HIGHWAY COMMISSION, STATE: Whether Commission may buy rights-of-way for highways through cities and towns.

January 24, 1938.

Mr. Howard Atcheson,
Commissioner, State Highway Commission,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter of January 18, 1938, in which you submit the following question:

"Does the State Highway Commission of Indiana have power to buy, under any circumstances, rights-of-way through cities and towns?"

Insofar as this question relates to cities and towns with a population in excess of thirty-five hundred as shown by the last preceding United States census, this question was answered by me under date of January 13, 1938. It remains to be determined as to whether in the case of cities and towns with a population of thirty-five hundred or less, the State Highway Commission has the power to buy, under any circumstances, rights-of-way through said cities. This question as thus limited requires the consideration of chapter 18 of the Acts of 1933, creating the present Highway Commission and chapter 256 of the Acts of 1937 concerning the State Highway Commission of Indiana and especially with reference to the powers and limitations upon the powers of said commission as set out in said latter Act.

Chapter 18 of the Acts of 1933, as already stated, was an Act creating a State Highway Commission, providing for the appointment of its members and prescribing the powers and duties of the commission in the establishment of a system of state highways. Section 16 of that Act provides in part as follows:

"If any state highway connects at the corporate limits of any city or of any town having a population of more than thirty-five hundred, as shown by the last preceding United States census, with an unimproved street of such city or town, the state highway com-
mission may, in its discretion, improve the same as a part of such state highway; and if any state highway connects at the corporate limits of any town having a population of not to exceed thirty-five hundred, as shown by the last preceding United States census, with an unimproved street of such town, the state highway commission shall select, mark and maintain such street until such time as it may improve the same as a part of such state highway and after such street shall have been improved as a part of a state highway, such street shall thereafter be maintained as a part of such state highway; and if any state highway connects at the corporate limits of any town having a population of not to exceed thirty-five hundred, as shown by the last preceding United States census, with an improved street of such town, the state highway commission shall select, mark and maintain the same as a part of such state highway.


Section 18 of the Act authorized the commission in the name of the State of Indiana to purchase or by voluntary grants and donations receive or otherwise acquire "lands and rights necessary for the construction, repair and maintenance of any state highway, and necessary for the relocating, widening or straightening of any state highway, or necessary for the clearing and removing of obstructions to the vision at highway crossings and curves, or for any other purpose or use contemplated by this Act." (Acts of 1933, page 80.)

The commission was also endowed with the right of eminent domain insofar as it was necessary or proper for the carrying out of the provisions of the Act. Inasmuch as in the case of cities or towns having a population of not to exceed thirty-five hundred, the highway commission, in the case of an unimproved street was required to "select, mark and maintain such street" until such time as it may improve it as a part of such state highway and inasmuch as in the case of improved streets in such cities or towns, the State Highway Commission was required to "select, mark and maintain the same as a part of such state highway," in cases where such streets constitute the connecting link between state highways outside of said cities and towns, I think the general power to secure the
necessary right-of-way for widening highways would extend to streets in cities which, under the law, became a part of the state highway system. In other words, the streets in cities and towns which were authorized and in some cases required to be taken over by the commission as a part of the state highway were in fact just as much a part of the state highway system as the rural highway with which it connected. If that is true, the power to buy or otherwise acquire additional right-of-way when necessary, which was conferred by section 18, was sufficient to authorize the commission to buy additional right-of-way for the purpose of widening such streets.

See also the provision of section 1 of chapter 124 of the Acts of 1933, which provide as follows:

“That whenever the state highway commission, as a part of a state highway, shall improve any street of any city or town in the state over which a state highway passes, the state highway commission is hereby authorized to improve such street to the width required by the rules, regulations and/or orders of the proper authorities of the federal government; such improvement shall be done at the expense of the State of Indiana and paid for out of the funds of the state highway commission.”


I doubt, however, whether this particular provision added anything to the authority which the commission already possessed to buy additional right-of-way in streets which were taken over as a part of the state highway system, but it did have the effect of authorizing the State Highway Commission to improve such a street and pay the cost thereof under the conditions therein set out unhampered by the limiting provisions set out in section 16 of the Highway Commission Act of 1933, which provided as follows:

“If a street of any incorporated city or town is improved under the provisions of this act, and the expense per mile of such improvement is greater than the average expense of improvement of such roads outside of the corporate limits of the city or town, then and in that event, the extra expense shall be paid by the city or town to the state highway fund.”

Passing now to chapter 256 of the Acts of 1937, in my previous opinion of January 13, 1938, I referred quite extensively to section 2 of the Act, from a consideration of which I concluded that the rights-of-way for the purpose of widening streets in cities and towns of more than thirty-five hundred population and which was a part of the state highway system was to be paid for by such cities and towns. That section, however, contained the following language, quoting from pages 1202-1203 of the Acts of 1937:

“The state highway commission, notwithstanding the provisions of this act shall continue to perform the duties now imposed upon it by law, in reference to the streets in cities and towns having a population of thirty-five hundred, or less, where such streets are the routes of state highways.”

It seems to me that the obvious purpose of this provision was to free the State Highway Commission from the limitations provided earlier in the Act insofar as they apply to streets in cities and towns having a population of thirty-five hundred or less. Thus construing the above language, and I think it can have no other construction, it is obvious that the same authority to obtain rights-of-way in such cities and towns as existed prior to the enactment of the 1937 Act still exists.

As to the right of the highway commission to use highway commission funds for the purchase of additional rights-of-way to widen streets in cities where the population is more than thirty-five hundred, which right was denied in my previous opinion of January 13, 1938, it is urged that section 21 of the 1937 Act, supra, gives that right in cases where the street forms the route of any highway in the federal aid or seven per cent system when the consent and approval of the Board of Public Roads of the United States Department of Agriculture has been obtained. I do not think, however, that section 21 lends itself to such a construction. The language used is as follows:

“The state highway commission is hereby authorized and empowered with the consent and approval of the bureau of public roads of the United States Department of Agriculture to improve, construct and maintain, to the width authorized by such bureau a street
or highway in any city or town in this state which forms the route of any highway in the federal aid or seven per cent system, into or through such city or town such improvement to be done with funds appropriated to said commission and federal funds allotted for such purpose by the federal government. Said commission is further authorized to enter into any and all agreements required by such bureau for the maintenance of such improvements, and said commission is hereby authorized to enter upon any such street for the purpose of making said improvement, and to maintain the same after the completion thereof.” (Our italics.)

Acts of 1937, pages 1214-1215.

Neither of the words italicized in the above quotation, in my opinion, embraces the acquiring of a right-of-way, an authority which could very clearly and plainly have been given if the intent had been to do so. The word “improve” is probably of wider significance than either of the other words used, but authority to improve a highway does not, in my opinion, extend to the acquiring of a right-of-way. As said by the court in the case of State, ex rel., County of Ramsey v. Babcock, 242 N. W. 474, at page 476:

“The word ‘improve’ is a common word in everyday use. Its meaning is well understood. As commonly used, the word means to make better or to enhance the quality or value of some existing thing or subject. In speaking of improving a highway, we have reference to bettering a highway already in existence. The acquiring of the right-of-way for a road is obtaining title to or an easement in the land on which the highway is to be built, and is not an improvement of the road.”

It seems to me that the authority of the commission in the purchasing of additional right-of-way at the commission’s expense to widen streets is limited to those streets which the commission authorized to take over as a part of the state highway system in cities and towns which have a population of not exceeding thirty-five hundred. Your question is answered accordingly.