

is destroyed as a result of any road improvement by the Department of Highways, such department must compensate such abutting property owner for the destruction of such approach or driveway or in lieu thereof cause same to be reconstructed at public expense.

3. Where an improvement of a road is undertaken by the Department of Highways which will render unsuitable the approaches of the owners of abutting real estate, provision for such approaches may be made in the plans for such road improvement, but if such provision is not made and the approaches are destroyed by reason of the improvement, the Department of Highways must either compensate the abutting property owner therefor or thereafter cause such approach to be reconstructed at public expense.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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SCHOOL DISTRICT TERRITORY—COUNTY BOARD OF EDUCATION—WHERE “PLAN OF ORGANIZATION” ADOPTED —YEAR 1938-1939—NO MANDATORY DUTY TO FORMULATE OR ADOPT SUCH FURTHER “PLAN”—WHEN PROVISIONS SECTION 4696 G. C. OPERATIVE FREE FROM LIMITATIONS OF “SCHOOL FOUNDATION LAW”—DUTY AND POWERS AS TO TRANSFER OF SCHOOL TERRITORY—VOTE.

*SYLLABUS:*

1. *After the adoption of a “plan of organization” of school district territory within a county in the year 1938 by a county board of education in pursuance of the provisions of Sections 7600-1 to 7600-8, both inclusive, of the General Code of Ohio, no mandatory duty rests upon a county board of education to formulate or adopt a further “plan of organization” as the term is used in the statutes mentioned, nor does there exist any authority for a county board of education to adopt such a plan of organization.*

2. *After the close of the organization year 1938-1939 for which period a “plan of organization” for school district territory within a county had been adopted by a county board of education in the year 1938 in pursuance of the provisions of Sections 7600-1 to 7600-8, both inclusive, of the General Code of Ohio, the provisions of Section 4696, General Code, are operative, free from any limitations contained in the provisions of the School Foundation Law.*

3. *After the expiration of the “plan of organization” of school district territory within a county adopted by a county board of education in*

1938 in pursuance of the provisions of Sections 7600-1 to 7600-8, both inclusive, of the General Code of Ohio, and in accordance with its mandatory duty as imposed by the aforesaid statutes, at the close of the organization year 1938-1939, it is the mandatory duty of a county board of education under Section 4696, General Code, when a petition is filed with it either after the close of said year 1938-1939 or within a reasonable time prior thereto, which petition meets all legal requirements and is signed by 75 per cent of the electors residing on territory of a school district of the county school district praying for a transfer of that territory to a contiguous city, exempted village or another county school district, to make the transfer as requested, provided of course, that the territory which it is sought to have transferred does not lie in a rural school district in which the schools have been centralized by a vote of the people and that the said territory sought to be transferred has not been transferred into the district where it then lies within a period of five years prior to the filing of said petition or if such is the case, the approval of the Director of Education to the transfer sought has been obtained.

COLUMBUS, OHIO, July 28, 1939.

HON. HUGH A. STALEY, *Prosecuting Attorney, Greenville, Ohio.*

DEAR SIR: This is to acknowledge receipt of your request for my opinion, which reads as follows:

"I would like your opinion upon the following propositions: Petitions signed by 75 per cent or more of the electors in territories contiguous to the territory of the Versailles Exempted Village School District, which territory is now a part of the county system were filed with the County Board of Education on June 1st and 15th respectively.

This territory sought to be transferred is now attached to the Ansonia Village School District, a part of the county system. The case of *State ex rel. Adsmund v. Board of Education of Williams County*, 135 O. S., 383, holds that when such a petition is filed on or before the date fixed for the annual consideration and adoption of a school organization plan, it is a mandatory duty of such County Board of Education by virtue of Section 4696 General Code, to then approve and transfer the territory.

Assuming that these petitions satisfy all the legal requirements, I should like your opinion as to whether or not they have been filed within the proper time, having in mind Section 7600-2 and Section 7600-7 of the General Code.

The Board of Education of the Ansonia Village School District formally and by resolution adopted, refused to agree to the transfer of this territory, having in mind Section 7600-5

of the General Code. I would like to know whether or not this section has any application when a petition is filed under Section 4696, General Code."

As you predicate your inquiry upon the assumption "that these petitions satisfy all the legal requirements", and nothing appears to the contrary, I assume for the purposes of this opinion that separate petitions have been filed for each school district from which it is sought to have territory transferred to the Versailles Exempted Village School District and that in none of these districts have their schools been centralized by vote of the people nor has any of the territory sought to be transferred been transferred into the district in which it now lies within a period of five years prior to the filing of the petitions or, if such is the case, the approval of the Director of Education has been obtained to the transfer now sought.

With these assumptions, the sole question presented is whether or not the filing with the county board of education between June 1, 1939, and June 13, 1939, of a petition signed by 75 per cent or more of the resident electors of certain described territory of a school district of the county school district under the jurisdiction of the said county board of education requesting a transfer of the said territory to a contiguous exempted village school district imposes upon the said county board of education a mandatory duty to make the transfer as so requested.

This question involves the consideration of a number of statutory provisions relating to transfers of school territory in the light of recent pronouncements of the Supreme Court of Ohio, on the subject.

The power and duty of a county board of education to transfer territory from a school district of the county school district to an exempted village school district, a city school district or another county school district, is fixed by Section 4696, of the General Code, which reads as follows:

"A county board of education may, upon a petition of a majority of the electors residing in the territory to be transferred, transfer a part of all of a school district of the county school district to an exempted village, city or county school district, the territory of which is contiguous thereto. Upon petition of seventy-five per cent of the electors in the territory proposed to be transferred the county board of education shall make such transfer. A county board of education may accept a transfer of territory from any such school district and annex same to a contiguous school district of the county school district.

In any case before such a transfer shall be complete (1) a resolution shall be passed by a majority vote of the full membership of the board of education of the city, exempted village

or county school district making or accepting the transfer as the case may be, (2) an equitable division of the funds and indebtedness between the districts involved shall be made by the county board of education, which in the case of territory transferred to a county school district shall mean the board of education of the county school district to which such territory is transferred, and (3) a map shall be filed with the county auditor of each county affected by the transfer.

When such transfer is complete the legal title of the school property shall become vested in the board of education of the school district to which such territory is transferred.

Any territory which has been transferred to another district, or any part of such territory, shall not be transferred out of the district to which it has been transferred during a period of five years from the date of the original transfer without the approval of the state director of education to such a transfer."

In 1935, the Legislature of Ohio adopted what is commonly referred to as the School Foundation Law, of which Sections 7600-1 to 7600-9, inclusive, of the General Code are a part. These last mentioned sections relate to organization of school territory.

Section 7600-1, General Code, provides that on or before September 1, 1935 and on or before the first days of April, 1936, 1937 and 1938, each county board of education in the state shall prepare a diagram or map of the county, showing the then location and position of all school districts therein, the location and character of highways and of streams and natural barriers within the county, the location of each school building and of each route over which school pupils are being transported to and from school, together with a statement of the size and condition of each school building and the number and ages of children attending school therein. It is also required by the provisions of this section that the diagram or map should show the recommendations of the county board of education as to detachments of territory from and attachments of territory to adjacent counties and city and exempted village school districts for purposes of economy, efficiency and convenience.

Section 7600-2, General Code, provides that after the survey and the preparation of the map spoken of in Section 7600-1, General Code, the county board of education shall prepare a new diagram or map prescribing transfers of territory within the county school districts, elimination of districts or creation of new school districts which, in its opinion, will provide a more economical and efficient system of county schools, and on or before June 1st annually, shall adopt the same as the plan of school district organization.

Sections 7600-3, 7600-4, 7600-5 and 7600-6, of the General Code, relate to the procedure to be followed by a county board of education

with respect to holding hearings, etc., in the adoption of the plan of organization spoken of in Section 7600-2, General Code, and the powers of the Director of Education with respect thereto if the county board of education fails to act or the affected boards of education fail to agree to the plan formulated by the county board.

