

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the workmen's compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2540.

STREET IMPROVEMENT—CONTINUATION OF STATE ROAD THROUGH CITY—NO PART OF COST PAYABLE BY STATE OR COUNTY—EX-CERTIONS.

SYLLABUS:

1. *Where a city street which is a continuation of a state road or highway is improved by the city as a street, neither the State nor the county in which such city is located is authorized to contribute to the city any part of the cost and expense of such improvement.*

2. *Where a city street is a continuation of a state road or highway, the same may be improved by the county commissioners of the county in which such city is located, with the consent of such city evidenced by proper legislation of its council. In such case the city may participate in the payment of the cost and expense of such improvement by paying to the county treasurer such amount of the cost and expense of the improvement as may be agreed upon between the county commissioners and the council of the city. The city may pay its proportion of the cost and expense of the improvement from the proceeds of taxes levied upon the taxable property of the city or from the proceeds of assessments therefor levied against abutting property owners, or both.*

3. *Where a city street is a continuation of a state road or highway the same may be improved by the Director of Highways by and with the consent of the legislative authority of the city. In such case the city may participate in the payment of the cost and expense of that part of the width of the improvement which is in excess of that contemplated and provided for by the plans and specifications of the Department of Highways for said improvement as a state road or highway and the commissioners of the county in which such city is located may participate in the payment of the cost and expense of so much of the width of said improvement as is in excess of eighteen feet. The city may pay its proportion of the cost and expense of such improvement from the proceeds of tax levies therefor upon all the taxable property of the city, or from the proceeds of assessments, which may be made in any one of the methods provided for in the case of street improvements within a municipality and under the exclusive control thereof.*

COLUMBUS, OHIO, September 5, 1928.

HON. JAMES COLLIER, *Prosecuting Attorney, Ironton, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your communication in which you request my opinion on certain questions therein stated. Your communication reads as follows:

"The council of the City of Ironton has asked the county commissioners of this county to contribute to the repair of Third Street, which forms a part of an inter-county highway or main market road. This street has long been paved by the city and all assessments paid. It is now proposed to resurface the street with asphalt,—the city to pay the expense of improving the intersections. The adjoining property owners are to be re-assessed for a certain proportion of the expense, and the council has asked the county commissioners to pay a certain part of it, and the State Highway Department to pay a certain part of it. The amount that each is to pay, to be agreed upon by the council, county commissioners and State Highway Department.

FIRST: Do the county commissioners have authority to contribute to the expense of the improvement of this street?

SECOND: If the county commissioners are not authorized to contribute to the general expense of this improvement, could they take over the improvement of a certain part of it?"

If, from your communication, it is to be understood that the City of Ironton is contemplating the improvement of the street here in question, as a city street, by and under the direction of the proper officers of said city, it is quite clear that in such case neither the State nor Lawrence County, for want of statutory authority so to do, can contribute to the city any part of the cost and expense of such improvement.

With respect to your second question, it appears that the street here in question forms a part of a state road; and that the contemplated improvement, which is something more than a repair of the street, will be wholly within the city of Ironton.

Section 6949, General Code, is applicable to the consideration of the question here presented. So far as pertinent, this section provides as follows:

"The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. * * * "

Under the provisions of Section 6952, General Code, the word "road" as used in this connection, is construed to include any state or county road or any part thereof, and "any city or village street or streets, or any part thereof, which forms a continuous road improvement."

Section 6949, General Code, as originally enacted in the Cass highway law, 106 O. L. 574, provided that: "The board of county commissioners may extend a proposed road improvement into or through a municipality when the consent of the council of said municipality has been first obtained."

