

(d) The proceeds of a bond issue, the authority to issue such bonds having been first obtained by vote of the electors pursuant to the provisions of Sections 2293-19, et seq., General Code.

2. Township trustees may purchase additional machinery for use in the operation of a stone quarry owned by the township out of the levy of a tax or an issue of bonds, as provided in Section 3298-20, General Code. The authority to levy such tax must first be obtained by a vote of the electors and the question of levying such tax must be submitted to the electors in the manner prescribed by Sections 5625-15, et seq., General Code. The authority to issue such bonds must first be obtained by a vote of the electors and the question of issuing such bonds must be submitted to the electors in the manner prescribed in Sections 2293-19, et seq., General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.

2046.

COUNTY COMMISSIONERS—AUTHORITY TO WIDEN INTER-COUNTY
HIGHWAYS—SECTIONS 1191 AND 6860, GENERAL CODE, CONSTRUED.

SYLLABUS:

Where an application for state aid for the improvement of an inter-county highway, as a part of the state highway system, is made by the county commissioners of a county, under the authority of Section 1191, General Code, prior to the effective date of the Norton-Edwards Act (112 v. 430), amending said section, and said application is approved by the Director of Highways, the county commissioners of such county may widen the road to be improved and acquire the necessary land therefor under the authority of Section 6860, et seq., as amended in said Norton-Edwards Act, which section inter alia requires the approval of the Director of Highways when roads on the state highway system are concerned.

COLUMBUS, OHIO, May 2, 1928.

HON. SETH PAULIN, *Prosecuting Attorney, Painesville, Ohio.*

DEAR SIR:—This will acknowledge receipt of your recent communication in which you request my opinion upon a certain question therein stated. Your communication is as follows:

“In November, 1927, the county commissioners of Lake County, Ohio, made application under Section 1191 of the General Code to the Director of Highways of the State of Ohio, to improve an inter-county highway now designated as the Wickliffe-Madison Road S. H. No. 563, and shortly thereafter the Director of Highways approved the application and set aside certain funds to pay the state's share of the cost of said improvement. It was discovered in January, 1928, that part of this road was only 40 feet in width and the Commissioners of Lake County thereupon started proceedings to locate the center line of said road and widen said portion of said road to 60 feet under authority of Section 6860, General Code, as enacted by the 87th General Assembly.

The question has now arisen as to whether the Commissioners can properly proceed to widen this road under the provisions of Section 6860 as re-

enacted, inasmuch as the application for the improvement of said road had been approved prior to January 2, 1928, and the legislation commenced for said improvement under the provisions of the State Highway law in effect prior to January 2, 1928.

As soon as the road is widened to the width of 60 feet the commissioners desire to proceed with the improvement of said road in cooperation with the State Highway Department, the expense of said improvement being paid as provided by the state highway laws in effect prior to January 2nd, when the Norton Highway Bill became effective.

May we have your opinion as to whether or not the county commissioners can proceed to acquire the additional 20 feet by purchase or condemnation under the above named section, in view of the circumstances as outlined?"

In Opinion No. 776, under date of July 25, 1927, this department held that where an application for state aid in the improvement of a state highway was filed by a board of commissioners under the then provisions of Section 1191, General Code, prior to the effective date of the Norton-Edwards Act, 112 O. L. 430, the proceedings relating to such improvement were "pending proceedings" within the meaning of Section 26 of the General Code, and that such improvement should be completed under and in conformity with the then existing statutory provisions, relating to the improvement of state highways, notwithstanding the fact that said statutory provisions were later amended or repealed by said Norton-Edwards Act. This act went into effect January 2, 1928, and inasmuch as it appears from your communication that the application for state aid for the improvement of the state highway therein mentioned was both made by the board of county commissioners and approved by the director of highways prior to said date, said improvement as a pending proceeding is to be completed under the appropriate provisions of Sections 1191, et seq., General Code, as they read prior to their amendment or repeal by the Norton-Edwards act above referred to.

Touching generally the subject to which your question relates, Section 1201, General Code, as it read prior to its amendment in said act, provided that if the line of a proposed state highway improvement deviated from the existing highway, the county commissioners making application for state aid for such improvement were required to provide the requisite right of way made necessary by such change or alteration or such additional right of way as might be required for the improvement. By the amendment of said Section 1201, General Code, 112 O. L. 440, county commissioners do not now have authority to procure other or additional right of way for the purposes above mentioned, but such authority is now given to the director of highways. In this connection, Section 1194, General Code, provides that when the director of highways proposes to construct a portion of the state highway system or to reconstruct, improve, widen or repair a portion thereof in such manner that the probable cost and expense thereof will exceed one thousand dollars per mile, he shall cause the roadway to be surveyed and the boundaries thereof located, established and properly monumented and that if the right of way is less than sixty feet in width, he shall cause the same to be widened to sixty feet in width and as much wider as he may deem necessary. By section 20 of the Norton-Edwards act, Section 1202, General Code, the director of highways is expressly authorized to alter, widen, straighten, re-align or re-locate any road or highway on the state highway system, and by said Section and the following Section of said act, Section 1201 General Code, he is authorized to purchase or appropriate such property as may be needed for any one or more of said purposes.

However, in view of the particular question presented in your communication, I do not deem it necessary to determine the question of the application of the above

noted sections of the General Code, or of any of them, to the facts presented in your communication. Your question is whether or not the county commissioners of Lake County, under the provisions of Section 6860, General Code, can widen the state highway referred to in your communication to sixty feet and acquire by purchase or condemnation the additional twenty feet of right of way required for said purpose.

Prior to its amendment in the Norton-Edwards act, above referred to, the county commissioners of a county were given the power and authority among other things, to widen all public roads within the county other than inter-county or main market roads, i. e., state highways. Said Section, 6860, General Code, as amended 112 O. L. p. 484, 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.”

Touching the question at hand, Section 6862, General Code, as amended, provides in part as follows:

“When the county commissioners are of the opinion that it will be for the public convenience or welfare to locate, establish, alter, widen, straighten, vacate or change the direction of a public road they shall so declare by resolution, which resolution shall set forth the general route and termini of the road, or part thereof, to be located, established or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed. * * *”

This section and following sections of the General Code, as amended in the Norton-Edwards act, likewise provide for the procedure to be followed in locating, establishing, widening or otherwise changing a public road when such improvement is petitioned for by the required number of freeholders of the county residing in the vicinity of the proposed improvement.

It will be noted that by the provisions of Section 6860, et seq., General Code, the county commissioners of a county are expressly authorized, among other things, to widen a road on the state highway system, providing this is done with the approval of the director of highways. The further question here presented on the facts stated in your communication is whether the provisions of Section 6860, General Code, as amended, as authority for the county commissioners of your county to widen the state highway therein referred to, is affected by the fact that proceedings for the improvement of said state highway were initiated prior to the time that said section 6860, General Code, as amended, went into effect. As to this it will be noted that the power and authority given to county commissioners by this section of the General Code, to locate, establish and widen public roads, is a power and authority wholly independent of the power and authority to construct, improve, repair or maintain public roads given by the statutory provisions to the director of highways or county commissioners and that such power and authority to widen public roads has no necessary connection whatever with proceedings for the construction, improvement, repair and maintenance of the same.

I am quite clearly of the opinion, therefore, that the fact that the proceedings for the improvement of the state highway mentioned in your communication were commenced prior to the time that the provisions of Section 6860, General Code, as amended,

went into effect, does not affect the application of the provisions of said section, as amended, and that the commissioners of Lake County may widen the right of way of said state road to sixty feet, and acquire the additional land necessary for the purpose by proceedings had under the provisions of Section 6862, et seq., General Code. If the road here in question is widened by the county commissioners under authority of Sections 6860, et seq., General Code, as amended, and in the manner therein provided, the compensation and damages for and on account of land acquired by the county commissioners for the purpose of widening said road will have to be paid out of the county treasury or by the benefited property owners, as provided for in Section 6868, General Code, as amended in the Norton-Edwards act above referred to.

Although, as above noted, the question submitted in your communication does not require a consideration of the provisions of Section 1201, General Code, before the amendment of that section by the 87th General Assembly, it may be observed that the provisions of said section required a board of county commissioners to acquire lands for the purpose of widening an inter-county highway as a part of a state aid improvement petitioned for by the county commissioners.

Your attention is directed to the case of *Uncapher vs. Curl, et al.*, 116 O. S. 705, the syllabus of which reads as follows:

“When in the construction of an intercounty highway by state aid under Section 1191 et seq., General Code, it becomes necessary to widen the existing highway by taking property of an adjoining landowner, the commissioners of the county in which such highway is located must provide the requisite right of way for such deviation from the boundaries of the existing highway, and are authorized by Section 1201, General Code, to pay ‘the owner or owners of such land or property as may be necessary for such change or alteration’ the value of such land or property so taken.”

In the opinion Judge Day said, at page 708:

“Under the construction that we give Section 1201, General Code, it should not be confined to simply the straightening of curves and the changing of the line around hills or other obstructions; but the intent of the Legislature was to require the county commissioners to provide the requisite right of way for the proposed improvement if additional land outside the existing highway was required to complete such improvement. Whenever the boundaries of the existing highway were departed from, that was a deviation from such highway, in a broad and liberal sense of the word, and to give it any more restricted meaning and confine the word ‘deviate’ to a change in the line of the road for the purposes of eliminating curves, angles, or grades is to give the section too narrow a construction.”

Under the holding in this case it is clear that the statutes as they read prior to the passage of the Norton-Edwards Act required the county commissioners to provide whatever additional right of way might be necessary for the improvement of a state highway under the state aid sections. This being true, since as above pointed out the improvement referred to in your letter is being done under Sections 1191 et seq., of the General Code, as they read prior to their amendment, it would follow that in the instant case it is the duty of the county commissioners to provide the necessary right of way.

In this connection it may be further noted that if in the case presented by your communication the county commissioners desire to pay the compensation and damages for and on account of lands acquired for the purpose of widening said road, out of the proceeds of bonds issued by the county commissioners for the purpose of providing

the county's share of the cost and expense of said improvement, said county commissioners, as a part of said improvement as a pending proceeding, may acquire the necessary land for widening said road under authority of said Section 1201, General Code, as it read prior to its amendment.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2047.

CARP—AUTHORITY TO EXTERMINATE VESTED IN DIRECTOR OF AGRICULTURE—MAY EXERCISE DISCRETION.

SYLLABUS:

By the terms of Section 1447, General Code, authority is vested in the Director of Agriculture, his agents and employes to exterminate carp in any waters of the State. The manner and means of so doing is within the discretion and sound judgment of the Director of Agriculture.

COLUMBUS, OHIO, May 2, 1928.

HON. CHARLES V. TRUAX, *Director, Department of Agriculture, Columbus, Ohio.*

DEAR SIR:—This will acknowledge your letter of recent date which reads:

“I am herewith handing you a letter from Mr. W. of Sandusky, Ohio, expressing his request for the authority of the Department of Agriculture, to eradicate the carp from the East Bay Club marshes at that point, and concerning the status of which some litigation has recently terminated in the Supreme Court of Ohio.

I should very much appreciate an opinion of your Department as to the law governing in this matter.”

The letter from Mr. W., which you enclose, reads in part as follows:

“You will doubtless recall that in 1925 and in 1926, the writer communicated with you on several occasions relative to a permit for the extermination of carp in the East Bay Club marshes.

You will also recall at that time, the question of title, the public rights of fishing and navigating, were questioned by certain persons; you are aware that the Supreme Court of Ohio has recently given its decision that these waters are private to the owners of the property.

Over the elapsed period, carp have come into these waters unmolested until the vegetation and plant life, duck foods—wild rice, etc., on which we have spent many hundreds of dollars—as well as all sport and pan fish, have completely been eradicated. Professor Osborne and your Mr. Harry Crossley have in the past several years, made exhaustive studies of the conditions here and their findings are well known to you and need no discussion here.

Our organization has expended many thousands of dollars in improving this property with the definite purpose in mind of making this into a fur farm and a wild fowl resort and breeding ground. Now that a final decision of public and private rights has been given, we are prepared to go ahead with