An examination of the abstract of title submitted shows that the Vaughters Kramer Company has a good and indefeasible fee simple title to the above described property free and clear of all encumbrances whatsoever. The title to said property as exhibited by said abstract is accordingly hereby approved.

An examination of the warranty deed tendered to the State of Ohio by the Vaughters Kramer Company shows that the same has been executed in the manner required by law, and that the same is in form sufficient to convey said property to the State of Ohio by fee simple title free and clear of all encumbrances, and said deed is hereby approved.

An examination of encumbrance estimate No. 5843 is defective for the reason that the same has not been signed by the Director of Finance as required by statute. Said encumbrance estimate is otherwise properly executed and the same when signed by the Director of Finance in its present form will show that there are sufficient balances in a proper appropriation account to pay the purchase price of the above described property. Said encumbrance estimate is however, disapproved for the reason that the same has not been signed by the Director of Finance.

In the files submitted to me is a copy of the certificate of the Controlling Board showing that the money necessary to pay the purchase price of this property was released by said Board.

I am herewith returning said abstract of title, warranty deed, encumbrance estimate No. 5843, Controlling Board certificate and other files submitted. When the signature of the Director of Finance to said encumbrance estimate is secured, the same should be again brought to my attention so that all of the proceedings relating to the purchase of this property may be approved by me.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1442.

BOARD OF EDUCATION—RESOLVING TO EMPLOY ARCHITECT TO PREPARE PRELIMINARY SCHOOL HOUSE PLANS WITH CONDITION THAT CONTRACT WILL BE MADE HIM FOR GENERAL SUPERVISION WHEN BONDS APPROVED—NO LIABILITY IF ISSUE FAILS AND DIFFERENT PROJECT UNDERTAKEN LATER.

SYLLABUS:

1. *The express power granted to a board of education to build schoolhouses includes the power to employ architects for that purpose.*

2. *The authority of a board of education granted to it by express provision of statute, to submit to the electors of its school district the proposition of issuing bonds for the purpose of constructing a schoolhouse or schoolhouses, impliedly authorizes the board of education to employ an architect or expert builder to prepare preliminary sketches and estimates for the proposed school building or buildings so the board may be advised as to the size of the bond issue to be submitted to the electors.*

3. *A board of education may lawfully employ an architect to prepare sketches, plans and estimates for a proposed school building and make his compensation therefor payable out of the general fund of the district.*

4. *Persons dealing with a board of education are presumed to have knowledge of the extent of the board's power.*

5. *Architects contracting with a board of education to furnish sketches and estimates of cost for a proposed school building, preliminary to the submission to the electors of the district of a bond issue for the erection of said building, and thereafter to furnish detailed plans and specifications and supervise the construction of the building, in the event the bond issue is approved by the electors, cannot recover on a quantum meruit for such preliminary sketches and estimates if the bond issue fails, and the project in conformity to such sketches and estimates is abandoned, in the absence of a lawful express contract to that effect.*

6. *An architect who contracts with a board of education for the rendering of architectural services in the preparation of plans and estimates for a proposed school building, conditioned upon the approval by the electors of the district of a bond issue for the construction of the building, cannot lawfully be paid for the services so rendered as a moral obligation, in the event the bond issue fails.*

COLUMBUS, OHIO, January 24, 1930.

HON. LEROY W. HUNT, Prosecuting Attorney, Toledo, Ohio.

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

> "The following proposition has been submitted to me by the Board of Education of Ottawa Hills, a village in Lucas County, and I am forwarding the same to you with the request that you give us your official opinion upon this matter:
>
> *Question:* On March 5, 1928, said board of education adopted the following resolution:
>
> 'WHEREAS: It is necessary to procure certain preliminary sketches, estimates and other information relative to the erection of a proposed school building in Ottawa Hills Village School District in order to submit a bond issue for the approval of the electors of the said school district.
>
> BE IT RESOLVED: That the Board of Education of the Ottawa Hills Village School District, Lucas County, Ohio, shall and it hereby does retain and employ Mr. "A", an architect, of Toledo, Ohio, to prepare the said sketches, estimates, etc., relative to the submission of the said bond issue; and in consideration of the rendering of the said preliminary architectural services, the said board of education, upon the approval of the bond issue by the electors of the said district shall and will enter into a bona fide contract with the said Mr. "A" for full architectural services in connection with the designing and erection of the said school building at a compensation based upon six (6%) per centum of the total cost of the work erected from the said plans and under the said supervision.'
>
> Thereafter said board of education adopted the necessary resolution preliminary to voting upon a bond issue in the amount of $180,000, of which $134,600 was allocated to the erection of the building, $40,000 to furnishings, and $5,400 for interest. Required certificate was made to the county auditor, setting forth in substance the above; average weighted maturity of the bonds certified to be 20 years. This proposed bond issue was defeated in the election in November, 1928. Prior to election day Mr. "A", the aforesaid architect, made a study of the proposed building and prepared sketches and elevations for the same.
>
> In March, 1929, said board of education, consisting of four of the same members as during the year 1928, and one new member outside, formulated their plans for a new school building. An advisory committee

was appointed, several architects considered, and in May, 1929, written contract was executed between the board and a different architect from the aforementioned Mr. "A", by which that architect was employed to 'perform all architectural and engineering services for a school building intended to be erected' by the board of education. Pursuant to that contract, said firm of architects studied the school needs and prepared several sets of drawings for the board prior to the fall election. On August 28, 1929, the board adopted the first preliminary resolution submitting to the electors a bond issue of $225,000, of which $5,000 was allocated to purchase of a site, $198,000 to construction of the building, $10,000 to furnishings, and $12,000 for interest. Certificate was made to the county auditor, in which the weighted average return of bonds was certified at 23 years. This bond issue was approved by the electors of the village at the November (1929) election.

The first named Mr. "A" architect, received no compensation for the work done by him in 1928. He now claims that he is either entitled to act as architect for the board in the building of the new school building or entitled to compensation for the services rendered in 1928. The board is under contract with the second mentioned architectural firm, and desires to continue to utilize its services. The board has taken the position with Mr. "A", that it was understood in 1928 that payment for his services rendered prior to election was contingent upon the approval of that particular bond issue by the electors; that the board is not legally liable to Mr. "A" for the services rendered by him, and therefore cannot make payment to him.

The board further maintains that the bond issue submitted to the electors in 1929 is entirely distinct from that considered in 1928, and is not covered by the scope of the resolution with respect to Mr. "A"'s employment.

The board requests answers to the following questions:

First: Is the board liable to Mr. "A" for any amount under the resolution adopted March 5, 1928?

Second: If liable, out of what fund can payment be made?

Third: If Mr. "A" cannot force payment, can the board voluntarily pay him for the time spent, and, if so, out of what funds?

Fourth: If Mr. "A" rendered no services other than those rendered prior to the election of 1928, can any part of the proceeds of the bond issue adopted in 1929 be used to compensate him for those services rendered in 1928?"

Boards of education, like all statutory administrative boards, are limited in the exercise of their public functions to the performance of such acts as are authorized by statute, either in express terms or by necessary implication.

Express authority is granted to boards of education by Section 7620, General Code, to build schoolhouses. They are also expressly authorized to issue bonds when necessary for that purpose. Section 2293-2, General Code.

In the issuance of bonds for any purpose, a school district must keep within the limitations of net indebtedness fixed by the statute. When an issue of bonds will cause the net indebtedness of a school district to exceed one tenth of one per cent of the tax duplicate of the district, and will not exceed six per cent of said tax duplicate the board of education for the district may lawfully issue the bonds only when approved by the electors of the district after the proposition is submitted to them according to law. Section 2293-15, General Code.

In the construction of modern schoolhouses the services of an architect to prepare plans and specifications and supervise the construction of the building according to such plans and specifications are as necessary as are those of the workmen who do the actual work of construction, and, although there is no express authority, in terms, empowering a board of education to employ an architect for the performance of architectural services in connection with the building of a school building, there would seem to be no question but that the express power to build schoolhouses granted by Section 7620, General Code, includes the power to contract for architectural services as a necessary incident to the express power so granted. Dillon, on Municipal Corporations, 5th Edition, Section 701, McQuillan on Municipal Corporations, 2nd Edition, Section 384 and 519 note.

Likewise, there is little doubt but that the express power to submit the question of issuing the bonds for the building of a schoolhouse to the voters of a school district includes the power to procure preliminary plans and estimates, which can not properly be done except by securing the services of an architect or expert builder for that purpose. Without such services the board of education would not be able to make an accurate estimate of the cost of the proposed building, and would not know how large a bond issue to submit to the voters. *People ex rel. Kiehm* vs. *Board of Education,* 190 N. Y. S. 798; 198 App. Div. 476.

In the employment of an architect, as well as in the making of any contract, a board of education must necessarily comply with the law relating to the making of contracts and the incurring of obligations by a political subdivision.

By the terms of Section 5625-33, General Code, it is provided in substance, that no subdivision or taxing unit shall make any expenditure of money unless it has been properly appropriated, or 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 contract made without such a certificate is void, and no warrant may lawfully be issued in payment of the amount due thereon.

From the terms of the resolution passed March 5, 1928, by the Board of Education of Ottawa Hills Village School District, as quoted in your letter, it appears that the board of education recognized the necessity of procuring preliminary sketches, estimates and other information relative to a proposed school building so that a bond issue might be submitted to the electors of the school district. In pursuance thereof, it proposed to employ and retain Mr. "A" to prepare these plans and estimates, in consideration of which it agreed "upon the approval of the bond issue by the electors of said district" to "enter into a *bona fide* contract with Mr. "A" for architectural services in connection with the designing and erection of the said school building."

There apparently was no attempt made at that time to make a contract with Mr. "A" or to impose on the school district any financial obligation; nor did said resolution assume to fix a price to be paid for the preliminary sketches. The compensation of Mr. "A" for the preparation of the preliminary sketches and estimates was, by the terms of the resolution, to be provided for by the payment of six per cent of the total cost of the work erected from the said plans under Mr. "A"'s supervision, in accordance with the *bona fide* contract which they proposed to enter into, "upon the approval of the bond issue by the electors of said district."

No attempt was made at that time to comply with the provisions of Section 5625-33, General Code, and, of course, it would have been impossible to have complied with the provisions of said Section 5625-33, General Code, at that time

if a contract had been made for the payment of a definite amount from the proceeds of the bond issue, as the bonds had not then been authorized, much less sold and in the process of delivery. However, it would, in my opinion, have been possible at that time to have made a contract for these preliminary architectural services, payable from the general fund of the district, if an appropriation therefor was available. I know of no law prohibiting a board of education from paying for architectural services such as those here under consideration, from the general fund, or for that matter from paying the entire cost of building the schoolhouse from the general fund, if the money is there available. As a practical proposition, this could probably never happen, and I know of no reported case in this state where the subject has been considered.

In the case of *Wyckoff* vs. *Force,* 61 Calif. App. 246, 214 Pac. 489, under laws somewhat similar to those of Ohio, it is held:

> "In the absence of statutory requirement the trustees of a school district may employ an architect and make his compensation payable out of the general fund."

Inasmuch as a board of education can contract only when acting as a board and in a meeting duly convened, it will be conclusively presumed that the resolution quoted in your letter embodied all the provisions of the agreement between the board and Mr. "A". It should be observed at this point that the question here involves not merely a contract between private parties, but a contract made between a private party and public officers. Without considering that question for the moment, and assuming for the purpose of illustration that the board possessed the power to bind the school district by such an agreement as is contained in the resolution referred to, the plain import of the language of the said resolution is to create an indivisible, conditional contract whereby Mr. "A" was employed to perform certain architectural services in the preparation of preliminary sketches and estimates, detailed plans and specifications, and the supervision of the construction of a school building to be constructed from the plans and specifications so made. That is to say, if an agreement were to be made in the terms of the resolution between two parties capable of so contracting it would amount to the employment of Mr. "A" to do two things, to-wit: the preparation of estimates and detailed plans and specifications for, and the supervision and the construction of a certain school building, in consideration of the payment to him of six per cent of the entire cost of the building so constructed, upon condition that the money be made available therefor by the approval of a bond issue by the electors of the school district.

