

Code, is unreasonable when one considers that the income from such agent's certificates, according to figures furnished by your department, has been as follows:

1924	-----	\$738 00
1925	-----	639 00
1926	-----	592 00

Section 1138 supra, is not discriminatory because it includes resident and non-resident nurserymen or dealers.

Therefore, it is my opinion that Section 1138, General Code, is a valid exercise of the police power and the State of Ohio may properly require a license fee as therein provided. In passing it is proper to observe that the provisions of a duly enacted statute should be followed by administrative officers, unless, and until such statute be declared unconstitutional by a court of competent jurisdiction.

Respectfully,  
 EDWARD C. TURNER,  
*Attorney General.*

78.

DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS—MAY CONSENT TO CONSTRUCTION OF SWITCH TRACK ACROSS INTER-COUNTY HIGHWAY OR MAIN MARKET ROAD—DEPARTMENT HAS JURISDICTION WHERE STRUCTURES ERECTED.

*SYLLABUS:*

1. *The Department of Highways and Public Works may consent to the construction of a switch track across an inter-county highway or main market road upon such terms and conditions as will protect the interests of the traveling public.*

2. *In consenting to the placing of structures upon an inter-county highway or main market road, the department of highways and public works cannot bargain away its right to have such structures removed whenever, in the exercise of reasonable judgment, such structures become obstructions in the use by the traveling public of such road.*

COLUMBUS, OHIO, February 12, 1927.

HON. GEORGE F. SCHLESINGER, *Director of Highways and Public Works, Columbus, Ohio.*

DEAR SIR:—I acknowledge receipt of your recent communication, which is as follows:

“The Keystone Gravel Company of Dayton has made application to this department to construct a grade crossing on one of our highways. This line will be used as a switch and there will be about twenty movements of cars per day. They are asking for this permission for a period of one year, at the end of which they will remove their tracks from the highway and either separate the grade or abandon the switch.

The writer is inclined to grant this permission if in your judgment the interest of the traveling public can be protected and this department assured at

the end of the year period the crossing will be removed. I would also desire your assistance in drawing up the agreement."

The method by which railroad companies secure the right to occupy a public road is prescribed in the special sections of the General Code applicable to such companies. The specific section is 8763, which provides that where it is necessary to occupy the public road with service tracks, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the terms and conditions of the occupancy. I doubt the applicability of this or any of the other special sections for the reason that they deal specifically with railroad companies and not with tracks constructed by private individuals. In the specific case concerning which you inquire, the track is apparently to be constructed by a private corporation other than a railroad. The inapplicability of these sections is emphasized by the fact that Section 8764 of the General Code provides that where no agreement can be reached, as authorized by the previous sections, the company may appropriate such part of the road as may be necessary, upon the terms provided for the appropriation of the property of individuals. Certainly the gravel company in this instance would have no right of eminent domain.

Your inquiry raises a preliminary question which may be readily disposed of. This has to do with the authority and jurisdiction of the Department of Highways and Public Works over inter-county highways and main market roads. It is unnecessary to review the pertinent sections of the statute. For the purpose of this discussion, it is sufficient to say that the clear intent of the highway statutes is to vest entire control and supervision of the construction, improvement, maintenance and repair of inter-county highways and main market roads in your department. A clear line of demarcation is made between these roads and other roads.

Assuming, therefore, the general authority of the department over inter-county highways and main market roads, the main question which you raise is reached, that is, as to whether or not you have authority to grant the right to cross the highway with tracks at grade upon such terms and conditions as may be deemed necessary for the protection of the traveling public.

Section 7204 of the General Code gives authority to the Director of Highways and Public Works as to inter-county highways and main market roads to direct the removal of any "telegraph or telephone lines, steam, electrical or industrial railways, oil, gas, water or other pipes, mains, conduits or any object or structure," when in the opinion of the director the same constitute obstructions. The same authority is given to county commissioners as to roads other than those within the jurisdiction of the Director of Highways and Public Works.

The next paragraph of the same section makes a proviso to the effect that these structures which are ordered from the highway may be relocated thereon with the consent and approval of the director, but provides that the giving of such consent and approval shall be within his discretion. This paragraph also specifically states that any such consent and approval shall not be construed to be the granting of franchise rights. The effect of this section is to give to your department practically plenary powers over the inter-county highways and main market roads and the only limitation upon that power is that it must be reasonably exercised. You will note, however, that by its terms this section is limited to properties already existing in the highways and does not specifically authorize the placing of any new structures therein.

By the terms of Section 7204-1a, as enacted in 111 O. L., at page 282, is found the authority as to new structures. The third paragraph of that section is as follows:

"It shall be unlawful for any person, partnership or corporation to hereafter erect within the bounds of any highway or on the bridges or culverts

thereon, any obstruction whatever, without first obtaining the consent and approval of the Director of Highways and Public Works, in case of inter-county highways and main market roads and the bridges and culverts thereon, and the consent and approval of the county commissioners in case of highways other than inter-county highways and main market roads and the bridges and culverts thereon."

This portion of Section 7204-1a recognizes the existence of authority to authorize and consent to the placing of structures in the public highway, and I am of the opinion that by its terms the permission in the present instance may be granted.

Such permission would, however, be a mere license, revocable at will, whenever in your judgment the track became such an obstruction to the highway as to necessitate its removal. In other words, I do not believe it to be within the authority of your department to bargain away the right of absolute police power over the highway. The permission should accordingly contain such terms and conditions as you deem necessary for the effectual protection of the traveling public and should also reserve the right to order the removal of the track at any time upon such notice as may be deemed reasonable.

Answering your question specifically, I am of the opinion that you are authorized to grant permission to construct a switch track across a highway, which is either an inter-county highway or main market road, upon such terms and conditions as you may deem proper for the protection of the traveling public, provided that such permission is made revocable at any time when, in the exercise of reasonable judgment, it becomes necessary.

I am not free from doubt on the foregoing matter and suggest that you be extremely cautious in giving consents to grade crossings. You are, of course, familiar with Sections 8895 and 8902 of the General Code.

I note that you desire my assistance in drawing up the proposed agreement and I will be glad to cooperate with you.

Respectfully,  
EDWARD C. TURNER,  
*Attorney General.*

79.

DIRECTED APPROPRIATION BILL—SENATE MAY PASS SAME WITHOUT REFERRING TO FINANCE COMMITTEE—LEGALLY PASSED IF IT RECEIVES MAJORITY VOTE OF ALL MEMBERS.

**SYLLABUS:**

1. *A bill making a directed appropriation may be legally passed by the Senate of Ohio without said measure being referred to the Finance Committee prior to action by the Senate.*

2. *A bill directing an appropriation of state moneys is legally passed by the Senate if it receives a majority of the votes of all the members elected thereto, said measure not being an emergency and not coming within the exceptions provided in Section 29 of Article II of the Constitution of Ohio.*

COLUMBUS, OHIO, February 14, 1927.

HON. THOMAS EDWARD BATEMAN, *Clerk, Ohio Senate, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication of the 10th instant, which reads: