

730.

GRADE CROSSING ELIMINATION—CO-OPERATION OF HIGHWAY DIRECTOR AND COUNTY COMMISSIONERS—QUESTION OF WHETHER LATTER SHOULD PAY PROPORTIONATE SHARE FOR INCIDENTAL WORK NOT PROVIDED FOR IN PLANS DISCUSSED.

SYLLABUS:

Where county commissioners enter into a contract to co-operate with the Director of Highways in the elimination of a grade crossing, the county commissioners are required to pay their proportionate share of the cost of such improvement as shown by the plans and specifications including all necessary and incidental things irrespective of whether they are shown upon the plans or otherwise. As to whether or not an undertaking which is not shown upon the plans or specifications is a necessary incident to such an improvement is a question of fact to be determined in each case from all of the circumstances to be determined in the first instance by the Director of Highways whose discretion will not be disturbed in the absence of fraud, collusion or gross abuse of discretion.

COLUMBUS, OHIO, August 12, 1929.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is made of your communication, which reads:

“We respectfully request your written opinion upon the following matter:

May a county which is co-operating with the State Highway Director in the elimination of grade crossing, legally pay a proportionate share of the costs under the provisions of Section 1229-9, General Code, for the relocating of the tracks of a railroad, which relocation became necessary by reason of an excavation for piers, when such relocation of the tracks was not provided for in the plans and specifications for the improvement?”

The power of the Director of Highways to initiate proceedings to eliminate grade crossings first came into existence with the taking effect of the so-called Norton-Edwards act as passed by the 87th General Assembly, 112 O. L. 430, which revised the laws relating to the Department of Highways. Sections 53 to 66, inclusive, of said act, which said sections were designated as Sections 1229 to 1229-14, inclusive, of the General Code, set forth the powers and procedure of the Director of Highways in connection with such undertakings. Without a detailed discussion of the various steps of the procedure as outlined in the sections referred to, it may be stated that the sections generally relate to the construction of such projects in co-operation with the railroad company or companies, and the Director of Highways, without mentioning the county commissioners. It may be further stated that when the director has properly found a proposed improvement of that character is necessary, an agreement must be entered into before any work shall be done, and plans and specifications covering the same, which show all changes of grade and changes of location in the highway, and a detailed and accurate description of all private property to be taken, shall be prepared and filed as required by Section 1229-11, General Code.

Section 1229-9 provides, among other things, that the cost of constructing the improvement, including the making of ways, crossings or viaducts above or below the railroad tracks, together with sufficient approaches thereto, shall be chargeable to the improvement. Other things the section mentions as being chargeable to such improvement are “incidental expenses.” The section further provides: “All costs

and things made chargeable to the improvement by this section shall be borne, unless otherwise agreed upon, fifty per cent by the State and fifty per cent by such company or companies."

Section 67 of the act under consideration, which was designated by the Attorney General as Section 1191 of the General Code, seems to apply to the power of the Director of Highways in connection with co-operative projects with reference to the construction of roads and bridges, as well as the co-operation in connection with the separation of grade crossings. The following is quoted from said section:

"The commissioners of any county may co-operate with the Department of Highways in the abolishment of railway grade crossings on the state highway system or any extension thereof, and in the construction or reconstruction of bridges and viaducts within municipal corporations, and shall be authorized to pay such portion of the cost of any such work as may be agreed upon between said commissioners and the Director of Highways."

Said section further provides that any counties having a tax duplicate of real and personal property in excess of three million dollars shall be authorized to co-operate in the reconstruction of state roads by paying the cost thereof as agreed thereon by the county commissioners and the Director of Highways, to which it is unnecessary to give further consideration for the purpose of this opinion. Said section further provides in reference to the method of procedure, in case of co-operation, as follows:

"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."

Section 68 of the so-called Norton-Edwards Act, which was designated as Section 1195 of the General Code by the Attorney General, further relating to the procedure in cases of co-operation, among other things, provides that if upon receipt of the proposal to co-operate the director approves the same, he shall indicate such action upon his journal and certify such approval to the county commissioners. It further provides that he shall transmit to the county commissioners copies of maps, plans, profiles, specifications and estimates which he has prepared for such construction, and upon receipt of the same the county commissioners may, by resolution, adopt the director's action, and, if so, a copy of such resolution shall be transmitted to the director.

Section 69 of the Norton-Edwards Act, which was designated as Section 1222 of the General Code by the Attorney General, authorizes the levying of a tax by the county commissioners for the purpose of providing a fund to cover the cost and expense of co-operating proceedings, and Section 1223 of the General Code authorizes the issuance of bonds in anticipation of the collection of said tax.

