

1084.

ROADS AND HIGHWAYS—STATE HIGHWAY COMMISSIONER MAY CONSTRUCT AND IMPROVE MAIN MARKET ROADS BY FORCE ACCOUNT—SECTION 1231 G. C. DOES NOT AUTHORIZE “COST PLUS” CONTRACTS—WHERE ROADS IMPROVED OR CONSTRUCTED BY FORCE ACCOUNT TEN PER CENT OF COST ASSESSABLE AGAINST ABUTTING REAL ESTATE—CANNOT DIVIDE WORK SO PART WITH CO-OPERATION OF COUNTY, TOWNSHIP OR VILLAGE AND REMAINDER WITHOUT CO-OPERATION.

1. *Under section 1231 G. C. (107 O. L. 137), the state highway commissioner may construct and improve main market roads by force account, that is, by purchase of necessary equipment and material and employment of necessary labor. In the event of so proceeding, the state highway commissioner may not avail himself of the aid of counties, townships or villages. (Opinion of August 16, 1917, Op. Atty.-Genl. 1917, Vol. II, p. 1547, followed.)*

2. *Said section 1231 G. C. does not authorize “cost plus” contracts.*

3. *If as authorized by section 1231 G. C. the state highway commissioner constructs and improves a section of main market road by force account, he must by virtue of and in accordance with section 1191 G. C. (107 O. L. 121), assess ten per cent of the cost of such construction and improvement against abutting real estate.*

4. *The construction and improvement work on a given section of main market road may not be so divided as that part thereof may be executed by the state highway commissioner without the co-operation of the county, township or village, and the remainder with such co-operation.*

COLUMBUS, OHIO, March 17, 1920.

HON. A. R. TAYLOR, *State Highway Commissioner, Columbus, Ohio.*

DEAR SIR:—Your letter of recent date is received, reading as follows:

“In order to carry out the policy of constructing through roads, it may be necessary for the highway department to assume the initiative and improve certain gaps in main market roads without receiving co-operation from counties or townships.

I have in mind I. C. H. No. 24, M. M. No. 111, leading from Columbus to Cleveland. I am desirous of completing the grading and bridging of this highway during the present year. The major part of the highway will be improved this year with the exception of a portion in Knox, Ashland and Holmes counties. If the department has authority to grade and bridge the portions in the respective counties without county or township co-operation, it will hasten the early completion of a through road between the two industrial centers—Cleveland and Columbus. The object in proceeding in this manner is to use state highway equipment insofar as available and also prison labor which may be secured at about \$2.50 per day.

Has the commissioner authority under section 1231 of the General Code to let the contract at cost plus or proceed by force account to improve main market road? If so, would it be compulsory to assess at least ten per cent of the cost upon property holders?”

Said section 1231 G. C. (107 O. L. 137) to which you make reference, reads as follows:

“The state highway commissioner, subject to the provisions of this act,

shall have power to purchase such equipment and materials, and employ such labor as may be deemed necessary to execute any work upon said main market road, or he may let contracts for the execution of any work upon said roads. The state highway commissioner is hereby authorized to sell either at private sale, or at public sale after such notice as he may deem proper, any machinery, tools or equipment that through wear have become unfit for use. The proceeds of such sale shall be paid into the state treasury to the credit of the state highway improvement fund. The state highway commissioner is also authorized to exchange such machinery, tools and equipment for new equipment and pay the balance of the cost of such new equipment from any funds available for that purpose. When contracts are let for the construction of main market roads, the provisions of this chapter relating to the letting of contracts for inter-county roads shall apply in all respects to letting of contracts for such main market roads. County commissioners, township trustees and village councils shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or any of such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure shall be the same as in the case of co-operation by such authorities, in the construction, improvement, maintenance and repair of inter-county highways, as provided in this act. The funds appropriated or available for main market roads shall be used in carrying out the provisions of this section."

Said section was, among others, considered in an opinion of this department of date August 16, 1917, Opinions of Attorney-General for 1917, Vol. II, p. 1547. The conclusion therein reached was that by virtue of said section the state highway commissioner might, in the construction and improvement of main market roads, proceed under force account. The statement was made in the course of the opinion that if the state highway commissioner proceeded upon force account, he might not avail himself of the aid of counties, townships or villages in the improvement of main market roads—the basis of said statement being the sentence of said section 1231 which reads as follows:

"County commissioners, township trustees and village councils shall have the same power and authority to co-operate in the construction, improvement, maintenance and repair of main market roads as is granted to them by this act in the construction, improvement, maintenance and repair of inter-county highways; and in case the commissioners of any county, the trustees of any township and the council of any village, or any of such authorities, determine to co-operate in the construction, improvement, maintenance or repair of any main market road, the procedure shall be the same as in the case of co-operation by such authorities, in the construction, improvement, maintenance and repair of inter-county highways, as provided in this act."

The conclusion reached in said opinion is plainly in accord with the terms of said section 1231.

You are therefore advised that you have authority under section 1231 to construct and improve main market roads by force account—that is to say, you have the power to purchase such equipment and material and employ such labor as you may deem necessary to execute construction and improvement work upon main market roads. In proceeding in this manner you cannot avail yourself of the aid of counties, townships and villages.

You also inquire whether you may improve a main market road by letting "contract at cost plus." The answer to this inquiry is in the negative. The only form of contract authorized by said section 1231 is that covered by the sentence:

"When contracts are let for the construction of main market roads, the provisions of this chapter relating to the letting of contracts for inter-county roads shall apply in all respects to letting of contracts for such main market roads."

It should be noted here that said section 1231 does not contain the broad terms of that part of section 1191 (107 O. L. 121) which relates to construction, improvement, maintenance and repair work upon inter-county highways when the state highway commissioner proceeds upon his own initiative after the failure of the county or township to apply for state aid before a specified date. In that case the state highway commissioner may proceed

"either by contract, force account or in such manner as the state highway commissioner may deem for the best interests of the public."

Language practically identical with that just quoted is found in section 1209 in its form as appearing 107 O. L. 126, relating to the manner of completing work by state highway commissioner when the original contractor abandons his contract, etc.

Lack of similar broad provisions in section 1231 but serves to emphasize the fact that if the state highway commissioner does not proceed upon "force account" as above defined, his only alternative is to resort to a contract upon the plan of competitive bids as in the case of improvement of inter-county highways with state aid.

You also ask whether in case you proceed to improve a main market road by force account, it will be compulsory to assess at least ten per cent of the cost upon property holders. The answer is in the affirmative. Section 1191 G. C. contains, among other provisions, the following:

"When a part of the inter-county highway system *or main market road system* of the state is improved by the state, by contract or force account, without the co-operation with a county or some township thereof, ten per cent of the cost of said construction or improvement *shall be assessed* against the land abutting thereon according to the benefits, provided the total amount assessed against any abutting property shall not exceed thirty-three per cent of the valuation of such abutting property for the purpose of taxation."

The provision just quoted is followed by others outlining the procedure to be followed by the state highway commissioner in making the assessment.

The statements above made sufficiently answer your inquiries in the form in which they are submitted. However, personal conferences at your department have disclosed that you have had in mind the question whether you were authorized to arrange the construction work on a given section of main market road so that you might execute part thereof (as, for instance, the grading and building of bridges) without the co-operation of county, township or village, and leave the remainder, such as foundation and paving, to be carried out upon the usual plan of co-operation by the state with county, township or village.

You are advised that said section 1231 does not authorize such procedure. Read literally, the section might be supposed to furnish such authority; but when we recur to those provisions of section 1191, as above quoted, we find that an assessment must **be made**, based upon the "cost of said construction or improvement." It is evident that no practicable plan is available whereby an assessment may be calculated if part

of the work is done by the state highway department without co-operation of county, etc., and part of it as a consequence of separate proceedings initiated by county commissioners for state aid. Furthermore, in the one case, the assessment is to be made by the state highway commissioner (section 1191) and in the other case by county commissioners (section 1214). In fact the two plans are so entirely different in all their aspects that there is no way of reconciling them. Under these circumstances, section 1231 must be taken as meaning that if the state highway commissioner sees fit to undertake the construction and improvement of a section of main market road without the co-operation of county, township or village, he must bring the section to completion without such local co-operation, and must make the assessment at the percentage and in the manner pointed out by section 1191.

Respectfully,

JOHN G. PRICE,
Attorney General.

1085.

FISH AND GAME LAWS—SECTIONS 1423 G. C. AND 1421 G. C. AS AMENDED, DISCUSSED—EFFECTIVE DATES OF SUCH STATUTES AND WHAT STATUTES GOVERN IN ISSUING PERMITS FOR FISHING.

Sec. 1423 G. C. which is a part of the codified fish and game laws, became effective September 5, 1919. H. B. 405 amended said section and was filed in the office of the secretary of state, January 29, 1920 and can not be operative until the expiration of 90 days from the date it was so filed. Until the expiration of said 90 days it can not be assumed that it will become a law. In the meantime the division of fish and game should be governed by section 1423 G. C. in the form as effective September 5, 1919.

Sec. 1421 G. C. as now in force or as amended does not prohibit the taking of fish in the Lake Erie fishing district, not otherwise prohibited, by means other than as described in said section which must be used in the taking of the fish enumerated in said section.

COLUMBUS, OHIO, March 17, 1920.

The Department of Agriculture, Bureau of Fish and Game, Columbus, Ohio.

GENTLEMEN:—Your letter of recent date is as follows:

“There appears to be much confusion in connection with the issuance of permits to catch carp, as provided under section 1421 of the fish and game laws now in force. The present session of the legislature passed over the Governor's veto H. B. 405, including therein an amendment which prohibits the taking of fish, except with hook and line, between Cedar Point across the bay to the Baltimore Elevator Docks.

Section 1411 defines the Lake Erie fishing district. Under this section the taking of fish for commercial purpose is permitted, also section 1423 provides for a license fee for operation in the Lake Erie district. H. B. 405 apparently will become a law about April 23rd. The enclosed ‘Permission to Take Carp’ is issued for the spring fishing season which would extend to the 31st day of August.

From the fact that the house bill would become a law during the above period, would you advise the department to issue permits under a new form,