

It is also my opinion that if said association proposes to transact its appropriate business, it should be incorporated under the provisions of Section 9445, General Code, supra, and receive a proper license from the insurance department for the transaction of its business.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

P. S.—I am returning to you herewith both proposed articles of incorporation for your files.

E. C. T.  
*Attorney General.*

1368.

GARAGE—DIRECTOR OF HIGHWAYS AND PUBLIC WORKS IN ERECTING GARAGE, THE AGGREGATE COST OF WHICH EXCEEDS \$3,000.00, MUST COMPLY WITH SECTIONS 2314 TO 2332, GENERAL CODE.

**SYLLABUS:**

*The Director of Highways and Public Works must comply with Sections 2314 to 2332, both inclusive, of the General Code, when he wishes to build a garage for the use of the state, the aggregate cost of which exceeds three thousand dollars.*

COLUMBUS, OHIO, December 14, 1927.

HON. JOSEPH T. TRACY, *Auditor of State, Columbus, Ohio.*

DEAR SIR:—Permit me to acknowledge receipt of your request for my opinion, as follows:

“This office is in receipt of Voucher No. 47350 from the Department of Highways and Public Works. By it authorization is given for the payment of \$2,755.00 to ----- for the erection of a highway garage at -----, Ohio. This is estimate Number One on highway maintenance order number 8490, copy of which is hereto attached. I am advised that plans and specifications for the structure were prepared by the state architect and that bids were invited informally and that the bid of \$42,720.00 by ----- of -----, Ohio, was the lowest of the bids submitted. Following the receipt of bids a maintenance order, number 8490, was issued for the construction of the building. The procedure outlined in Sections 2314 to 2332, G. C., relating to the filing of plans and advertising for bids, was not allowed.

The question at issue is whether it is necessary that these general sections be complied with in the construction of garages for use of the Division of Highways.

For your information I would advise that this question was submitted to your predecessor last year, and under date of October 8, 1926, he gave us a ruling in which he advised that it was unnecessary for the Highway Department to follow the procedure as set forth in the above mentioned statutes. In order that our auditing of expenditures may be in accord with your interpretation of the law, I herewith request that you review the ruling above mentioned and render your formal opinion relative to the question at issue.”

You state that the voucher in question is in part payment for a garage which is being erected by the Department of Highways and Public Works for its use at Chillicothe, Ohio.

You also state that in letting the contract the procedure outlined in Sections 2314 to 2332, both inclusive, General Code, was not followed, and you are questioning the validity of the contract for that reason.

Therefore, your specific question is whether or not Sections 2314 to 2332, both inclusive, General Code, must be complied with and followed when the Department of Highways and Public Works is building a garage for said Department's use.

Section 1202, General Code, provides in part as follows :

“ \* \* \*

The Director of Highways shall be authorized to purchase or lease land along or in the vicinity of state highways which in his judgment may be required in order to furnish storage facilities for materials or equipment employed in the maintenance and repair of such state highways, and to pay from the state maintenance and repair fund such reasonable price for such real estate as may be agreed upon between him and the owner or owners thereof. He shall be authorized to erect on such land, such sheds or other structures as in his judgment may be required.”

The above section authorizes the Director of Highways and Public Works to purchase or lease land for the purpose of furnishing storage facilities for materials or equipment in connection with the maintenance and repair of the highways of the state. It also provides that “he shall be authorized to erect on such land such sheds or other structures as in his judgment may be required.” This latter provision evidently means that he shall erect such structures for the purposes provided in said section, to-wit, “storage facilities for materials or equipment.”

Section 6948-1a, General Code, provides as follows :

“The Director of Highways and Public Works, subject to the provisions of law governing the State Highway Department, shall have power to purchase such equipment and materials and employ such labor as may be deemed necessary to execute any work in the construction of inter-county highways in the manner provided in Section 1231 of the General Code, provided the estimated cost of such work does not exceed three thousand dollars per mile.

