

In passing, I may call your attention to Opinion No. 1896, dated March 26, 1928, and addressed to your office, in which you were advised that a contract with a firm of engineers for engineering services was not invalid. That contract was entered into by a village and the discussion in that opinion is pertinent to the question you now present. It is, however, needless for me to reaffirm the statements therein contained.

Specifically answering your inquiry, I am of the opinion that a firm of engineers may be employed by a village council to do all engineering work in connection with village improvements.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2661.

CROSSING—SEPARATED—NO AUTHORITY FOR DIRECTOR OF HIGHWAYS TO RECONSTRUCT UNDER SECTION 1229-19, GENERAL CODE—REQUIREMENTS FOR APPLICATION OF SAID SECTION, DISCUSSED.

SYLLABUS:

Section 1229-19 of the General Code does not authorize the director of highways to relocate and reconstruct or widen, reconstruct or realign a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, or Sections 6956-22 to 6956-39 of the General Code, where it is not proposed to relocate and reconstruct such crossing in whole or in part without the right of way of the state highway, or where the highway was in existence prior to the railway.

COLUMBUS, OHIO, October 1, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Receipt is acknowledged of your communication of recent date requesting my opinion as to whether or not, under the provisions of Section 1229-19, General Code, you may initiate proceedings to cause the reconstruction of an underpass in State Highway 553, which causes the tracks of the Akron, Canton and Youngstown Railway Company to pass over said state highway, a short distance north of Wadsworth, in Medina County, Ohio. Your communication reads as follows:

“The possibility of reconstructing the above underpass (Medina County, S. H. 553, A. C. & Y. Underpass North of Wadsworth) has been brought to my attention, but before proceeding further with the project, I desire that you advise me whether or not I have the authority to initiate proceedings under Section 1229-19 to bring this about.

The present highway passes under an old wooden trestle of the Akron, Canton and Youngstown Railway Company, which provides but 11.19 feet of vertical clearance and 18 feet of lateral clearance. It is proposed to depress the highway and elevate the railroad tracks to obtain 14 feet of vertical clearance and widen the present opening to provide 24 feet of lateral clearance for the highway. If it can be legally done, we propose to allot 25% of the cost to the State, 25% to Medina County and 50% to the Railway Company.

So far as we can now tell, the present structure was not built under the provision of any statutory law nor was the railway in existence before the highway. No realignment of the highway beyond its present bounds is proposed.

We desire to effect this improvement if legally authorized and, accordingly, I am asking your advice in the matter."

Section 1229-19, General Code, which was passed by the 87th General Assembly as a part of House Bill No. 67, was amended by the same Legislature in House Bill No. 511 (112 O. L. 504). Section 1229-19, General Code, as amended in House Bill No. 511, reads as follows:

"When a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, of the General Code, is situated on a road or highway on the state highway system, or an extension thereof, and is so located that in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway, or extension thereof, the director deems it necessary to relocate and reconstruct the same in whole or in part *without* the right of way of such road or highway, or extension thereof; or when in the opinion of the director a separated crossing, which was not constructed under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, of the General Code, and which separated crossing is located on a road or highway, or an extension thereof on the state system, which road or highway was laid out and opened after the construction of the railroad, is in need of widening, reconstruction or realignment in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway, or extension thereof, the director is authorized to relocate and construct or widen, reconstruct or realign the same.

In order to accomplish the things hereinbefore in this section provided for, the director is authorized to take such action and initiate and prosecute such proceedings as hereinbefore in this act provided to secure the elimination of existing grade crossings; and the cost and expense of such relocation and reconstruction, or such widening, reconstruction, or realignment shall be borne by the state or by the state and any other political subdivision in which the crossing is located, and by the railroad company or companies in the proportions set out in this act in relation to the elimination of existing grade crossings, unless otherwise agreed upon.

Every person or company owning, controlling, managing or operating a railroad in this state shall maintain and keep in good repair good, safe, adequate and sufficient crossings, and approaches thereto, whether at grade or otherwise, across its tracks at all points, other than at separated crossings separated under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, of the General Code, or under and in accordance with the provisions of this act relating to the elimination of existing grade crossings, and other than separated crossings relocated and reconstructed or widened, reconstructed or realigned under and in accordance with the provisions of this section hereinbefore set out, where such tracks intersect a road or highway on the state highway system, or an extension thereof."

It is noted that in your communication you state specifically that in the reconstruction of the underpass it is not proposed to relocate and reconstruct the same, in whole or in part, without the right of way of such state highway. From a reading of the first portion of Section 1229-19, General Code, just quoted, it is apparent that in order for the director of highways to have jurisdiction to initiate proceedings for the reconstruction of an existing separated crossing, upon a cooperative basis, between the state, county and railway company, it is necessary, first, that the separated crossing be one that was not constructed under and in accordance with the provisions of Sections 8863 to 8894, both inclusive, General Code, or under and in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, General Code; and, second, that the plans provide for a relocation and reconstruction of said separated structure, in whole or in part, *without* the right of way of such highway.

It is also apparent from a reading of the latter portion of the first paragraph of Section 1229-19, General Code, that those provisions are only applicable to separated crossings, where the highway was laid out and opened after the construction of the railroad.

Since the plans for the reconstruction of the crossing in question do not call for a relocation and reconstruction of said crossing, in whole or in part, without the right of way of the highway or an extension thereof, and since the tracks of the railroad were not in existence prior to the construction of the highway, the provisions of Section 1229-19, General Code, are not applicable and, therefore, you have no authority to initiate proceedings for the reconstruction of the separated crossing, upon a cooperative basis, between the state, county and railway company.

The last paragraph of the section is not applicable to the case under consideration. It is true that the underpass in question is a separated crossing and was not constructed under the provisions of Sections 8863 to 8894, both inclusive, of the General Code, or in accordance with the provisions of Sections 6956-22 to 6956-39, both inclusive, of the General Code; nor was it constructed under the provisions of the Norton-Edwards Act. However, that portion of the section requires the company to *maintain* and keep in good repair good, safe, adequate and sufficient crossings and approaches thereto. This paragraph undoubtedly requires the railroad company to maintain and keep the present crossing in good repair, etc. "Maintenance" usually relates to keeping in good condition that which is in existence, as distinguished from reconstruction or increasing or enlarging. The project in question requires an enlargement of the underpass, and the language of the paragraph under consideration is not broad enough to require such to be done by the railroad company for the reason that it would not be maintaining the crossing in question.

Answering your question specifically, it is my opinion that, on the facts stated in your communication, the provisions of Section 1229-19, General Code, do not authorize you to initiate proceedings to bring about the reconstruction of the underpass in State Highway No. 553.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2662.

APPROVAL, BONDS OF BUCKSKIN TOWNSHIP RURAL SCHOOL DISTRICT, ROSS COUNTY, OHIO—\$72,000.00.

COLUMBUS, OHIO, October 2, 1928.

Retirement Board, State Teachers Retirement System, Columbus, Ohio.