Alexander, on October 3, 1922, and inquired as to the status of the title to the following described premises as disclosed by the abstract:

> Situated in the township of Put-in-Bay, County of Ottawa, and State of Ohio, and known as Lot Number Forty-two (42) of Peach Point subdivision as surveyed, platted and recorded in County Recorder's Office at Port Clinton, Ottawa County, Ohio, being a lot of Shiele and Hollway's Peach Point Subdivision. And being the same premises conveyed from Anna Shiele and John Hollway, to Mrs. R. E. Smith and Mrs. Betty Gates as recorded in the records of Ottawa County, Ohio, Deed Book Volume 62, page 437.

After an examination it is believed that said abstract shows the title to said premises to be in the name of Bettie Gates. However, your attention is directed to the deed which was executed by Anna Schiele and John Hollway to Mrs. R. E. Smith and Bettie Gates March 5, 1907, as disclosed at page 45 of the abstract, which contained a reservation to the effect that said premises should be used "for residence purposes only" and further restrictions in reference to mercantile business, etc. The effect of such restrictions of course will depend to some extent upon the existing facts. If the grantors who made such restrictions, or their heirs, are now interested in adjoining premises and in the enforcement of such restrictions, there might be some objection to your board accepting such conveyance. However, if there are no parties who are interested in the enforcement of such restrictions who own adjoining lands, such restrictions might be of little or no effect. Therefore it is suggested that you should determine to your own satisfaction to what extent, if any, the restrictions above referred to will affect the enjoyment of the premises.

You have further submitted a deed, executed by Bettie Gates, which it is believed is sufficient to convey the title to said premises to the state when properly delivered.

You have further submitted encumbrance estimate number 3348 which contains the certificate of the director of finance to the effect that there are unencumbered balances legally appropriated in the sum of One Thousand Dollars ($1,000) to cover the purchase price.

The abstract, deed and encumbrance estimate are being returned herewith.

Respectfully,
JOHN G. PRICE,
Attorney-General.

3657.

ROADS AND HIGHWAYS—VILLAGE ORDINANCE CONSENTING THAT BOARD OF COUNTY COMMISSIONERS MIGHT CONSTRUCT HIGHWAY IMPROVEMENT THROUGH SUCH VILLAGE IS NOT EFFECTIVE AS GIVING CONSENT PROVIDED FOR BY SECTION 1193-1 G. C.

A village ordinance consenting that a board of county commissioners might construct a highway improvement through such village (section 6949 G. C.) is not effective as giving the consent provided for by section 1193-1 G. C. relating to im-

provements to be carried out by the Department of Highways and Public Works on the state aid plan.

COLUMBUS, OHIO, October 11, 1922.

HON. P. B. BENTON, *Prosecuting Attorney, Delaware, Ohio.*

DEAR SIR:—You have recently addressed this department as follows:

"I am submitting to you for your opinion in behalf of the board of County Commissioners of Delaware County, Ohio, the question hereinafter stated in relation to the ordinance initiated by the electors of the village of Sunbury, this county, at the election held August 8, 1922, and which ordinance reads as follows, with the caption omitted:

Section One. That the consent of the Council of said Village of Sunbury, Delaware County, Ohio, is hereby given to the improvement by the Commissioners of Delaware County, Ohio, of that portion of I. C. H. No. 24, Columbus and Wooster Road, in said Village beginning
(Here follow description of route.)

Section Two. That said improvement is to be constructed by paving said section and draining same, and grading same according to such surveys, profiles and specifications as may hereafter be approved by the Commissioners of Delaware County, Ohio.

Section Three. This ordinance shall be in force and effect from and after the earliest period allowed by law.

The Board of County Commissioners and the Department of Highways and Public Works, in co-operation, are anxious to improve the above designated road in connection with section "R" I. C. H. No. 24, Columbus-Wooster Road, which section extends from the Knox County line southwesterly to the North corporation line of said Village.

The above street leading through said Village would connect said section being improved with a section of said road already improved leading south from said Village.

The Village Council prefer another route and refuse to enact any further legislation to advance this route.

At the same election an ordinance passed by the Village consenting to such other route was subjected to a referendum and failed of approval by a vote of four and one half to one.

Question: Can the County Commissioners proceed in co-operation with the Department of Highways and Public Works to make this improvement, without further legislation by the Village Council; and if so, can such Board of County Commissioners assess a part of the cost of said improvement against the lands and lots abutting on either side of the proposed improvement?"

In a memorandum which you submit with your inquiry, you suggest that the

initiated ordinance was no doubt drawn under authority of Section 6949 G. C. with the purpose of having assessed against benefited lands a part of the cost of the proposed improvement through the village; and that, as there is no intention that the village as such bear any part of the cost, the giving of consent, through the medium of the initiated ordinance, to the making of the improvement, has rendered unnecessary any further legislative action.

Said Section 6949 reads:

> "The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceed ings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality."

When the terms of this section are compared with those of the initiated ordinance, the conclusion is altogether clear that the ordinance carries with it full authority to the county commissioners to make the improvement as a county project. In so making the improvement, the commissioners would be governed by exactly the same procedure as though the section to be improved were outside the village. and they would have like power to assess property within the village as would be the case with property outside the village. The procedure in question is fully set forth in Sections 6906 to 6948-2, the matter of division of cost being dealt with particularly by Sections 6919 and 6921. Section 6949 needs no clarification; its purpose is to permit a waiver in favor of the county of any primary and exclusive right which a municipality may have in the matter of municipal street improvement. When such waiver has been given, and the municipality as such is bearing no part of the cost, the municipality has no concern whatever with the matter of property assessment. If the municipality as such is desirous of bearing a part of the cost, special provision for that contingency is made by Sections 6950 to 6953.

But what has thus far been said is pertinent only as affording a basis for inquiry into the real point raised by your question, and that is, whether Section 6949 G. C. and an ordinance passed under authority thereof are available to confer authority for the making of an improvement within a village, when such improvement is proposed to be carried out on the state aid plan contemplated by Sections 1178 to 1231-7 G. C., and not under the county plan or county aid plan provided by Sections 6906, et seq.

As part of the former group of sections, there appear Sections 1193-1 and 1192-2, which are quite similar in structure to Sections 6949 to 6953. For present purposes, quotation need be made of a part only of Section 1193-1:

> "When upon the application of county commissioners or township trustees and under the supervision of the state highway department, the im-

provement of an inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improved inter-county highway or main market road is extended into or through a village, or an improvement constituting an extension of an improvement constituting an extension of an improved inter-county highway or main market road is constructed within a village, it shall not be necessary for the village to assume any part of the cost and expense of the proposed improvement. If no part of the cost and expense of the proposed improvement is assumed by the village, no action on the part of the village, other than the giving of its consent, shall be necessary: and in such event all other proceedings in connection with said improvement, including the making of assessments, shall be conducted in the same manner as though the improvement was situated wholly without a village. * * * *"

The initiated ordinance now in question makes no reference to such improvement as is described in Section 1193-1, that is to say, a state aid improvement carried on under the supervision of the state highway department (now Department of Highways and Public Works); the ordinance describes an improvement "by the Commissioners", and according to such surveys, etc., "as may hereafter be approved by the Commissioners." Notwithstanding this, is the claim tenable that the ordinance permits a state aid improvement, when it is borne in mind that such an improvement is to be initiated by application of the county commissioners (Section 1191); is to be carried out on plans improved by the commissioners (Section 1200); and is to be accompanied by a property assessment made, not by the state authorities, but by the county commissioners (Sections 1214 and 1217)? The answer is believed to be in the negative. The fact remains that the Legislature has seen fit to deal with state aid improvements through villages in a statute entirely distinct from that relating to improvements directly under the supervision of the county authorities; and the only way to give full effect to the distinction thus made is to treat Sections 1193-1 and 6949 as independent of each other, with the result that consent by the village under Section 6949 to an improvement by county commissioners is not to be treated as equivalent to a consent under Section 1193-1 that the state make the improvement. It is well to note in passing, though the point is not, perhaps, of itself controlling, that there is even a difference in legislative policy as between the two last named sections, since Section 1193-1 relates only to villages, while Section 6949 extends to all municipalities.

The fact has not been overlooked that in the case of Brownfield v. Clapham, 25 O. C. C. (N. S.), 443; 27 O. C. D. 424, the Court of Appeals of Licking County held, as stated in the second branch of the syllabus:

"The duties of the state highway commissioner with reference to the construction of roads by means of state aid are ministerial or advisory, and the responsibility for keeping in a condition for safe travel a road undergoing such reconstruction rests upon the county commissioners, and liability arises against them where a traveler over such road who is injured as a result of negligence by the contractors in the prosecution of the work."

It would seem that this general statement is too broad in the light of the provisions of Section 1218 G. C., to the effect, among other things, that state aid contracts "shall be made in the name of the state and executed on its behalf by the state highway commissioner," and in the light of the fact that there are complete and in-

dependent codes providing respectively for state aid improvements and county (or county aid) improvements. The conclusion in the case cited would seem to have been fully justified by the more limited statement in the course of the opinion

> "that the responsibility for keeping the public roads in repair *while such construction work is in process* rests wholly with the commissioners."

In other words, the real basis for the conclusion reached would seem to have been that the county's liability did not cease until the section of road under improvement had become subject to state maintenance under section 1224 through completion and acceptance by the state of the work of its contractor. The further statement of the court immediately following that last above quoted

> "* * * it is their (county commissioners') duty to provide for safe travel upon the public highways of the county upon state and county roads,"

is hardly to be reconciled with a subsequent holding by the Supreme Court in Weiher vs. Phillips, 103 O. S. 249, in substance that liability of a county is purely statutory and not to be extended beyond the clear import of the statutes; and that state highways are under the exclusive control of the state highway department, and if in repair work a barrier is left across the highway without light or guard, the county is not chargeable with negligence. At all events, we have in the present instance one statute providing for consent by the village to an improvement by state authorities, with the way open to the village to act under either or both statutes; and we are not at liberty to assume that action under one of the statutes was intended as action under the other, or under both statutes.

Another consideration which would seem to lead to the same answer as do the views already stated, is this: You are aware that the method of financing so far as concerns benefited property owners is somewhat different in the case of state aid improvements from that prevailing in improvements undertaken by the county commissioners without state aid. For instance in the latter class of improvements it is legally possible, though not usual in practice, that no part of the cost be assessed against benefited lands; whereas with the former class of improvements it is mandatory that at least ten per cent. be assessed. Compare sections 6919 and 6921 with sections 1214 and 1217. It follows that, as a legal proposition, the village, when giving its consent, must be presumed to have taken account of the difference in financing noted. Further discussion along this line, however, is believed to be unnecessary, in the light of other determinative considerations above noted.

Answer to your question is accordingly made by the statement that the initiated ordinance does not give the consent of the village to the making of the improvement on the plan of co-operation between state and county.

Respectfully,
JOHN G. PRICE,
Attorney-General.