

does not clearly appear from the tax rate sheet submitted by you. The mere fact that the aggregate levies already provided for mount up to 17.90 mills does not establish the conclusion that there is not room for such a levy. There are now rather numerous levies that are not subject to any of the limitations. Part of the state levy is in this situation; and certain county road levies are likewise immune from the limitations. In the absence of a statement as to just what levies, other than the state educational building fund levy, the state department of public welfare building fund levy, and the state highway improvement fund levy, are outside of the fifteen mill limitation and enter into the total of 17.90 mills above referred to, this department cannot say that the election is to have no effect whatever. All that can be said on the facts submitted is that it does not have the effect of authorizing any levy to be made outside of the fifteen mill limitation that would otherwise be subject thereto.

If the school district in question had submitted the proposition under sections 5649-5 and 5649-5a of the General Code, the majority vote which such proposition received would have sufficed; the mistake made consisted in proceeding under the wrong statute.

Respectfully,  
 JOHN G. PRICE,  
*Attorney-General.*

2626.

ROADS AND HIGHWAYS—WHERE COUNTY COMMISSIONERS IMPROVE SECTION OF INTER-COUNTY HIGHWAY—VILLAGE STREET FORMS PART OF SUCH HIGHWAY—MAY APPROPRIATE LANDS WITHIN VILLAGE FOR PURPOSE OF RE-ADJUSTMENT OF HIGHWAY—PLANS APPROVED BY DIRECTOR OF HIGHWAYS AND PUBLIC WORKS.

*County commissioners, in undertaking the improvement of a section of inter-county highway under authority of sections 6906 to 6954 G. C., may, when a village street forms part of the line of such highway, appropriate lands within the corporate limits of the village for the purpose of a re-alignment of the highway. By reason of section 1203 G. C. plans for the proposed improvement should receive the approval of the Director of Highways and Public Works.*

COLUMBUS, OHIO, November 26, 1921.

HON. E. STANTON PEARCE, *Prosecuting Attorney, Steubenville, Ohio.*

DEAR SIR:—You have recently made request of this office for an opinion upon a question which may be stated as follows:

Inter-county highway No. 7 passes through the village of Stratton, Ohio. The county commissioners desire to improve that part of the highway passing through said village, and they find that proper construction requires the securing of new right of way through the village, because the highway as at present located has been in part washed away by the Ohio river. The village will give its consent to the making of the improvement by the county commissioners. May the county commissioners appropriate real estate within the corporate

limits of the village for the purpose of securing the proposed new right of way?

With your inquiry you have submitted a sketch showing the alignment of the present highway, and also the alignment of the proposed new section of highway, and this sketch indicates that within the limits of the village the proposed new road will be constructed at an average distance of perhaps one hundred feet from the present road.

The statutes dealing generally with the establishment and alteration of roads by county commissioners are sections 6860 et seq. Said section 6860 reads:

"The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except the inter-county and main market roads."

Sections 6861 to 6878 set out the procedure to be followed, provision being made for action by the commissioners either upon the filing of a petition (section 6862) or without the filing of a petition (section 6878). However, this group of sections is not applicable in the situation covered by your inquiry, for the reason that the highway which you describe is an inter-county highway, and therefore within the exception noted in section 6860.

County commissioners are also given powers under section 1201 G. C. for the acquisition by purchase or appropriation of additional right of way "if the line of the proposed improvement deviates from the existing highway." However, said section 1201 is part of the state aid improvement statutes, and would therefore seem to be called into operation only when the improvement is undertaken by the state upon the application of county commissioners or township trustees. It is understood from your inquiry that the improvement in question is proposed to be undertaken by the county commissioners as a county project and not as a state aid project. It is therefore unnecessary to discuss here the question whether under said section 1201 the county commissioners might appropriate property within a village.

We are therefore reverted to sections 6906 to 6954 as the only remaining statutes which may permit authority for the proposed appropriation. These last-named sections deal generally with road improvement by county commissioners.

In connection with sections 6906 to 6954 we are to read section 1203 of the state aid statutes as follows:

"Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from constructing, improving, maintaining or repairing any part of the inter-county highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the state highway commissioner and shall receive his approval."

In the series of sections 6906 to 6954 G. C. provision is made by sections 6949 to 6953 for the construction of a proposed county road improvement into, within or through a municipality. It is provided, among other things, in substance, that if no part of the cost and expense of the proposed improvement

is assumed by the municipality then no other action on its part is necessary, save the giving of its consent to the improvement.