Section 7600-7, General Code, provides that on or before the 15th day of October, 1935 and on or before the 1st day of July, 1936, 1937 and 1938, the county boards of education shall transmit the plan of organization as adopted, to the Director of Education, who shall approve the same with such modifications and additions thereto as he deems desirable upon following the procedure as fixed by the statute for the making of such additions and modifications. Said Section 7600-7, General Code, further provides:

“Upon approval of the director, such plan of organization within any county shall take effect upon a date to be fixed by the director, and thereafter no school district or parts thereof shall be transferred or the boundary lines thereof changed unless such transfer or change of boundary lines is in accordance with such adopted plan of organization.”

Section 7600-8, General Code, provides for the modification and changing of a “county plan of organization”, obviously meaning the county plan of organization provided for in the preceding sections.

Section 4692, General Code, which was last amended at approximately the same time and by the same legislature as were Sections 7600-1 to 7600-8, both inclusive, of the General Code, provides for the making of transfers of territory within a county school district upon the initiative of the county board of education subject to remonstrances by the electors residing in the territory proposed to be transferred.

Section 4736, General Code, provides for the creation of new school districts within a county school district, by a county board of education, in its discretion, limited only by remonstrances from the electors of the territory affected by the creation of such proposed new school district.

All the statutory provisions hereinbefore referred to, relate to the same subject matter, that is, to reorganization of school territory by transfers and changing of boundary lines. They should therefore be considered as being in *pari materia*. This was pointed out in an opinion of a former attorney general, being No. 5176 rendered under date of February 20, 1936, and addressed to the Director of Education. It was also pointed out in the said opinion that nowhere in the provisions of the School Foundation Law was there any machinery provided for the actual making of transfers of school territory. Neither the making nor the adoption of a “plan of organization” for a county school district effect any actual transfers of territory. The plan is merely tentative. To

accomplish the transfers to meet the plan resort must necessarily be had to the provisions of Sections 4692, 4696 and 4736, General Code, which set up the machinery for transferring territory. For this reason, if for no other, the said sections 4692, 4696 and 4736, General Code, should not be regarded as having been repealed by implication. The observations of the Attorney General in the opinion referred to above are in substantial agreement with those of the Supreme Court of Ohio, in the case of *State ex rel. Adsmond v. Board of Education of Williams County School District*, 135 O. S., 383, decided May 10, 1939, wherein the court considered and applied the provisions of Section 4696, General Code. In the course of the court's opinion in that case it is said on page 390:

“No one appearing before this court has been so bold as to claim that Section 4696, General Code, has been repealed by implication by Section 7600-7, General Code.”

It will be observed from an examination of the provisions of Sections 7600-1 et seq., General Code, that a mandatory duty is imposed upon county boards of education and the Director of Education to prepare and adopt “plans of organization” for school districts within each county in the state in the years 1935, 1936, 1937 and 1938. No duty is fixed and no authority is extended thereby to formulate or adopt a “plan of organization” for counties after the 1938 plan is adopted. Are we to take from this that the 1938 plan when adopted and approved by the Director of Education and a date fixed by him for it to become effective is to continue for all time, unless modified strictly in accordance with Section 7600-8, General Code, which provides that an existing plan of organization may be modified by going through the same procedure as is provided for the adoption of such plan in the first place? If that be true, what effect is to be given to the provisions of Section 7600-7, General Code, which provides that no transfers shall be made or boundary lines changed unless such transfer or change of boundary lines is in accordance with the plan of organization then in effect? Are the mandatory provisions of Section 4696, General Code, to be rendered ineffective unless a county board of education and the Director of Education choose to modify the 1938 plan so as to allow a transfer to be made as requested? If the county board would so choose to modify the plan and was in accord with the requested transfer, the transfer could lawfully be made by it upon a petition signed by 50% of the electors residing in the territory sought to be transferred and the mandatory provisions of the statute which is operative only when a 75% petition is filed, would be of no practical avail.

