

being under the supervision of the county superintendent and assistant county superintendents of schools.

Respectfully,
GILBERT BETTMAN,
Attorney General.

1580.

COUNTY COMMISSIONERS—FUNDS FROM LEVY UNDER SECTION 5625-6(e), GENERAL CODE, NOT APPLICABLE FOR COUNTY'S SHARE OF GRADE ELIMINATION COST—LEVY UNDER SECTION 6926, GENERAL CODE, NOT OBLIGATED TO PAY BOND ISSUE, APPLICABLE FOR SUCH COST.

SYLLABUS:

1. *Funds arising by reason of the levy provided for in paragraph (e) of Section 5625-6, General Code, may not be used to pay the county's portion of the cost of a grade separation made in pursuance of Section 6956-22, et seq., of the General Code.*
2. *The proceeds of the levy provided for under Section 6926, General Code, which are not obligated to pay bonds issued in anticipation of the collection thereof, may be used to pay the county's share of the cost of a grade elimination project instituted under the provisions of Section 6956-22 of the General Code.*

COLUMBUS, OHIO, March 3, 1930.

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

GENTLEMEN:—Your recent communication reads as follows:

“Under the provisions of Sections 6956-22 to 6956-39 of the General Code, providing for the elimination of grade crossings, may the county commissioners pay the county's proportion of the expense of such elimination out of the county road and bridge fund provided for by Section 5625-6, Paragraph (e), of the General Code?”

Section 5625-6, General Code, to which you refer, as amended by the 87th General Assembly (112 O. L. 394) provides in part:

“The following special levies are hereby authorized without vote of the people:

* * * * *

e. In the case of a county, for the construction, reconstruction, re-surfacing, and repair of roads and bridges, other than state roads and bridges thereon.

f. In the case of a county, for paying the county's proportion of the cost and expense of the construction, improvement and maintenance of state highways.

* * * * *

Excepting the special levies authorized in this section any authority granted by provision of the General Code to levy a special tax within the fifteen mill limitation for a current expense shall be construed as authority to provide for such expense by the general levy for current expenses.”

As you suggest, Sections 6956-22, et seq., authorize the county commissioners to raise or lower the grade of any main market road or inter-county highway above or below the tracks of railroads.

By the terms of Section 6956-24, General Code, as a condition precedent to the exercise of such jurisdiction by the county commissioners notice of the proposed improvement describing the details thereof shall be given to the Director of Highways. Without discussing the various details with reference to the procedure in making a grade separation under said section, it may be stated that the cost and expense thereof shall be borne unless otherwise agreed upon, 50% by the county and 50% by the railroad company or interurban railroad company.

Paragraph (e) of Section 5625-6, General Code, relates to a levy to pay the county's proportion of the cost of constructing, resurfacing and repairing roads and bridges other than State roads. Inasmuch as Sections 6956-22, et seq., relate to separating grade crossings on inter-county highways and main market roads, it follows that the levy made under paragraph (e) of the section above mentioned, could not be used for the reason that State roads are expressly excepted in the language used in the said paragraph. However, it appears that in view of the advice of your Bureau funds arising under Section 6926 of the General Code, are placed to the credit of the same fund that is mentioned in paragraph (e) of Section 5625-6, General Code. While of course the purpose is generally the same, and in most instances no confusion will arise by reason of such practice, it is believed that your present inquiry necessitates a consideration of the question as to whether the funds arising under Section 6926, General Code, may be expended for grade separation projects, and if so, it of course would result in the division of the fund to which you refer. Section 6926, General Code, provides:

"The proportion of the compensation, damages, costs and expenses of such improvement to be paid by the county shall be paid out of any road improvement fund available therefor. For the purpose of providing by taxation a fund for the payment of the county's proportion of the compensation, damages, costs and expenses of constructing, reconstructing, improving, maintaining, and repairing roads under the provisions of this chapter, the county commissioners are hereby authorized to levy annually a tax not exceeding two mills upon each dollar of the taxable property of said county. Said levy shall be in addition to all other levies authorized by law for county purposes, and subject only to the limitation on the combined maximum rate for all taxes now in force."

In an opinion of the Attorney General found in Opinions of the Attorney General for 1926, page 158, it was held that funds arising under the section last quoted could be used by the county commissioners "in the payment of that portion of the costs and expenses to be paid by the county of a project on an inter-county highway or main market road by the county commissioners and without co-operating with the Department of Highways and Public Works."

If the former Attorney General was correct in his conclusions above referred to, the question now presents itself as to whether the undertaking by the county commissioners under the statutes to which you refer, to eliminate a grade crossing is constructing, reconstructing or improving a road within the meaning of the language used in Section 6926, supra.

In my Opinion No. 101 issued to the Bureau of Inspection and Supervision of Public Officers under date of February 16, 1929, it was held as follows:

"1. The moneys allotted to a municipality under the provisions of

Sections 5537 and 6309-2 of the General Code, may legally be expended for the purpose of maintaining and repairing bridges and viaducts upon streets within the municipality.

