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SYLLABUS:

Notes of a township issued by a board of township trustees under authority of Section 505.37, Revised Code, may be offered for sale by the board to a bank by private negotiations with the bank, as such an offer would constitute an offer for sale on the open market within the purview of that section of law. Opinion No. 468, Opinions of the Attorney General for 1949, page 183, approved and followed; the first paragraph of the syllabus of Opinion No. 3385, Opinions of the Attorney General for 1962, issued on October 30, 1962, overruled.

Columbus, Ohio, January 9, 1963

Hon. Richard E. Bridwell, Prosecuting Attorney
Muskingum County, Zanesville, Ohio

Dear Sir:

In your request for my opinion, you note that the first paragraph of the syllabus of Opinion No. 3385, Opinions of the Attorney General for 1962, issued on October 30, 1962, is in conflict with the conclusion reached in Opinion No. 468, Opinions of the Attorney General for 1949, page 183. You then request that, in view of this conflict, I reconsider said first paragraph of the syllabus of the 1962 opinion.

Opinion No. 3385, *supra*, dealt with whether, in the construction of a building to house township fire equipment, the board of township trustees could issue notes to a bank under authority of Section 505.37, Revised Code, which section reads, in part, as follows:

“* * * 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 * * *.

“* * * * * * * *

“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 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 ex-

ceed 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. One fourth of *such purchase price* shall be paid at time of purchase, and the remainder of the purchase price shall be covered by notes maturing in two, three, and four years respectively. *Such notes shall be offered for sale on the open market or given to the vendor if no sale is made.*

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(Emphasis added)

In Opinion No. 3385, *supra*, I stated:

"Section 505.37, *supra*, allows a board of townships trustees to issue notes of the township to cover deferred payments due on purchases allowed under the section. One fourth of the purchase price must be paid at the time of purchase, and the remainder of the purchase price is covered by notes maturing in two, three, and four years respectively. Such notes are to be offered on the open market and, if no sale is made, are to be given to the vendor.

"Thus, if the township were to make a purchase costing \$30,000, the section requires a down payment of \$7,500, with notes to be issued for the \$22,500 balance. While a bank might be the best bidder on the open market for the notes, the township could not deal directly with the bank to the exclusion of others; and the bank would obviously never be the vendor."

The syllabus of Opinion No. 3385, *supra*, reads as follows:

"1. Notes issued under Section 505.37, Revised Code, by a board of township trustees, in the purchase of fire fighting equipment, buildings, and sites for buildings, must be offered for sale on the open market or given to the vendor if no sale is made, and the board may not deal directly with a bank, to the exclusion of others, in the issuance of such notes.

"2. A board of township trustees may not borrow money and issue a note therefor under Section 505.37 where the money is to be used to construct a building to house fire equipment, as the issuance of such notes is limited to cases where there is a 'purchase' made from a 'vendor'; and the construction of a building would necessarily entail some costs not involving purchases, and purchases involving more than one vendor."

In the 1948 opinion (Opinion No. 468, *supra*), the then attorney general considered the language of the predecessor to Section 505.37,

supra, former Section 3298-54, General Code, which predecessor section also contained the words "Such notes shall be offered for sale on the open market or given to the vendor if no sale is made." At page 186 of said Opinion No. 468, it is stated:

"The term 'open market' is one of frequent lay usage, yet the courts have used the term only in rare instances and the only definition of the term by a court, of which I am apprised, is one by the Supreme Court of Colorado, reported in the case of *Harvey v. City and County of Denver*, 18 P. (2nd) 321, 322, 92 Colo. 114, wherein the court say:

"It conveys the idea of buying at the dealer's price, what he offers, as distinguished from the idea of presenting to him a schedule of what you desire, in which he may or may not directly deal, and which he may be obliged to import, or manufacture to special design, and asking him at what price he can meet your requirements."

"It is my opinion that the term as applied in the section of the General Code under discussion would imply an offer of sale of the notes of the township by the trustees to a prospective purchaser or to prospective purchasers through normal commercial channels customarily used in the sale and exchange of negotiable instruments, at such price as they would be willing to accept or at the prevailing price for similar instruments if higher than the lowest acceptable price, under such circumstances that the trustees would be under no obligation to sell such notes at a price that would not be acceptable to them and the prospective buyer or buyers under no obligation to purchase the same at a greater price than they were willing to pay."

The syllabus of the 1948 opinion reads as follows:

"Notes of a township issued by township trustees for the purchase of firefighting equipment under authority of Section 3298-54 of the General Code of Ohio are not required to be advertised or offered for public sale but may be offered for sale by the trustees by private negotiations through normal commercial channels customarily used in the sale and exchange of negotiable instruments and sold at such price as may be acceptable to them or at the prevailing prices for similar instruments if higher than the lowest acceptable price."

The term "open market" is defined in Webster's Third New International Dictionary as "a freely competitive market in which any buyer or seller may trade and in which prices are determined by competition." Under this definition, and under the *Harvey* case, cited in the 1949 opinion, the open market for the sale of notes under Section 505.37, *supra*, would

consist of all possible buyers of such notes, and a board of township trustees which deals with a bank in the sale of such notes, would be dealing with a possible buyer in the "open market." It follows, therefore, that a board of township trustees is not required to request bids, or consult with several possible purchasers, in the sale of the notes, but may deal directly with one bank, to the exclusion of others, in the issuance of such notes. Accordingly, I find that I am in agreement with the conclusion of Opinion No. 468, *supra*, and I thus overrule the first paragraph of the syllabus of Opinion No. 3385, *supra*.

As to the above conclusion, however, I do not feel that this should alter the final conclusion of said Opinion No. 3385 regarding the authority of the township there in question to issue notes under the contemplated procedure. In that case, the township wished to *construct* a building, not buy one. Section 505.37, *supra*, in the first paragraph, authorizes the construction of a building; however, the language pertaining to the issuance of notes is found in the fourth paragraph, and only authorizes such issuance in the *purchase* of equipment, buildings, and sites. Further, the provisions as to the deferred payments and issuance of notes refer to "the purchase price" and "the vendor." In the construction of a building, a site would be purchased, but the hiring of a contractor, or employees, could hardly be termed a "purchase"; and if the township were to purchase materials for the building, such purchases would necessarily be made from various vendors, not one.

In summary, therefore, it is my opinion and you are advised that notes of a township issued by a board of township trustees under authority of Section 505.37, Revised Code, may be offered for sale by the board to a bank by private negotiations with the bank, as such an offer would constitute an offer for sale on the open market within the purview of that section of law. Opinion No. 468, Opinions of the Attorney General for 1949, page 183, approved and followed; the first paragraph of the syllabus of Opinion No. 3385, Opinions of the Attorney General for 1962, issued on October 30, 1962, overruled.

Respectfully,

MARK McELROY

Attorney General