

994.

APPROVAL, BONDS OF PICKAWAY TOWNSHIP RURAL SCHOOL DISTRICT, PICKAWAY COUNTY, OHIO—\$29,250.00.

COLUMBUS, OHIO, September 14, 1927.

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

995.

APPROVAL, BONDS OF CORTLAND VILLAGE SCHOOL DISTRICT, TRUMBULL COUNTY—\$4,000.00.

COLUMBUS, OHIO, September 14, 1927.

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

996.

COUNTY COMMISSIONERS—THEIR DUTY TO PROVIDE NECESSARY RIGHT OF WAY WHEN ROAD IS BEING CONSTRUCTED UNDER SECTIONS 1191 ET SEQ., GENERAL CODE—FUND FOR PURCHASE.

**SYLLABUS:**

1. *It is the duty of a Board of County Commissioners to provide the necessary right of way when a road is being constructed or improved, under the provisions of Sections 1191, et seq., General Code, and such Board of County Commissioners may pay for such right of way out of the money received from taxes levied, under the provisions of Section 1222, General Code, or out of the proceeds of bonds issued, in anticipation of the collection of such taxes, as provided in Section 1223, General Code.*

2. *No part of the fund raised by the issuance of bonds, in anticipation of the collection of special assessments against property abutting upon an improvement, under the provisions of Section 1223, General Code, may be used to purchase right of way for road purposes.*

COLUMBUS, OHIO, September 14, 1927.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—Receipt is acknowledged of your request for my opinion as follows:

"We respectfully request your written opinion on the following question:

The Supreme Court in a case from Morrow County recently held that it was the duty of the county commissioners to furnish right of way in connection with the improvement of an inter-county highway.

Question: In view of the provisions of Section 1222 and 1223 of the General Code, may the cost of such right of way be paid from a fund raised by a levy under Section 1222; if not, from what fund is it to be paid?"

The case to which you refer in your communication is that of *Uncapher vs. Curl, et al, Board of County Commissioners of Morrow County*, and is reported in the Ohio Law Bulletin and Reporter of July 11, 1927, at page 435, the syllabus of which reads:

"When in the construction of an inter-county highway by state aid, under Section 1191, et seq., General Code, it becomes necessary to widen the existing highway by taking property of an adjoining land owner, the commissioners of the county in which such highway is located must provide the requisite right of way for such deviation from the boundaries of the existing highway, and are authorized by Section 1201, General Code, to pay 'the owner or owners of such land or property, as may be necessary for such change or alteration,' the value of such land or property so taken."

To the same effect was the holding in an opinion of this department reported in Opinions, Attorney General, 1921, Volume I, page 781, the syllabus of which reads as follows:

"Where county commissioners make application to the state for aid in improving a highway, and additional right of way is required for the carrying out of the improvement project, the cost of such additional right of way must be borne by the county alone and is not to be treated as an item of cost and expense, either for the purpose of calculating distribution of cost, as between state and county, or for the purpose of calculating distribution of cost as between county, township, and property owners."

You inquire whether, in view of the provisions of Sections 1222 and 1223, General Code, the cost of such right of way may be paid from a fund raised from taxes levied, under authority of Section 1222 of the General Code.

Section 1222 of the General Code provides:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of the construction, improvement, maintenance and repair of highways and of bridges in municipalities under the provisions of this chapter, the county commissioners are hereby authorized to levy a tax, not exceeding one and one-half mills, upon all the taxable property of the county. Said levy shall be in addition to all other levies authorized by law for county purposes but subject, however, to the extent of one-half mill thereof, to the limitation upon the combined maximum rate for all taxes now in force. The remaining one mill of said levy so authorized shall be in addition to all other levies made for any purpose or purposes, and the same shall not be construed as limited, restricted or decreased in amount or otherwise by any existing law or laws. The proceeds of such levy shall be used solely for the purpose of paying the county's proportion of the cost and expense of constructing, improving, maintaining and repairing inter-county highways and main

market roads or parts thereof in cooperation with the state highway department or the federal government or both; and the funds produced by such levy shall not be subject to transfer to any fund, either by order of court or otherwise.

The county commissioners of any county in which less than one and one-half mills is levied in any year under the provisions of this section shall within the above limitations determine what part of such levy shall be subject to the limitations upon the combined maximum rate for all taxes now in force and what part of such levy shall be outside such limitation and unrestricted by any existing law or laws."

It will be observed that the purpose for which the tax may be levied, as provided in the above quoted section of the code, is to provide the county's proportion of the *cost and expense* of the *construction, improvement, maintenance and repair of highways*, under the *provisions of this chapter*.

The chapter referred to in the above quoted section appears in the code under the title of "State Highway Department," and deals generally with the construction of highways, under the supervision of the State Highway Department, upon a co-operative basis between the state and a county, or between the state and a township.

Sections 1222 and 1223 are a part of a group of sections under this title (Sections 1178-1231-10, both inclusive, of the General Code) and these sections must be read together.

Section 1223, General Code, provides for the issuance of bonds by the county commissioners in anticipation of the collection of the taxes authorized to be levied by Section 1222, *supra*.

Section 1223 of the General Code, provides, in part, as follows:

"The county commissioners, in anticipation of the collection of *such taxes* \* \* \* , and whenever such construction, improvement or repair is being done upon their application, may, whenever in their judgment it is deemed necessary, sell the bonds of said county in any amount not greater than the aggregate amount necessary to pay the respective shares of the estimated *compensation, damages, cost and expense payable by the county*, \* \* \* and the owners of the land assessed or to be assessed for such improvement, but the aggregate amount of such bonds issued and outstanding at any one time and to be *redeemed by a tax levy* upon the grand duplicate of the county, shall not be in excess of one per cent of the tax duplicate of such county. \* \* \* " (Italics the writer's.)

Section 1223, *supra*, is in *pari materia* with Sections 1201 and 1222, General Code, and must be so construed.

It will be observed that Section 1223, *supra*, speaks of the purposes for which bonds may be issued, in anticipation of the collection of taxes authorized to be levied, under the provisions of Section 1222, *supra*. Among these purposes is the payment of compensation and damages, which clearly has under contemplation the payment for land taken for right of way, in order to widen or change the course of a road and the damage caused the residue of such land, if any, by reason of such taking. Section 1201, General Code, authorizes the county commissioners to appropriate land for right of way purposes and said statutes speak of the commissioners paying for the value of the land taken together with damages to the residue, if any, caused by such taking, and it is quite apparent to me that the compensation and damages spoken of in Section 1223, *supra*, refers to the compensation and damages incident to the ac-

quiring of right of way for road purposes by a board of county commissioners, under the provisions of Section 1201, General Code.

Answering your question specifically, it is my opinion that it is the duty of a board of county commissioners to provide the requisite right of way when a road is being constructed or improved, under the provisions of Sections 1191, et seq., General Code, and a board of county commissioners may pay for such right of way out of the money received from taxes levied, under the provisions of Section 1222, General Code, or out of the proceeds of bonds issued, in anticipation of the collection of such taxes, as provided in Section 1223, General Code. However, no part of the fund raised by the issuance of bonds, in anticipation of the collection of special assessments against property abutting upon said improvement, may be used by the county commissioners to purchase right of way for road purposes.

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

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997.

MUNICIPALITIES—POWER TO IMPOSE OCCUPATIONAL TAX NOT EXTENDED TO FIELDS ALREADY OCCUPIED BY STATE—STATE LICENSE FEE AND MUNICIPAL OCCUPATIONAL TAX NOT UNCONSTITUTIONAL—STATE LICENSE AND MUNICIPAL LICENSE FEE NOT UNCONSTITUTIONAL.

**SYLLABUS:**

1. *The power granted to municipalities by Section 3 of Article XVIII of the constitution of Ohio, to impose an occupational tax in the exercise of its powers of local self government, does not extend to fields in such municipality which have already been occupied by the state.*
2. *The exaction of a license fee only by the state does not preclude the imposition by a municipality of an occupational tax in the exercise of the powers of local self government.*
3. *The imposition by the state of an excise or occupational tax does not preclude the exaction of a license fee by a municipality in the exercise of its local police powers, but such license fee must not be in excess of the cost of administering the police regulations.*
4. *The granting of a license for a particular privilege by the state does not prevent the exaction of a proper license fee by a municipality in the exercise of local police power.*

COLUMBUS, OHIO, September 14, 1927.

*Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.*

GENTLEMEN:—This will acknowledge receipt of your recent communication requesting my opinion, as follows:

“On September 7th, 1922, the Attorney General by letter advised the Bureau that: