

1971.

COUNTY COMMISSIONERS—AUTHORITY TO EXPEND PROCEEDS OF TAX LEVY FOR PURPOSE OF CONSTRUCTING OR IMPROVING COUNTY HIGHWAYS—SECTION 1222, GENERAL CODE, DISCUSSED.

SYLLABUS:

The proceeds of a tax levy, made under the provisions of Section 1222, General Code, as amended by the 87th General Assembly (112 O. L. 470), may be expended by the county commissioners for the purpose of constructing, reconstructing or improving any section of highway in the system of county highways, under the provisions of Sections 6965 to 6972, inclusive, of the General Code, regardless of whether or not the Legislature has appropriated any moneys for state aid in accordance with Sections 6970 and 6971, General Code.

COLUMBUS, OHIO, April 14, 1928.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Receipt is acknowledged of your communication of recent date requesting my opinion as follows:

“We respectfully request your written opinion upon the following:

Section 1222, as enacted in House Bill No. 67, 112 O. L. 470, provides for a levy to be made by the county commissioners for the payment of the county's proportion of the cost and expense of cooperating with the Department of Highways. It further provides that the proceeds of such levy shall be used for the purpose of paying the county's proportion of the cost and expense of any work conducted by the Department of Highways in cooperating with such county and also for the purposes provided in Sections 6965 to 6972, inclusive, of the General Code.

Question: May the fund produced by this levy be used by the county commissioners on the county system of highways provided for in Sections 6965 to 6972 inclusive, regardless of the fact that the Legislature has made no provision by appropriation for the state's proportion of improvements under the provisions of those sections?”

Section 1222, General Code, which is referred to in your communication, was enacted by the last Legislature as a part of the “Norton-Edwards Bill” (112 v. 430). This section provides as follows:

“For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of cooperating with the Department of Highways as hereinbefore provided, the county commissioners are hereby authorized to levy a tax, not exceeding one and one-half mills, upon all the taxable property of the county. Such levy shall be in addition to all other levies authorized by law for county purposes, but subject, however, to the extent of one-half mill thereof, to the fifteen mill limitation. The remaining one mill of said levy so authorized shall be in addition to all other levies made for any purpose or purposes, and the same shall not be construed as limited, restricted or decreased in amount, or otherwise, by any other law or laws. The proceeds of such levy shall be used for the purpose of paying the county's proportion of the cost and expense of any work conducted by the Depart-

ment of highways in cooperating with such county *and also for the purposes provided in Sections 6965 to 6972, inclusive, of the General Code*; and the funds produced by such levy shall not be subject to transfer to any other fund, either by order of court or otherwise.

The county commissioners of any county in which less than one and one-half mills is levied in any year, under the provisions of this section, shall within the above limitations determine what part of such levy shall be subject to the fifteen mill limitation, and what part of such levy shall be outside such limitation and unrestricted by any other law or laws. A county may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section."

Sections 6965 to 6972, inclusive, of the General Code, referred to in Section 1222, were enacted in what is commonly called "The Green Law" which authorized and directed the creation of a system of county highways in each county of the state. It is unnecessary herein to set forth in full each of these sections. Suffice it to say Section 6965 provides that in each county of the state a system of county highways should be created, and within sixty days after the taking effect of the act the township trustees were required to make a report to the county commissioners "setting forth the relative value of each road in the township in consecutive order as a used highway, the kind of traffic over such road, its length and * * * condition, together with such other information" as was desired and requested by the county commissioners.

Section 6966 required the board of county commissioners of each county to determine from the information furnished by the township trustees "the relative importance and value for traffic of the various public highways of the entire county." The system of highways so selected and designated by the county commissioners was to be known as the system of county highways of such county, and all the roads therein were to be known and designated as county roads. The county surveyor was required to make a map showing such system, which map was required to be approved by the Director of Highways.

Section 6967 reads in part as follows:

"The board of township trustees of any township within a county may make application in writing to the board of county commissioners thereof for the construction, reconstruction or improvement of any section of highway in the county system. If the county commissioners approve such application they shall direct the county surveyor to make the necessary plans for the construction, reconstruction or improvement of such section of highway together with an estimate of the cost thereof. It shall be the duty of the county surveyor to promptly prepare such plans and estimates and file the same with the county commissioners. If the county commissioners approve said plans and estimates of such section of highway, the cost thereof shall be paid as follows:

The county shall pay not less than five hundred dollars per mile of said cost, such payment to be made out of the proceeds of any levy or levies made or to be made upon the grand duplicate of said county for the purpose of paying a county's proportion of the compensation, damages, costs and expenses of construction, reconstruction and improvement of roads under the provisions of Sections 6906 and 6956 of the General Code. The township in which such section of road is to be constructed shall pay not less than five hundred dollars per mile, payment to be made out of the proceeds of any levy or levies made

or to be made against the tax duplicate of such township for the purpose of paying the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing and improvement of roads under the provisions of Section 6906 to 6956 of the General Code.

