

510.

HIGHWAY—THROUGH MUNICIPALITY—STATE DIRECTOR MAY CONSTRUCT WITH CONSENT OF COUNCIL—LIMITED TO MAINTENANCE AND REPAIR OF STREET EXTENSIONS WITHIN MUNICIPAL BOUNDARIES.

SYLLABUS:

1. *Under the provisions of Section 1224-1a of the General Code, as now in force, the Director of Highways may, at his discretion, construct, reconstruct, improve, maintain or repair any continuation of a highway on the state highway system through the limits of a municipal corporation, including the bridges and culverts thereon, when the consent for such improvement has been granted by the municipal corporation. To authorize such a proceeding it is necessary in the case of construction or reconstruction that the highway extend through the limits of such corporation.*

2. *When an improvement is upon a street within a city which does not form a part of a highway running through the same, but which constitutes a continuation of a state highway, the Director of Highways is limited to maintenance and repair, and the construction or reconstruction of bridges, and is not authorized to construct or reconstruct such street.*

COLUMBUS, OHIO, June 11, 1929.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication which reads:

“Various requests are reaching the State Highway Department for the construction or reconstruction of streets inside cities within the State of Ohio. The question at issue is as to the right of the Highway Department to expend State funds for this purpose.

In order to clarify the situation, I would request that you advise us by official opinion in regard to this question.

Section 1224-1a of the General Code reads in part as follows:

‘The director may at his discretion construct, reconstruct, improve, maintain or repair any continuation of a highway on the state highway system through the limits of a municipal corporation, and the bridges and culverts thereon, but he shall first obtain the consent of the legislative authority of such municipal corporation before proceeding with such work. He may also, if he deems it to the best interest of the public, upon obtaining the consent of the legislative authority of any city, maintain or repair any continuation of such road or highway within such city, and he may construct or reconstruct the bridges and culverts thereon, and pay the portion agreed to of such work from state funds.’

Section 5541-8 of the General Code reads in part as follows:

‘The director of highways and public works, or such other state official as may from time to time be the chief officer of any department of state having charge of the main market roads and inter-county highways of the state, or other state highway system, shall have the same authority to expend portions of the proceeds of the tax herein imposed upon the extensions of such main market roads and inter-county highways, or other state highways, within cities, as is conferred upon him by law with respect to such extensions within villages, and the procedure with respect to such expenditure

within cities shall be the same as is provided by law with respect to such expenditures within villages.'

In the revision of the Highway Code by the last legislature, Section 1224-1a was amended by House Bill No. 195 which will become operative after the expiration of the usual ninety day referendum period.

Due to the various sections of law relating to this question the Highway Department is in doubt as to whether this right to expend highway funds inside a city is limited to the operation of maintenance and repair or whether it has the authority to also construct or reconstruct a city street on an extension of the highway system if it be decided that same is for the best interest of the public.

Your prompt attention in regard to this matter will be greatly appreciated inasmuch as we have projects pending which must be decided within the next ten days."

As you state, Section 1224-1a, General Code, contains, in part, the provisions as set out in your communication. As you suggest, this section was amended in House Bill No. 195, as passed by the 88th General Assembly, which has not as yet gone into effect. However, it may be noted that the section as amended, does not now contain the provisions to which you refer. However, Section 1189-2, General Code, as enacted in said House Bill No. 195, does contain somewhat similar provisions which need not be discussed in this opinion, inasmuch as it is evident that your question is with reference to the law as it now exists.

Section 1224-1a, supra, in the first sentence of the part thereof which you quote, in clear and unambiguous language authorizes the Director of Highways, in his discretion, to construct, reconstruct, improve, maintain or repair any continuation of a highway on the State highway system through the limits of the municipal corporation, including the bridges and culverts thereon, when the consent of the municipal corporation is given prior to the undertaking of such work.

The second sentence which you quote seems to refer to the maintenance or repair of any continuation within a city, in cooperation with such city. In other words, the section seems to provide for two classes of improvement. The one relates to the construction or reconstruction of a street through a municipality which forms a part of a road upon the State highway system. The other pertains to the maintaining and repairing of any continuation of a State highway within a city. In other words, the former deals with construction and reconstruction as well as maintenance and repair, while the latter authorizes only maintenance and repair. It is with some difficulty that the intention of the Legislature is discovered with reference to the distinction, nevertheless a distinction has been attempted.

In the former provision the power to construct, etc., seems to depend upon the street being a part of a highway which runs through a municipality. In the latter case the authority seems to be dependent upon such a street being an extension or continuation of a State highway *within* a city, as contradistinguished from such a highway running *through* a municipality.

In any event, it is indisputable that Section 1224-1a, General Code, authorizes the Director to construct and reconstruct, as well as maintain streets that form a part of the State highway system upon a road continuing through the municipality; on the other hand, if such a continuation does not form part of a road continuing through a municipality which is a part of the State system, the director's power is limited to maintenance and repair, except as to bridges and culverts, which in either case he is authorized to reconstruct.

