIO, December 1, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Your recent communication reads:

"We respectfully request you to furnish this department with your written opinion upon the following: