

in local districts, if there be a possibility of the contingency arising during the term of office or during the time which the contract of employment covers, which would make a position incompatible, the rule of incompatibility would apply.

In an early English case, *Rex vs. Tizzard*, 9 B & C 418, Judge Bailey in speaking of incompatibility of offices uses this language:

'I think that the two offices are incompatible when the holder cannot in every instance discharge the duty of each.'

In view of the foregoing, and in specific answer to your question, I am of the opinion that the offices of justice of the peace and county attendance officer are incompatible.

Respectfully,  
GILBERT BETTMAN,  
*Attorney General.*

936.

COUNTY COMMISSIONERS—CO-OPERATING WITH HIGHWAY DIRECTOR ON STATE ROAD IMPROVEMENT—MAY PAY PORTION OR ALL OF COST OF RIGHT OF WAY.

*SYLLABUS:*

*County commissioners, in co-operation with the Director of Highways, may lawfully acquire the right of way required in connection with the improvement or repair of any state highway, and may lawfully agree to and pay any agreed portion, or all, of the cost of such right of way.*

COLUMBUS, OHIO, September 30, 1929.

HON. HARRY K. FORSYTH, *Prosecuting Attorney, Sidney, Ohio.*

DEAR SIR:—This will acknowledge receipt of your letter of recent date, which reads as follows:

"There is a bad right angle turn on State Highway No. 119 where it crosses the line between Auglaize and Shelby Counties. It is desired to purchase additional right of way at this point from abutting property owners in order to widen and straighten this turn.

The commissioners of this county have submitted to me the question whether or not they are permitted to spend county funds to make this purchase.

Section 1191 (House Bill 195) passed April 5, 1929, provides in part as follows:

'County commissioners of any county shall be authorized to co-operate with the Department of Highways in the cost of obtaining right of way required for or in connection with any state highway improvement or repair contemplated by the director.'

I am informed that the Director of Highways wishes this change made, but wishes the county to pay for the right of way.

The earlier part of this section in referring to county co-operation on a

state improvement, referred to an improvement where there will be a pavement and that of more than twenty feet in width.

Kindly advise me whether or not the county funds may be used for the proposed purchase."

The question is, may the county commissioners lawfully acquire and pay for lands necessary to widen and straighten the state highway to which you refer.

Section 1191, General Code, was re-enacted by the 88th General Assembly in House Bill No. 195, and in so far as is pertinent, reads as follows:

" \* \* \* County commissioners of any county shall be authorized to co-operate with the Department of Highways in the cost of obtaining right of way required for or in connection with any state highway improvement or repair contemplated by the director; and to pay any agreed proportion of the cost of such right of way. Unless otherwise expressly restricted, the authority granted to county commissioners by this section to co-operate with the Department of Highways shall extend to all portions of the state highway system, both within and without municipal corporations, subject to the condition that the consent of a municipal corporation be given to the performance of any work within its limits."

It will be noted that provision is made in said section for the county commissioners to co-operate with the Department of Highways in the cost of obtaining such right of way as may be required in connection with a state improvement and extends to all portions of the state highway system.

Section 6860, General Code, was enacted in the Norton-Edwards Act (112 O. L. 484), and reads as follows:

"The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the Director of Highways shall be had."

By the provisions of the act, supra, the county commissioners are given power to locate, establish, alter, widen and straighten roads on the state highway system, except as to such roads as are a part of the state highway system, the approval of the Director of Highways shall be had. Likewise, it will be noted that Section 1191, as last amended, authorizes county commissioners to co-operate with the State Highway Department in the cost of obtaining right of way in connection with the improvement or repair of any road, that is a part of the state highway system.

Before the amendment of Section 1191 by the 88th General Assembly, my predecessor, in an opinion dated July 5, 1928, and reported in the Opinions of the Attorney General for 1928, Volume III, page 1677, reviewed the general law on the subject, and, among other things, at page 1685, said:

"Section 1201 of the General Code, which is found on the same page in 112 Ohio Laws, authorizes the director to condemn land or property for state highway purposes by action taken in the manner therein prescribed. Section 1201-1 is also descriptive of the procedure incident to such appropriation proceeding. Section 1188, found on page 443 of 112 Ohio Laws, is as follows:

"The costs and expenses in connection with the purchase and appropriation of property for highway purposes, unless otherwise provided by law, shall be payable by the director out of any funds of the Department of High-

ways available for the construction, improvement, maintenance and repair of highways.'

From these sections of the Code it is clear that the duty of providing the necessary right of way for state highways, irrespective of the width thereof, devolves primarily upon the Director of Highways. He has the authority and it is his duty to secure all lands necessary for state highway purposes. There is at present no provision of law requiring the county commissioners to acquire right of way for the improvement of a road in the state highway system. This is a departure from the practice existing prior to the enactment of the Norton-Edwards act. Former Section 1201 made it the duty of the county commissioners to acquire such right of way when co-operating in the improvement of an inter-county highway or main market road. The amendment of that section in the Norton-Edwards act has omitted any reference to any such duty.

It does not follow, however, from the foregoing, that the county commissioners are without power to act with respect to the acquisition of a right of way for a state highway. It is true that the obligation to provide such right of way is no longer present. As a part of the Norton-Edwards act, Section 6860 of the General Code was amended to read as follows:

'The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads within the county, except that as to roads on the state highway system the approval of the Director of Highways shall be had.'

The succeeding section of the General Code, as amended in the Norton-Edwards act, provides the procedure to be followed in locating, establishing, widening or otherwise changing a public road upon petition. You will observe that Section 6860, *supra*, extends the authority to widen to state highways where the approval of the Director of Highways is first had. Accordingly the county commissioners may, in an independent proceeding had under the authority of the provisions of Sections 6860, *et seq.*, General Code, widen the road in question with the consent of the Director of Highways and as an incident to such improvement acquire the necessary right of way. In that event, of course, the county would bear the entire cost of the widening."

Under the Norton-Edwards Act, as observed, no provision was made requiring the county commissioners to acquire the right of way for the improvement of a road in the state highway system, yet it was concluded, the county commissioners were not without power to acquire a right of way for a road which was a part of the state highway system by virtue of Sections 6860, *et seq.*, General Code, provided the county commissioners, in doing so, co-operated with the State Highway Director; and my predecessor concluded that "in that event, of course, the county would bear the entire cost of the widening." However, regardless of what the law was previous to the amendment of Section 1191, General Code, by the 88th General Assembly, provision is now specifically made authorizing the county commissioners to co-operate with the Highway Department in acquiring a right of way for roads in the state highway system and to co-operate with the department in the cost of obtaining any such necessary right of way.

I am therefore of the opinion that county commissioners, in co-operation with the Director of Highways, may lawfully acquire the right of way required in connection with the improvement or repair of any state highway, and may lawfully agree to and pay any agreed portion, or all of the cost of such right of way.

Respectfully,

GILBERT BETTMAN,

*Attorney General.*