

2604.

APPROVAL, BONDS OF THE VILLAGE OF PARMA HEIGHTS, CUYAHOGA COUNTY, OHIO—\$32,000.00.

COLUMBUS, OHIO, September 21, 1928.

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

2605.

APPROVAL, AMENDMENT TO ARTICLES OF INCORPORATION OF THE AMERICAN LIABILITY AND SURETY COMPANY.

COLUMBUS, OHIO, September 21, 1928.

HON. CLARENCE J. BROWN, *Secretary of State, Columbus, Ohio.*

DEAR SIR:—I am returning to you herewith the certificate of amendment to the articles of incorporation of The American Liability and Surety Company, with my approval endorsed thereon.

Respectfully,
EDWARD C. TURNER,
Attorney General.

2606.

RELOCATION—STATE ROAD—WHAT NOTICES OF HEARING FOR MUST SPECIFY—WHERE CONTRIBUTIONS OF PRIVATE CORPORATIONS PAID—FIVE PER CENT MINIMUM BORNE BY PROPERTY OWNERS.

SYLLABUS

1. Where a hearing was held by the director of highways under authority of Section 1189 of the Code prior to the enactment of the Norton-Edwards Act, to determine the advisability of changing the location of a state road, an order may be entered, subsequent to the effective date of that act, effecting such change.

2. Notices of a hearing to determine the advisability of a change in location of a state highway must specify the change proposed to be made and the director of highways accordingly has no jurisdiction, subsequent to such hearing, to order the relocation in a manner not specified in such notice.

3. Contributions of private corporations toward the construction of state highways should not be paid into the state treasury, but should be paid either direct to the contractor on requisitions issued therefor by the director of highways or to the director of highways and by him deposited and disbursed for the purpose of the gift.

4. *In the construction of state highways, at least five per cent of the cost thereof must be assessed in accordance with the provisions of Section 1214 of the Code. In the event that a private corporation desires to assume such assessments, they should nevertheless be made by the director of highways in accordance with such section and certified to the county auditor for collection. The director may receive from the railroad company unofficially its check to pay for such assessments and forward such check to the county auditor along with the assessments, in which events it will be unnecessary to advertise the filing of such assessments. The county treasurer, upon receipt of such check, should receipt for such assessments and remit to the state treasurer the amount thereof.*

COLUMBUS, OHIO, September 22, 1928.

HON. HARRY J. KIRK, *Director of Highways, Columbus, Ohio.*

DEAR SIR:—This will acknowledge receipt of your communication, as follows:

“I have received a proposition from the D. & I. Railroad Company in which they propose to contribute the sum of \$75,000.00 to this department, which is to be used to relocate State Highway No. 299 in Fulton County, in such manner that a grade crossing with their new railroad line, now under construction, will be avoided.

We were approached on this matter in 1927 by the railroad company and a public hearing at that time was held covering a relocated line which was then thought the one to be followed. At this hearing mention was made of an alternate relocation, which since being investigated proves in some ways more desirable than the one on which the hearing was held. No ruling was ever made on the evidence from this hearing as we then had no definite offer from the railroad company.

Since receiving this offer, which is a very satisfactory one, we desire to cause the highway to be relocated on one of the two relocated lines as mentioned above. Before doing so, however, I desire that you advise me on the following matters:

1. Can the highway be relocated on the line originally planned without further hearing, using the record of that held in 1927?
2. Can the alternate relocation be made on the basis of the same hearing of 1927?
3. How should the contribution of the Railroad Company be handled?
 - (a) Shall it be paid directly to the State?
 - (b) Shall it be paid to the contractor on our requisition?
4. How will the manner of paying the assessments of property owners be handled?

In connection with item No. 4, there is an agreement with the property owners that they will not have to bear the cost of any assessments. The Railroad Company is to pay this cost for the property owners as part of its contribution. I desire to know whether the amount of the assessment is to be assumed by the county who, in turn, will be reimbursed by the Railroad Company, or whether the whole amount can be paid to the state and no assessment made.”

I am further advised by your office that it is proposed to relocate the state highway upon an existing road so that the change is not a straightening or changing of the

line within the provisions of Section 1202 of the Code, but is rather a technical relocation or change in the location of an existing inter-county highway within the provisions of Section 1189 of the Code.

As your letter states that a hearing was had upon this matter in 1927, it is necessary to look to the provisions of law then applicable in order to determine the force and effect of such hearing. Section 1189 of the Code, so far as pertinent, then provided:

"In addition to the inter-county highways and main market roads heretofore established under authority of law, the director of highways and public works shall have authority to designate additional inter-county highways or main market roads, or change existing inter-county highways or main market roads after notice and hearing as hereinafter provided.

Provided, however, the authority granted herein to the director of highways and public works to abandon all or any part of such inter-county highway or main market road shall not apply to any section of such highway previously constructed by the state cooperatively and taken over by the state for maintenance.