In an opinion of this department under date of March 21, 1917, Opinions of the Attorney General, 1917, Vol. 1, page 313, construing the then provisions of Section 6949, General Code, above quoted, it was held that the county commissioners and the council of a municipality were not authorized to co-operate in the improvement of a part of an inter-county highway of the state, where the part to be improved was entirely within the limits of a municipality. However, in 1917 Section 6949, General Code, was amended in the enactment of the White-Mulcahey road law, so as to read as first above quoted herein; and as the section now reads the county commissioners of

a county are authorized to co-operate with the council of a city or village in the improvement of that part of a state or county road which lies wholly within the municipality. In such case the improvement should of course be conducted by the county, and not by the municipality; and in the case here presented, inasmuch as the street herein question is a part of a state road, the improvement will have to be made under plans and specifications approved by the Director of Highways and under his supervision and inspection. Sections 1203 and 6906, General Code.

With respect to the payment of that part of the cost and expense of the improvement to be paid by the City of Ironton in case of an improvement of said street by the board of county commissioners under authority of Sections 6949 et seq., General Code, Section 6951-1 as amended (112 O. L. page 494) provides in part as follows:

“ * * * The municipality shall pay to the county treasurer its estimated portion of the cost and expense of such an improvement to be borne by the municipality as a whole as fixed in the agreement between the council and the county commissioners, out of any funds available, and may issue such bonds therefor and under such conditions as provided for in Section 6951.”

Further to this point, Section 6950, General Code, as amended, (112 O. L. page 493) provides in part as follows:

“ * * * For the purpose of providing by taxation a fund for the payment of the proportion of the cost and expense of said improvement to be paid by the municipality and also the compensation and damages incident thereto, said municipality is authorized to levy taxes upon all the taxable property of such municipality under the same restrictions imposed by law in the case of taxes levied, for the purpose of providing funds for the payment of the municipality's share of the cost of street improvements under the exclusive jurisdiction and control of the council of a municipality. The council of said municipality may assess against abutting property owners all or any part of the proportion of the cost and expense of said improvement and the compensation and damages to be paid by it. Said assessments shall be made in one of the methods provided for in the case of street improvements wholly within the municipality, and under the exclusive control of the council.”

It will be noted that Section 6949 above quoted, provides that the “board of county commissioners may *construct* a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has been first obtained.” This section must be read in connection with Section 6906 of the General Code, which provides in part as follows:

“The board of county commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same. * * * ”

In view of the language used in that part of Section 6906 above quoted, the word *construct* in Section 6949, in my opinion, means to construct by the doing of any one or more of the things specified in Section 6906.

By way of answer to your second question, therefore, I am of the opinion that the county commissioners of Lawrence County are authorized to improve the street

in question as a part of a state road or highway by co-operation with the authorities of the city of Ironton in the manner provided by Section 6949 et seq., General Code.

In this connection your attention is also directed to Section 6953 of the General Code, which reads in part as follows :

"Whenever any portion of a road to be improved by the county commissioners lies within the corporate limits of a municipality and the council of said municipality desires to improve all or any part of said road within such municipality to a greater width than is contemplated by the proceedings for said improvement by the county commissioners, such council shall at any time before it approves the surveys and profiles for such improvement determine by resolution the additional width to which it desires such road, or part thereof, to be improved and shall cause a copy of such resolution to be filed with the county commissioners. * * * The council of the municipality may assume all that part of the estimated cost and expense of such improvement rendered necessary by the increased width thereof, or such part of said additional expense as may be agreed upon between the council and the county commissioners."

By way of more complete answer to the inquiries made in your communication, it may be observed that the Director of Highways of the state may likewise improve the street here in question as a continuation of a state road by cooperation with both the board of county commissioners of Lawrence County and the council of the city of Ironton in the manner provided by Sections 1191 and 1224-1a, General Code, as amended in 112 O. L. pages 469 and 454.

Section 1191, General Code, provides among other things, that the county commissioners shall be authorized to co-operate with the Department of Highways "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." This section further provides that: "Any board of county commissioners desiring to co-operate as above, may, by resolution, propose such co-operation 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."

