

2854.

IMPROVEMENT OF STREET—LOCATED WITHIN MUNICIPALITY—STATE OF OHIO MAY NOT PAY TOTAL OR ANY PART UNLESS SUCH STREET IS DESIGNATED AS A STATE ROUTE.

SYLLABUS:

*The State of Ohio may only pay all or any portion of the cost of the improvement of a street in a municipality, designated as a state route through a municipality, when a contract therefor has been prepared and approved by the Attorney General, and duly entered into under the provisions of Section 1189-2, General Code of Ohio.*

COLUMBUS, OHIO, January 22, 1931.

HON. CHARLES D. HAYDEN, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—This will acknowledge receipt of a request for my opinion from your predecessor, as follows:

“I am writing this letter with a statement of facts as submitted to me. As to further details, if any, I am not at this time ready to give them but if such are necessary, we will furnish the same if requested by your office. The question is as follows:

In a case where the abutting property owners of a municipality petition for a street improvement, which is a part of a state route through the village, in reliance upon the representation that a portion of the cost of the improvement would be paid for by the State Highway Department and such improvement is completed and the total cost thereof paid jointly by the village and property owners and immediately thereafter appropriated and used as a link in the improved highway of the State of Ohio, is the State Highway Director warranted in paying to the Treasurer of Knox County, Ohio, a portion of the cost of this improvement to be credited pro rata to the assessments that have been made against the property abutting on said state route and street?”

The State Highway Department, to which reference is made, is administered by a State Highway Director appointed by the Governor under the provisions of Section 1179, General Code, and functions as such under the provisions of Sections 1178, et seq., of the General Code of Ohio. It is a well settled rule that administrative officers created by statutes, can not lawfully expend public moneys unless the power to do so has been expressly conferred upon them or may be fairly implied as incidental to the power expressly granted.

From the facts contained in the inquiry, it is manifest the street upon which the improvement was made, was one that the Director had designated as part of a state route through the village, under his authority as contained in pertinent provisions of the Norton Edwards Act, namely, Section 1189, General Code, as found in 112 O. L., p. 437, and as amended in 113 O. L., p. 603.

Section 1189-2, General Code, as amended in 113 O. L., pp. 603-604, as far as pertinent to the question, provides as follows:

“The director may at his discretion construct, reconstruct, improve, widen, maintain or repair any section of state highway within the limits of a municipal corporation, and also the bridges and culverts thereon, and pay the entire cost and expense thereof from state funds; but he shall first

obtain the consent of the council or other legislative authority of such municipal corporation. Any such municipal corporation may cooperate with the director in such construction, reconstruction, improvement, widening, maintenance or repair, and may pay such portion of the cost of such work as may be agreed upon between the municipality and the director. The council or other legislative authority of any municipal corporation, desiring to cooperate as herein provided, 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 municipality, shall be filed with the director. The director shall thereupon cause to be prepared the necessary surveys, plans, profiles, cross-sections, estimates and specifications for such work, and copies thereof shall be filed by him with the council or other legislative authority of the municipality. After the council or other legislative authority has approved such surveys, plans, profiles, cross-sections, estimates and specifications, and after the municipality has provided the funds necessary to meet that portion of the cost of the work assumed by it, the municipality shall enter into a contract with the state of Ohio providing for the payment by such municipality of the agreed portion of the cost. 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."

It will be noted that the statute, *supra*, provides that the Director of Highways at his discretion may construct, reconstruct, improve, etc., any section of a state highway within the limits of a municipal corporation. Provision is also made in the section, *supra*, authorizing a municipal corporation to cooperate with the Director in such construction, improvement, maintenance or repair, and authorizing the municipality to pay such portion of the cost of such work as may be agreed upon between the municipality and the Director, and directing the municipal corporation to evidence its desire and intention to so cooperate by the passing of an appropriate resolution, which, among other things, should set forth the portion of the cost and expenses to be contributed by the municipality, which shall be filed with the Director. The act then requires that the Director prepare necessary surveys, plans, estimates and specifications for such work, copies of which shall be filed by him with the council of the municipality, etc., and after the municipality approves them and provides the funds necessary to meet that portion of the cost of the work assumed by it, the municipality shall enter into a contract with the state of Ohio providing for the payment by such municipality of the agreed portion of the cost, etc. I assume, from the facts stated in your letter, that the village in question improved one of its streets which was a part of the state highway system and after the completion thereof the cost was paid by the village and a portion of the cost assessed back on the property owners, and, as far as the state sharing in the cost thereof, simply relied upon some representation that a portion of the cost of the improvement, after it was completed, would be paid by the State Highway Department. I am unable to find anything in the statutes authorizing the State Highway Department to recoup the cost of an improvement of a highway in a village, which has been duly designated by the Highway Director as part of the state highway system.

While provision is made in Sections 1211 and 1212, General Code, for the State Highway Department to use funds derived from the registration of automobiles to reconstruct highways on the state system, yet the use therefor is limited to funds appropriated for such purpose as required by the provisions of Section 1212, General Code, *supra*, in which it is provided:

"The cost and expense of the construction, reconstruction, improve-

ment, maintenance and repair of a highway under the provisions of this act shall be paid by the treasurer of state upon the warrant of the auditor of state. The warrant of the auditor shall be issued upon the requisition of the director and be paid from any appropriation or funds available to carry out the provisions of this act."

I am unable to find any provision in the statutes appropriating funds to recoup the village and property owners for any portion of the cost of an improvement of a street which has been designated as a part of the state highway route through a village. It is manifest the improvement of the street was not made in pursuance of the provisions of Section 1189-2, General Code, *supra*. From the provisions of the statute on the subject, it is clear the Director of Highways can only lawfully share the cost of improvements of streets designated as a state highway in municipalities and villages, when he has prepared the necessary surveys, plans, profiles, cross-sections, estimates and specifications for such work, and filed copies thereof with the legislative authority of the municipality. On the approval thereof by the council and after the council has provided the funds necessary to meet the portion of the cost of the work assumed by it, the law requires the entering into a contract with the State of Ohio, approved by the Attorney General, providing for the payment by the village of its agreed portion of the cost. The statute requires all those various things to be done before the Director shall advertise for bids.

The improvement of the street mentioned, not having been made in accordance with the statutes on the subject, I am of the opinion the State Highway Director would have no authority to now pay any portion of the cost of the improved street now a part of the state highway system.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

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2855.

APPROVAL, QUIT CLAIM DEED CONVEYING TO OHIO STATE ARCHAEOLOGICAL AND HISTORICAL SOCIETY, AS A GIFT, LAND IN LEBANON TOWNSHIP, MEIGS COUNTY, OHIO—NORMA C. PEOPLES—C. E. PEOPLES.

COLUMBUS, OHIO, January 23, 1931.

*The Ohio State Archaeological and Historical Society, Columbus, Ohio.*

GENTLEMEN:—This is to acknowledge the receipt of your recent communication submitting for my examination and approval a certain quit claim deed therewith enclosed, by which Norma C. Peoples and C. E. Peoples, her husband, have conveyed to the Ohio State Archaeological and Historical Society, as a gift, a certain parcel of real estate situated in Lebanon Township, Meigs County, Ohio, which parcel of land is more particularly described as follows:

"Situated in Section 12, Town 2, Range 11 in 100 acre Lot No. 156. Beginning at a stake 1633 feet west of the center line of the Portland road, on the south line of the Norma Calkins 25 acre tract; thence west along the