I believe it may be regarded as definitely settled that the provisions of the School Foundation Law with respect to organization of school territory within a county school district, and transfers of territory, and changes of boundary lines therein do not repeal the provisions of Section

4696, General Code, and go no further than to modify or limit their application during the time that the "plan of organization" is in effect. This is the conclusion reached by the Attorney General in the 1936 opinion, and is definitely the holding of the Supreme Court in the Williams County case and several other similar cases to which reference will hereinafter be made. Neither the Attorney General nor the Supreme Court definitely fix the extent of that limitation. It is definitely held in the Williams County case that if a transfer is requested within the mandatory provisions of Section 4696, General Code, by the filing of a 75% petition with the county board of education prior to the adoption of a plan of organization for any year as provided by Sections 7600-1 et seq., it is the mandatory duty of the board to include it in the next yearly plan of organization and make the transfer as requested. In the Williams County case, *State ex rel., Adsmond v. Board of Education*, supra, which was an action in mandamus to compel the county board of education of the Williams County School District to transfer certain territory of Pulaski Township Rural School District, a district of the Williams County School District, to the Bryan Exempted Village School District, to which the said territory is contiguous, it is held as stated in the syllabus:

"Where a petition, signed by seventy-five per cent or more of the resident electors within certain territory located in a county school district seeking transfer of such territory for school purposes to a contiguous exempted village school district, is filed with the county board of education on or before the date fixed for the annual consideration and adoption of the school organization plan for such county school district for the ensuing year, and such petition otherwise satisfies legal requirements, it is the mandatory duty of such county board of education by virtue of Section 4696, General Code, to then approve the transfer of such territory. Such county board of education is not warranted in refusing such transfer because of any inhibition in Section 7600-7, General Code, wherein it is provided that 'such plan of organization within any county shall take effect upon a date to be fixed by the director, and thereafter no school district or parts thereof shall be transferred or the boundary lines thereof changed unless such transfer or change of boundary lines in accordance with such adopted plan of organization.'"

An examination of the statement of facts upon which the ruling of the court in the above case was predicated shows that a petition was filed with the Williams County District Board of Education, which petition satisfied legal requirements and was signed by more than 75 per cent of the resident electors in the territory sought to be transferred, requesting a transfer of the territory in question to the Bryan Exempted Village School

District. The petition was filed on May 16, 1938, on which date the county board of education held a meeting to consider a plan of organization for 1938. The board later refused to transfer the territory as requested, on the ground as stated by the board, that such transfer "would not be for the best interests of the schools in said Pulaski Township Rural School District or for the welfare of Williams County School District to transfer said territory; and said proposed transfer of territory does not conform to the plan of organization adopted by this county board of education as approved by the Director of Education and now in force in the Williams County School District."

On July 8, 1938, an action in mandamus was filed in the Court of Appeals to compel the county board of education to transfer the territory as requested in the petition which had been filed therefor. On January 13, 1939, the Court of Appeals granted a peremptory writ of mandamus, commanding the county board to make the transfer as requested. Appeal was taken to the Supreme Court, which court affirmed the decision of the Court of Appeals.

In the course of the opinion in the above case, Judge Hart, speaking for the court, after referring to the statutory provisions of Sections 7600-1 to 7600-8, both inclusive, and those of Section 4696, General Code, and noting that these sections are in *pari materia* and must be construed together and harmonized if possible, said on page 389 of the opinion:

"The court does not concur in the claim that so long as an organization plan is in force, on the theory that one plan is in force until the instant the next year's plan goes into operation, no petition can be considered under Section 4696, General Code, for the reason that while a plan is in effect no transfer may be made unless it is in accordance with such adopted plan of organization. On the other hand, there is no good reason why the transfer may not take place at the close of the organization year following the date the petition for that purpose is filed.

Since the old plan of county organization, under the School Foundation Law, goes out of existence and a new plan is created and adopted each year for the evident purpose, among other things, of readjusting school district territory, it is idle to say that a petition for transfer of territory does not conform to the plan of reorganization when it is within the power and duty of the county board to make it conform for the ensuing year. The petition for transfer may reasonably be construed to contemplate the transfer upon the turn of the organization year, and not necessarily as of the date when the petition is filed. The Court of Appeals took this view and accordingly entered its decree to the effect that the transfer be made as of the close of the year 1938-1939. The court sees no objection to this procedure.



The rule suggested does not violate the letter of these statutes and it certainly falls within the spirit of them when construed together. On any other theory, Section 4696, General Code, could never have operation, and yet no one appearing before this court has been so bold as to claim that Section 4696, General Code, has been repealed by implication by section 7600-7, General Code."

