

In the opinion it was said as follows:

“The humane agent is in the employ of the humane society, a corporation. He is engaged in a public duty and for performing this duty, the county or municipality is authorized to pay him a compensation. He is not, in my opinion in the service of the state, the county, or of the city, within the meaning of section one of the civil service act.”

Inasmuch as a humane agent is not an officer of the county, I know of no rule or principle of law to prevent a humane society from supplementing the amount the county commissioners appropriate as salary to such agent, in accordance with Section 10072, General Code, with such additional salary as it may deem proper. Such agents, although engaged in public or quasi-public duties, are nevertheless agents in the employ of the humane society, a corporation.

Answering your question specifically, I am of the opinion that when, in accordance with the provisions of Section 10072, General Code, a board of county commissioners has appropriated money to be paid to a humane society agent, such humane society is not thereby precluded from paying such agent an amount as salary in addition to such amount appropriated by such commissioners.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2631.

APPROVAL, NOTES OF THE VILLAGE OF PARMA, CUYAHOGA COUNTY
—\$137,067.00.

COLUMBUS, OHIO, September 27, 1928.

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

2632.

COUNTY COMMISSIONERS—WIDENING OF STATE ROAD OVER 18
FEET—CO-OPERATION WITH DIRECTOR OF HIGHWAYS—PERCENT-
AGE OF COST—ASSESSMENT DISCUSSED.

SYLLABUS:

1. *A proposal to cooperate with the state in the widening of a state road over eighteen feet may be made by the county commissioners upon a certain percentage of the cost of such excess pavement or such proposal may agree to pay a lump sum toward such excess cost, provided that the amount thereof does not exceed the amount which the county is authorized to contribute toward such improvement.*

2. *Where county commissioners propose to cooperate with the state in the widening of a state highway in excess of eighteen feet, it is necessary that the director of highways prepare estimates of the cost of the proposed improvement which will reveal an estimate of that proportion of the whole improvement as to which the county is authorized to cooperate.*

3. *Not less than five per cent nor more than ten per cent of the cost and expense of constructing a state highway must be assessed in accordance with the provisions of Section 1214 of the Code, and such assessment is separate and distinct from the assessment authorized to be made by the county commissioners by Section 1193 of the Code, where such commissioners assume and agree to pay a proportion of the cost of constructing the highway.*

4. *Under Section 1214 of the Code, the percentage of the cost and expense of constructing a state highway which is to be assessed, may be increased over ten per cent thereof upon the filing with the director of highways of consents in writing signed by sixty per cent of the property owners within the assessment area, which the director of highways proposes to assess in connection with the improvement.*

COLUMBUS, OHIO, September 27, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication as follows:

“The new Highway Code enacted by our last Legislature provided for the possible cooperation of counties having less than \$300,000,000 tax duplicate in the widening over eighteen feet of state roads. In this connection several questions have arisen upon which we would like to have your opinion:

(1) If a county signifies its willingness to cooperate in the widening over eighteen feet, should the application for state aid, as made by the county commissioners, provide for a certain percentage of this cost over eighteen feet, or is it satisfactory to make it a definite lump sum?

(2) In such a case is it necessary to make separate estimates of cost for the portion of the project upon which the state pays the entire cost and that portion on which the county cooperates? It would seem that this would be desirable in order to permit the county to take care of its financing.

(3) When the county cooperates with the state and assumes a portion of the cost of widening over eighteen feet and assumes also the assessment to be made against property owners by the director, as provided in Sections 1213 and 1214-1, is it necessary for the county to make two separate assessments against the property owners?

It would seem from this law that the director would have to assess from five to ten per cent of the cost against property within one-half mile or within one mile of either side of the improvement, whereas the county commissioners in making their assessment on the widening portion would have the right to assess against the abutting property, or against the property for practically any distance up to two miles of either side of the proposed improvement, and in also a greater percentage than the state is permitted to assess.

(4) Under Section 1214 provision is made whereby the assessment against property owners may be increased upon the filing with the director of consent thereto signed by at least sixty per cent of the land and lot owners *who are to be especially assessed for such improvement.*

(a) Is it right to assume that this applies only to the property *within one-half mile or within one mile* of either side of the road as the Director may see fit to assess?

(b) Furthermore, is there any way in which a petition signed by over sixty per cent of the *abutting property* on a proposed road improvement in a county having a tax duplicate of over \$300,000,000 can be considered?

(In a specific instance I have in mind such a petition has been presented requesting that the pavement be widened to 40 feet, etc., and it is quite probable that the county commissioners in making the assessment upon the extra width of paving, under Section 6919, will assess only the abutting property.)

(5) In case of county cooperation by counties having a tax duplicate of over \$300,000,000, under Section 1191 is it necessary for the highway director to make the five to ten per cent assessment against the property on either side of the improvement as provided in Section 1214?

Inasmuch as we are now holding up a considerable number of projects due to our uncertainty as to the proper procedure, your early consideration of the above questions will be appreciated."

Before proceeding to consider the individual questions which you submit, I deem it advisable to have before us the pertinent sections of the General Code relative to proceedings of this character.

Section 1194 of the Code imposes upon the director the duty, in so far as **funds** are available therefor, to construct, reconstruct, improve, widen, maintain and repair the roads and highways, and bridges and culverts thereon in the state highway system. This section is of general application and is followed by the later Section 1214 of the Code, the first sentence of which is as follows:

"Not less than five per cent nor more than ten per cent of the cost and expense of constructing a state highway, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property within one-half mile or within one mile of each side of the improvement, provided the total amount assessed against any owner of property shall not exceed twenty per cent of the current tax valuation of the property to be specially assessed."

Thereafter in the section the various steps to be taken by the director in making the assessment are set forth. This section is also of general application in so far as the construction of a state highway is concerned and it follows therefrom that it is mandatory to assess at least five per cent of the cost of constructing any state highway in the manner provided in that section. You will observe that the assessment area may be either the property within one-half mile or the property within one mile on each side of the improvement.

Section 1191 of the Code is as follows:

"The commissioners of any county may cooperate with the department of highways in the abolishment of railway grade crossings on the state highway system or any extension thereof, and in the construction or reconstruction of bridges and viaducts within municipal corporations, and shall be authorized to pay such portion of the cost of any such work as may be agreed upon between said commissioners and the director of highways. Said com-

missioners shall also be authorized to cooperate with said department in widening the paved portion of any state road where the paved portion of such road is constructed or reconstructed to a width greater than eighteen feet; and such commissioners shall be authorized to pay such portion of the cost occasioned by or resulting from such widening as may be agreed upon between them and said director. Any board of county commissioners desiring to cooperate as above, may, by resolution, propose such cooperation to the director, and a copy of such resolution, which resolution shall set forth the proportion of the cost and expense to be contributed by the county, shall be filed with the director. Where any portion of the work covered by such proposal is within the limits of a village, such proposal shall be accompanied by the consent of the village to the doing of such work, evidenced by proper legislation by its council, unless such consent has already been given by said village to the director. Provided, however, the county commissioners of any county having a tax duplicate of real and personal property in excess of three hundred million dollars shall also be authorized to cooperate with the department of highways in the reconstruction of state roads by paying such portion of the cost thereof as is agreed upon by the county commissioners and director of highways."

It is by virtue of this section that counties with less than three hundred million tax duplicate may cooperate in widening the paved portion of a road in excess of eighteen feet. The method in which this cooperation is accomplished is set forth in Section 1195, as follows:

"If upon the receipt of a proposal to cooperate, the director approves of the same, he shall enter such approval upon his journal and shall certify his approval thereof to the county commissioners; and he shall cause to be transmitted to the county commissioners copies of such maps, plans, profiles, specifications and estimates as he may prepare for the construction of the work covered by such proposal. Upon receipt of the maps, plans, profiles, specifications and estimates for the proposed improvement, the county commissioners may, by resolution, adopt the same and provide for the cooperation of the county in the construction of the work. A certified copy of such resolution shall be transmitted to the director."

Specific provision is made for contract with the Director of Highways for cooperation by Section 1200 of the Code, which is as follows:

"If the county commissioners, after adopting the maps, plans, profiles, specifications and estimates are still of the opinion that the work should be constructed, and that the county should cooperate upon the basis set forth in their proposal, they shall adopt a resolution requesting the director of highways to proceed with the work, and shall enter into a contract with the State of Ohio providing for the payment by such county of the agreed proportion of the cost and expense. The form of such contract shall be prescribed by the Attorney General, and all such contracts shall be submitted to the Attorney General and approved by him before the director shall be authorized to advertise for bids. The provisions of Section 5660 of the General Code shall apply to such contract to be made by the county commissioners, and a duplicate of the certificate of the county auditor made in compliance with the provisions of said section shall be filed in the office of the director. All improvements upon which any county may cooperate shall be constructed under the sole supervision of the director of highways. The proportion of

the cost and expense, payable by the county, shall be paid by the treasurer of the county upon the warrant of the county auditor issued upon the requisition of the director, and at such times during the progress of the work as may be determined by such director. Upon completion of the improvement, the director shall ascertain the exact cost and expense thereof, and shall notify the county commissioners as to his conclusions, and thereupon any balance in the fund provided by such commissioners for the county's share of the cost shall be disposed of as provided by law."

The statute erroneously refers to Section 5660 of the Code, which has been repealed. This reference must be construed as applying to Section 5625-33 of the Code, which is of like import to the repealed section.

Section 1193 provides for assessments, as follows:

"Where county commissioners cooperate with the department and assume a part of the cost of constructing any pavement on a state road to a width greater than eighteen feet, such commissioners shall be authorized to specially assess such portion of that part of the cost assumed by them on behalf of the county as they may deem proper and such special assessments may be made according to any one of the several methods provided by Section 6919 of the General Code of Ohio, and the procedure in making said assessments shall be the same as is provided by law with respect to the assessments authorized by said Section 6919 of the General Code."

Provision is made for obtaining the necessary revenues for cooperation under Section 1222 of the Code, as follows:

"For the purpose of providing a fund for the payment of the county's proportion of the cost and expense of cooperating with the department of highways as hereinbefore provided, 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. Such 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 fifteen mill limitation. 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 other law or laws. The proceeds of such levy shall be used for the purpose of paying the county's proportion of the cost and expense of any work conducted by the department of highways in cooperating with such county and also for the purposes provided in Sections 6965 to 6972, inclusive, of the General Code; and the funds produced by such levy shall not be subject to transfer to any other 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 fifteen mill limitation, and what part of such levy shall be outside such limitation and unrestricted by any other law or laws. A county may use any moneys lawfully transferred from any fund in place of the taxes provided for under the provisions of this section."

In anticipation of the collection of taxes or in anticipation of the collection of assessments, the commissioners may issue bonds under Section 1223 of the Code, which is as follows:

“The county commissioners, in anticipation of the collection of the taxes provided for by the preceding section, and in anticipation of the assessments which they are authorized by this act to levy, may, whenever in their judgment it is deemed necessary, sell the bonds of said county in any amount not greater than the aggregate sum necessary to pay the share of the estimated compensation, damages, cost and expense payable by the county and the owners of the lands 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. In computing such one per cent, bonds to be redeemed by special assessments shall not be taken into account. Bonds issued under the authority of this section shall state for what purpose issued, and bear interest at a rate not to exceed six per cent per annum, payable semiannually, and in such amounts, and to mature in not more than ten years after their issue as the county commissioners shall determine. Prior to the issuance of such bonds, the county commissioners shall provide for the levying of a tax upon all the taxable property of the county to cover any deficiency in the levy, payment or collection of any special assessments anticipated by such bonds. The proceeds of such bonds shall be used exclusively for the payment of the cost and expense of the work for which the bonds are issued.”

You will observe that Section 1193, *supra*, authorizes the county commissioners to make special assessments in any of the several methods provided by Section 6919 of the Code. That section provides four different methods of assessment, among the areas so provided being property within a half mile, one mile or two miles, so that the assessment area may be different from that prescribed for the Director of Highways by Section 1214, *supra*.

Consideration of these sections leads me to the opinion that, irrespective of county cooperation, every road construction project by the director must involve an assessment of not less than five per cent levied against property located either within one-half mile or one mile of the proposed improvement. This provision is mandatory and of course applies to all construction work, whether the same be in excess of eighteen feet in width or not. In the first instance, therefore, at least five per cent of the total cost of each construction project must be assessed by the director. This assessment may, however, be assumed by the county commissioners under Section 1214-1 of the Code, which is as follows:

“The board of county commissioners of any county may assume on behalf of the county, and agree with the director to make the assessments provided for in Section 34 of this act, and to be made in connection with the construction of any state highway in such county. Any board of county commissioners desiring to assume such assessments and to make the same, shall notify the director of their willingness so to do, which notification may be given at any time after the director has made, or cause to be made, the estimates of cost covering the proposed construction and after he has determined the rate of assessment and number of installments in accordance with the provisions of the preceding section. Upon receiving such notification, the director shall certify to such commissioners his estimate of cost, less the cost of bridges and culverts and also the rate of assessment fixed by him and the number of semi-annual installments into which the assessments are to be divided. Such board of county commissioners may thereupon enter into an agreement with the director to assume on behalf of the county and to make the assessments in accordance with the certification made to them