In Opinion No. 2318 of this department directed to the Director of Highways under date of July 5, 1928, it was held on a consideration of the above quoted and other provisions of Section 1191, General Code, as follows :

"County commissioners, in counties having a tax duplicate of less than three hundred million dollars, are limited in their co-operation with the Department of Highways, in the widening of the paved portion of a state road, to the portion of the cost of the construction or reconstruction of such paved portion which represents the excess width over eighteen feet. The commissioners may assume any part of the cost of such excess width provided that the state assumes some portion thereof.

In any instance where a state road is being constructed or reconstructed to a width greater than eighteen feet, the county commissioners, in counties having a tax duplicate of less than three hundred million dollars, are authorized to co-operate with respect to the cost of widening in excess of eighteen feet, irrespective of whether or not any pavement theretofore existed."

Section 1224-1a above referred to authorizes the Director of Highways to construct, reconstruct or improve any continuation of a state road or highway through the limits of a municipal corporation by and with the consent of such municipality. This section, so far as the same is pertinent in the consideration of the question here presented, reads as follows :

“ * * * The director may at his discretion construct, reconstruct, improve, maintain or repair any continuation of a highway on the state highway system through the limits of a municipal corporation, and the bridges and culverts thereon, but he shall first obtain the consent of the legislative authority of such municipal corporation before proceeding with such work. He may also, if he deems it to the best interest of the public, upon obtaining the consent of the legislative authority of any city, maintain or repair any continuation of such road or highway within such city, and he may construct or reconstruct the bridges and culverts thereon, and pay the portion agreed to of such work from state funds. When any portion of an extension of the state highway system within a municipal corporation is to be improved and the legislative authority of said municipal corporation desires to improve all or any portion thereof to a greater width than is contemplated by the proceedings for said improvement by the director, such legislative authority shall at any time before the surveys, plans, profiles, cross-sections, estimates and specifications for such improvement are approved by the director, determine by resolution the additional width to which it desires such extension, or part thereof, to be improved, and shall cause copies of such resolution to be filed with the director.

The director shall thereupon cause to be prepared the necessary surveys, plans, profiles, cross-sections, estimates and specifications for improving such extension, or part thereof, to said additional width. The estimate shall set forth the probable cost and expense of so much of said improvement as is made necessary by the proposed increase of width thereof. Copies of such surveys, plans, profiles, cross-sections, estimates and specifications shall be filed with the legislative authority of the municipal corporation and upon the approval of the same by such legislative authority the improvement shall be constructed to such additional width. The municipal corporation shall first enter into a contract with the State of Ohio, providing for the payment by such municipal corporation of the agreed proportion of the cost and expense. The form of such contract shall be described 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 municipal corporation, and a duplicate of the certificate of the chief fiscal officer of the municipal corporation, made in compliance with the provisions of said section, shall be filed in the office of the director. The improvement shall be constructed under the sole supervision of the director. The proportion of the cost and expense payable by the municipal corporation shall be paid by the proper officers thereof upon the requisition of the director and at such times during the progress of the work as may be determined by him.

The legislative authority of said municipal corporation may assess against abutting property owners all or any part of the cost and expense of improving such extension, or part thereof, to such additional width, which assessments shall be made in any one of the methods provided for in the case of street

improvements wholly within a municipality and under the exclusive control of such municipality. For the purpose of providing by taxation a fund for the payment of all or any part of the cost and expense of improving such extension, or part thereof, to such additional width, said municipal corporation is authorized to levy taxes upon all the taxable property of such municipal corporation under the same restrictions and conditions imposed by law in the case of taxes levied for the purpose of providing funds for the payment of the municipal corporation's share of the cost and expense of street improvements under the exclusive jurisdiction and control of such municipal corporation.

In anticipation of the collection of assessments to be made against abutting property as hereinbefore provided and in anticipation of the collection of taxes levied for the purpose of providing for the payment of all, or any part of the cost and expense of improving such extension, or part thereof, to such additional width, said municipal corporation is authorized to sell its bonds under the same conditions and restrictions imposed by law in the sale of bonds for street improvements under the exclusive control and jurisdiction of such municipal corporation."

In said opinion No. 2318 of this department, above referred to, construing the above quoted provisions of Section 1224-1a, General Code, it was held:

"Where a village street constitutes a continuation of a state highway into or through the village and the highway department undertakes the resurfacing or rebuilding of such street to the same width as the existing pavement, the village has no authority, under Section 1224-1a of the General Code, to bear any portion of the cost of such improvement. If, however, the plans for the improvement as prepared by the Department of Highways do not contemplate resurfacing or rebuilding of such street to a width such as is desired by such village, the village may proceed under authority of Section 1224-1a of the Code to secure the improvement to such additional width, in which case the additional cost must be borne by the village."

In said former opinion of this department, above referred to, one of the questions there under consideration was whether in the case of a village street which has already been constructed to a width greater than eighteen feet and which is to be resurfaced or rebuilt to the same width as originally constructed, the village, or county, or both, could co-operate in the payment of the cost and expense of the improvement, and if so, on what portion of the pavement which constituted the improvement. In said opinion, referring to the above quoted provisions of Section 1224-1a, General Code, in their application to the question above stated, it was said:

"In my opinion this language must be construed as providing that it is only when the plans of the Highway Department contemplate an improvement at a width narrower than that desired by the proper authorities of the municipality that the village may participate. In the instance you cite, you state that the street is to be resurfaced or rebuilt to the same width as originally constructed. If by this you mean that the plans of the Highway Department call for a resurfacing or rebuilding at the same width, then apparently there is no authority for any division of the cost and the State must bear it all, unless it be desired by the municipality that the street be improved at a greater width. Consequently, I am of the opinion that the village in the instance you cite may not participate in the cost of the improvement.

In so holding, I do not wish to be understood as saying that the village has no right whatsoever to improve a street that may constitute an extension of a state highway. By an independent proceeding the village may make such improvement of the street as it sees fit, being governed by the general sections of law applicable thereto. Such proceeding would, however, be one wholly within the authority of the village and the contract would have to be let by it, but it is conceivable that a proceeding by the village and one by the director might so be co-ordinated as to result in a joint improvement of the street in question.

In case of the county, however, it is quite apparent from the provisions of Section 1191, *supra*, that co-operation may be had in an improvement to a greater width than eighteen feet either within or without the limits of a municipality. You will note by the express language of the section that, where any portion of the work covered by such proposal of the county commissioners is within the limits of a village the consent of the village must be furnished. In this instance the work of reconstruction will be to a width in excess of eighteen feet. Under such circumstances I believe it within the authority of the county to co-operate by bearing a proportion of so much of the cost of the improvement as is in excess of eighteen feet."

It is obvious that what is said in said former opinion of this department with respect to the improvement of a village street as a continuation of a state road or highway has equal application under the provisions of Section 1224-1a, General Code, to the improvement of a city street which is a continuation of a state road or highway; and the above noted provisions of Sections 1191 and 1224-1a, General Code, and the former ruling of this department construing the same afford, I believe, a sufficient answer to the inquiry suggested in your communication as to the method in which the street here in question as a continuation of a state road may be improved by the Director of Highways in co-operation with the county and city.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2541.

CIVIL SERVICE—PROVISIONAL APPOINTEE IN STATE CLASSIFIED SERVICE—EMPLOYMENT CONTINUES ONLY UNTIL SUBMISSION OF ELIGIBLE LIST—DUTY OF APPOINTING AUTHORITY DISCUSSED.

SYLLABUS:

A person employed in a position in the classified civil service of the state under a provisional appointment can legally continue in such employment only until such time as a regular appointment to the position can be made from an eligible list submitted to the appointing authority by the State Civil Service Commission, and in such case such appointing authority cannot legally continue the status of such person as a provisional employe by refusing or neglecting to make a regular appointment to such position from the eligible list submitted.