It will be observed from the foregoing, that the order of the court approving the decree of the Court of Appeals is that the county board of education make the transfer requested as "*of the close of the year 1938-1939.*"

So far as the express provisions of Sections 7600-1 to 7600-8, both inclusive, standing alone, are concerned, it is difficult to gather that the plan adopted in 1938 expires in 1939, at the close of the organization year 1938-1939, yet from the decree of the court upon consideration of these statutes with those in *pari materia*, and the language used by the court in expressing its conclusion, it is apparent that in the minds of the court such is the case. As it is clear from the terms of these statutes that no mandatory duty is imposed upon, nor is any authority extended to county boards of education to adopt plans of organization in the year 1939 or after June 1, 1938, it must be concluded in the light of the language used by the Supreme Court in the case mentioned above, that at the close of the organization year 1938-1939, plans of organization expire, and thereafter no further plans of organization, in the sense that the term is used in these statutes, can be adopted. To the same effect are *State ex rel. Misamore v. Hancock County Board of Education*; *State ex rel. Rohrbaugh v. Henry County Board of Education*; *State ex rel. Rosebrock v. Henry County Board of Education*; *State ex rel. Sonenberg v. Henry County Board of Education*, decided by the Supreme Court on the same day as was the *Williams County* case, and all reported in 135 O. S. 394, and *State ex rel. Workman v. Board of Education*, 135 O. S., 456, decided May 31, 1939. See also *State ex rel. Puehler v. Board of Education of Fulton County School District*, 134 O. S., 280.

Prior to the limitations on the operation of the provisions of Section 4696, General Code, as contained in the School Foundation Law, it was well settled that under Section 4696, General Code, a county board of education had no discretion if 75 per cent of the electors residing in territory sought to be transferred petitioned for such transfer and the petition met all legal requirements; and that mandamus would lie to compel such transfer in case the county board of education refused to make it. *State ex rel. Brenner v. County Board of Education of Franklin County*, 97 O. S., 336; *State ex rel. Whartenby v. County Board of Education of Perry County*, 122 O. S., 463.

I am therefore of the opinion, upon consideration of the holdings of

the Supreme Court in the cases referred to above, that the provisions of Section 4696, General Code, are now operative, free from any limitations as set up in the so-called School Foundation Law, and that the filing of the petitions mentioned by you in your letter of inquiry imposes upon the County Board of Education of the Darke County School District a mandatory duty to make the transfers as requested, assuming of course, that the petitions meet all legal requirements.

Respectfully,

THOMAS J. HERBERT,  
*Attorney General.*

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961.

CONTRACT—STATE WITH THE GORMAN-LAVELLE PLUMBING AND HEATING COMPANY, COMPLETION HEATING WORK, RECEIVING HOSPITAL, CLEVELAND STATE HOSPITAL.

COLUMBUS, OHIO, July 29, 1939.

HON. CARL G. WAHL, *Director, Department of Public Works, Columbus, Ohio.*

DEAR SIR: You have submitted for my approval a contract between the State of Ohio, acting through you as Director of the Department of Public Works for the Department of Public Welfare and The Gorman-Lavelle Plumbing and Heating Company, an Ohio Corporation with its principal place of business in Cleveland, Ohio, for the construction and completion of Contract for Heating Work for a project known as Receiving Hospital, Cleveland State Hospital, Cleveland, Ohio as set forth in Item 4, Heating Contract for Receiving Hospital of Proposal dated June 14, 1939, all according to Plans and Specifications, which Plans, Specifications and Proposal are made a part of this Contract. This contract calls for an expenditure of \$14,040.00.

You have submitted the following papers and documents in this connection: Contract encumbrance record No. 80; division of contract; estimate of cost; notice to bidders; proof of publication; controlling board's release; Workmen's Compensation certificate showing a compliance with the laws of Ohio relating to Workmen's Compensation; recommendations of State Architect; approval of PWA; tabulation of bids; form of proposal containing the contract bond signed by the Standard Accident Insurance Company of Michigan as surety; its power of attorney for the signer; its certificate of compliance with the laws of Ohio relating to surety companies; letter from the Auditor of State showing that all necessary papers are on file in his office.

Finding said contract in proper legal form, I have noted my approval