In the construction of main market roads under the provisions of said Section 1231 of the General Code, the Director of Highways and Public Works shall be required to proceed by contract when the estimate exceeds three thousand dollars per mile.”

It will be noted that this section authorizes and empowers the Director of Highways and Public Works to purchase such equipment as may be deemed necessary to perform the duties required by law. I find no specific authority in our present statutes authorizing said director to keep such equipment in repair, however, provision has been made therefore by the present General Assembly in Section 18 of House Bill No. 67, 112 Ohio Laws 430. This section has been codified as Section 1190-1, General Code, and will become effective January 2, 1928.

I am of the opinion, however, that the power to purchase equipment for use would give said director authority to keep the same in repair as a necessary incident thereto. In order to keep such equipment in repair it might become necessary to erect struc-

tures for said purposes, and the Director of Highways has authority so to do if the General Assembly has made appropriation for that purpose.

I find in the general appropriation act passed by the General Assembly for the period from July 1, 1927, to December 31, 1928, under the appropriations made to the Department of Highways and Public Works, an appropriation of \$1,000,000.00 for "Additions and Betterments."

The budget classification under the head of "Additions and Betterments" provides :

"This title means permanent investments which will increase the permanent assets of the state. Land and its improvements represent either the ownership in fee or the enjoyment under lease of real estate. A distinction of vital importance arises here, in that in the former case the valuable life of the expenditure is co-terminus with the life of the improvement, while in the latter it is limited to a term of years either more or less than life."

Therefore, the appropriation made by the General Assembly may be used by the Director of Highways and Public Works for the purpose of erecting a garage upon land owned by the state in fee or land which it has leased for a term of years.

I am advised by you that an examination of your records discloses that the project in question is being financed from the appropriation herein mentioned.

This brings us to a consideration of Section 2314 of the General Code, which section provides as follows :

"Whenever any building or structure for the use of the state or any institution supported in whole or in part by the state or in or upon the public works of the state that are administered by the superintendent of public works, is to be erected or constructed, or whenever additions or alterations, structural or other improvements are to be made, or heating, cooling or ventilating plants or other equipment to be installed for the use of the state, or in or upon such public works or in or for an institution supported in whole or in part by the state, or for the supply of material therefor, the aggregate cost of which exceeds three thousand dollars, each officer, board or other authority, upon whom devolves the duty of constructing, erecting, altering, or installing the same, hereinafter called the owner shall make or cause to be made, by an architect or engineer whose contract of employment shall be prepared and approved by the Attorney General and filed with the Auditor of State, the following: full and accurate plans, suitable for the use of mechanics and other builders in such construction, improvement, addition, alteration, or installation; and details to scale and full sized, so drawn and represented as to be easily understood; accurate bills showing the exact quantity of different kinds of material necessary to the construction; definite and complete specifications of the work to be performed, together with such directions as will enable a competent mechanic or other builder to carry them out and afford bidders all needful information; a full and accurate estimate of each item of expense and of the aggregate cost thereof, and such further data as may be required  
\* \* \* ."

It will be noted that said section is applicable to "any building or structure for the use of the state." There is no exception made at any place in the section or the subsequent sections relative thereto. There can be no doubt but that a garage which was erected by the Director of Highways and Public Works under authority of law would be "for the use of the state."

Said Section 2314 is part of what is known as the "Building Regulations" and is made applicable to those buildings mentioned therein. The other sections, to-wit, 2315 to 2332, both inclusive, outline the procedure which must be followed in preparing the plans and letting the contract in connection with "any building or structure for the use of the state," and they would therefore have to be followed in connection with the building in question.

You refer to a ruling by my predecessor under date of October 8, 1926. An examination of the files of this office discloses that such ruling was by letter and not an official opinion.

I can not agree with the view expressed by my predecessor in said letter. The fact that when Sections 2314, et seq., of the General Code were enacted the legislature could not have had in mind the erection of garages situated upon the highways of the state, for the reason that at that time there was no authority to erect the same, does not prevent said sections from being applicable thereto. Section 2314 is general and relates to "any building or structure for the use of the state." These terms are general, and the fact that no such building was contemplated at the time the legislature enacted said sections would not prevent them from being applicable to any buildings or structures thereafter so erected.

Neither can I agree with the proposition contained in said letter that since the legislature has prescribed a definite form of procedure to be followed by the Highway Department in the maintenance and repair of state highways, it would be inconsistent to require the department to follow the provisions of said Section 2314 in connection with the construction of garages.

Without an appropriation for such purpose the Director of Highways could not build a garage. That would be a capital investment of the state and properly classified under "Additions and Betterments." The fact that the legislature has provided how the contracts for maintenance and repair of state highways should be let has no application to the letting of contracts for a "building or structure for the use of the state," since the legislature has specifically provided for the procedure to be followed in such cases.

It is therefore my opinion that the Director of Highways and Public Works must comply with Sections 2314 to 2332, both inclusive, of the General Code, when he wishes to build a garage for the use of the state, the aggregate cost of which exceeds three thousand dollars.

However, in the instant case, the Department of Highways and Public Works and the contractor entered into a contract which was in accordance with the law as then interpreted by the chief law officer of the state. I am of the opinion that such contractor should be paid for the work which he has actually performed under said contract. The preliminary steps required by law were not taken by the Department of Highways and Public Works and the contract was not let according to the law relative thereto.

The Supreme Court of this state in the case of *Enmert vs. City of Elyria*, 74 O. S., 185, a case in which a taxpayer had sought to enjoin the city from the payment of money upon a contract which had been let contrary to law, said:

"But because a municipality is not legally liable to pay for a public improvement, it does not follow that it is not under a moral obligation to do so or that a court because it will not enforce payment will enjoin it. The contract for paving this street is not ultra vires. If invalid, it is so merely because the contract was made before the bonds to provide the money to pay for it were sold. Now that the work has been done in accordance with the contract and the bonds have been sold and the money to pay for it is in the treasury, it is right that it should be paid for and a court of equity ought not,

unless its failure so to do would defeat the purpose of the law, prevent the municipality from doing what equity and fair dealing would exact from an individual."

So in the instant case we have a situation in which the contractor could not enforce payment for the work which he has done under said contract, but the state should under these particular circumstances be willing to pay for the same. I am of the opinion that a court of equity would not interfere therewith. The state should be willing to pay for the benefits which it has received under said contract.

I do not mean to hold that in future the Director of Highways and Public Works may continue letting contracts without, when necessary, complying with Sections 2314, et seq., of the General Code and pay the contractor for the services performed, but I do hold that in this case the contractor should receive payment for the work which he has actually done under the contract because all parties were relying upon the interpretation of the law by the legal adviser of the Department of Highways and Public Works.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

---

1369.

APPROVAL, LEASE TO LAND ALONG BUCKEYE LAKE IN LICKING COUNTY, OHIO.

COLUMBUS, OHIO, December 14, 1927.

HON. G. F. SCHLESINGER, *Director, Department of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my examination and opinion three copies of a lease between the State of Ohio, as lessor, and Arthur Smadbeck, of Millersport, Ohio, as lessee, covering state land lying between the northerly line of "Lake Shore Drive" in Fairfield Beach allotment, in Licking County, Ohio, and the southerly top water line of Buckeye Lake in Licking County, and extending between the westerly line of Juniper Road in said Fairfield Beach allotment, produced northward to the southerly top water line of Buckeye Lake and the easterly line of Rosewood Road in said Fairfield Beach allotment, produced northward to the southerly top water line of Buckeye Lake, for a period of fifteen years from November 18, 1927, and renewable for a like period at an annual rental of \$100.00 per year, payable semi-annually for the first fifteen year period.

I have examined said lease and am of the opinion that the same is in proper legal form and properly executed. I am returning said lease to you herewith with my approval noted thereon.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*