by the director. Before entering into such an agreement, they shall provide by the issuance of bonds a sum which shall be determined by applying to the estimated cost of the improvement, less the cost of bridges and culverts, the rate of assessment determined by the director. In such agreement the commissioners shall assume on behalf of the county the estimated assessments, and shall agree to make the same, and they shall further agree that the proportion of the cost and expense assumed by them shall be paid by the treasurer of the county upon the warrant of the county auditor issued upon the requisition of the director and at such times during the progress of the work as may be determined by such director. The provisions of Section 5660 of the General Code shall apply to such contract to be made by the commissioners, and a duplicate of the certificate of the county auditor made in compliance with the provisions of said section shall be filed in the office of the director. The form of such contract shall be prescribed by the attorney general, and all such contracts shall be submitted to the attorney general and approved by him before the director shall be authorized to advertise for bids. The commissioners shall be authorized to issue under authority of Section 70 of this act the bonds hereinbefore provided for, and all of the pertinent provisions of said section shall apply to the issuance of such bonds. The commissioners shall thereafter make the assessments assumed by them on behalf of the county and shall cause the same to be collected, and the proceeds of such assessments shall be used solely for the retirement of the bonds issued in anticipation of the collection of said assessments. The making and collection of said assessments and all other matters in connection therewith not specifically provided for in this section shall be had and done as is or may be provided by law with respect to special assessments levied for the construction of county roads. The commissioners shall have the same authority to provide funds in the first instance by the issuance of notes, and to defer the issuance of bonds, as is or may be provided by law with respect to county improvements."

It is to be observed that this section specifically requires that the assessments made by the county commissioners shall be made in accordance with the certification made to them by the director. In other words, they are restricted in making the assessments to the methods available to the director under Section 1214.

Your first question is as follows:

"If a county signifies its willingness to cooperate in the widening over eighteen feet should the application for state aid as made by the county commissioners provide for a certain percentage of this cost over eighteen feet, or is it satisfactory to make it a definite lump sum?"

From the provisions of Section 1191, *supra*, it is clear that the commissioners are authorized to assume by way of cooperation any part of the cost of the proposed widening over eighteen feet. That is to say, no definite limitation is found as to the proportion of such excess cost to be borne by the county commissioners and they would be authorized to assume practically all if they so see fit. From the fact that they are cooperating in such cost, it necessarily follows that some portion of such excess cost must be borne by the state.

Sections 1191, 1200 and 1222 of the General Code all speak of the proportion of the cost and expense of the improvement. This apparently has reference to a definite percentage of the cost and not to a fixed amount irrespective of the cost. The statute is not clear on this subject, however, and I do not feel warranted in stating that the agreement to pay a fixed amount, provided it did not exceed the cost of that portion

of the road as to which the commissioners are authorized to cooperate, would be unlawful. Any fixed amount less than the total cost of the portion of the road in excess of eighteen feet would necessarily be a proportion of that cost and the fact that it is stated in figures instead of percentages in my judgment would not be fatal.

I note that you refer to the action of the county commissioners as an application for state aid. Strictly speaking, this is not the action taken by the commissioners under these circumstances. Section 1191 described the action as a proposal to cooperate, and I believe that this is a more apt description of the action taken.

You are accordingly advised, in answer to your first question, that the proposal to cooperate with the state in the widening of a state road in excess of eighteen feet may provide for a certain percentage of the cost of such excess pavement or may agree to pay a definite sum toward such costs, provided that such sum does not exceed the final cost of such excess pavement.

This brings me to a consideration of your second question, which is as follows:

"In such case is it necessary to make separate estimates of cost for the portion of the project upon which the state pays the entire cost and that portion on which the county cooperates? It would seem that this would be desirable in order to permit the county to take care of its financing."

As you suggest, if the proposal of the county commissioners is based upon a percentage of the cost, some difficulty may be encountered in arranging the financing of the county's portion, especially in view of the fact that Section 1200 of the Code, *supra*, requires a certificate of the auditor with respect to the contract for cooperation.

Section 1191 is silent as to just when the proposal to cooperate is to be made. This is, however, clarified by the following sections, particularly Section 1195 and Section 1200. Section 1195 requires the certification to the county commissioners of the maps, plans, profiles, specifications and estimates, upon receipt of which the county commissioners may adopt the same and Section 1200 provides that they shall then determine whether the work shall be constructed and the county cooperate on the basis set forth in the proposal. Thereafter the contract is to be entered into with the State of Ohio, providing for the payment of an agreed proportion of the cost and expense. Read together, these sections make it manifest that the contract between the county commissioners and the director is entered into on the basis of estimates only and not upon the actual contract for the improvement, which is not to be let until after the other contract is made. If the estimate for the improvement is made as a whole without separating that portion within the eighteen feet and that beyond, clearly no basis whatever is provided for the certificate of the county auditor. Accordingly, it is my opinion that it will be necessary for the director of highways to make separate estimates which will clearly reveal the estimated cost of that proportion of the work as to which the county is authorized to cooperate. This will provide a basis upon which the county can provide the funds by the issuance of notes and bonds. Subsequently upon completion of the improvement, the director is required, by Section 1200, *supra*, to ascertain the exact cost and notify the county commissioners.