Section 5541-8, General Code, which is a part of the gasoline tax law, seems to authorize the use of said funds in the extension of main market roads and inter-county

highways within municipalities, in accordance with laws now provided with respect to such expenditures. In other words, said section seems to refer to the power under Section 1224-1a, of the General Code. That is to say, any authority conferred by Section 1224-1a, General Code, with reference to the powers to expend moneys upon roads within municipalities is adopted by reference relative to the expenditures mentioned in Section 5541-8, General Code. This section of course, has reference to the so-called one cent gasoline tax which is to be distinguished from the two cent tax mentioned in Section 5537, General Code. In this connection, it should be mentioned that Section 5541-8, General Code, was amended by the 88th General Assembly in House Bill No. 335, and expressly authorizes the State's share to be used for the cost of constructing, widening and reconstructing the State highways and for supplying the State's share of the cost of eliminating railway grade crossings. This bill was filed in the office of the Secretary of State on April 17, 1929, and inasmuch as Section 5541-2, General Code, which was amended in the same Act provides a tax levy, in all probability the same went into immediate effect. In any event, the amendment does not seem in any wise to limit the purpose for which such funds can be used in connection with the construction and reconstruction of highways. Said section as amended, in part, provides:

Sec. 5541-8. "When appropriated by the General Assembly such * * * highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

Eighty per cent of said highway construction fund shall be appropriated and used for paying the state's share of the cost of constructing, widening and reconstructing the state highways of this state and also for supplying the state's share of the cost of eliminating railway grade crossings upon such highways.

* * * *

The director of highways * * * shall have authority to expend portions of the tax, herein imposed, upon extensions of state highways within municipal corporations or upon portions of state highways within municipal corporations, as is or may be provided by law.

* * * * "

Although there is an inference in said section that such funds are to be used only on co-operative projects as the section relates "to the State's share of the cost of constructing," etc., I am inclined to the view that the section, as amended, does not contemplate inhibiting the use of such funds for constructing streets which form a part of a highway passing through a municipality.

Your attention is directed to an opinion of my predecessor, No. 1677, issued to Hon. Harry J. Kirk, Director of Highways, under date of July 5, 1928, and an opinion No. 2540, issued to Hon. James Collier, Prosecuting Attorney, Ironton, Ohio, under date of September 5, 1928, wherein it was indicated that the Director of Highways had power to improve streets within municipalities which were continuations of highways. However, said opinions did not undertake to distinguish between repair and construction. In fact, it was unnecessary for this question to be technically considered, in view of the questions considered by the then Attorney General in said opinions.

Based upon the foregoing, and in specific answer to your inquiry, it is my opinion that, under the provisions of Section 1224-1a of the General Code, as now in force, the Director of Highways may, at his discretion, construct, reconstruct, improve, maintain or repair any continuation of a highway on the state highway system through the limits of a municipal corporation, including the bridges and culverts thereon,

when the consent for such improvement has been granted by the municipal corporation. To authorize such a proceeding it is necessary that the highway extend through the limits of the corporation.

When an improvement is upon a street within a municipality which does not form part of a state highway running through the same, but is a continuation of a state highway, the Director of Highways is limited to maintenance and repair and the construction or reconstruction of bridges, and is not authorized to construct or reconstruct such street.

Respectfully,
GILBERT BETTMAN,
Attorney General.

511.

STATE WARRANT—FORGED BEFORE DELIVERY—PAYEE ENTITLED TO DUPLICATE—ISSUED ONLY WHEN DELIVERED TO PROPER PARTY.

1. *When state warrants are drawn by the state auditor in payment of obligations against the state and such warrants are lost before their delivery to the payee, or his agent, and without any fault on the part of the payee, the said payee is entitled to have warrants drawn and delivered to him in payment of the obligations for which the lost warrants had been drawn.*

2. *A state warrant is not "issued" until it is delivered to the person entitled to it.*

COLUMBUS, OHIO, June 12, 1929.

HON. H. H. GRISWOLD, *Director of Public Welfare, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your request for my opinion, as follows:

"On or about the first day of March of the present year vouchers were issued by this department in payment of certain items of indebtedness for supplies furnished. Warrants were drawn by the Auditor of State to cover the items and transmitted to this department. These warrants were stolen from the mailing desk, endorsements forged by the person who stole them and warrants cashed at various places finally clearing through various banks and paid by the Treasurer of State.

This was not discovered until some ten days or two weeks after this incident occurred. The persons to whom these warrants were payable have never received compensation from the state and we desire to make payment to them at the earliest possible moment. Assuming that the obligations were incurred in such way as to be an encumbrance against the appropriation for the year 1929, will you kindly advise us as to whether we may issue duplicate vouchers for these amounts furnishing the Auditor of State with evidence that the original warrants had been cashed by persons other than the payees, and charge these disbursements against the proper appropriation made to our department or whether it will be necessary for the payees to be reimbursed through the action of the Sundry Claims Board and the General Assembly?"

By the terms of Sections 241, et seq., General Code, the Auditor of State is con-