

compromised either before or after the filing of civil actions, by any board or officer or by order of any court unless the attorney general shall first give his written approval thereof."

From the facts presented I feel that it would be for the best interests of the state and the subdivisions thereof interested in this matter to accept the proposition of settlement made by the administrator. By virtue of such a settlement practically all of the assets remaining in the hands of the administrator will be applied toward the payment of the shortages, the only portion going elsewhere being fourteen per cent upon approximately \$700.00. While some question might properly be raised as to the state's right to claim priority over general creditors, the amount involved in this instance is so small as to make such a contention not worth while.

At the same time I desire to call your attention to what I have heretofore stated, namely, that no collection has yet been effected upon the bond of the officer. Any settlement which is entered into should be so made as to preserve the right to recover in full upon the bond in question, and the prosecuting attorney is required by Section 286 of the Code to prosecute this claim and effect recovery.

You are accordingly advised that I approve of a settlement with the administrator of the estate of the officer in question on the basis of fourteen per cent of the claim upon the finding in question, provided, however, that the acceptance of this offer is done in such a way as to preserve all existing rights upon the bond of the officer.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

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1825.

APPROVAL, BONDS OF MONROE COUNTY, OHIO—\$18,000.00.

COLUMBUS, OHIO, March 7, 1928.

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

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1826.

COUNTY COMMISSIONERS—AUTHORITY TO BIND THEIR SUCCESSORS DISCUSSED—ROAD CONTRACTS DISCUSSED—AUTHORITY OF TOWNSHIP TRUSTEES TO BIND SUCCESSORS.

*SYLLABUS:*

*A board of county commissioners cannot, by entering into a contract with one or more boards of township trustees providing for the improvement of the roads in the county system of highways by widening, grading and graveling or stoning the same,*

*over a five-year period, or otherwise, bind their successors in office and thus deprive them of their power and duty, in the exercise of the discretion vested in them by law, to determine which, if any, of the roads in the county system shall be improved, in what manner such roads shall be improved, how such improvements shall be financed, etc. Nor can the township trustees by such a contract or otherwise, deprive their successors in office of the power and duty to exercise the discretion conferred on them by law with reference to such improvements.*

COLUMBUS, OHIO, March 8, 1928.

HON. H. E. CULBERTSON, *Prosecuting Attorney, Ashland, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of March 3, 1928, reading as follows:

“Ashland County has completed all of her state road system except about two miles, which will be completed this year. We are now anxious to get the farmer to these roads and have worked out an idea fashioned after the state system. Before we get tied up we would like to know if either your office or the State Highway Department can see anything illegal in it. We have worked it out along the so-called Stage Construction Plan, only we are using five years instead of three.

Our plan is to take one or more county roads on the county system in each township and enter into a contract with the township trustees after a petition has been signed by the property owners. Basis of assessment to be county, 50%; township, 35% and property owners, 15%; roads to cost \$8,000.00 per mile to be constructed by widening and grading and graveled or stoned over a five-year period, when the county is to take the completed road over and maintain it. Township and property owners to pay assessed portion semi-annually over 5 year period.”

Acknowledgment is also made of your communication of the same date supplementing the facts contained in your first communication, as follows:

“This morning I sent you a letter requesting your opinion on a county road program. In looking over my copy I find that I omitted the most important thing and that is: We want to carry on this work with our Road Fund and not issue bonds. The big question with me was whether we could go into a five-year contract, when it necessarily would have to be financed from year to year and also we might run into new boards of trustees and even commissioners. The plan is fine and I personally would like to see it go through if we can get by any legal bars.”

As I understand your letters, it is proposed that the county commissioners enter into contracts with various boards of township trustees providing a five-year road building program. It seems apparent that no legislation has been started for the improvements in question, by either the county commissioners or township trustees, and that petitions have not been filed by property owners to be affected by such improvements. It is not stated in what year or years of the five-year program mentioned a contract or contracts will be let for such improvements, nor does it appear what, if any, funds will be available in the general road funds of the county or township for the purpose of meeting the county's or township's agreed share of the cost of such improvements.

In your first communication you say that "our plan is to take one or more county roads *on the county system* in each township and enter into a contract with the township trustees after a petition has been signed by the property owners." In other words, it is proposed to have the township trustees co-operate with the county in the matter of the improvement of one or more of those roads in each township which said roads have been made a part of the county system of roads as provided in Sections 6965 and related sections of the General Code.

There is no statute authorizing a board of county commissioners and one or more boards of township trustees to enter into a contract such as is described in your letter, and it is fundamental that statutory boards have such powers and only such powers as are expressly conferred by statute, together with such implied powers as may be necessary to carry the powers expressly granted into effect.

A contract like the one proposed would be clearly objectionable, for the reason that the county commissioners and the township trustees now in office can not bargain away their own discretionary powers and legislative authority any more than they can take away the discretionary powers and legislative authority of their successors in office. The authority to determine which, if any, of the roads in the county system of highways shall be improved is vested by law in a board of county commissioners, as is the power to decide in what manner the roads shall be improved and how the improvement will be financed. The Legislature has conferred such power and authority upon the board of county commissioners and it seems to me quite plain that the commissioners now in office cannot, by making a contract with the township trustees or otherwise, take away from the county commissioners, who succeed them, the power and authority so vested by the Legislature and thus tie the hands of future boards.

Likewise, certain powers and duties have been vested in the township trustees and the trustees now in office cannot, in the method described in your letter, deprive their successors in office of the power and duty to exercise *their* discretion as they see fit in determining certain questions relating to the question of the township's co-operation in improving a county road. See for example Section 6921, General Code, which authorizes county commissioners and township trustees to assume the entire cost of the improvement and dispense with special assessments.

Sections 6906 and 6911, General Code, provide, in part, as follows :

Sec. 6906. "The board of county commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same. \* \* \* The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement. \* \* \* "

Sec. 6911. "The board of county commissioners may by resolution, which said resolution shall be adopted by a unanimous vote, find that the public convenience and welfare require the improving of any public road or part thereof by grading, draining, paving, straightening or widening the same and constructing or reconstructing any bridges and culverts necessary for such improvement, and in said resolution shall fix the route and termini of such improvement, and shall apportion the cost thereof, which shall be apportioned and paid in any one of the methods provided for by Section 6919 of the General Code. \* \* \* "

Section 6919, General Code, reads :

“The compensation, damages, costs and expenses of the improvement shall be apportioned and paid in any one of the following methods, as set forth in petition :

1. Not less than thirty-five per cent, nor more than fifty per cent thereof shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all taxable property in the county, or out of any funds available therefor; not less than twenty-five per cent, nor more than forty per cent thereof shall be paid out of the proceeds of any levy or levies for road purposes upon the taxable property of any township or townships in which said improvement may be in whole or part situated; and the balance thereof, which shall not be less than twenty per cent nor more than thirty-five per cent, shall be assessed against the real estate abutting upon said improvement, or the real estate situated within one-half mile of either side thereof, or the real estate situated within one mile of either side thereof, according to the benefits accruing to such real estate; or,

2. Not less than one-half nor more than two-thirds thereof shall be paid out of the proceeds of any levy or levies for road purposes upon the taxable property of any township or townships in which such improvement may be in whole or part situated; and the balance thereof shall be assessed against the real estate abutting upon the improvement or against the real estate situated within one-half mile of either side of said improvement, or the real estate situated within one mile of either side thereof according to the benefits accruing to such real estate; or,

3. All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof, according to the benefits accruing to such real estate; and the balance thereof, if any, shall be paid by the county and the township or townships in which such improvement may be in whole or part situated, in such proportion as may be agreed upon between the county commissioners and the trustees of such township or townships; or,

4. All or any part thereof shall be assessed against the real estate abutting upon said improvement, or against the real estate situated within one-half mile of either side thereof, or against the real estate situated within one mile of either side thereof, or against the real estate situated within two miles of either side thereof, according to the benefits accruing to such real estate and the balance thereof, if any, shall be paid out of the proceeds of any levy or levies for road purposes upon the grand duplicate of all the taxable property in the county or from any funds in the county treasury available therefor.

When the board of county commissioners acts by unanimous vote and without the filing of a petition, the commissioners shall set forth in their resolution declaring the necessity for the improvement, the method of apportioning and paying the compensation, damages, costs and expenses of the improvement, which may be any one of the methods above provided.”

