

legality and form, as is evidenced by my approval endorsed upon the lease and upon the duplicate and triplicate copies thereof, all of which are herewith returned.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4729.

APPROVAL, BONDS OF AKRON CITY SCHOOL DISTRICT, SUMMIT COUNTY, OHIO—\$100,000.00.

COLUMBUS, OHIO, November 10, 1932.

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

4730.

APPROVAL, BONDS OF GREEN CAMP VILLAGE SCHOOL DISTRICT, MARION COUNTY, OHIO—\$2,000.00.

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

4731.

HIGHWAY DIRECTOR—MAY CONSTRUCT STATE ROAD THROUGH PATTERSON FIELD RESERVATION WITH CONSENT OF SECRETARY OF WAR.

SYLLABUS:

The Director of Highways has authority to relocate and construct a state road through The Patterson Field Military Reservation upon securing from the Secretary of War permission to make such improvement, in the event the terms of the permit prescribed by the Secretary of War are such as in the opinion of the Director of Highways will protect the public interests.

COLUMBUS, OHIO, November 14, 1932.

HON. O. W. MERRELL, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads in part as follows:

“The Department is contemplating the improvement of present State Route 4, or SH (ICH) No. 60, Sections A, B, by means of a relocation

slightly under four miles in length through the military reservation of Patterson Field in Greene County. The ultimate cost of the improvement will exceed \$200,000.00, and present plans call for sale of the project Nov. 18, 1932.

According to our information, the present state highway, established through road record, was in existence long before the military reservation was contemplated, and the War Department received title thereto from the Miami Conservancy District. In the event the Department contemplated a permanent high type improvement upon the present route through the reservation, the Judge Advocate General of the Army has stated that the War Department would oppose such an improvement until the legality of the title received from the Miami Conservancy District had been determined, it being the contention of the army that its rights with reference to the highway supersede those of the State.

The War Department has approved our proposed relocation of the highway through the reservation and has executed a permit, a copy of which is attached, by means of which the new right-of-way is to be made available without cost to the State.

The improvement will eliminate, for State traffic, four very dangerous grade crossings, two of which are with a railroad and two with a high speed interurban traction line. The present route will be shortened in length, and a narrow bridge, three right angle turns, and several dangerous grades eliminated for all except local traffic. A reproduction of an airplane picture of the present and proposed locations is attached.

It is requested that we be formally advised as to whether this permit should be accepted by the State in view of existing statutes prescribing therein the manner in which the Director of Highways is to acquire right-of-way for highway purposes and, as well, the legal right of the Director to bind the State to the provisions and conditions laid down by the War Department in the permit as would occur upon formal acceptance of the same."

It is understood that the portion of the road in question was located upon lands owned by the Miami Conservancy District, which lands were conveyed by said district to another party who, in turn, donated said land to the United States government. Section 6828-15 of the General Code empowers said district to sell lands and there would seem to be no question as to the United States government having acquired title. The question which now presents itself is as to the status of the present highway in view of the fact that the federal government has acquired the title to the lands upon which said road easement is located.

In this connection, reference is made to Clause 17 of Section 8 of Article 1 of the federal Constitution, which provides, among other things, that Congress shall have power:

"To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may be, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; * * * "

The Legislature of Ohio, in Section 13770, General Code, has provided that the consent of the State is given in pursuance of the constitutional provision hereinbefore set forth to the United States to acquire land in this State for sites for custom houses, court houses, post offices, arsenals, or other public buildings, and "for any other purposes of the government."

Section 13771 provides:

"That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States, for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands."

In view of the provisions of the General Code and the federal Constitution hereinbefore referred to, in all probability the federal government has power to regulate the use that may be made of said highway or that portion thereof which passes through the said military lands. However, Section 6 of the Act of Congress approved July 5, 1884 (23 Stat. 104), and designated as Section 1348 of Title 10 of the U. S. C. A., provides:

"The Secretary of War shall have authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon."

From the foregoing, it is evident that the Secretary of War has ample authority to permit the construction of said highway upon the proposed new alignment.

Under Section 1202 of the General Code, the Director of Highways is authorized "to purchase or appropriate property for the necessary right-of-way" for altering, widening, straightening, realigning or relocating a highway. The section further provides that the title to such lands shall be taken to the State by easement deed in accordance with the form prescribed by the Attorney General. However, it must be kept in mind that Section 1202, *supra*, of course, has reference to the Director of Highways exercising his powers when acquiring property owned by private citizens of the State, as contradistinguished from acquiring land from the federal government. While the section grants authority to the Director to appropriate land, it is obvious that this section can have no application to land being acquired from the federal government, for the reason that the State is without authority to condemn land owned by the federal government. Elliott on Roads and Streets, Vol. 1, p. 287. It follows, therefore, that if rights are to be acquired from the federal government, they may only be had upon the conditions imposed by such government.

In view of the statutes hereinbefore mentioned, it must be concluded that there is ample power for the Secretary of War to grant a permit to construct such a highway and there is also power vested in the Director of Highways to accept a permit for such purposes.

Whether or not the particular terms set forth are such as, from a practical standpoint, the Director of Highways desires to accept, is a question, of course, that can be determined only by the Director. One of the terms of these conditions set forth and designated as No. 4 in the copy of said permit which you enclose provides "That the State of Ohio, Department of Highways shall save the government harmless from any claims for damages to property or injuries to persons which may arise incident to the construction and maintenance of said road." In considering this particular condition, it may be observed that the courts in this state have frequently held that in the construction of roads, the state acts in its governmental capacity and is not liable for claims to persons by reason of negligence. Of course, as far as damages are occasioned by reason of the taking of lands for highways, the laws do provide for the jury to determine the compensation and damages as provided in Section 1201-1, General Code. While the Constitution of Ohio authorizes the legislature to provide for suits against the state, no such law has as yet been passed which authorizes a suit to be maintained against the state or any officer thereof growing out of negligence in the construction of highways. Moreover, inasmuch as the state is to construct and maintain said highway in the same manner highways are constructed when the easement for a right-of-way is acquired from a private individual, it is inconceivable that a claim arising out of negligence could be successfully pressed against the federal government, and it is, therefore, believed that this clause has no practical or legal significance.

In your communication, you present an inquiry as to whether condition No. 2 of said road permit might be intended to relieve the War Department of construction and maintenance costs which might arise by reason of overloading of army equipment. I do not believe that this provision of the permit is susceptible of such a broad interpretation. While it does impose upon the state the whole burden of construction and maintenance, I do not believe that this would preclude the assertion by the state of a claim of the cost of making repairs where damage to the road is actually sustained by reason of something done by the federal authorities.

You further state that condition No. 5 will leave the matter of the control of the road by the highway department entirely in the hands of the commanding officer of the reservation, and suggest that, since this will be a matter of personal policy of the incumbent, it may prove unsatisfactory. By the terms of this provision, the commanding officer is given the right to prescribe "such rules and regulations as may be necessary to properly protect the interests of the United States." You will observe that the right to prescribe rules and regulations does not extend beyond such as are necessary to protect the interests of the federal government. It seems to me that this does not leave the matter to the mere whim or caprice of the commanding officer, and furthermore it would appear that, where federal necessity really exists, this right would obtain in any road. Consequently, I cannot see that this particular condition is objectionable.

Your comment with reference to condition No. 7 has been noted and it is believed that this section could not be construed so as to prevent the state from widening the highway at future times. In other words, it would seem that this section simply provides that there shall be no construction of surface, aerial or underground installations without the permission of the Secretary of War.

While condition No. 8, as you state, makes no provision for requiring the constructions to be made in accordance with state specifications and standards, it is likewise believed that the state could not impose such requirements upon the federal government either with reference to the new road or the old.

In view of the foregoing, it is my opinion that the copy of the permit which you enclose and which the Secretary of War proposes to deliver is within the legal authority of the Secretary of War to make, and it is within the legal power of the Director of Highways to accept the same if he finds that in so doing the interest of the public will be served in connection with the reconstruction and realignment of said proposed highway improvement.

Respectfully,

GILBERT BETTMAN,
Attorney General.

4732.

RELIGIOUS SEMINARY—ENDOWMENT FUNDS EXEMPT FROM TAXATION—NOT EXEMPT WHERE INCOME RESERVED TO DONOR DURING HIS LIFE

SYLLABUS:

1. *The deposits representing ordinary endowment funds of a college-seminary, composed of a high school, college and seminary, fostered by a religious sect for the purpose of developing vocations towards the ministry and charging tuition but not conducted for profit, are, when the income from such endowments is being presently used in the operation of such school, exempt from taxation under the provisions of section 5406, General Code.*

2. *So much of said deposits as represent donated funds upon which the donors have reserved the income for themselves during their lives is not exempt from taxation.*

COLUMBUS, OHIO, November 14, 1932.

Tax Commission of Ohio, Columbus, Ohio.

GENTLEMEN:—Acknowledgment is hereby made of your letter making inquiry as to the exemption from taxation of certain funds of St. Charles College-Seminary, of Bexley, Ohio. These funds, which were donated by certain benefactors, are deposited in certain financial institutions in the name of St. Charles College-Seminary, Bishop Hartley, Trustee. The income from said funds being used for the general maintenance purposes of said school constitute what is known as endowment funds. Said institution, which was incorporated in 1928, is fostered by the Roman Catholic Church, and, as stated in its catalogue, "The primary purpose of the college * * * is to develop vocations to the Holy Priesthood." The institution consists of an ecclesiastical seminary, a college and a preparatory department. Though charges are made for such things as tuition, board and room, these sources of income are not sufficient to maintain the school, and a large part of the expenses are cared for by endowment funds and by contributions of the Catholic Church. The institution is not conducted on a commercial basis with a view to profit.

Section 5406, General Code, provides:

"The deposits required to be returned by financial institutions pursuant to this chapter include all deposits as defined by section 5324 of the