Section 71 of the Norton-Edwards Act, which was designated by the Attorney General as Section 1200 of the General Code, provides:

"If the county commissioners, after adopting the maps, plans, profiles, specifications and estimates are still of the opinion that the work should be constructed, and that the county should co-operate upon the basis set forth in their proposal, they shall adopt a resolution requesting the Director of Highways to proceed with the work, and shall enter into a contract with the State of Ohio providing for the payment by such county of the agreed proportion of the cost and expense. The form of such contract shall be prescribed 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 county commissioners, and a duplicate of the certificate of the county auditor made in compliance with the provisions of said section shall be filed in the office of the director. All improvements upon which any county may co-operate shall be constructed under the sole supervision of the Director of Highways. The proportion of the cost and expense, payable by the county, shall be paid by the treasurer of the county upon the warrant of the county auditor issued upon the requisition of the director, and at such times during the progress of the work as may be determined by such director. Upon completion of the improvement, the director shall ascertain the exact cost and expense thereof, and shall notify the county commissioners as to his conclusions, and thereupon any balance in the fund provided by such commissioners for the county's share of the cost shall be disposed of as provided by law."

It is believed the foregoing will sufficiently set forth the procedure necessary in order to complete a co-operative project. At this point it may be proper to mention that Section 1200, supra, seems to anticipate the entering into a contract between the county commissioners and the State of Ohio when the commissioners, by a proper resolution, have requested the Director of Highways to proceed with a co-operative project. The form of such contract is to be prescribed 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.

From the foregoing, it is clear that when a proper agreement to co-operate has been entered into, the project shall be constructed under the sole supervision of the Director of Highways and the county commissioners have nothing to do except to pay a portion of the cost of the expense as agreed upon. The section provides that when the improvement is completed, the director shall ascertain the exact cost and expense, and notify the commissioners of his findings, and thereupon any balance in the fund provided by such commissioners shall be disposed of as provided by law.

It is believed to be clear that when the county has once legally agreed to co-operate and certified to the director the funds available for such purpose, such funds are bound until such time as the project has been completed, in accordance with the terms of the contract as made by the Director of Highways. The authority to co-operate is limited to a certain portion of the costs. When a project is completed, it follows that if a saving has been made from the estimated costs upon which the amount of the county's funds were based, the county will be entitled to its proportionate deduction by reason of such saving. While plans are required to be prepared and approved by the county commissioners to be used as the basis of the estimate for the guidance of said authorities in arriving at the contract, it of course does not follow that every detail of the method to be followed in the accomplishment of a given construction is required to be shown on the plans. The specifications frequently make a brief reference to the moving of a track or maintenance of traffic and many other incidents in connection with a given construction. In other instances such items may not be specifically mentioned. It of course is impossible for engineers to foresee many contingencies that may arise in the carrying out of a given project.

Section 1210 authorizes extra work contracts. In the event that such a contract is necessary it may be entered into by the Director of Highways in accordance with said section and it appears that the county commissioners have no voice in the matter.

One of the provisions with reference to extra work contracts as mentioned in said section is as follows:

"When it is deemed necessary by the director to perform extra work in connection with any project and the proposal of the contractor contains no unit price bid covering the item or items involved in such extra work and the cost of such work does not exceed two thousand dollars, the director may enter into a contract covering such extra work without advertising for and receiving bids therefor."

In all probability the question you have in mind does not arise by reason of an extra work contract. If it should, then clearly the county would be bound by the contract as made by the Directors of Highways. In other words, when a contract has been let for a given project irrespective of whether there is co-operation, an extra work contract is authorized to cover situations that arise in connection with the completion of a project and such contracts are entered into by the Director of Highways and it is unnecessary to go through the formalities of an original contract before making the extra work contract.

Apparently, when a contract has been entered into pursuant to co-operation by the Director of Highways and county commissioners for a separation of a grade crossing, such a contract contemplates the construction of such project as indicated by the plans and specifications and there will be included therein all necessary work or things to be done which are incidental to the main construction. Whether or not the given undertaking, such as the moving of a railroad track, is a necessary incident to the main construction, is a question of fact to be determined in the first instance by the Director of Highways and his judgment in this respect will not be disturbed in the absence of fraud or collusion or abuse of discretion.

As hereinbefore indicated, what is and what is not a necessary incident is a question of fact that must be determined in each case from all of the circumstances. It is, therefore, my opinion that a more specific answer to your inquiry cannot be given.

It perhaps should be mentioned that House Bill No. 195, as enacted by the 88th General Assembly, amended some of the sections hereinbefore referred to, and became effective on July 25, 1929. No doubt the question you present arises in view of situations coming into existence prior to said amendment and, therefore, no consideration has been given herein to the provisions of the amended law.

Respectfully,

GILBERT BETTMAN,
Attorney General.

731.

APPROVAL, ABSTRACT OF TITLE TO LAND OF SOPHIA STICKNEY,
IN CARTHAGE, CINCINNATI, HAMILTON COUNTY, OHIO.

COLUMBUS, OHIO, August 12, 1929.

HON. RICHARD T. WISDA, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—There has been submitted for my examination and approval, an abstract of title, warranty deed, encumbrance estimate No. 5058, and Controlling Board's certificate, relating to a certain parcel of land and the appurtenances thereunto belonging owned of record by one Sophia Stickney, in Carthage, Cincinnati, Ohio, and which property is more particularly described as follows:

"Situate in Section 12, Millcreek Township, Fractional Range No. 2 in