From a consideration of all the circumstances, I am led to the conclusion that it is necessary to make separate estimates covering the cost of that portion of the pavement within eighteen feet and that in excess of eighteen feet. In this way a proper basis is provided for the county financing in the event that the proposal to cooperate is made upon a percentage basis.

Your third question is as follows:

"When the county cooperates with the state and assumes a portion of the cost of widening over eighteen feet, and assumes also the assessment to be made against property owners by the director as provided in Section 1213 and 1214-1, is it necessary for the county to make two separate assessments against the property owners?"

From what I have heretofore stated, I believe it is clear that the statutes contemplate two separate assessments against the property. The one is made mandatory by the provisions of Section 1214 of the Code and is made by the director against two possible assessment areas, unless the county commissioners agree under the provisions of Section 1214-1 to assume the burden of making the assessment. In case the county commissioners act, they must assess in accordance with the certification of the director. On the other hand, the assessment contemplated by Section 1193 of the Code, supra, is of a portion of the cost of the improvement assumed in the first instance by the county commissioners. This assessment may be made against an entirely different assessment area and the installment period, being fixed by the county commissioners, need not coincide with that fixed by the director under Section 1214. It is, therefore, my opinion that where the county assumes the burden of making the assessment as authorized by Section 1214-1, and likewise determines to assess a portion of the cost assumed by it under Section 1193 of the Code, the two assessments are separate and distinct and must be so treated.

Your fourth inquiry is as follows:

"Under Section 1214 provision is made whereby the assessment against property owners may be increased upon the filing with the director of consent thereto signed by at least sixty per cent of the land and lot owners who are to be especially assessed for such improvement. (a) Is it right to assume that this applies only to the property within one-half mile or within one mile of either side of the road as the director may see fit to assess? (b) Furthermore, is there any way in which a petition signed by over sixty per cent of the abutting property on a proposed road improvement in a county having a tax duplicate of over \$300,000.000 can be considered?"

Section 1214 of the Code, supra, as I have before stated, makes it mandatory upon the director to make assessment therein provided, and I believe that there is no question but what the words "land and lot owners resident of the county, who are to be specially assessed for such improvement", mean those property owners within the assessment area the director intends to assess for the particular improvement. If that determination is to assess property within one-half mile, the percentage may be increased where sixty per cent of the property owners within this area consent in writing, and, if the area proposed is the property within one mile, then sixty per cent of such property owners must consent in writing before the percentage may be increased.

You further ask whether a petition signed by over sixty per cent of the abutting property owners on a proposed road improvement, in a county having a tax duplicate of over \$300,000,000, can be considered. There is no statutory authority for such petition and consequently it is not of any official force and effect. I see no reason, however, why the director cannot take into consideration the fact that these property owners are in favor of the proposed improvement in determining whether it shall be made. It would give no authority to you, however, to increase the percentage to be assessed under Section 1214 over the ten per cent maximum therein prescribed. Of

course the county commissioners, in cooperating in the improvement, can assess the abutting property owners alone for such portion as is assumed by the county, but that is of no materiality so far as the jurisdiction and authority of the director is concerned.

Your fifth inquiry is as follows:

“In case of county cooperation by counties having a tax duplicate of over \$300,000,000, under Section 1191 is it necessary for the highway director to make the five to ten per cent assessment against the property on either side of the improvement as provided in Section 1214?”

As I have before stated, the provisions of Sections 1214 and 1214-1 are of general application to all construction projects on state roads. It makes mandatory the assessment therein provided and in my opinion is equally applicable to all counties of the state irrespective of the amount of their tax duplicate. Consequently an assessment of not less than five per cent must be made under these sections in every construction project.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2633.

APPROVAL, FINAL RESOLUTION FOR ELIMINATION OF GRADE CROSSING NEAR THE VILLAGE OF GRANVILLE, LICKING COUNTY, OHIO.

COLUMBUS, OHIO, September 27, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I am in receipt of your letter submitting for my approval certified copy of final resolution on the following improvement:

Elimination of grade crossing over tracks of the New York Central Railroad Company on State Highway No. 47, at a point just west of the Village of Granville in Licking County, Ohio.

I have carefully examined said resolution and find it correct in form and legal. I am therefore returning the same to you with my approval endorsed thereon, in accordance with Section 1218 of the General Code.

Respectfully,
EDWARD C. TURNER,
Attorney General.