

Upon examination, I find that the Original Order Sheet and duplicate copy and the Lease proper and duplicate copy are not signed by yourself as Commissioner.

I am, therefore, returning to you the above lease without my approval endorsed thereon.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

2635.

APPROVAL, BONDS OF LAUREL RURAL SCHOOL DISTRICT, HOCKING COUNTY, OHIO—\$600.00.

COLUMBUS, OHIO, December 6, 1930.

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

2636.

RAILWAY GRADE CROSSING—ACTION TO ELIMINATE TAKEN BY DIRECTOR OF HIGHWAYS—COUNTY COMMISSIONERS NEED NOT JOIN TO EFFECT VACATION OF HIGHWAY.

**SYLLABUS:**

*When the Director of Highways institutes a proceedings to eliminate a railway grade crossing under Section 1229-19 of the General Code there is no necessity for the county commissioners to take any action in order to effect a vacation of the portion of the highway lying within the right of way of the railroad company.*

COLUMBUS, OHIO, December 8, 1930.

HON. ROBERT N. WAID, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your request for my opinion reading as follows:

“In carrying out the above improvement (elimination of a grade crossing) it is necessary to relocate the highway and vacate the present highway within the right-of-way lines of the railroad company.

Proceedings to this end have been carried out under Section 1229-19, plans have been agreed upon and a satisfactory agreement drafted with one exception. The railroad company believes that that part of the agreement, which states that, upon completion of the new improvement, the old highway shall be vacated by the state, should be affirmed and agreed to by the commissioners of L County on the theory that present laws do not give the Director of Highways final jurisdiction over the vacation of highways or parts thereof on the State Highway System.

In view of the fact that, if the contention of the railroad company is correct, all proceedings of the department involving the vacation of crossings must be consented to in advance by the county authorities, we have refused to recognize the railroad's position. Unless we have the legal authority, however, we cannot sustain our contention and the purpose of this letter is to request a ruling from you as to whether or not the Director of Highways has the legal authority to vacate a portion of a highway not further needed for highway purposes on the State Highway System independent of the action of the county commissioners.

In this connection I wish to refer to the letter of H. E. King, Asst. General Attorney of the New York Central Railroad, sent you under date of August 19th and copied to this department.

As the settlement of this question will decide upon the date on which we can place the improvement under construction, your early attention to same will be appreciated."

I gather from your communication and from that of counsel for the railroad company that the question really in issue is as to whether that portion of the highway between the bounds of the right of way of the railroad, rendered unnecessary for highway purposes by the elimination of a grade crossing, may be completely vacated as a public thoroughfare without the cooperation of the board of county commissioners of the county in which the portion of the state highway proposed to be vacated exists. I further assume, as indicated from the communication of counsel for the railroad company, that the portion of the state highway proposed to be vacated is not located within the limits of a municipal corporation. I will therefore confine this opinion to the question as stated above, excluding therefrom any discussion of the procedure for the vacation of portions of state highways within the limits of municipal corporations.

Public highways, subject to constitutional limitations, if any, are under the full control of the Legislature and may be vacated in whole or in part in such manner and through such instrumentalities as the Legislature may designate. 29 C. J. 517, Section 226. The answer to your inquiry, therefore, depends entirely on the extent of the authority granted to the Director of Highways to vacate the portion of the original state highway which will be rendered unnecessary for highway purposes by the elimination of a grade crossing over a railroad.

Section 1229, General Code, authorizes the Director of Highways to eliminate one or more existing grade crossings on the state highway system by (1) relocating any portion of such state highway or (2) by constructing an overhead bridge over the railroad or an underpass beneath it.

Section 1229-1, General Code, provides as follows:

"When the director deems it necessary in the abolishment of such existing grade crossings to change the location of any road or highway on the state highway system or on any extension of the state highway system such director may relocate such road or highway, or any part thereof, or such extension, or any part thereof, and may vacate the whole or any portion of such road or highway, or of such extension, abandoned by such relocation, and cause the improvements above contemplated to be placed in such relocated road or highway, or such relocated extension; provided, that in the relocation of any such highway that portion of the abandoned highway within the limits of the right of way of such company or companies as are participating in the cost of the improvement shall be vacated, abandoned and closed to the public upon the opening of the relocated portion of the highway, or extension, to the public."

There is nothing in the provisions of the above quoted section of the General Code which expressly requires that the vacation of the portion of the "abandoned highway" within the limits of the right of way of the railroad shall be conditioned on the affirmative action of any subdivision of the state government. It may be said that Sections 1229, et seq., were enacted chiefly with the intention of prescribing the duties and authority of the Director of Highways, although in some of the latter sections powers of the subdivisions of the state to cooperate with the Director of Highways in the construction of highway improvements on the state highway system are set forth. There is nothing in the context of Section 1229-1, General Code, that indicates that the word "abandoned" is used therein in other than its usually accepted legal meaning. As so used "abandoned" is construed to mean to relinquish, to give up, including both the intention and the external act evidencing such intention. 1 Bouvier's Law Dictionary, page 2; 29 C. J. 534, Sections 250, et seq. I assume, of course, that in such projects as are contemplated within the scope of your inquiry it will be the intention of the Director of Highways, followed by appropriate acts, to abandon the portion of the highway between the bounds of the railroad right of way, duplicated by the grade separation project.

It will therefore be seen that in such a proceedings full power and authority is vested in the Director of Highways and there is no approval required on the part of the county commissioners. It follows, of course, that I cannot agree with the position of the railroad company, that the agreement should contain a stipulation to the effect that the county commissioners agree to cause that portion of the road within the right of way to be vacated.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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2637.

APPROVAL, BONDS OF VILLAGE OF CEDARVILLE, GREENE COUNTY,  
OHIO—\$22,000.00.

COLUMBUS, OHIO, December 8, 1930.

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

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2638.

APPROVAL, BONDS OF VILLAGE OF CEDARVILLE, GREENE COUNTY,  
OHIO—\$2,000.00.

COLUMBUS, OHIO, December 8, 1930.

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