Subject to the above limitations, the exact proportions of the cost to be paid by the county and township shall be determined by agreement between the commissioners and trustees.

Fifty per cent of the cost of any such improvement, but in no case more than two thousand dollars per mile shall be apportioned to and assessed against the owners of real estate abutting on said improvement, or the owners of real estate situated within one-half mile of either side of said improvement, according to the benefits accruing to such real estate, as may be determined by a majority vote of the board of county commissioners. Upon the written consent of sixty per cent in number of the owners of real estate to be specially assessed for any improvement, the county commissioners shall be authorized to increase the amount specially assessed to the extent set forth in such written consent. The county commissioners may, however, if they deem it equitable and for the best interest of the public, waive the making of the special assessment herein provided for, or any part thereof, and pay from any available funds in the county treasury, created either by taxation or from the sale of bonds, all that portion of the cost of the improvement not paid by the state and township, or such share thereof as they deem proper. The state shall pay in the manner hereinafter provided such amount as may be available from appropriations from the general revenue fund made by the General Assembly, but in no event more than two thousand dollars in any one township during any one fiscal year. * * *

Special assessments shall be made in the manner provided by law with respect to special assessments for the construction of county roads by boards of county commissioners and as specially provided in Sections 6922, 6923 and 6925 of the General Code of Ohio. All questions of appropriation of property, claims for compensation and damages, and the award thereof, shall be determined in the manner provided by law for use in the construction of county roads by boards of county commissioners."

Section 6968, provides in part that :

"After the approval of the plans and estimates by the county commissioners, and if said commissioners are still satisfied that the public convenience and welfare requires the construction of the improvement, and by resolution so determine, they shall advertise for bids once not later than ten days prior to the date fixed for the letting of a contract in a newspaper published and of general circulation in said county, and shall also cause a notice of said letting to be posted in their office ten days before the date thereof. * * * "

Sections 6969, 6970 and 6971 read as follows :

Sec. 6969. "In the event any township within the county does not make application in the manner herein provided within sixty days after any state aid funds provided by the General Assembly shall be available, the board of county commissioners may proceed independent of township co-operation to construct, reconstruct or improve any section of highway on the county sys-

tem of highways selected by them, and the state aid herein provided for shall be available for use and shall be paid in connection with such improvement in the manner herein provided. Upon the written statement of any board of township trustees that it is unable to cooperate with the county and state by reason of tax limitations, the county commissioners shall investigate or cause to be investigated such statement, and if satisfied the same is correct, such board of county commissioners shall be authorized to assume on behalf of the county all or such portion of the township's share as may be necessary."

Sec. 6970. "Immediately upon the execution of any contract under the provisions of this act the county commissioners shall cause to be made a certificate setting forth the number and section designations of the road covered by such contract, the mileage of such section to be improved, the contract price for such improvement, and the name of the township in which such improvement is situated, together with such other facts as the Auditor of State of the State of Ohio may prescribe. Each such certificate shall be forthwith transmitted to the Auditor of State of the State of Ohio together with a written endorsement thereon by the prosecuting attorney of the county that the contract in question has been let in conformity with the provisions of this act. Upon receipt of such certificate with the endorsement of the prosecuting attorney thereon, the Auditor of State shall draw his warrant upon the Treasurer of State against any appropriations from the general revenue fund made by the General Assembly for state aid in the construction, reconstruction or improvement of county highways and apportioned to said county and unexpended, and shall make said warrant payable to the treasurer of said county and forthwith transmit the same to him. The amount so remitted shall be by the county treasurer placed in a special fund for the construction of said improvement and shall be expended for that and no other purpose. The certificate required to be made by Section 5660 of the General Code of Ohio shall not be required as to any funds in the state treasury appropriated to aid counties in the construction, reconstruction or improvement of county highway systems and apportioned to any particular township, and designated by the county commissioners of a county for use therein. Where work is done by force account, the certificate to the Auditor of State herein provided for shall be issued after the county, township and property owners' shares of the funds have been provided, and at the time the order to do the work is made by the county commissioners."

Sec. 6971. "For the purpose of encouraging the construction of a secondary or county system of highways and rendering effective the foregoing sections and extending necessary state aid in the construction, reconstruction or improvement of the several systems of county highways there shall be appropriated by the General Assembly out of the general revenue fund of the state for use annually in each township within the State of Ohio under the provisions of this act such sum as shall be deemed just and reasonable, but in no event less than one thousand dollars or more than two thousand dollars per township per annum. All aid furnished by the state under the provisions of the foregoing sections shall be paid from such appropriations."

Section 8 of the Greene Law, codified as Section 6972 of the General Code, which is also pertinent to a consideration of the question here presented, reads as follows :

"This act (G. C. Sections 6965 to 6972) shall be supplementary to all existing provisions of law for the construction and improvement of highways

by the state and the counties or townships therein, and no such section of law or part thereof shall be held to be repealed or otherwise affected by this act."

