

It is interesting to note that the recent probate code expressly authorizes the investment of funds held by fiduciaries in certain types of mortgages (Section 10506-41 G. C.), and it may be suggested that good business judgment would require that township trustees in the investment of cemetery funds in interest-bearing notes and mortgages follow the pertinent terms of such section, as to such investments.

In view of the foregoing, and in specific answer to your inquiry, I am of the opinion that township trustees, under authority of Section 3458, General Code, may invest cemetery trust funds in an interest-bearing note secured by a first mortgage on real estate.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4765.

COUNTY COMMISSIONERS—CO-OPERATING WITH HIGHWAY DIRECTOR ON STATE ROAD IMPROVEMENT—MAY PAY FOR COST OF RIGHT OF WAY WHERE ROAD LESS THAN TWENTY FEET IN WIDTH.

SYLLABUS:

County commissioners of any county, regardless of the size of its tax duplicate, may use county funds to pay for a right of way required by any state highway improvement or repair contemplated by the director, even though such improvement or repair will not produce a pavement of more than twenty feet in width.

COLUMBUS, OHIO, November 25, 1932.

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

GENTLEMEN:—I acknowledge receipt of your communication which reads as follows:

“You are respectfully requested to furnish this department with your written opinion upon the following:

QUESTION: May the county commissioners in counties having a tax duplicate of real and personal property less than \$300,000,000 use county funds to pay for a right-of-way on state roads which are being improved to a width of twenty feet or less.”

Section 1191, General Code, reads as follows:

“The commissioners of any county may co-operate with the department of highways in the elimination of railway grade crossings on the state highway system and in the construction or reconstruction of bridges and viaducts, together with the approaches thereto, 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 commissioners shall also be authorized to co-operate with said department in constructing, reconstructing, resurfacing or widening a state highway, where the result of such construction, reconstruction, resurfacing or widening is to produce a pavement more than twenty feet in width,

and the commissioners shall under such circumstances be authorized to pay all or any agreed portion of the cost of so much of any such pavement so constructed, reconstructed, resurfaced or widened as lies outside of or extends beyond such width of twenty feet, together with all or any agreed portion of so much of the cost of grading, drainage structures, right of way, and other appurtenances and incidental expenses as may be occasioned by or result from such construction, reconstruction, resurfacing or widening of the pavement in excess of twenty feet in width. The amount which such commissioners may assume and agree to pay, either in whole or in part, shall be determined by the director by first estimating the cost of the work with a pavement to the full width planned and by subtracting therefrom his estimate of the cost of completing such improvement with a pavement of a width of twenty feet and no more; and the determination of the director in this respect shall be final. Any board of county commissioners desiring to co-operate as provided in this section 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. Where any portion of the work covered by such proposal is within the limits of a municipal corporation, such proposal shall be accompanied by the consent of the municipal corporation to the doing of such work, evidenced by proper legislation of its council or other legislative body unless such consent has already been given by said municipal corporation to the director. Provided, however, the county commissioners of any county having a tax duplicate of real and personal property in excess of three hundred million dollars shall also be authorized to co-operate with the department of highways in the construction, reconstruction, resurfacing, widening or repair of state highways including the bridges and viaducts thereon by paying such portion of the cost thereof as is agreed upon by the county commissioners and director of highways. County commissioners of any county shall be authorized to co-operate with the department of highways in the cost of obtaining right of way required for or in connection with any state highway improvement or repair contemplated by the director; and to pay any agreed proportion of the cost of such right of way. Unless otherwise expressly restricted, the authority granted to county commissioners by this section to co-operate with the department of highways shall extend to all portions of the state highway system, both within and without municipal corporations, subject to the condition that the consent of a municipal corporation be given to the performance of any work within its limits."

It will be seen that this section gives counties the right to co-operate with the state highway department as follows:

1. When the result of the improvement of a state highway will produce a pavement more than twenty feet in width, the county commissioners of any county may pay all or any agreed portion of the cost of so much of the pavement as extends beyond the width of twenty feet, including so much of the cost of grading, drainage structures, right of way, etc., as may be occasioned by the excess of paving over the twenty feet in width. This applies to all counties irrespective of the size of their tax duplicate.

2. Where a county has a tax duplicate of real and personal property in excess of three hundred million dollars (\$300,000,000), its commissioners may

co-operate in the cost of constructing, reconstructing, resurfacing, widening or repair of state highways, including the bridges and viaducts thereon. This applies to all state highways in such counties irrespective of the width of paving to be produced by such improvement.

3. The county commissioners of any county may co-operate with the highway department in the cost of obtaining right of way required by any state highway improvement or repair contemplated by the director. This clause of section 1191, General Code, refers especially to acquiring right of way and its terms are so broad as to include any county, regardless of the size of its duplicate, and any state highway, regardless of the width of the pavement to be produced by the improvement or repair.

This was practically my holding in my opinion of September 30, 1929, to the Prosecuting Attorney of Shelby County, appearing in Opinions of the Attorney General for 1929, Vol. II, page 1444, wherein I held:

“County commissioner, in co-operation with the Director of Highways, may lawfully acquire the right of way required in connection with the improvement or repair of any state highway, and may lawfully agree to and pay any agreed portion, or all, of the cost of such right of way.”

Prior to the amendment of section 1191 by the 88th General Assembly, section 1191 did not authorize the counties to co-operate with the highway department in paying the cost of obtaining right of way but it was held in the Opinions of the Attorney General for 1928, Vol. III, page 1677, that the county commissioners could acquire and pay for right of way for a state highway by virtue of section 6860, et seq., General Code, provided the county commissioners in so doing co-operated with the director. Referring to this in my opinion of September 30, 1929, I said:

“However, regardless of what the law was previous to the amendment of Section 1191, General Code, by the 88th General Assembly, provision is now specifically made authorizing the county commissioners to co-operate with the Highway Department in acquiring a right of way for roads in the state highway system and to co-operate with the department in the cost of obtaining any such necessary right of way.”

This authority is more clear since the enactment by the 89th General Assembly of section 1191-2 which, among other things, expressly authorizes county commissioners, with the approval of the directors, to purchase or appropriate property for state highway purposes.

I am therefore of the opinion that the county commissioners of any county, regardless of the size of its tax duplicate, may use county funds to pay for a right of way required by any state highway improvement or repair contemplated by the director, even though such improvement or repair will not produce a pavement of more than twenty feet in width.

Respectfully,
GILBERT BETTMAN,
Attorney General.