

2132.

ROADS AND HIGHWAYS—WHEN TOWNSHIP TRUSTEES MAY BY ISSUE OF BONDS UNDER SECTION 3298-1 G. C. PROCURE FUNDS TO BE USED IN MAKING AGREEMENT AUTHORIZED BY SECTION 6921 G. C. WITH COUNTY COMMISSIONERS—RESURFACING ROADS—WHERE TOWNSHIP FURNISHES MATERIAL—PROCEDURE OF TOWNSHIP TRUSTEES IN PROCEEDINGS TO ISSUE SUCH BONDS.

1. *By virtue of section 6921-1 G. C. (108 O. L. Part II, p. 1240), township trustees may by means of an issue of bonds under sections 3298-1 et seq. G. C. procure funds to be used in making agreement authorized by section 6921 G. C.*

2. *In proceeding to issue such bonds, township trustees should follow the procedure pointed out by sections 3298-1 et seq., including the adoption of the preliminary resolution of necessity described in sections 3298-5 and 3298-6 G. C.*

COLUMBUS, OHIO, June 2, 1921.

HON. LAWRENCE H. WEBBER, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—You have recently submitted the following statement and inquiries:

“The township trustees of Eaton township, Lorain county, have made an arrangement with our county commissioners whereby, if the township trustees will raise \$10,000 with which to buy material, the county commissioners will do the work of resurfacing an inter-county highway in Eaton township. The township at this time has no money to go ahead with the work. The only possible way for them to get this money would be to raise same by a bond issue. They have a valuation of about two million eight hundred dollars, and wish to issue \$10,000 worth of bonds to buy the material to do this resurfacing.

Section 3298-5 of the General Code provides that the township trustees may by unanimous vote adopt a resolution declaring the necessity for a certain improvement. There is considerable doubt in the writer's mind as to whether or not this is the kind of improvement which is contemplated by the statute in view of the fact that the trustees are not initiating the matter, but are only joining with the county commissioners, their part being to furnish \$10,000 worth of material, and the county's portion being to see that the work of placing this material or resurfacing this road is done.

Will you be kind enough to give me your opinion, first, as to whether or not you think the preliminary resolution of the trustees is necessary, and if so what it should contain. Second, is it legal for the board of township trustees to raise this money by bond issue and then the county commissioners do the balance of the work? In other words, the procedure to me seems to be irregular and not such as provided by law as found in sections 3298-1 to 3298-15, both inclusive.”

In response to a request for additional information, you have stated among other things in your letter of May 16th:

“The plan is for the whole cost of the expense of resurfacing this

inter-county highway to be paid by the county and township, no assessment to be made against abutting land owners. The section of road in question was improved by the county some years ago, but the surface of the road is gone to pieces and it needs immediate attention.

The county commissioners have made the following proposition to the township trustees—that if the township trustees will furnish the material, the estimated cost of which is about \$10,000, the county commissioners will take care of the work of resurfacing.”

If the circumstances which you describe involved only the inquiry whether the township trustees might issue the bonds of the township for the purpose of purchasing materials to be delivered to the county commissioners for use in improving a road, it is believed that a negative answer would be imperative, for the reason that no statute has been found conferring authority for the particular purpose indicated. You say, however, that under the proposed plan of co-operation as between county commissioners and township trustees, the estimated cost of materials which would be furnished by the trustees is \$10,000, so that it is to be assumed that the real point at issue is whether the township trustees may raise the \$10,000 through the sale of bonds of the township,—in other words, that it is immaterial to the county commissioners and township trustees whether the latter cooperate in the proposed improvement through the medium of delivering \$10,000 worth of materials or \$10,000 in cash. Hence, while your second question, in the form in which it is asked, is answered in the negative, the question will now be considered. May the trustees, under authority of sections 3298-1 to 3298-15n, G. C., issue the bonds of the township and turn over the proceeds to the county commissioners for use by the latter in part payment of the cost of the resurfacing within said township of a section of highway heretofore improved by the county commissioners?

Section 7464, G. C. reads in part:

“The public highways of the state shall be divided into three classes, namely: State roads, county roads and township roads. * *

(b) County roads shall include all roads which have been or may be improved by the county by placing brick, stone, gravel or other road building material thereon, or heretofore built by the state and not a part of the inter-county or main market system of roads, together with such roads as have been or may be constructed by the township trustees to conform to the standards for county roads as fixed by the county commissioners, and all such roads shall be maintained by the county commissioners.

(c) Township roads shall include all public highways of the state other than state or county roads as hereinbefore defined, and the trustees of each township shall maintain all such roads within their respective townships; and provided further, that the county commissioners shall have full power and authority to assist the township trustees in maintaining all such roads, but nothing herein shall prevent the township trustees from improving any road within their respective townships, except as otherwise provided in this act.”