Prior to the enactment of the Greene Law on April 6, 1923, (110 v. 267), which was entitled "An Act to afford relief to townships by providing for the creation of a system of county highways in each county of the state and authorizing state aid in the construction thereof," the efforts of the State of Ohio had been devoted practically entirely to the construction, improvement and maintenance of the state highway system composed of inter-county highways and main market roads, which connected the various county seats and industrial centers of the state. As the state highway system was gradually created and improved, the necessity for secondary or feeder roads became apparent and the Greene law was therefore passed by the General Assembly, creating a secondary system composed of the system of county highways. In other words, the policy of building a secondary system, composed of definitely designated roads selected in accordance with their importance, was adopted.

It will be noted that Section 6971, supra, provides that "there shall be appropriated by the General Assembly out of the general revenue fund of the state for use annually in each township within the State of Ohio under the provisions of this act such sum as shall be deemed just and reasonable, but in no event less than one thousand dollars or more than two thousand dollars per township per annum." No authority need be cited to the effect that one General Assembly cannot bind a succeeding General Assembly and it is manifest that the provision just quoted is nothing more than a declaration of the policy of the 85th General Assembly, which enacted the Greene law.

The 87th General Assembly in the general appropriation act made the following appropriation to the Department of Highways and Public Works :

"SECONDARY HIGHWAY SYSTEM.

H—Fixed Charges and Contributions—

H 8—Contributions -----\$500,000 00

To be distributed in manner provided in Sections 6965 to 6972, General Code (110 O. L. 267). No township to receive in excess of \$1,000 per year as state aid. Said Fund to be distributed in the order in which applications are filed subsequent to July 1, 1927."

This appropriation was, however, vetoed by the Governor and, as a matter of law, therefore, there is no appropriation for the present fiscal period from which state aid may be paid to counties improving roads in the system of county highways under the sections above quoted, thus engendering your question as to whether or not the counties may proceed under the sections in question without state aid.

It will be observed that Section 1222, General Code, above quoted, provides that the proceeds of the levy authorized by such section shall be used "also for the purposes provided in Sections 6965 to 6972, inclusive, of the General Code," thus presenting the question as to whether or not, under the Greene law, counties may improve a road in the system of county highways without state aid, using to pay the cost thereof the proceeds of the levy authorized by Section 1222.

It is my opinion that the answer to this question must be in the affirmative. In the first place it will be observed that by the express terms of Section 6972, supra, the Greene law is "supplementary to all existing provisions of law for the construction and maintenance of highways by * * * the counties." The Greene law, therefore, supplements Section 6906 and the following and related sections of the General Code

relating to road construction and improvement by county commissioners. As above pointed out, the provisions of Section 6971, providing that General Assemblies, subsequent to the 85th General Assembly, should make appropriations from which state aid might be paid, could in no event be considered binding upon later General Assemblies. It seems quite obvious that it was not contemplated by the 85th General Assembly, when enacting the Greene law, that none of the provisions thereof should be effective unless it was determined by later Legislatures to co-operate with the counties in improving roads in the system of county roads. The purpose of state aid was merely to encourage the local subdivisions, either county or townships, in building these roads, and it seems clear that it was not intended that because of failure to continue making appropriations to make state aid possible, construction of roads in a county system under the Greene law should entirely cease. On the other hand, the intention seems to be clear that the primary duty of constructing, improving and maintaining roads in the county system was intended to be placed upon the local officials and local taxing units and the money from the state appropriations was to be given as an incentive to or reward for a greater road building program by the local units.

In connection with these conclusions, I see no reason why the provisions of Section 6970, *supra*, should not be complied with by the local officials even though no appropriation is now available against which the auditor may draw his warrant upon the Treasurer of State in favor of any county operating under the Greene law. Whether or not appropriations will be made in the future, which will permit paying to counties the moneys contemplated by the Greene law, rests in the sound discretion of future General Assemblies. In any event, however, no harm can come from the local officials acting in accordance with the provisions of Section 6970.

For the reasons above set forth, it is my opinion, in specific answer to your question, that the proceeds of a tax levy, made under the provisions of Section 1222, General Code, as amended by the 87th General Assembly (112 v. 470), may be expended by the county commissioners for the purpose of constructing, reconstructing or improving any section of highway in the system of county highways, under the provisions of Sections 6965 to 6972, inclusive, of the General Code, regardless of whether or not the Legislature has appropriated any moneys for state aid in accordance with Sections 6970 and 6971, General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.

1972.

AGREEMENT—EFFECT OF AGREEMENT BETWEEN C. C. C. & ST. L. R. R. COMPANY AND OHIO STATE BOARD OF AGRICULTURE, DISCUSSED.

SYLLABUS:

Effect of agreement between the C. C. C. & St. L. Ry. Co. and the Ohio State Board of Agriculture, dated November 9, 1892, discussed.

COLUMBUS, OHIO, April 14, 1928.

HON. CHARLES V. TRUAX, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication under recent date, wherein you request my opinion as to the effect of a purported agreement be-