Before establishing any additional main market roads or inter-county highways, or making any changes in existing inter-county highways or main market roads, the director of highways and public works shall give notice by publication in two newspapers of general circulation in each of the counties in which the proposed road or highway to be established is located or in which it is proposed to make such changes (by publication) once each week for two successive weeks.

Such notice shall state the time and place of hearing, which hearing shall be held in the county, or one of the counties, in which said proposed road or some part thereof is situated, or in which it is proposed to make such changes, and which hearing shall be open to the public, and which notice shall further state the route of the proposed inter-county highway or main market road or the change proposed to be made in an existing inter-county highway or main market road. The director of highways or an engineer designated by him shall attend such hearing and hear any proof offered on such matter.

Any changes made in existing inter-county highways or main market roads by the director of highways or any additional inter-county highways or main market roads established by him following such hearing, shall be certified to the counties interested therein, and a report of such change or addition filed in the office of the governor, and the report of the director of highways making such change or establishing such road shall be placed on file in the office of the department."

Since this hearing was held prior to the effective date of the Norton-Edwards Act, under the familiar principle which has heretofore been expressed to you in connection with that act, this matter constituted a pending proceeding and the director would, in spite of the amendment of Section 1189 in that act, still be authorized to proceed and make a finding upon the evidence presented at the hearing so had.

I am of course assuming that all of the steps enumerated in Section 1189, supra, were taken, and, if so, I am of the opinion that you would have authority to make the change in the highway in accordance with the plan set forth in the notice. You will note that the notice must contain a statement of the change proposed to be made in the existing inter-county highway or main market road. This, in my opinion, is a representation to interested parties that this change alone is under contemplation. Accordingly I do not feel that you would have jurisdiction after a notice specifying a particular relocation, to adopt some alternative plan without having a new hearing and serving new notices thereof.

Accordingly, in answer to your first and second inquiries, I am of the opinion that you now have the authority to establish a relocation as set forth in the notices of the original hearing, but there exists no authority in you to effect the relocation in a manner other than that so designated, except upon the institution of a new proceeding for that purpose. Of course a new proceeding could not now be started under the repealed section. After the state highway is relocated, any improvement in the way of construction, reconstruction or repair thereof would constitute an entirely separate proceeding. Hence in the consideration of the other questions which you suggest, the pertinent sections of the Code, which were amended by the Norton-Edwards Act, are applicable. The right of the director of Highways to accept the contribution of the railroad company in this instance is clearly given by Section 1224 of the General Code, which in its last sentence provides:

“Nothing in this act shall be construed so as to prohibit the federal government, or any individual or corporation, from contributing a portion of the cost of the construction, maintenance and repair of said highway.”

Your next question is, however, whether this money may be paid to the state, and thereupon applied to the proposed construction of the road, or whether it should be paid to the contractor on requisitions issued by the director. If the funds to be contributed were paid to the director and turned into the state treasury, I doubt their availability for the purposes for which they were given until a proper appropriation by the Legislature thereof had been made. The director may, however, receive such funds and hold them in trust for the purposes for which they were given. Consequently, I am of the opinion that the amounts to be paid by the railroad company may be paid direct to the contractor on the requisition of the director of highways or may be paid to the director and by him deposited and disbursed for the purposes of the contribution.

You further state that the railroad company desires, as a part of its contribution, to assume all assessments of property owners in connection with the proposed construction of the road. Section 1214 of the Code makes it mandatory that at least five per cent of the cost of constructing a state highway shall be assessed. That section is as follows:

“Not less than five per cent nor more than ten per cent of the cost and expense of constructing a state highway, excepting therefrom the cost and expense of bridges and culverts, shall be a charge upon the property within one-half mile or within one mile of each side of the improvement, provided the total amount assessed against any owner of property shall not exceed twenty per cent of the current tax valuation of the property to be specially assessed. Within the limitations above prescribed, the rate of assessment and the area to be assessed on each improvement shall be determined by the director. Provided, further, upon the filing with the director of a consent in writing therefor signed by at least sixty per cent of the land and lot owners, resident of the county, who are to be specially assessed for such improvement, the director may increase the per cent of the cost and expense of the improvement to be specially assessed in accordance with such consent in writing, but in no event shall the amount assessed against any owner exceed the benefits.

In determining whether the required number of owners have signed any such consent, owners of life or leasehold estates shall not be counted; minors and other persons under disability shall not be counted unless represented by legal guardians and with the consent of the probate judge, in which

case the action of such guardians shall be binding upon such persons and all tenants in common of any undivided estate in fee, resident of the county, shall be counted as a unit.

The director shall, upon completion of the improvement, make, or cause to be made, a tentative apportionment of the amount to be paid by the owners of property specially assessed, which apportionment shall be made according to the benefits to the land so located.