Section 6921, G. C., which appears in the series of statutes relating to improvement of county roads by county commissioners (section 6906 to 6954, G. C.), reads:

"The county commissioners, or joint board thereof, upon a unanimous vote, may without a petition therefor, order that all the compensation and damages, costs and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the county, or out of any road improvement fund available therefor, or the county commissioners or joint board thereof, may enter into an agreement with the trustees of the township or townships in which said improvement is in whole or part situated, whereby said county and township, or one or more of them may pay such proportion or amount of the damages, costs and expenses as may be agreed upon between them."

Since your letter shows that the county has already improved the section of highway in question, it follows, in view of the very broad provisions of section 7464 G. C. that it is a county road subject primarily to maintenance by the county, and hence within the purview of section 6921, G. C., in the sense that county commissioners, under the general authority conferred by sections 6906 to section 6954, may take charge of improvement or maintenance work thereon.

Clearly, then, section 6921 furnishes ample authority for an agreement between your county commissioners and the trustees of Eaton township, whereby the trustees may turn over to the commissioners a sum of money to be devoted by the latter in conjunction with moneys of the county to the resurfacing of the road in question. We thus return to the question whether the township trustees may procure such sum of money by an issue of bonds under sections 3298-1 to 3298-15n.

Section 3298-1 reads:

"The board of trustees of any township shall have power, as hereinafter provided, to construct, reconstruct, resurface or improve any public road or roads, or part thereof, under their jurisdiction. Such trustees shall also have the power to construct, reconstruct, resurface or improve any county road or inter-county highway or main market road within their township; provided, however, that in the case of a county road the plans and specifications for the proposed improvement shall first be submitted to the county commissioners of the county and shall receive their approval and in the case of an inter-county highway or main market road such plans and specifications shall first be submitted to the state highway commissioner and shall receive his approval. The township trustees shall have power to widen, straighten or change the direction of any part of a road in connection with the proceedings for its improvement."

The next following three sections relate to petitions by land-owners, followed by sections 3298-5 and 3298-6, which read:

"Section 3298-5. The township trustees may, without the presentation of a petition, take the necessary steps to construct, reconstruct, resurface, or improve a public road, or part thereof, as hereinbefore provided, upon the passage of a resolution by unanimous vote declaring the necessity therefor. The cost and expense thereof may be paid in any one of the methods provided in section 3298-13 of the General Code, as may be determined by the township trustees in said resolution."

"Section 3298-6. When the board of township trustees has determined that any road shall be constructed, reconstructed, resurfaced or improved, as herein provided for, such board shall determine by resolution by unanimous vote, if acting upon a petition, the route and termini of such road, the kind and extent of the improvement, and at the same time shall order the county surveyor to make such surveys, plans, profiles, cross-sections, estimates and specifications as may be required for such improvement. The township trustees may order the county surveyor to make alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadway, or different materials, and approve all or any number of such alternate surveys, plans, profiles, cross-sections, estimates and specifications. The county surveyor may, without instructions from the township trustees, prepare alternate surveys, plans, profiles, cross-sections, estimates and specifications, providing therein for different widths of roadways or different materials. When alternate surveys, plans, profiles, cross-sections, estimates and specifications are approved by the township trustees or submitted by the county surveyor on his own motion, the township trustees and county surveyor, shall after the opening of bids agree which of the surveys, plans, profiles, cross-sections, estimates and specifications shall be finally adopted for the construction of the improvement."

Section 3298-7 provides for the filing of copies of surveys, etc., by the county surveyor with the township trustees, and (except in certain instances as hereinafter noted) the giving of notice by the trustees through publication in a newspaper that the improvement is to be made. Sections 3298-8 to 3298-12 make provision for appropriation of property, settlement of damage claims, resolution to proceed, etc.; section 3298-13 sets forth plans for division of cost as between township and property owners; and section 3298-14 contains provisions as to certain classes of property which may be assessed.

Section 3298-15 reads:

"The township trustees upon a unanimous vote, may without a petition thereof (therefor), order that all the compensation, damages, costs, and expenses of constructing any improvement be paid out of the proceeds of any levy or levies for road purposes on the grand duplicate of the township, or out of any road improvement fund available thereof (therefor)."

Sections 3298-15a to 3298-15c describe the procedure to be followed in making the assessment.

Section 3298-15d reads:

"The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the township shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the township's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, resurfacing or improving roads under the provisions of section 3298-1 to 3298-15n inclusive of the General Code and for the purpose of maintaining, repairing or dragging any public road, or roads, or part thereof, under their

jurisdiction in the manner provided in sections 3370 to 3376 inclusive of the General Code, the board of trustees of any township is hereby authorized to levy annually a tax not exceeding three mills upon each dollar of the taxable property of said township. Said levy shall be in addition to all other levies authorized by law for township purposes and subject only to the limitation on the combined maximum rate for all taxes now in force. The taxes so authorized to be levied shall be placed by the county auditor upon the tax duplicate against the taxable property of the township and collected by the county treasurer as other taxes. When collected such taxes shall be paid to the treasurer of the township from which they are collected and the money so received shall be under the control of the township trustees of such township for the purposes for which such taxes were levied."

Section 3298-15e reads in part:

"The township trustees, in anticipation of the collection of such taxes and assessments, or any part thereof, may, whenever in their judgment it is deemed necessary, sell the bonds of said township in any amount not greater than the aggregate sum necessary to pay the estimated compensation, damages, costs and expenses of such improvement. Such bonds shall state for what purpose they are issued and shall bear interest at a rate not to exceed six per cent per annum, payable semi-annually, and in such amounts and to mature at such times as the trustees shall determine, subject to the provision, however, that said bonds shall mature in not more than ten years. Prior to the issuance of such bonds the township trustees shall, in case all or any part of said bonds are to be redeemed by special assessments, provide for the levying of a tax upon all the taxable property of the township to cover any deficiencies in the payment or collection of any such special assessments. * * * The proceeds of such bonds shall be used exclusively for the payment of the compensation, damages, costs and expenses of the improvement for which they are issued."

The remainder of the series of sections relates to letting of contracts, supervision by county surveyor, record of proceedings, etc.

No doubt, the series of sections just described gives the impression upon its face that the project therein contemplated is one which comes exclusively within the jurisdiction of township trustees, and hence does not go to the extent of authorizing bonds the proceeds of which are to be used on projects in charge of county commissioners. Doubtless this impression gave rise to the practice of resort by township trustees to section 3295 G. C., in the issue of road bonds,—a practice which was held unauthorized by the decision of the supreme court in the case of *State, ex rel. Steller vs. Zangerle*, 100 O. S. 414, which decision was foreshadowed in principle in an opinion of this department, 1917 Opinions Attorney-General, Vol. I, page 550, whereof the headnote reads:

"Section 6929 General Code governs in the matter of issuing bonds to cover a township's share of the cost and expense of a road improvement under an agreement as to the division of the cost and expense of such improvement made by the trustees of said township

with the board of county commissioners under section 6921 General Code, and such bonds should be issued under said section 6929 and not under section 3295 General Code."

As a result, evidently, of such decision of the supreme court, the General Assembly on January 28, 1920, enacted an original section, designated section 6921-1 (108 O. L. Pt. 2, page 1240), reading as follows:

"Where the compensation, damages, costs and expenses of an improvement, other than the portion thereof, if any, to be specially assessed against benefited real estate, are to be paid in part by the county and in part by the township or townships in which such improvement is situated, under an agreement between the county commissioners and the trustees of such township or townships entered into under the provisions of section 6919 or section 6921 of the General Code, the part of such compensation, damages, costs and expenses to be paid by the interested township or townships may be paid from the proceeds of any levy or levies made by the county commissioners under section 6927 of the General Code or from the proceeds of any levy or levies made by the township trustees under section 3298-15d of the General Code. Where bonds are issued to provide funds for any such improvement, the shares of the county and of the township or townships and of the real estate specially assessed, if any, may be provided by a bond issue by the county commissioners under authority of section 6929 of the General Code; or in lieu of such method of providing the necessary funds, the county commissioners may issue bonds under authority of section 6929 of the General Code in an amount sufficient to provide the shares of the county and of the real estate specially assessed, if any, and the remainder of the necessary funds, being the share of the interested township or townships may be provided by the township trustees by an issue of bonds under authority of section 3298-15e of the General Code. All bonds heretofore issued by any board of township trustees under authority or assumed authority of section 3295 or section 3298-15e of the General Code, which have been sold for not less than par and accrued interest and the proceeds of which have been paid into the treasury of the township issuing the same and which bonds were sold for the purpose of providing the township's share of the compensation, damages, costs and expenses of any improvement to be constructed under an agreement between the county commissioners and the trustees of such township, shall be held to be legal, valid and binding obligations of the township issuing the same and the proceeds of such bonds shall be used for paying the township's share of the compensation, damages, costs and expenses of such improvement. Where the township trustees of any township under authority or assumed authority of section 3295 or section 3298-15e of the General Code or the related sections, have initiated proceedings for the issuance of bonds for the purpose of paying the township's share of the compensation, damages, costs and expenses of any such improvement, such proceedings shall be held to be legal, valid and binding upon such township and shall be carried to a conclusion under the provisions of the sections under which said proceedings were initiated, and the township trustees shall be authorized to do any and all things necessary in the completion of said proceed-

ings and in the issuance and sale of said bonds, which bonds shall be legal, valid and binding obligations of the township, and the proceeds thereof shall be used for paying the township's share of the compensation, damages, costs and expenses of said improvement."