The wording of the resolution makes the contract entire, that is, payment for the preliminary sketches and estimates is so bound up with the payment for the detailed plans and specifications as to be inseparable, thus making the contract indivisible and the payment for either or both to be dependent upon the condition precedent, the availability of the money for the construction of the building.

Judging the agreement by these standards, and aside from the question of the possible lack of power of a board of education to bind its school district on conditional contracts in any case, it follows that inasmuch as the bond issue failed, no liability exists under the so-called agreement embodied in the resolution. The agreement, from its very terms, was not to be effective except upon the fulfillment of a contingency which did not take place.

Touching these questions, your attention is directed to Volume 5, page 261 et seq., of Corpus Juris, and cases there cited. Quoting from the text, it is said:

"A contract to prepare plans and specifications and superintend the erection of the structure for a fixed price is an entire one, and recovery cannot be had for a performance of part of the contract without a performance of the other part, or a sufficient excuse for the nonperformance. Where, however, the different items are provided for separately, with specified prices for each, the contract is severable and recovery may be had for performance of one item, although it cannot be had for the others.

If an architect prepares plans and specifications for a building pursuant to an unconditional order or direction of the owner, but without any express agreement as to compensation, he is entitled to recover the reasonable value of the services rendered, whether the plans are used or not, as where the owner abandons his intention to build, or stops work on the plans before they are completed.

Where the contract so provides, the architect's right to compensation may be dependent upon the plans and specifications submitted by him being satisfactory to the employer or approved by him, or upon the acquisition by the employer of the property designed to be improved, or upon the ultimate determination of the employer to build in accordance with the plans submitted; or it may be dependent upon some other condition or contingency."

If it may be said that the terms of the resolution here under consideration are capable of such a construction as to permit the resubmission of the bond issue until the conditions of the contract are finally fulfilled, and it was in fact resubmitted in substantially the same form, that is, if by the use of substantially the same plans and estimates a bond issue in substantially the same amount was again submitted and approved by the electors, a somewhat different question would be presented. That, however, was not done, and we need not give that question any consideration.

When the second proposal for a bond issue was submitted it was submitted after consideration of plans and estimates made by other architects and for a considerably larger amount. It is possible that the reason the first bond issue failed, and the second carried, was because the electors wanted a larger and perhaps better, or at least a different school building supervised by other architects than was contemplated had the first proposal carried.

It is a familiar principle of law that all persons dealing with school officers are presumed to have knowledge of the extent of their power. *State* vs. *Freed,* 10 O. C. C. 294; *Schwing* vs. *McClure,* 120 O. S. 335, 342; *Arkansas National Bank* vs. *School District,* 152 Ark. 507; 238 S. W. 630; *Lucius* vs. *Town of Norfolk,* 99 Conn. 686, 122 Atl. 711; *Martin* vs. *Common School District,* 163 Minn. 427, 204 N. W. 320. This principle is stated by Judge Dillon, in his work on Municipal Corporations, Section 447, as follows:

"It is fundamental that those seeking to deal with a municipal corporation through its officials must take great care to learn the nature and extent of their power and authority."

Mr. "A" must therefore be conclusively presumed to have known the extent of the powers of the board of education, and that the board could not create a legal obligation for his services in the preparation of preliminary sketches and estimates in the manner done, apart from the obligation which it attempted to create for full architectural services which were in plain language conditioned upon the approval of the bond issue based on the preliminary sketches to be made by

Mr. "A". Without a doubt, Mr. "A" understood this at the time, and had not a second proposed bond issue been submitted to the people, and carried, there would not now be any claim made by Mr. "A" for payment for work done by him in the making of sketches and estimates in accordance with the resolution of March 5, 1928. The second proposed bond issue, having been submitted more than a year after Mr. "A"'s sketches and estimates had been made and upon different estimates prepared by other architects, proposing to build an entirely different building, and costing a considerably greater amount of money, had no relation whatever to the first proposed bond issue or to Mr. "A"'s services in the preparation of estimates preliminary to the submission of the question in the first place.

Somewhat similar questions have been passed upon by the courts in New York. It is there held that architects are bound to know the extent of the appropriations for public buildings and must draw their plans and make their specifications for such buildings so that the buildings may be built within the appropriations. Thus is is held in the case of *Horgan & Slattery* vs. *New York,* 100 N. Y. S. 68:

> "An architect employed by an armory board to furnish plans and specifications for the erection of a building to cost a stipulated sum can not recover if the plans and specifications made by him are for a building substantially exceeding that sum."

Again, in the case of *Pierce* vs. *Board of Education,* 211 N. Y. S. 788, it is held:

> "Architects contracting with a board of education to furnish plans and specifications to the board for school buildings, held bound to know that erection of buildings and recovery for services under contract were conditioned on expense coming within appropriation by district authorities as required by Educational Law, Section 314."

You also inquire whether or not the board may now lawfully pay Mr. "A" for his services even though no legal obligation exists for such payment. Courts are quite generally agreed that boards of education may lawfully recognize and pay moral obligations. They are just as generally agreed that such payments may not be made unless a moral obligation really exists. Whether or not a moral obligation, which may lawfully be recognized and paid, really exists in any case involves consideration of questions of fact, and the application of the principles of law governing moral obligations to the facts in any case is extremely difficult.

Without entering upon a discussion of this question, I would direct your attention to opinion No. 1306, rendered by me under date of December 17, 1929, and addressed to the Prosecuting Attorney of Clearmont County, wherein there is contained quite an exhaustive discussion of the principles pertaining to the payment of moral obligations by a board of education, and many authorities are cited. The situation there passed upon was quite analogous to the situation involved in the present inquiry.

In view of the fact that the school district received no substantial benefit from the use of the preliminary plans and estimates made by Mr. "A", for the reason that they were not utilized in the final plans adopted, and that Mr. "A" suffered no substantial loss for the reason that he understood that the payment for his work was conditioned upon the approval by the electors of the bond issue in question, it cannot be said in my opinion that the circumstances are such as to bring the claim of Mr. "A" within what is considered by the courts to be a moral obligation.

Applying the principles discussed in my former opinion, and the conclusions there reached on a somewhat similar set of circumstances, together with the authorities there referred to, I am of the opinion that the board of education in this case cannot lawfully recognize and pay Mr. "A" for his services, as a moral obligation.

In specific answer to your questions, therefore, I am of the opinion:

1. No legal obligation exists against the board of education of Ottawa Hills Village School District for the payment to Mr. "A" for services rendered by him in the preparation of plans and sketches for a school building made in pursuance of the resolution of the board adopted March 5, 1928.

2. The answer to the first question renders unnecessary an answer to this question.

3. The board cannot lawfully recognize and pay Mr. "A"'s claim as a moral obligation.

4. In view of the answers to the former questions this question needs no answer.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1443.

CHAUFFEUR'S LICENSE—OPERATOR OF SCHOOL BUS TRANSPORTING PUPILS AND EMPLOYE OPERATING MOTOR VEHICLE MUST POSSESS.

SYLLABUS:

1. *An operator of a school bus used to transport pupils to and from a schoolhouse is a chauffeur within the meaning of Section 6290, General Code, and should be registered after having made application and successfully passed an examination as to qualifications as set forth in Section 6302, General Code.*

2. *Any person who is employed for the purpose of operating a motor vehicle, and so operates a motor vehicle, must be registered as a chauffeur.*

COLUMBUS, OHIO, January 24, 1930.

HON. CLARENCE J. BROWN, Secretary of State, Columbus, Ohio.

DEAR SIR:—This is to acknowledge receipt of your letter of January 23, which is as follows:

> "Will you kindly render this office an opinion upon the following question:
>
> Is an operator of a school bus, who is under contract with the board of education to transport pupils to and from a school house, required to be licensed as a chauffeur when such operator is the owner of the motor vehicle?"

I am also in receipt of two other requests for opinions involving a consideration of the same sections of the General Code. These requests will be answered herein. The letter of Hon. H. E. Culbertson, Prosecuting Attorney of Ashland County, Ohio, requests my opinion upon the question of whether or not county