The director shall file such apportionment with the resident district deputy director of the resident district in which the lands to be assessed are located, for the inspection of the persons interested, and shall thereupon publish once each week for two consecutive weeks in some newspaper published and of general circulation in the county where the improvement is located notice that such estimated assessment has been made and that the same is on file with the resident district deputy director, and the date when and place where objections, if any, will be heard. The director shall likewise, at least ten days before the date set for said hearing, cause a copy of such notice to be mailed to each owner whose lands are to be assessed and whose address is known. Notices to corporations shall be mailed to any officer or agent upon whom service of summons could be made as provided by law.

If any owner of property affected thereby desires to make objections, he may file with the director his objections to said assessments in writing before the time for said hearing. Such objections shall be entered on the journal.

If any objections are filed, the director shall hear the same, or cause the same to be heard by an engineer of his department designated for that purpose and such hearing shall be held at the office of the resident district deputy director of the district in which the lands to be assessed are situated and said director, or engineer designated by him, shall act as an equalizing officer and he may change said assessments if in his opinion any change is necessary to make the same just and equitable, and the director shall approve and confirm said tentative assessment as made or modified, as the case may be.

Such assessments when so approved and confirmed shall be certified by the director to the county auditor of the county in which the lands affected are located, and upon the receipt of the same by the county auditor, he shall forthwith enter the same upon an appropriate record, and thereupon such assessments shall become a lien on the land chargeable therewith.

Upon receipt of such assessments by the county auditor he shall publish notice for one week in a newspaper published and of general circulation in the county, or if there is no such newspaper published in the county then in a newspaper of general circulation in the county, which notice shall state that such assessments are on file in the county auditor's office and that the owner or owners of any lands assessed who may desire may, within thirty days from the date of the publication and mailing of such notice, pay their respective assessments, or any part thereof, into the county treasury. The county treasurer shall receive such payments as may be made and issue receipts therefor. All unpaid assessments shall bear interest at the rate of six per cent per annum, computed from the end of the period above provided for payment in cash.

All assessments, or parts of assessments, not paid within the time limited as hereinbefore provided, shall together with accrued interest be placed by the county auditor upon a special duplicate to be collected as other taxes and the principal shall be payable in not more than twenty semi-annual installments extending over a period of not more than ten years as may be

determined by the director and certified to the county auditor. Such interest shall be collected at the same time and in the same manner as the principal of such assessments.

Upon the collection of such assessments and interest, or any part thereof, the county treasurer upon the warrant of the county auditor shall promptly pay the same into the state treasury to the credit of the fund from which the costs and expenses of the project involved were paid."

This mandatory language would prevent the director from taking any official action attempting to relieve the property owners of the assessment for the construction of this road. It will, therefore, be necessary to proceed with the assessments in accordance with the provisions of this section. I believe, however, the purposes of all concerned would be served if, after the assessments are properly approved and confirmed so that the amount thereof is definitely determined, the railroad should deposit its check with the director unofficially and he would forward the check to the county auditor at the time the assessments are certified. The county treasurer could then issue receipts for such assessments and the amount so collected could be remitted to the state treasury in accordance with the last portion of the section. If such a course be adopted, I believe it would be unnecessary to make publication of notice of the filing of the assessments, since this would be of no purpose whatsoever under the circumstances.

I believe it would be useless to have the county assume the assessments, as it is authorized by Section 1214-1, General Code, as such a course would only complicate the situation and the procedure outlined above will, I believe, prove more satisfactory.

Summarizing the foregoing, I am of the opinion that:

1. Where a hearing was held by the director of highways under authority of Section 1189 of the Code prior to the enactment of the Norton-Edwards Act, to determine the advisability of changing the location of a state road, an order may be entered, subsequent to the effective date of that act, effecting such change.
2. Notices of a hearing to determine the advisability of a change in location of a state highway must specify the change proposed to be made and the director of highways accordingly has no jurisdiction, subsequent to such hearing, to order the relocation in a manner not specified in such notice.
3. Contributions of private corporations toward the construction of state highways should not be paid into the state treasury, but should be paid direct to the contractor on requisitions issued therefor by the director of highways.
4. In the construction of state highways, at least five per cent of the cost thereof must be assessed in accordance with the provisions of Section 1214 of the Code. In the event that a private corporation desires to assume such assessments, they should nevertheless be made by the director of highways in accordance with such section and certified to the county auditor for collection. The director may receive from the railroad company unofficially its check to pay for such assessments and forward such check to the county auditor along with the assessments, in which event it will be unnecessary to advertise the filing of such assessments. The county treasurer, upon receipt of such check, should receipt for such assessments and remit to the state treasurer the amount thereof.

Respectfully,
EDWARD C. TURNER,
Attorney General.