

OPINION NO. 73-105

Syllabus:

The Department of Transportation is authorized by R.C. 5501.11 to agree with the City of Cleveland to exchange for land needed for the right of way of Interstate 90, land needed by the city for expansion of a water treatment facility, which land the Department may acquire by purchase or appropriation.

To: J. Phillip Richley, Dir., Dept. of Transportation, Columbus, Ohio
By: William J. Brown, Attorney General, October 25, 1973

I have before me your request for my opinion regarding a proposed acquisition of land by the Department of Transportation, pursuant to an agreement with the City of Cleveland to exchange this land for a tract owned by the city. The city's tract is part of the site of a water treatment facility. It is set aside for expansion of the facility, which expansion is now required by an order of the Environmental Protection Agency. However, this tract is also needed for the right of way of Interstate 90. Under the proposed contract, the city would agree to deed the required right of way to the state, and the state would agree to acquire title to another tract by purchase or appropriation, and deed that land to the city as a replacement site for the land originally set aside for expansion of the water treatment facility.

Your letter states that the Department understands that R.C. 5501.11 authorizes such contract and use of the state's power of eminent domain, but the city and the owner of the private property which may be appropriated have expressed doubts concerning the validity of the statute in this case.

R.C. 5501.11 speaks to the powers and duties of the Director of the Department of Transportation, as follows:

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The Director may purchase or appropriate property necessary for the location or construction of any culvert, bridge, or viaduct, or the approaches thereto, including any property needed to extend, widen, or alter any feeder or outlet road, street, or way adjacent to or under any such bridge or viaduct when the extension, widening, or alteration of such feeder road, street, or way is necessary for the

full utilization of such bridge or viaduct, or for any other highway improvement, and may purchase or appropriate, for such length of time as is necessary and desirable, such additional property as is required for the construction and maintenance of slopes, detour roads, sewers, roadside parks, rest areas, recreational park areas, scenic view areas, or drainage systems incident to any highway improvement, which he is or may be authorized to locate or construct. Title to property purchased or appropriated by the director shall be taken in the name of the state either in fee simple or in any lesser estate or interest which the director deems necessary or proper, in accordance with forms to be prescribed by the attorney general. The deed shall contain a description of the property and be recorded in the county where the property is situated, and when recorded, shall be kept on file in the department of highways.

Provided that when property, other than property used by a railroad for operating purposes, is acquired in connection with improvements involving projects affecting railroads wherein the department of highways is obligated to acquire property under grade separation statutes, or on other improvements wherein the department is obligated to acquire lands under agreements with railroads, or with a public utility, public corporation, or private corporation owning similar facilities for the readjustment or relocation of their facilities, a fee simple title or an easement may be acquired by purchase or appropriation in the name of such railroad, public utility, public corporation or private corporation in the discretion of the director. When the title to lands, which are required to adjust such facilities pursuant to agreements with the director of highways, is taken in the name of the state, said lands may in the discretion of the director be conveyed in fee simple to the railroad, utility or corporation for which it was acquired. Said conveyance shall be prepared by the attorney general and executed by the governor and bear the great seal of the state of Ohio.

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Chapters 5501., 5503., 5505., 5511., 5513., 5515., 5517., 5519., 5521., 5523., 5525., 5527., 5529., 5531., and 5533. of the Revised Code do not prohibit the federal government, or any individual or corporation, from contributing a portion of the cost of the establishment, construction, reconstruction, relocating, widening, resurfacing, maintenance, and repair of said highways.

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It will be noted that the above language expressly authorizes the purchase or appropriation of property "in connection with

improvements * * * wherein the department is obligated to acquire lands under agreements with * * * a * * * public corporation * * * for the readjustment or relocation of their facilities * * *. I agree with your conclusion that this language directly authorizes the type of agreement and acquisition in question. The language being unambiguous, there is no need for me to construe it. See State ex rel. Wallace v. City of Colina, 20 Ohio St. 2d 100 (1972).

If your question about the validity of R.C. 5501.11 is intended also to question its constitutionality, please be advised that myself and my predecessors have traditionally declined to decide such an issue, since it is the prerogative of the courts. See, e.g., Opinion No. 73-088, Opinions of the Attorney General for 1973; Opinion No. 3644, Opinions of the Attorney General for 1954. However, I can see no plausible basis for a challenge to the constitutionality of R.C. 5501.11, as applied in this fact situation. The expenditure and appropriation, if any, will clearly be for a public purpose.

Please note further that if title to the land is taken in the name of the state, the conveyance to the city "shall be prepared by the attorney general and executed by the governor and bear the great seal of the state of Ohio. This conveyance would provide additional formal approval of the transaction by this office.

In specific answer to your question, it is my opinion and you are so advised, that the Department of Transportation is authorized by R.C. 5501.11 to agree with the City of Cleveland to exchange, for land needed for the right of way of Interstate 90, land needed by the city for expansion of a water treatment facility, which land the Department may acquire by purchase or appropriation.