OFFICIAL OPINION NO. 98

December 11, 1946.

Hon. W. D. Hardy,
Member of the Board of Trustees,
Evansville State Hospital,
210 Grein Building,
Evansville 8, Indiana.

Dear Sir:

I have your letter requesting an opinion concerning the authority of the Board of Trustees of Evansville State Hospital to convey a strip of real estate to the State of Indiana, through the State Highway Commission of Indiana, for the widening and improvement of State Highway No. 662. You state that the highway proposed to be improved extends through the grounds of the Evansville State Hospital, which highway is locally known as Slaughter Avenue. The remaining part of your letter upon which your question arises reads as follows:

> "The plans call for widening this roadway through the state property and the Trustees of Evansville State Hospital have been asked to convey additional right of way for this purpose.
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> "At Wednesday's meeting of the Board of Trustees this matter was considered and the Board requested that I procure your opinion as to whether we have any authority to convey any interest in the state property for highway purposes.
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> "We have no objection to this highway being widened, as it serves the hospital, but I expressed my doubt as to our authority to grant this right of way, and while I have not made a thorough investigation, I still doubt that we may do this.
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> "My opinion is in part confirmed by the fact that the Legislature expressly authorized conveyance of a right of way through lands belonging to the state by special act in 1889.
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> 11 Burns' 1943 (Replacement) Sec. 62-317,
> See also: State v. Portsmouth Savings Bank, 106 Ind. 435.

"Also by act of the Legislature authorizing the Board of Trustees of the Indiana State Prison to dispose of property.

5 Burns' 1933, Sec. 22-106."

I should say that there is merit to your position that public officials have no unbridled authority to convey the State's lands; and the authorities you cite indicate a legislative intent that the State's lands or interests may not be conveyed in the absence of legislative authority. Furthermore, I think it is a well settled principle that property already devoted to a public use may not be taken for a subsequent public use in the event the subsequent use seriously interferes with the use for which the property was originally procured or appropriated.

Town of Cicero v. Lake Erie, etc., R. Co. (1912), 52 Ind. App. 298, and cases cited, p. 310.

See also: Opinions of the Attorney General (1936), p. 46; (1938), p. 348; (1941), p. 76.

In this instance, however, you state that the Board of Trustees of the Evansville Hospital has no objection to the improvement of the existing highway through the hospital grounds, because of the fact that the highway serves the hospital. Your letter indicates that the Board of Trustees considered the proposed highway improvement to be a benefit to the institution. If the proposed improvement will benefit the hospital, it would seem that the subsequent use would not constitute an interference with the prior use, and this would seem to be especially true in view of the fact that the highway as it now exists extends through the hospital grounds.

The authority of the Highway Commission to improve and maintain highways on the premises of state institutions is contained in Chapter 113, p. 314 of the Acts of 1941 (Sec. 36-174, Sec. 36-175, Burns' 1945 Pocket Supp.) which reads as follows:

"From and after the passage of this act, the state highway commission shall improve and maintain all highways and driveways on the premises of all the state institutions in the same manner as the state highways are improved and maintained, upon request being

made so to do by the boards of trustees of the several state institutions.

"The expense of improving and maintaining any such highways or driveways shall be paid by such state highway commission out of the construction appropriation of such highway commission."

It will be noted that these sections do not mention any necessity of acquiring an easement for the purpose of improving and maintaining highways on these grounds. It may well be argued that the Act itself grants the easement for "An easement is a liberty or privilege which one man may have in the lands of another * * *." Cin. etc. R. Co. v. Sipe (1858), 11 Ind. 67, 68. In fact it must be remembered that neither the State Highway Commission nor the Evansville State Hospital owns the title or the easement. In either instance the title and easement vests in the State of Indiana and it is a well settled rule that when both the fee and an easement in the same property are acquired by the same person the easement is extinguished and merged into the absolute fee. 28 Corpus Juris Secundum, p. 720, par. 57. The situation, therefore, is that the State of Indiana owns a parcel of real estate part of which is devoted to purposes of a state hospital under the jurisdiction of the board of trustees of that institution and part of which is devoted to the purposes of a state highway which the highway department is authorized to improve and maintain.

See also: Opinions of the Attorney General (1940), p. 229.

The question, therefore, is not whether a right of way should be conveyed to the state, for the state already owns the fee, and such conveyance of a right of way would appear to be wholly unnecessary. The question is rather whether the State Highway Commission is authorized by this statute to widen an existing highway. Under the statutory authority to improve and maintain highways within the grounds of state institutions the word "improve" as used in the Act of 1941, *supra,* is broad enough to include the widening of the road in question, since it is used in connection with the word "maintain." The word "maintain" in the absence of language indi-

cating a broader meaning usually means to restore the project to, or to keep it in, its original state; but in this instance the statute authorizes such highways to be "improved and maintained" in the same manner as other state highways are improved and maintained. The word "improve" as so used, in my opinion, includes the idea of construction or reconstruction; and, in the improvement of highways under the control of the highway commission, it is customary to widen existing highways as part of the construction work.

There are opinions in the decided cases that support this conclusion. In the case of Gocke v. Staebler, *et al* (1910), 141 Ky. 66, the appellant contended that the word "improve" did not convey the idea of construction, but the court held that the word "improve" as used in the statute could not be confined to the narrow limits contended for; that the word "improve" means "to make better" or "to increase the value or good qualities of."

In the case of Thomason v. Court of County Commissioners (1913), 184 Ala. 28, the opinion states that "the words 'repairing' and 'improving' in a sense are embraced within the idea conveyed by the word 'constructing'."

As used in the statute in this instance, I think the words "improve" and "maintain" are broad enough to authorize the highway commission to improve the highway through the hospital grounds in the same manner that other state highways are improved.

I am, therefore, of the opinion that, upon the request of the board of trustees of a state institution to do so, the State Highway Commission may widen a state highway which is located upon the premises of a state institution, and that no conveyance of an easement or right of way is necessary or proper.