Section 6952 reads as follows:

"The county commissioners shall thereupon receive bids and let the contract for improving such portion of said road as lies within the municipality, either in connection with the remainder of said improvement or separately, as such board of commissioners may determine. The total cost and expense of said work shall be paid on the allowance of the county commissioners, by the warrant of the county auditor, and after the completion of said work and the payment of the cost and expense thereof, any balance of the funds contributed by said municipality shall be refunded to it to be disposed of according to law. *The word 'road' as used in sections 6906 to 6953 inclusive of the General Code, shall be construed to include any state or county road or roads, or any part thereof, or any state or county road or roads, and any city or village street or streets, or any part thereof, which forms a continuous road improvement.*"

It is therefore clear that county commissioners have the same power as to a village street which forms part of the line of a county road as they have with reference to the improvement of that part of the road outside of the village. In the series of sections 6906 et seq. provision is made in section 6913 for publication of notice of intention to make the improvement, which notice is to include, among other things, a statement of the time and place "for hearing objections to said improvement, and for hearing claims for compensation for lands and property to be taken for said improvement or damages sustained on account thereof." And see the last sentence of section 6906.

Section 6913 reads:

"In the event that land or property is to be taken for such improvement, such notice shall state whose land or property is to be appropriated, and the county commissioners shall also cause such notice to be served at least ten days before said hearing on the owner of such piece of property to be appropriated. If resident within the county, such service shall be made by the county surveyor or his deputy or assistant by handing to each person personally a copy of such notice, or by leaving the same at the usual place of residence of such person. If any owner or owners are non-residents of the county, a copy of the newspaper containing such notice shall be mailed by the clerk of the board of county commissioners to each such owner whose property is to be taken, if his address be known to said clerk. Return of the time and manner of service shall be made and filed with the county commissioners on or before the date fixed for hearing claims for compensation."

Section 6914 provides for the method of filing claims for compensation for land and property to be taken, and section 6915 provides for the allowance by the county commissioners of compensation for land and property taken and for damages.

Section 6916 reads as follows:

"Any person, firm or corporation aggrieved by the finding of the commissioners upon any application for compensation or damages,

may appeal to the probate court by giving the notice provided for in the chapter of this act relating to appeals in road cases, and by filing the bond therein provided, and such proceedings shall be thereafter had upon such appeal, as are provided for in said chapter."

The appeal mentioned in said section 6916 is fully provided for by sections 6890 et seq., including trial of the case by jury.

Section 6917 reads:

"If after hearing and determining all claims for compensation and damages, on account of land or property taken for said improvement, or after the determination of such claims in the probate court on appeal, said board of commissioners is still satisfied that the public convenience and welfare require that such improvement be made, and that the cost and expense thereof will not be excessive in view of the public utility thereof, said commissioners shall order by resolution that they proceed with such improvement, and shall adopt the surveys, plans, profiles, cross-sections, estimates and specifications therefor, as reported by the surveyor, or with such modifications thereof as the commissioners and surveyor may agree upon."

Since the statutes treat the appropriation of land as an integral part of a county road improvement project, this department can discover no reason for distinguishing between an appropriation of lands within and without a village, and your question is accordingly answered in the affirmative. In view of the provisions of section 1203 G. C., the plans and specifications should be submitted to the director of highways and public works for approval. The appropriate time for such submission would seem to be that at which the surveyor completes the plans and specifications as set out in section 6911, and before the surveyor transmits copies to the county commissioners as directed by section 6912.

The conclusion above stated in answer to your question is in no wise inconsistent with the fact that there are statutes (see sections 3677 and 3715) authorizing municipalities to appropriate property for, and to alter municipal streets. The general assembly seems to have had this very authority in mind when it provided in section 6949 that before the county might extend an improvement into a municipality, it should first obtain the consent of the municipality.

Nor has a previous opinion of this department (Op. Atty.-Gen. 1917, Vol. II, p. 1131) been overlooked. The facts dealt with in that opinion contemplated an entirely new street as a part of a general scheme involving a substantial re-routing of a main market road; whereas in the present instance we are dealing with a mere incidental change of alignment. Moreover, it is believed that there is an inconsistency between the fifth and sixth conclusions as embodied in the headnotes of the opinion in question, when such conclusions are examined in the light of the discussion set out toward the end of page 1135 and at the top of page 1136.

Respectfully,  
JOHN G. PRICE,  
*Attorney-General.*