The facts must show a substantial necessity for and an advantage to be gained by a grade separation.

Applying the test of necessity and expediency to the facts at hand, it will be seen that there is no through traffic over that portion of West Eighth street lying underneath the viaduct now in existence, and that the only traffic over that portion of said West Eighth street as aforesaid has been and is now local in character and confined exclusively to that traffic which has some connection with the business of certain industries located adjacent thereto. The facts as hereinbefore stated show that all the through or inter-county traffic has been carried over the viaduct which was constructed in 1894.

From these facts, and applying the spirit and intendment of the law, it is my opinion that inasmuch as there is no through or inter-county traffic over that portion of West Eighth street lying underneath said viaduct, and that all of said through or inter-county traffic has been moving over said viaduct, the Fisher Act (Sections 6956-22, et seq., of the General Code) is not applicable.

Respectfully,
EDWARD C. TURNER,
Attorney General.

279.

BOARD OF PARK COMMISSIONERS—NOT COUNTY BOARD—AUTHORITY TO PAY TRAVELING EXPENSES OF SECRETARY.

SYLLABUS:

1. A board of park commissioners, not being a county board within the purview of Section 2917, General Code, may lawfully employ counsel other than the prosecuting attorney to represent it.

2. If a board of park commissioners in its sound discretion believes that such travel is necessary and proper in the carrying on of the business of the park district, such board may allow and pay the traveling expenses of its secretary, when the trip or journey in which such expenses were incurred is necessarily implied in or reasonably and directly incident to the duties of the secretary, but traveling expenses incurred by such secretary in attending conventions, or on like trips, cannot be allowed and paid out of the public funds.

COLUMBUS, OHIO, April 5, 1927.

HON. OSCAR A. HUNSICKER, *Prosecuting Attorney, Akron, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter dated March 29, 1927, which reads as follows:

> "In Summit county the park commissioners organized pursuant to the provisions of law, are known as The Metropolitan Park Board; they have jurisdiction over the entire county with the exception of two districts, to-wit, Hudson village and Twinsburg township. Recently the members of the board being confronted with some legal questions, conferred with a firm of local attorneys and thereafter the attorneys duly rendered a bill to the board in the sum of two hundred dollars for legal advice.
>
> Our first question is whether this bill may be legally paid or whether the prosecuting attorney is the legal advisor to the park board. In the Opinions of the Attorney General of 1919, Volume 1, at page 217, et seq. is an opinion holding that the prosecuting attorney of a county is not compelled to furnish

advice to such board. We desire to know whether your office confirms this opinion and whether they may employ outside counsel.

The second question arising relative to the park board is this. Under Sections 2976-6 the park board is given power to employ a secretary and such other employes as may be necessary in the performance of the powers conferred. The park board has submitted to the auditor a bill for payment of expenses incurred by the secretary while making trips to Columbus. The auditor questions the authority to pay traveling expenses incurred by the secretary of the park board. Will you advise us whether payment of these expenses may be made legally?"

1. The statutes creating the board of park commissioners and enumerating the powers and duties thereof are Sections 2976-1 to 2976-10i, both inclusive, of the General Code.

Section 2976-2 provides for the creation of park districts by application to the probate court by a majority of the resident electors residing within the proposed district. A hearing must be had of which public notice must be given (Section 2976-3). If the court is of the opinion "that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application," with power to amend or change the limits of the territory, (Section 2976-4). Thereupon, the probate judge shall appoint three commissioners, (Section 2976-5), who as provided in Section 2976-6 shall constitute the board of park commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and being sued as in this act provided." Such board shall have power to acquire property by gift or devise, by purchase, or by appropriation (Section 2976-7). Such board is given power to levy assessments (Section 2976-9) and power to levy taxes and borrow money in anticipation of the collection thereof (Section 2976-10). It is to receive all unexpended balances of tax levies previously made under laws providing for county park improvements, and the county treasurer is the custodian of the funds of the board and is to pay out the funds on the warrant of the county auditor (Section 2976-10b).

Provision is made in Section 2976-10c, General Code, for the removal of such commissioners. Section 2976-10d provides for the annexation of property adjacent or contiguous to the existing park district. Section 2976-10e provides the powers of budget commissioners in relation to such districts. Section 2976-10f makes provision for the sale or lease of lands not needed. Section 2976-10g gives the board power to adopt bylaws, rules and regulations. Section 2976-10h enumerates the powers of employes and Section 2976-10i provides for the levying of a tax for the use of such district, the submission of the question to the electors and for the issuance of bonds.

You refer in your letter to a former opinion of this office which appears in the Opinions of the Attorney General for 1919, Vol.I, page 217, the first part of the syllabus of which reads as follows:

> "The board of park commissioners of the Cleveland Metropolitan Park District is not a county board within the purview of Section 2917, General Code; and the prosecuting attorney of the county is not required to furnish legal advice to such board."

Although this opinion specifies "the board of park commissioners of the Cleveland Metropolitan Park District" the conclusions and reasons therefor are applicable to any board of park commissioners organized in pursuance of this act. I concur in the conclusions and reasonings of said opinion.

Since a board of park commissioners is not a county board within the purview of Section 2917, supra, which provides in part:

> "The prosecuting attorney shall be the legal adviser of the county commissioners and all other county officers and county boards and any of them may require written opinions or instructions in matters connected with their official duties. He shall prosecute and defend all suits and actions which any such officer or board may direct or to which it is a party. * * *."

the inhibition of such section to the effect that

> "* * * no county officer may employ other counsel or attorney at the expense of the county except as provided in section twenty-nine hundred and twelve,"

does not apply to such board and the question that suggests itself is whether or not such a board may employ and pay for counsel or attorney other than the prosecuting attorney of such county.

The legislature (Section 2976-6, supra) designates such board of park commissioners as "a body politic and corporate, * * * capable of suing and of being sued as in this act provided." An anomalous situation would indeed exist if, since the prosecuting attorney of the county is not required to furnish legal advice or act as counsel for the board in question, such board could not consult or employ other counsel or attorney. The legislature has given extensive powers to such boards, among which are the power to sue and be sued, the power to appropriate lands and the power to levy taxes and issue bonds. In the doing of any of these things many questions might and undoubtedly would arise which would require the advice and services of an attorney. It may be said therefore that it is a necessary incident to such powers and duties expressly granted that the boards in question be given power to employ attorneys.

Each member of such board takes an oath faithfully to "perform the duties of his office" and gives "bond for the faithful performance of the duties of his office in the sum of $5,000.00." Unless some statutory prohibition exists a reasonable interpretation must be made in the light of what the normal operation of such a board would require. If sued they would require counsel to advise and defend. Likewise, if the board itself brings the action.

Section 2976-10b, General Code, provides in part:

> "* * * The auditor shall issue warrants to the treasurer to disburse the funds of the board upon order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe. * * *"

The only limitation upon such a board in its expenditure of money is found in Section 2976-10b, which, *inter alia*, provides:

> "No contract of said board involving the expenditure of money, shall become effective until the auditor certifies that there are funds of said board in the county treasury and otherwise unappropriated, sufficient to provide therefor."

Your attention is also directed to the fact that such a contract of employment would not be within the exceptions to the requirements of Section 5660 and that before such an expenditure could be made the provisions of Sections 5660 and 5660-1 must be complied with.

It is my opinion that if the provisions of the sections above discussed have been complied with and if the board in the faithful performance of its duties incurs reasonable expenses in the employment of counsel and attorney, the auditor should issue a warrant to the treasurer upon the order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting has prescribed.

2. In answer to your second question, Section 2976-6, General Code, provides in part:

> "* * * Such board may employ a secretary and such other employes as may be necessary in the performance of the powers herein conferred. * * *"

The various sections of this act are silent with regard to the specific duties of the secretary except as provided in Section 2976-6 that the board "shall keep an accurate and permanent record of all its proceedings" and as provided in Section 2976-10b that all orders of the board to disburse the funds of such board shall be "evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe." What other duties and specific work may be required of such a secretary is left to the judgment and discretion of such board.

Your attention is directed to a former opinion of this office which appears in the Opinions of the Attorney General for 1924, page 652, the syllabus of which reads as follows:

> "1. A board of trustees of a library is created by statute, and has only such powers as are provided in the statute, and such other powers as are reasonably necessary to the accomplishment of the purposes of the board.
>
> 2. The board of trustees of a library has no authority to pay the expenses of its librarian or other employes while in attendance on conventions.
>
> 3. The board of trustees of a library may pay the expenses of its secretary or other employes incurred in traveling to other cities for the purpose of purchasing books for the library, if the board in its sound discretion believes that such travel is reasonably necessary for the proper purchase of such books."

And to the case of *State ex rel. Marani vs. Wright*, 17 O. C. C. (N. S.) 396, the syllabus of which reads:

> "A municipality is not liable for the traveling expenses of one of its officials incurred in attending a convention of like officials of other municipalities."

In this case the court says on page 397:

> "We hold that in the absence of any specific statutory provision for such cases, the test of the city's liability must be deemed to be: is the trip or journey in which the expenses were incurred necessarily implied in or reasonably and directly incident to the prescribed duties of the municipal officer who undertakes such journey?
>
> It has been pointed out in argument that a municipal officer may properly undertake a journey at the city's expense to inspect material or supplies for the purchase of which, on behalf of the city, he is authorized to negotiate, if such journey is reasonably necessary for that purpose.
>
> This is upon the ground that the object of the journey is directly related to the duties of his office. Here, however, the purpose of the journey was to acquire such information in regard to the duties of his office as the building

inspector might reasonably acquire while in holding like positions, in various cities. We are unable to see how such an object relates itself either directly or with reasonable necessity to the duties of the relator's office. * * *"

While the opinion of the Attorney General above referred to concerns a board of library trustees, and the opinion of the Circuit Court above quoted from relates to the officials of a municipality, the conclusions of said opinions and the principles of law upon which the same were based, apply with equal force to the question here under consideration.

I am of the opinion, therefore, that if a board of park commissioners in its sound discretion believes that such travel is necessary and proper in the carrying on of the business of the park district, such board may allow and pay the traveling expenses of its secretary, when the trip or journey in which such expenses were incurred is necessarily implied in or reasonably and directly incident to the duties of the secretary, but that traveling expenses incurred by such secretary in attending conventions, or on like trips, cannot be allowed and paid out of the public funds.

Respectfully,
EDWARD C. TURNER,
Attorney General.

280.

DISAPPROVAL, BONDS OF JEFFERSON RURAL SCHOOL DISTRICT, HAMILTON COUNTY, OHIO—$28,000.00.

COLUMBUS, OHIO, April 4, 1927.

Re: Bonds of Jefferson Rural School District, Hamilton County, $28,000.00.

Retirement Board, State Teachers' Retirement System, Columbus, Ohio.

GENTLEMEN:—Upon examination of the transcript for the above bond issue I note that these bonds purport to have been authorized by elections held in 1925 and 1926.

The affidavit of the publisher shows that notice of the 1925 election was first published on October 10th. The last of the four publications was accordingly made on October 31st; the election was held on November 3rd so that a full week had not elapsed between the date of the last publication and the date of election.

The affidavit as to the 1926 election shows that the first publication was on October 8th, the last publication was accordingly on October 29th. As the election was on November 2nd a full week had not elapsed after the last publication.

Section 5649-9b of the General Code makes it mandatory that notice shall be given for four consecutive weeks prior to the election.

In construing similar statutes requiring notice the Supreme Court of Ohio has ruled that a full week must elapse from the date of the last publication. See the case of State of Ohio vs. Kuhner and King, 107 O. S., page 406.

Because of the insufficiency of the notice of both elections I am compelled to advise you that the bonds should be rejected.

Respectfully,
EDWARD C. TURNER,
Attorney General.