

2395

HIGHWAY, STATE—DIRECTOR OF HIGHWAYS—TO DETERMINE MOST FAVORABLE LOCATION TO RECONSTRUCT STATE HIGHWAY—REQUIRED TO COMPLY WITH PROVISION AS TO NOTICE AND HEARING AS SET OUT IN SECTION 1178-20 GC — RELOCATION NECESSARY — OHIO TURNPIKE COMMISSION—SECTION 1206 GC.

SYLLABUS :

The Director of Highways in making a determination, under the provisions of Section 1206, General Code, of the most favorable location for the reconstruction of a state highway the relocation of which the Ohio Turnpike Commission has found to be necessary, is required to comply with the provision as to notice and hearing with respect thereto as set out in Section 1178-20, General Code.

Columbus, Ohio, March 20, 1953

Hon. S. O. Linzell, Director of Highways
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows :

“Section 1206 of the Ohio General Code gives the Ohio Turnpike Commission authority ‘to change the location of any portion of any * * * State Highway’ it shall find necessary to change. With such authority, the requirement is imposed upon the Commission to ‘cause the same to be reconstructed at such location as the division of government having jurisdiction over such * * * highway shall deem most favorable * * *.’

“I, as Director of Highways having jurisdiction over state highways, am obliged to determine the most favorable location for a changed portion of state highway when such a change is determined as necessary by the Ohio Turnpike Commission.

“Section 1178-20 of the Ohio General Code providing that ‘the director of highways shall have authority to change existing state highways after notice and hearing as hereinafter provided’ etc.

“In the case of Section 1206 O.G.C., the Ohio Turnpike Commission is the initiating agent for a change in alignment and in the case of Section 1178-20 O.G.C., the Director of Highways is the initiating agency for a change in alignment.

“Will you please advise me whether or not, when the Ohio

Turnpike Commission determines a change in the location of a portion of state highway as necessary and the most favorable location in my judgment is determined, I am obliged to follow the requirements of Section 1178-20 and hold a hearing on the proposed relocation before certifying it as acceptable to the Commission."

Section 1178-20, General Code, in pertinent part provides :

"Before establishing any additional highways as part of the state highways system, or making any changes in existing highways comprising the state highway system, the director shall give notice by publication in one newspaper of general circulation in each of the counties in which the proposed highway to be established is located or in which it is proposed to make such changes, once each week for two successive weeks. Such notice shall state the time and place of hearing, which hearing shall be held in the county, or one of the counties, in which said proposed highway or some part thereof is situated, or in which it is proposed to make such changes, and which hearing shall be open to the public and *which notice shall further state the route of the proposed highway or the change proposed to be made in an existing highway of the State highway system.*" (Emphasis added.)

In Opinion No. 2606, Opinions of the Attorney General for 1928, p. 2135, one of my predecessors had under consideration the provisions of Section 1189, General Code, a prior statute analogous to Section 1178-20, *supra*. This section contained the following provision relative to proposed highway changes :

"* * * which notice shall further state the route of the proposed inter-county highway or main market road of the change proposed to be made in an existing inter-county highway or main market road."

The second paragraph of the syllabus in the 1928 opinion, *supra*, is as follows :

"2. Notices of a hearing to determine the advisability of a change in location of a state highway must specify the change proposed to be made and the director of highways accordingly has no jurisdiction, subsequent to such hearing, to order the relocation in a manner not specified in such notice."

The reasoning by which this conclusion was reached is indicated by the following language in the opinion (p. 2137) :

"* * * You will note that the notice must contain a statement

of the change proposed to be made in the existing inter-county highway or main market road. This, in my opinion, is a representation to interested parties that this change alone is under contemplation. Accordingly, I do not feel that you would have jurisdiction after a notice specifying a particular relocation, to adopt some alternative plan without having a new hearing and serving new notices thereof."

From the foregoing it would appear that the purpose of the hearing provided in Section 1178-20, General Code, is to assist the director in making two determinations. The first relates to the propriety of any relocation at all, and the second to the propriety of the new location which has been proposed.

Under the provisions of Section 1206, General Code, it is clear that as to state highway relocations made necessary by turnpike construction the commission is authorized to act independently of the director, and without compliance with the provisions as to notice and hearing in Section 1178-20, General Code, in the matter of determining the necessity of a removal of such highways from existing locations. The director retains, however, by the clear provisions of this later enactment, the authority which he had theretofore possessed to determine the location of such highway as reconstructed. In this sense, therefore, Section 1206, *supra*, does not confer any new power on the director but imposes a limitation on the power which had been previously conferred on him by a general statutory provision.

