

1222

1. HIGHWAYS, DIRECTOR OF—AUTHORIZED WITH APPROVAL AND CONSENT OF CONTROLLING BOARD TO EXPEND MONEYS NECESSARY FOR STUDY OF ANY TURNPIKE PROJECT—MAY USE ENGINEERING AND OTHER FORCES TO AFFECT STUDY—PROCEEDS OF TURNPIKE REVENUE BONDS TO REIMBURSE DEPARTMENT FOR SUCH EXPENDITURES—SECTION 1220 G. C.
2. CONTROLLING BOARD HAS AUTHORITY TO PRESCRIBE FORM IN WHICH APPLICATION SHALL BE MADE TO BOARD—AM. H. B. 654, PAGE 131 OF THE ENROLLED ACT, 98 G. A.

SYLLABUS:

1. Section 1220 of the General Code authorizes the director of highways, with the approval and consent of the controlling board, to expend such moneys as may be necessary for the study of any turnpike project and to use its engineering and other forces for the purpose of effecting such study, the department of highways to be reimbursed for expenditures so incurred from the proceeds of turnpike revenue bonds sold in connection with such project.

2. Amended House Bill No. 654, page 131 of the enrolled Act, 98th General Assembly, the general appropriation act for the biennium beginning July 1, 1949 and ending June 30, 1951, gives authority to the controlling board to prescribe the form in which application shall be made to said board.

Columbus, Ohio, November 18, 1949

Hon. T. J. Kauer, Director of Highways
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The Ohio Turnpike Commission has requested me to make traffic, engineering and related studies for a toll turnpike project, beginning at the eastern boundary of Ohio and connecting with the proposed Western Extension of the Pennsylvania Turnpike, and proceeding in a northwesterly direction across Ohio. Section 1220 of the General Code of Ohio seems to authorize such a study with the approval and consent of the board of control. Such a study is initially estimated to cost \$600,000.00. In view of the im-

portance of the proposal it is believed advisable to have the legal question determined before making the request.

"In view of the premises your opinion is respectfully requested upon the following :

1. Does the Ohio Turnpike Act (Sections 1201 to 1222 inclusive of the General Code of Ohio) violate any provisions of the state or federal constitutions?
2. May the Director of Highways use the employees and facilities of the department and contract with consulting engineers to make such a study with the consent and approval of the board of control?
3. If your answer to question No. 2 is in the affirmative please advise whether or not the proposed application to the board of control, marked Exhibit 'A' and attached hereto, is in proper legal form."

In response to your first question, I have already advised you that it has been the policy of the Attorneys General for many years not to render opinions as to the constitutionality of acts of the General Assembly, and pointed out the apparent reason for this policy. I am not inclined to depart from this practice. I feel that the executive branch of the Government, in the general nature of things, is obligated to accept the laws as passed and to assume their constitutionality.

Before considering your second question, I think it proper to comment upon the court contest which you called to my attention now taking place in New Jersey concerning the constitutionality of the Turnpike Authority Act passed by the legislature of that state. The action is for a declaratory judgment on the constitutionality of the Act. A New Jersey court of first instance has already ruled on the matter, finding the Act was constitutional in all its aspects. This decision has been appealed to the Supreme Court of New Jersey, where it is now pending. I have examined closely the briefs of counsel and the decision of the lower court. I have been impressed first of all with the similarity between the questions raised in the New Jersey courts and those which would necessarily be involved in a court contest in this State on the constitutionality of our Act and, secondly, by the weight of authority adduced in favor of the constitutionality of the New Jersey Act.

I believe the answer to your second question is found in the express provisions of the Turnpike Act (section 1201 to section 1222 of the General Code). Section 1220, General Code, is seen to contain specific authority

for the Director of Highways to conduct the type of study referred to in your letter. Said sections reads as follows :

“With the approval and the consent of the controlling board, the director of highways shall expend out of any funds available for the purpose such moneys as may be necessary for the study of any turnpike project or projects and to use its engineering and other forces, including consulting engineers and traffic engineers, for the purpose of effecting such study, and all such expenses incurred by the director of highways prior to the issuance of turnpike revenue bonds under the provisions of this act, shall be paid by the director and charged to the appropriate turnpike project or projects, and the director shall keep proper records and accounts showing each amount so charged. Upon the sale of turnpike revenue bonds for any turnpike project or projects, the funds so expended by the director of highways with the approval of the commission in connection with such project or projects shall be reimbursed to the department from the proceeds of such bonds.”

In response to your third question, I have examined the proposed application to the controlling board, which accompanied your letter.

Under the provisions of Amended House Bill No. 654, page 131 of the enrolled Act, the controlling board is given the authority to prescribe the form on which application shall be made to it. I am therefore unauthorized to answer your third question.

Respectfully,

HERBERT S. DUFFY,
Attorney General.