2. County commissioners may legally expend the county's portion of the motor vehicle license and gasoline tax receipts for the purpose of maintaining and repairing bridges on public roads and highways in the county system of highways."

Without an extended discussion it may be stated that the opinion above referred to overruled an opinion of the Attorney General rendered in 1924, and my said opinion was based upon the fundamental proposition of law to the effect that unless it is otherwise indicated, the terms "road" or "street" will include bridges thereon.

In view of the conclusion in my opinion last mentioned, the only question now remaining is whether or not the improvement which results in the separation of a grade crossing is to be considered as a road or a bridge. It is not believed that there has been an opinion or decision rendered upon this particular question. However, it is obvious that whatever method is adopted in connection with a grade separation project it results in the road being continued over or under a railroad. Whether said structure technically amounts to a bridge or a road, or both, it necessarily follows that it is a portion of a highway.

There seems to be no question but that Section 6926, *supra*, is still in effect. While the Budget Law, as enacted in 112 Ohio Laws, repealed a number of subsections which authorized the placing of the levy providing for in Section 6926, General Code, outside of all tax limitations by a vote of the people, such legislature did not see fit to disturb Section 6926, General Code. In this connection it may further be noted that Section 6929, authorizes the county commissioners to issue bonds in anticipation of the collection of the levies made under the provisions of Section 6926. It therefore would seem to follow that if there are outstanding bonds issued under the provisions of Section 6929, the collection of the levy provided for under the former section would have to be applied to the retirement of such bonds before it could be expended for any other purpose.

In connection with your inquiry it probably should be mentioned that Section 1222, General Code, as last amended in 113 O. L. 614, authorizes the county commissioners to levy a tax for the purpose of paying the county's portion of the costs and expenses of co-operating with the Department of Highways under the sections of the General Code that are *in pari materia* with Section 1222. The section then further provides that the proceeds of such levy shall be used for paying the expenses of any work conducted by the Department of Highways in co-operation with such county and for the purposes provided in Sections 6965 to 6969, inclusive, or Sections 6906 to 6956, inclusive, of the General Code. In view of the well established rule of enumeration and exclusion, it would seem that said Section 1222 by no process of reasoning could be construed to provide for the expenses to which you refer. It is understood that the funds arising from this section are placed in the same fund as is provided for in paragraph (f) of Section 5625-6, General Code, and that as a matter of practice such fund is not replenished from any other source. If funds are provided under paragraph (f) of Section 5625-6 other than the funds arising from the levy under Section 1222, no doubt such funds could be used for the purpose.

In view of the foregoing, and in specific answer to your inquiry, it is my opinion that:

1. Funds arising by reason of the levy provided for in paragraph (e) of Section 5625-6, General Code, may not be used to pay the county's portion of

the cost of a grade separation made in pursuance of Sections 6956-22, et seq., of the General Code.

2. The proceeds of the levy provided for under Section 6926, General Code, which are not obligated to pay bonds issued in anticipation of the collection thereof, may be used to pay the county's share of the cost of a grade elimination project instituted under the provisions of Section 6956-22 of the General Code.

Respectfully,

GILBERT BETTMAN,
Attorney General.

1581.

APPROVAL, CONTRACT BETWEEN STATE OF OHIO AND R. BURTON CHILD, FINDLAY, OHIO, FOR REPAIR AND REMODELING OF WARD 27, LONGVIEW STATE HOSPITAL, CINCINNATI, OHIO, AT AN EXPENDITURE OF \$17,987.00—SURETY BOND EXECUTED BY THE HARTFORD ACCIDENT AND INDEMNITY COMPANY.

COLUMBUS, OHIO, March 3, 1930.

HON. ALBERT T. CONNAR, *Superintendent of Public Works, Columbus, Ohio.*

DEAR SIR:—You have submitted for my approval a contract between the State of Ohio, acting by the Department of Public Works, for the Department of Public Welfare (Longview State Hospital), and R. Burton Child of Findlay, Ohio. This contract covers the construction and completion of general contract, including electrical work for repairs and remodeling Ward 27, Longview State Hospital, Cincinnati, Ohio, according to Items 1 and 2 of the form of proposal dated January 13, 1930, and calls for an expenditure of seventeen thousand, nine hundred and eighty-seven dollars (\$17,987.00).

You have submitted the certificate of the Director of Finance to the effect that there are unencumbered balances legally appropriated in a sum sufficient to cover the obligations of the contract. You have also furnished evidence to the effect that the consent and approval of the Controlling Board to the expenditure has been obtained as required by Section 11 of House Bill 510 of the 88th General Assembly. In addition, you have submitted a contract bond, upon which the Hartford Accident and Indemnity Company appears as surety, sufficient to cover the amount of the contract.

You have further submitted evidence indicating that plans were properly prepared and approved, notice to bidders was properly given, bids tabulated as required by law and the contract duly awarded. Also it appears that the laws relating to the status of surety companies and the Workmen's Compensation have been complied with.

Finding said contract and bond in proper legal form, I have this day noted my approval thereon and return the same herewith to you, together with all other data submitted in this connection.

Respectfully,

GILBERT BETTMAN,
Attorney General.