In the exercise of the power thus retained by the director, is there any implication in the later enactment, Section 1206, General Code, that the provisions as to notice and hearing set out in Section 1178-20, General Code, are not to be applicable? If so, such implication must be found in the fact that such later enactment is wholly silent on the subject. In any event we are confronted with a situation in which a general statute is worded in language sufficiently broad to apply to a relocation determination by the director unless the language of a later statute is such as to render it inapplicable. In short, the question is whether the later enactment effects a repeal by implication of an express provision of the former.

On the matter of repeals by implication we find the following statements in 37 Ohio Jurisprudence, 397, Section 136:

"It is not sufficient in order to effect a repeal by implication, that a later act is different from a former one, or that the subsequent statute covers some of the cases provided for by the former. It must further appear that the later act is contrary to, or incon-

sistent with, the former in order to justify the conclusion that the first is so repealed. Moreover, difficulty in reconciliation does not necessarily call for a repeal by implication. Except when an act covers the entire subject-matter of earlier legislation, is complete in itself, and is evidently intended to supersede the prior legislation on the subject, it does not by implication repeal an earlier act on the same subject, unless the two are so clearly inconsistent and repugnant that they cannot, by a fair and reasonable construction, be reconciled and effect be given to both. If they can stand together or if both can be enforced concurrently, there is no implication of a repeal. Furthermore, it is essential to repeal by implication that the repugnancy between the two statutes be irreconcilable, or as expressed by the various courts, necessary, clear, obvious, direct, strong, and absolute. The conflict must arise by express terms, not by inference or implication, unless the repeal by implication is necessarily implied. Lastly, it is to be borne in mind that the old statute is repealed only to the extent of the irreconcilable repugnancy, and not necessarily in its entirety."

In *Cincinnati v. Connor*, 55 Ohio St., 82, the first paragraph of the syllabus is as follows:

"Where, in a code or system of laws relating to a particular subject, a general policy is plainly declared, special provisions should, when possible, be given a construction which will bring them in harmony with that policy."

See also *State v. Hollenbacher*, 101 Ohio St., 478.

It is true, of course, that the later enactment in this instance is, in a sense, special legislation while the earlier provisions of Section 1178-20, General Code, are general in their terms and application. However, it must be remembered that special legislation will not be deemed to repeal general statutory provisions merely because they are different. The rule in such cases is stated in 37 Ohio Jurisprudence, 407, Section 148, as follows:

"It is well settled that a special law repeals an earlier general law to the extent of an irreconcilable conflict between their provisions; or, speaking more accurately, it operates to engraft on the general statute an exception to the extent of the conflict. But such a construction should be applied with caution, and, to have that effect, the subsequent special act should be plainly irreconcilable with the provisions of the prior general law; if the two acts are not repugnant and effect may be given to both, no repeal by implication will result. Moreover, even in the case of an irreconcilable inconsistency, *the general statute is not necessarily repealed in its entirety, but only to the extent of such repugnancy.*"

(Emphasis added.)

In the case at hand the two statutes are clearly repugnant, and irreconcilably so, only with respect to the authority under the general act, of the director to determine the *necessity* for relocation. Just as clearly, there is no repugnance whatever as to the authority of the director to select the location in which the highway is to be reconstructed. Accordingly there cannot be said to be any repugnancy between any of the provisions of Section 1206, General Code, and those provisions in Section 1178-20, General Code, relative to a notice and hearing to the extent applicable to the exercise of the authority retained by the director to determine the *place* of relocation.

As pointed out in the 1928 opinion, *supra*, with respect to a prior analogous statute, the provision as to the notice is intended, in part, to inform interested parties of the precise relocation proposed. It would appear that such parties would be interested not only in the question of the propriety of a removal from existing location, but in the place and extent of the new location as well. As to the former, of course, the right to notice and hearing has been lost by reason of the transfer of authority to make the determination from the director to the commission. As to the latter, however, the interest of the public is such that it might well be the subject of legislative protection. Such being the case, and the general provisions of Section 1178-20, *supra*, being clearly indicative of the general legislative policy, the subsequent special provisions in the turnpike act should, if possible, "be given a construction which will bring them in harmony with that policy." *Cincinnati v. Connor*, *supra*.

For this reason, and because I perceive only a limited conflict between the two statutes and deem it readily possible to give full effect to the later enactment and partial effect to the former, I am impelled to conclude, in specific answer to your inquiry, that the Director of Highways in making a determination, under the provisions of Section 1206, General Code, of the most favorable location for the reconstruction of a state highway, the relocation of which the Ohio Turnpike Commission has found to be necessary, is required to comply with the provision as to notice and hearing with respect thereto as set out in Section 1178-20, General Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General