This enactment has clearly authorized township trustees to proceed under section 3298-15e in the issuing of bonds to provide funds for use in entering into the agreement mentioned in section 6921 G. C.

Coming to your first question: Whether the preliminary resolution of the township trustees is necessary and what it should contain. While it is perhaps true that the primary purpose of the preliminary resolution has relation to the protection of persons whose lands might be assessed, yet sections 3298-1, et seq. do not seem to make any distinction as between improvements undertaken without cost to adjoining land-owners as such, and those having a property assessment in view. It will be borne in mind that, difficult as it is to distinguish in all cases between current repairs of temporary or ordinary character and maintenance work on a more or less extensive scale with a view to permanency, yet there is seemingly some distinction in the intendment of the statutes as between reconstruction and resurfacing work as mentioned in section 3298-1 and ordinary repair work as mentioned in section 3370. At any rate, the project which you describe is resurfacing work of somewhat extensive nature, and resurfacing is contemplated by section 3298-1 et seq.; so that the conclusion of this department is that the preliminary resolution mentioned in sections 3298-5 and 3298-6 should be adopted, and should contain all the matters mentioned in those sections, such as declaration of necessity, description of route and termini, order for survey, etc., and an order that the township undertake the improvement without assessment against abutting lands and pay the entire cost of the improvement save only such part as the county may assume as authorized by section 6921, G. C. This view is fortified by reference to the fact that when the General Assembly amended section 3298-7 in 108 O. L. at page 497 with a view of dispensing in certain cases with publication of notice of intention to make the improvement, it used the words

"except in cases of *re-construction or repair* of roads, where no land or property are (is) taken,"

thus indicating a legislative view that the preliminary resolution, preparation of plans, etc., were necessary in cases of reconstruction and repair, at least where the work was of greater scope than of merely incidental or ordinary character.

It is suggested that before any steps are begun under sections 3298-1 et seq., the township trustees and county commissioners enter into the agreement described in section 6921. This might be done through the passage of a resolution by the trustees asking the county commissioners to make the resurfacing improvement and offering to contribute \$10,000 to the enterprise, followed by the passage of a resolution by the county commissioners reciting by way of preamble the filing with them of a certified copy of the resolution of the trustees and concluding with a resolving clause that the trustees' resolution be recorded on the commissioners' journal and that upon the making available to the use of the commissioners of the \$10,000 the commissioners will carry out the improvement. When these steps have been completed, the township trustees could begin independent proceedings under sections 3298-1 just as though they intended to make the improvement them-

selves,—adopting first by unanimous vote the preliminary resolution as above outlined; then upon receipt of surveys, etc., publishing notice as mentioned in section 3298-7 (unless the facts permit of dispensing with publication under the exception made in said section); next, adopting the “resolution to proceed” as outlined in section 3298-12; and finally, adopting the resolution to issue bonds.

Respectfully,
JOHN G. PRICE,
Attorney-General.

2133.

APPROVAL, BONDS OF HURON COUNTY, OHIO, IN AMOUNT OF
\$74,200 FOR ROAD IMPROVEMENTS.

COLUMBUS, OHIO, June 3, 1921.

Industrial Commission of Ohio, Columbus, Ohio.

2134.

APPROVAL OF DEED FOR REAL ESTATE CONVEYED TO STATE BY
CITY OF TOLEDO.

COLUMBUS, OHIO, June 3, 1921.

HON. JOHN I. MILLER, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—Under date April 6, 1921, you wrote to this department as follows:

“Herewith I am transmitting an abstract of title for certain lands in the city of Toledo, which are to be conveyed by said city to the state of Ohio, in exchange for certain lands surrendered by the state to the city of Toledo.

Also a deed conveying title to the state for the land to be acquired by the state. I am also enclosing other documents including a blue-print, showing the land involved, which will assist you in arriving at an opinion on the question of title, which we respectfully request before accepting the deed.”

The deed referred to in your letter is being tendered by the city of Toledo to the state of Ohio as the outgrowth of an agreement or arrangement referred to in an act of the general assembly passed March 21, 1917, and appearing in 107 Ohio Laws, p. 572. The deed bears the corporate name and seal of the city of Toledo, and was on April 5, 1921, signed and acknowledged on behalf of said city by Hon. Cornell Schreiber, mayor, and Hon. Clarence A. Benedict, director of public service. The general description set out in said deed of the property therein conveyed is as follows:

“All that part of the new channel of Swan creek constructed by