

for failing to accept a deed which has not been first presented to the county auditor for the latter's endorsement. The instances in which a county recorder is liable to suit on his bond are contained in section 2781. Briefly, said section permits suit whenever the county recorder fails to perform his official duties or performs same in a negligent manner. In view of the position which I have taken in the instant opinion, to the effect that a county recorder is under no duty to accept a deed which has not been endorsed by the county auditor, my answer to your third question is that the recorder would not be subjected to any liability under the circumstances set forth in your inquiry.

In view of the foregoing and in specific answer to your inquiries, I am of the opinion:

1. If a deed of absolute conveyance of land which does not bear the endorsement of a county auditor is presented to the county recorder with the proper filing fee, the latter is without authority to accept such deed for filing and recording.

2. The county recorder has no authority to accept such deed, endorse a file number thereon, enter same in his daily register and then return the instrument to the presenter with the understanding at a later date it will be properly endorsed by the county auditor and returned for recording.

3. Whenever such deed is presented to a county recorder, he is under no obligation to accept and take same to the county auditor for transfer.

4. The refusal by a county recorder to accept such deed which does not bear the county auditor's endorsement would not render him liable to suit on his official bond.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

959.

ROAD IMPROVEMENTS—DEPARTMENT OF HIGHWAYS—
WHERE APPROACH OR DRIVEWAY OF ABUTTING PROP-
ERTY OWNER DESTROYED—COMPENSATION—RECON-
STRUCTION AT PUBLIC EXPENSE—STATUS WHERE
APPROACHES OF OWNERS OF ABUTTING REAL ESTATE
MADE UNSUITABLE THROUGH IMPROVEMENT.

SYLLABUS:

1. *Where the approach or driveway of an abutting property owner is destroyed as a result of any road improvement by the Department of Highways, such department must compensate such abutting property*

owner for the destruction of such approach or driveway or in lieu thereof cause same to be reconstructed at public expense.

2. *Where an improvement of a road is undertaken by the Department of Highways which will render unsuitable the approaches of the owners of abutting real estate, provision for such approaches may be made in the plans for such road improvement, but if such provision is not made and the approaches are destroyed by reason of the improvement, the Department of Highways must either compensate the abutting property owner therefor or thereafter cause such approach to be reconstructed at public expense.*

COLUMBUS, OHIO, July 28, 1939.

HON. ROBERT S. BEIGHTLER, *Director, Department of Highways, Columbus, Ohio.*

DEAR SIR: Your recent request for my opinion reads as follows:

"The Highway Department is in receipt of a communication from the Works Progress Administration regarding questions of eligibility on work which constitutes an improvement to private property. We are attaching a copy of same hereto for your consideration.

On the basis of this attached memorandum, we desire your formal opinion as to whether we may properly include the reconstruction of private driveways in our W. P. A. program. Also, we desire to inquire specifically as to the responsibility of the Director of Highways to reconstruct private driveways of abutting property owners where same are destroyed in connection with the improvement, maintenance or repair of a road by the Department of Highways; and the Director's responsibility in cases where such private driveways must be changed because they are not suitable to an improvement undertaken by the Department of Highways.

In referring to driveways being 'not suitable' in the foregoing paragraph, we mean there must be changes in construction such as raising or lowering of the grade, or widening the pavement and shoulders, or restoring the required drainage, to adjust the driveway to the new improvement."

In the memorandum attached to your letter, on the basis of which you desire my opinion as to whether the reconstruction of private driveways may be included in your W. P. A. program, it is said:

"The regrading of private driveways and walks or the resetting of private steps to bring them in conformity with the new grade is not eligible for execution under a Works Progress Ad-

ministration project. Such work is clearly a service performed in lieu of the payment of damages and constitutes an assumption by the Federal government of the sponsor's responsibility to provide for the cost of easements, rights-of-way and damages incidental thereto. This same category includes the construction of retaining walls to protect private property from damages due to the operation of the project but not necessary to the protection of the street or highway, as for example the construction of a retaining wall on a driveway which has been regarded to conform with a new street grade."

This language is so clearly and unambiguous as to require no construction and I accordingly advise you that it forbids you to include the reconstruction of private driveways in your W. P. A. program.

You also inquire as to the responsibility of the Director of Highways to reconstruct private driveways of abutting property owners where the same are destroyed as a result of the improvement, maintenance or repair of a road by the Department of Highways. In this connection, I direct your attention to Section 7212, General Code, which reads as follows:

"The owners of land shall construct and keep in repair all approaches or driveways from the public roads under the direction of the county surveyor, provided, however, that if, in the construction or improvement, maintenance and repair of any road the approach or driveway of an abutting property owner is destroyed, the authorities constructing, improving, maintaining or repairing such road shall compensate such abutting property owner of said lands for the destruction of such approach or driveway, or in lieu thereof authorize the county surveyor to reconstruct the same at public expense.

In the construction of a road improvement the state highway commissioner or county surveyor may in all cases where the approaches of the owners of abutting real estate are unsuitable to a projected improvement or so constructed as not to afford proper drainage after its completion, include in the plans for such improvement plans for proper approaches. The entire cost of constructing such approaches may be assessed against the lands along which they are constructed."

It will be noted that this statute provides that the authorities constructing, improving, maintaining or repairing a road, who by reason of such work destroy the approach or driveway of an abutting property owner, are required to either compensate such abutting property owner therefor, or in lieu thereof to authorize the county surveyor to recon-

struct the same at public expense. The section also provides that the State Highway Commissioner shall include in the plans for the improvement of a road provisions for approaches to abutting real estate where the existing approaches are unsuitable to the projected improvement or are so constructed as not to afford proper drainage after its completion.

Section 154-26, General Code, which was contained in the Reorganization Act of 1921, abolished the office of State Highway Commissioner, and Section 154-40, General Code, as originally enacted in 1921, transferred the powers formerly exercised by the State Highway Commissioner to the Department of Public Works and Highways. In 1928 the so-called Norton-Edwards Act (112 O. L., 430) was enacted and the Department of Highways created as a department independent of the Department of Public Works and Highways, and the functions formerly exercised by the Department of Public Works and Highways were transferred to the newly created Department of Highways.

It would therefore seem that Section 7212, *supra*, applies to the present Department of Highways, and the Director of Highways, as administrative head of said department, is required by reason of such section either to compensate the owner of abutting property for the destruction of an approach or driveway caused by the construction, improvement, maintenance or repair of a road or to reconstruct or cause to be reconstructed the same at public expense.

You also ask my opinion as to the responsibility of the Director of Highways in cases where private driveways must be changed because they are not suitable to improvements undertaken by the Department of Highways. The second paragraph of Section 7212, *supra*, provides that where a projected road improvement will render the approaches of the owners of abutting real estate unsuitable to such improvement or where such approaches are so constructed as not to afford proper drainage after completion of the improvement, provision may be made for proper approaches in the plan for said improvement. The Director of Highways may therefore, in preparing plans for a projected road improvement which will render unsuitable the approaches of abutting property owners, make provision therein for the construction of proper approaches, but if he fails to do so and the approach is destroyed as a result of such road improvement he must compensate the abutting property owner therefor or thereafter cause the same to be reconstructed at public expense.

Specifically answering your questions, I am of the opinion:

1. On the basis of the memorandum attached to your letter, the Department of Highways may not properly include in its W. P. A. program the reconstruction of private driveways damaged, injured or destroyed as a result of construction, improvement, maintenance or repair of any road by such department.
2. Where the approach or driveway of an abutting property owner

is destroyed as a result of any road improvement by the Department of Highways, such department must compensate such abutting property owner for the destruction of such approach or driveway or in lieu thereof cause same to be reconstructed at public expense.

3. Where an improvement of a road is undertaken by the Department of Highways which will render unsuitable the approaches of the owners of abutting real estate, provision for such approaches may be made in the plans for such road improvement, but if such provision is not made and the approaches are destroyed by reason of the improvement, the Department of Highways must either compensate the abutting property owner therefor or thereafter cause such approach to be reconstructed at public expense.

Respectfully,

THOMAS J. HERBERT,
Attorney General.

960.

SCHOOL DISTRICT TERRITORY—COUNTY BOARD OF EDUCATION—WHERE “PLAN OF ORGANIZATION” ADOPTED —YEAR 1938-1939—NO MANDATORY DUTY TO FORMULATE OR ADOPT SUCH FURTHER “PLAN”—WHEN PROVISIONS SECTION 4696 G. C. OPERATIVE FREE FROM LIMITATIONS OF “SCHOOL FOUNDATION LAW”—DUTY AND POWERS AS TO TRANSFER OF SCHOOL TERRITORY—VOTE.

SYLLABUS:

1. *After the adoption of a “plan of organization” of school district territory within a county in the year 1938 by a county board of education in pursuance of the provisions of Sections 7600-1 to 7600-8, both inclusive, of the General Code of Ohio, no mandatory duty rests upon a county board of education to formulate or adopt a further “plan of organization” as the term is used in the statutes mentioned, nor does there exist any authority for a county board of education to adopt such a plan of organization.*

2. *After the close of the organization year 1938-1939 for which period a “plan of organization” for school district territory within a county had been adopted by a county board of education in the year 1938 in pursuance of the provisions of Sections 7600-1 to 7600-8, both inclusive, of the General Code of Ohio, the provisions of Section 4696, General Code, are operative, free from any limitations contained in the provisions of the School Foundation Law.*

3. *After the expiration of the “plan of organization” of school district territory within a county adopted by a county board of education in*