It must be borne in mind that the above section is a part of a series or group of statutes, viz. Sections 6906 to 6948, inclusive, pertaining to county road improvements, which are either initiated by petition of the property owners or undertaken upon the unanimous action of a board of county commissioners. These sections

contemplate that each improvement shall be considered as a separate project and the necessary legislative action and other procedure must be taken by the county commissioners and township trustees in each particular case. Among other things, before a contract is let for the improvement of a particular road, a certificate must be issued by the proper fiscal authority to the effect that there are sufficient funds in the treasury or in process of collection to meet the obligation created. See Section 5625-33, General Code.

I know of no reason why the county commissioners and the various boards of township trustees may not adopt a program they desire to follow and proceed with the improvement of the different roads involved as the finances of the county and township permit. And the improvement may consist of grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing, applying dust preventatives or by otherwise improving, or of all or any combination of these things. However, the improvement of each road is a separate undertaking and the necessary legislative action and other procedure must be taken by the county commissioners and the township trustees for each road improvement.

I note in your letter that you state that the roads in question are to be "constructed by widening and grading and graveled or stoned over a five-year period, when the county is to take the completed road over and maintain it." Your attention is directed to Section 7464 of the General Code, as amended by the 87th General Assembly (112 v. 496), which provides *inter alia*, that:

" \* \* \*

(b) County roads shall include all roads which have been or may be established as a part of the county system of roads as provided for under Sections 6965, 6966, 6967 and 6968 of the General Code, which shall be known as the county highway system, and all such roads shall be maintained by the county commissioners.

\* \* \* "

In Opinion No. 1674 rendered under date of February 4, 1928, to the prosecuting attorney at Georgetown, Ohio, with reference to this section as amended, it was held as follows:

" \* \* \*

2. By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act), county roads are defined as including all roads, which have been or may be established as a part of the county system of roads as provided for in Sections 6965, 6966, 6967 and 6968, General Code (commonly called the Green law), which shall be known as the county highway system.

3. By the terms of Section 7464, General Code, as amended in House Bill No. 67, passed by the 87th General Assembly (Norton-Edwards Act) and Section 7467, General Code, the duty of maintaining and repairing all county roads is placed on the county commissioners regardless of whether they be dirt roads or otherwise.

4. The county's portion of gasoline excise tax funds (Section 5537 and related sections of the General Code) may be only used for the purpose of maintenance and repair of roads in the county highway system, including roads that are unimproved.

5. The term 'maintenance and repair' as used in Section 5537, General Code, embraces all work done upon roads and highways within the meaning of the term in its ordinary acceptation, and in addition thereto, includes all

work done upon any public road or highway in which the existing foundations thereof are used as the subsurface of the improvement thereof in whole or in substantial part.

\* \* \* "

In the opinion it was said as follows :

"With reference to the maintenance and repair of these roads, paragraph (b) of Section 7464, supra, expressly provides that 'all such roads shall be maintained by the county commissioners.' This provision is consistent with the provisions of Section 7467, General Code, to the effect that the 'state, county and township shall each maintain their respective roads as designated in the classification hereinabove set forth.' There is no provision in Section 7464, as amended, or any other section of the Code relieving the county commissioners from their duty of maintaining and repairing roads in the county highway system, which have not been improved, and it is clear from the provisions of Section 7464, as amended, and Section 7467 that the duty of maintaining and repairing all county roads is placed on the county commissioners regardless of whether they be dirt roads or otherwise.

\* \* \*

Your attention is further directed to the fact that by the express terms of paragraph (c) of Section 7464, as amended, 'the county commissioners shall have full power and authority to assist the township trustees in maintaining' township roads and that nothing in Section 7464 'shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act.' Section 7467, supra, also provides that 'either the county or township may, by agreement between the county commissioners and township trustees, contribute to the repair and maintenance of the roads of the other.'"

For the reasons above set forth, specifically answering your question, it is my opinion that a board of county commissioners cannot, by entering into a contract with one or more boards of township trustees providing for the improvement of the roads in the county system of highways by widening, grading and graveling or stoning the same, over a five year period, or otherwise, bind their successors in office and thus deprive them of their power and duty, in the exercise of the discretion vested in them by law, to determine which, if any, of the roads in the county system shall be improved, in what manner such roads shall be improved, how such improvements shall be financed, etc. Nor can the township trustees by such a contract or otherwise, deprive their successors in office of the power and duty to exercise the discretion conferred on them by law with reference to such improvements.

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