

purpose of furthering amendments of the statutes under which they function, and where members of police and fire departments join such organization, such action is not such political activity as constitutes taking part in politics within the purview of Section 486-23, General Code.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

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2277.

ROADS—COUNTY COMMISSIONERS—MAY IMPROVE STATE HIGHWAY OUTSIDE MUNICIPALITY AND ASSESS CITY LANDS WITHIN LIMITATION—CANNOT REPAIR CITY STREETS WITH COUNTY FUNDS IF NOT PART OF A COUNTY ROAD.

**SYLLABUS:**

1. *Where a state highway is being improved outside of a municipality, the board of county commissioners may, under the provisions of Section 1214, General Code, assess property located within said municipality, for the improvement of said highway, even though no part of said improvement extends into or through said municipality, provided the property against which the assessments are made is located within either one-half mile, or within one, or one and one-half miles of either side of such improvement, according to the benefits.*

2. *A board of county commissioners is unauthorized to repair a street in a municipality with general road funds of the county, or the county's portion of the gasoline excise tax fund, other than a county road extending into or through a municipal corporation or a part of a county road and a city or village street extending into or through a municipal corporation and forming a continuous road improvement, even though such street becomes out of repair by the use of the county's trucks thereon.*

COLUMBUS, OHIO, June 25, 1928.

HON. FRANK L. MYERS, *Prosecuting Attorney, Mt Gilead, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date reading as follows:

“May I have an opinion from you concerning the following questions:

1. Where a state highway, which does not extend into or through a municipal corporation and does not constitute an extension of an improved inter-county highway or main market road and lies wholly outside the circuits of municipal corporation, but within three-fourths of a mile of such municipal corporation, is improved and the plan of assessment is made upon all property within one (1) mile from either side of said improved road as provided by law, and no action having been taken by the council of the said municipal corporation for such improvement or assessment for said highway,—

(Question) May property located within the limits of such municipality be assessed by the county commissioners for such improvement so located outside said municipality?

2. Where the county's Unloader is placed at a railroad switch at the end of a city or village street, which street is not a part of a county or inter-county highway or main market road extending into or through such municipality and which does not form a part of a continuous improvement and such street becomes out of repair by the use thereof by the county's trucks,—

(Question) May the county place such street in repair out of the county road fund or gas tax receipts?"

Since receiving your communication, I have been informed by you verbally that the proceedings for the improvement of the road in question were begun prior to the effective date of House Bill No. 67, commonly known as the Norton-Edwards Act (112 O. L. 430). I have also ascertained that the said state highway is being improved upon a co-operative basis between the state and county, as provided in Sections 1191, et seq., General Code, as they read prior to their amendment in the Norton-Edwards Act. In those highway improvements, which are being improved upon a co-operative basis under the state aid plan, as provided in former Sections 1191 et seq., General Code, assessments are made by the board of county commissioners, as provided in former Section 1214, General Code. The pertinent part of this section, in so far as it applies in answering your questions, provided as follows:

" \* \* \* \* Five per cent of the cost and expense of the improvement, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property abutting on the improvement, provided the total amount assessed against any owner of abutting property shall not exceed twenty per cent of the valuation of such abutting property for the purposes of taxation. Provided, however, that the county commissioners by resolution adopted by unanimous vote may increase the per cent of the cost and expense of the improvement to be specially assessed and may order that all or any part of the cost and expense of the improvement contributed by the county and the interested township or townships be assessed against the property abutting on the improvements; but in no event, except within municipalities, shall more than fifteen per cent of the total cost and expenses of the improvement, exclusive of the cost and expenses of bridges and culverts, be specially assessed unless, a consent in writing to any additional increases, over and above such fifteen per cent and signed by at least fifty-one per cent of the land or lot owners, residents of the county, who are to be especially assessed for said improvement, shall be first filed with said county commissioners. \* \* \* Provided further, that the county commissioners by a resolution may make the assessment of five per cent or more, as the case may be, of the cost and expense of the improvement against the real estate within one-half mile of either side of the improvement *or* against the real estate within one mile of either side of the improvement, or against the real estate situated within one and one-half miles of either side of such improvement, according to the benefits accruing to such real estate. \* \* \*

\* \* \* \* \*

It is noted from the provisions of the foregoing statute that the county commissioners were *inter alia* authorized to provide for assessments to pay the property owners' cost of the improvement against the real estate within one mile of either

side of the improvement, such as was done in the case here under consideration. No exception is made to the plan of said assessment in case the assessments affect real estate situated within municipalities.

In passing upon a similar question, although not under the same statutes, the Supreme Court of Ohio in the case of *The Commissioners of Putnam County et al. vs. William Young, et al.*, 36 O. S. 288, where the act of March 29, 1867 (64 O. L. 80), was under consideration, held in the third branch of the syllabus as follows:

"The 'lots and lands' to be assessed to defray the expense of the improvement of a public road authorized by said commissioners include lots within the limits of a municipal corporation, where the same are within two miles of the improvement, and are benefited thereby."

In the opinion it was said in part as follows:

"The second ground of objection is, that village lots, lying within the limits of a municipal corporation, are not within the description of 'lots and lands' required by the fourth section of the act, as amended April 18, 1874 (71 O. L. 94), to be reported for assessment. This objection was considered in *Makemson vs. Kauffman*, 35 Ohio St. 444, and it was there determined that such objection was invalid. The statute requires the viewers and engineer to report for assessment all lots and lands lying within two miles of the contemplated improvement, which, in their judgment, will be benefited thereby, and which ought to be assessed therefor; the said distance to be computed in any direction from either side, end or terminus of said road. An owner of a village lot is as much a land owner as the owner of the contemplated improvement, which, in their judgment, will be benefited by a road improvement as a parcel consisting of many acres. Such lots, being embraced within the words of the statute, are to be held within its meaning, unless, from a consideration of all its parts, a contrary intention appears. 9 Bacon Ab. 247."

In considering the effect of the provisions of Section 1214, *supra*, as the same are applicable to assessments against property located within municipalities, where the improvement included a portion of the extension of an inter-county highway located within a village, this department in an opinion found in Opinions of the Attorney General, 1918, Volume 1, page 817, held:

"When an inter-county highway improvement is constructed in or through a village with its consent, in the manner provided by Section 1193-1, G. C., (107 O. L. 123), and at the same width as that of the balance of the improvement, bonds issued by the village to pay its assumed share of the cost and expense of such improvement are charges against the tax duplicate of the taxable real and personal property in the village, and the village in issuing such bonds is limited by the provisions of the Longworth law (Secs. 3939 et seq., G. C.).

In such case where the improvement is initiated by an application for state aid made by the board of county commissioners, such board of county commissioners is authorized to levy assessments to pay the share of the cost and expense of said improvement to be borne by the owners of benefited property, upon the lots and lands abutting upon said improvement, whether the same be within or without such village; or if the county commissioners

have taken appropriate action to that end under the provisions of Section 1214, G. C., (107 O. L. 129), they may levy assessments to pay the share of the cost and expense of such improvement to be borne by the owners of benefited property, upon lots and lands lying within one mile or one-half mile, as the case may be, of either side of said improvement, whether the real estate so assessed be within or without such village."

In view of the foregoing, and answering your question specifically, it is my opinion that where a state highway is being improved outside of a municipality, even though no part of said improvement extends into or through said municipality, the board of county commissioners may, under the provisions of former Section 1214, General Code, assess property located within said municipality, for the improvement of said highway, provided such property against which assessments are made is located within either one-half mile of either side of the improvement or within one or one and one-half miles of either side of such improvement, according to the benefits accruing to such real estate.

Coming now to a consideration of your second question, in which you inquire whether or not the board of county commissioners is authorized to use a part of the county's share of the gasoline excise tax fund, or a portion of the county road fund, for the purpose of repairing a city or village street, which does not constitute a continuation of a county road extending into or through a municipality and which road has become damaged by reason of trucks going over said street, which were hauling stone from an unloader placed by the county at the end of said street, your attention is invited to the provisions of Section 5537, General Code, which provide, in part as follows:

" \* \* \* \* \*

Twenty-five per cent of such gasoline tax excise fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county within the state, and shall be used for the sole purpose of maintaining and repairing the *county system of public roads and highways* within such counties. \* \* \* " (Italics the writer's.)

This department in Opinion No. 179, dated March 12, 1927, and addressed to the Bureau of Inspection and Supervision of Public Offices, in passing upon the question as to the use of the county's portion of the gasoline excise tax fund, held:

"2. The term 'the county system of public roads and highways' as used in Section 5537, General Code, refers to the system of county highways created under the provisions of Section 6966, General Code, and related sections, and county commissioners may use that part of the gasoline tax funds apportioned to the county for *the sole and only purpose of maintaining and repairing roads in the county system of roads provided for in Section 6966, supra, and related sections.*" (Italics the writer's.)

From the language of Section 5537, *supra*, it is manifest that the county commissioners are unauthorized to expend any portion of the gasoline excise tax fund, except for the purpose of maintaining and repairing roads in the county system, i. e., those roads designated as a part of the county system, under and by virtue of the provisions of Sections 6966 et seq., General Code.

You further ask if the county may repair the street in question with moneys in the county road fund, although you do not state under what section or sections

of the General Code, the levies creating this fund were made. However, in view of the conclusions herein reached, in my opinion, it is not material under which of the sections authorizing the levy of taxes for road purposes the taxes were assessed and collected. Nor do I deem it necessary herein to quote the provisions of Sections 1222, 5625-5, 5625-6, 5625-7, 6926, 6956-1 or 6956-1a of the General Code, authorizing levies for road purposes. Suffice it to say, these sections contemplate the levy of taxes by the taxing authorities of the county for county purposes, and several of these sections expressly and specifically limit the use of funds derived from taxes levied thereunder to the kinds of roads designated in the sections authorizing the levy.

Since it is contemplated that funds derived from levies made by the county for road purposes shall be expended for county purposes, unless there be specific authorization by statute for the expenditure of county funds to repair a street in a municipal corporation such an expenditure cannot be made. Section 6954, General Code, authorizes county commissioners to repair "that portion of a county road extending into or through a municipal corporation, or a part of a county road and a city or village street or streets extending into or through a municipal corporation and forming a continuous road improvement when the consent of the council of said municipal corporation has first been obtained" and is evidenced by proper legislation of the council entered upon its records. You will observe that this section applies only to the streets of a municipality coming within the terms of the statute, and there is no statute authorizing the county commissioners to repair a street in a municipality with county funds other than the streets specified.

Nor is there any section which makes it the duty of county commissioners to repair streets of a municipality which have been damaged by reason of the transportation of materials or equipment for use in constructing or repairing county roads. Section 6964-1, General Code, reads in part as follows:

"It shall be the duty of boards of county commissioners to repair all substantial damage caused to *county or township roads* by the transportation of materials or equipment over such roads for use in construction or repairing any road by such county commissioners. Such repairs shall be made immediately upon the completion of the work for which such materials and equipment were transported, or as soon thereafter as weather conditions will permit. The work may be done either by contract let in the manner provided by law or by the employment of labor and purchase of materials, as in the ordinary repair of county roads.

\* \* \* If there be no balance in such fund, payment shall be made from any fund in the county treasury created by general taxation for county road work carried forward by the county, an inspection of the county and township roads over which material and equipment for use thereon were transported shall be made by the county commissioners, or they may require the county surveyor to make such inspection and report to them in writing as to the substantial damage, if any, caused to such roads by such use thereof. \* \* \* " (Italics the writer's.)

You will note that this section is, by its terms, limited in its application to county or township roads. In the present case it is unfortunate that the Legislature has not included municipal streets as well as county or township roads in this section, but it seems clear that such streets were not intended to be improved by the commissioners in the cases described in the section.

For the reasons above set forth, it is my opinion that the board of county commissioners is unauthorized to repair a street in a municipality with the general

road funds of the county, or the county's portion of the gasoline excise tax fund, other than a county road extending into or through a municipal corporation, or a part of a county road and a city or village street extending into or through a municipal corporation and forming a continuous road improvement, even though such street becomes out of repair by the use of the county's trucks thereon.

Respectfully,

EDWARD C. TURNER,  
*Attorney General.*

2278.

CORPORATION—CHARITABLE TRUST—ARTICLES MUST INCLUDE  
COPY OF WILL DIRECTING ORGANIZATION.

SYLLABUS:

*Articles of incorporation, filed under authority of Section 10086 of the General Code, must set forth a copy of the will and testament to carry out whose provisions the corporation is organized.*

COLUMBUS, OHIO, June 26, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication of June 20, 1928, which reads as follows:

“Your attention is directed to Section 10085 and the following Sections of the Code, and in particular to Section 10086.

These sections as you know have to do with the organization of charitable trusts.

I find that the practice has been in this department to require articles of incorporation for such corporation to include a full copy of the last will or testament directing the organization of such corporation.

On the other hand Section 10086 seems to be somewhat ambiguous. The first sentence and the last sentence apparently deal with two different contingencies.

In case the original executor or executors and the other persons named in the first sentence of the section file articles is it necessary that copy of the will be included in the articles?”

Sections 10085 and 10086 of the General Code are as follows:

Section 10085:

“When, by the last will and testament of a person, duly admitted to probate in this state or elsewhere, a decedent devised or bequeathed, or may devise or bequeath, his or her property, or a portion thereof, for charitable uses within this state, or for the establishment and maintenance of an industrial or educational school or institution to be located within the state; and when in such will it was or may be, provided that the executor or executors thereof shall organize a corporation under our laws, to receive the property so de-