

MINUTES OF TWENTY EIGHTH MEETING
NOVEMBER 28, 1951

Pursuant to call of the Chairman, the Ohio Turnpike Commission met in special open session in Hearing Room No. 2, State Office Building, Columbus, Ohio, at 10:30 o'clock a. m. on November 28, 1951 with its Attorney, Bond Counsel, representatives of the Consulting Engineers, of the Financial Advisor, of the Department of Highways, and with representatives of the press also in attendance.

The meeting was called to order by the Chairman and the roll was called and the attendance was reported to be as follows:

Present: McKay, Teagarden, Shocknessy, Kauer
Absent: Seasongood

Whereupon the Chairman announced that a quorum was present.

The Chairman stated that this special meeting had been called after consultation with the members of the Commission in New York City to consider together and to receive from the counsel for the Commission their reports upon the conclusion reached by the Financial Advisor concerning the financing of the project under the present legislation which conclusion was communicated to the Commission in the following letter:

"Mr. James W. Shocknessy, Chairman November 20, 1951
Ohio Turnpike Commission
Columbus, Ohio

Dear Mr. Shocknessy:

This will confirm our advices to you and the members of the Commission given during our conference this morning.

Under our contract with the Commission, as its Financial Advisor, we have fully investigated the feasibility of financing the construction of the proposed Ohio Turnpike through the sale by the Commission of revenue bonds.

We have made intensive analyses of the engineering report of the J. E. Greiner Company of Baltimore and of the preliminary studies of traffic and revenues as prepared by Parsons, Brinckerhoff, Hall and Macdonald of New York. Based thereon, assuming the availability of materials and favorable market conditions for the sale of the bonds, and

subject to the major qualification hereinafter mentioned ,
we are of the opinion that the Ohio Turnpike, as planned
by the Commission and approved by the Governor, is a
feasible engineering project and a sound financial undertaking.

Our counsel have reviewed and studied extensively the
Ohio Turnpike Act, and based upon their advice to us it is
our considered judgment that Section 8 of the Act, which
provides for the appropriation of property, is deficient in
that the Commission would be subject to interminable and
expensive delay in acquiring possession of the necessary
rights-of-way. We believe that this deficiency makes the
sale of revenue bonds impossible. Were it not for this
deficiency, we believe that we could successfully underwrite
the issue.

Very truly yours,

Blyth & Co. , Inc.
B. J. Van Ingen & Co. , Inc.
The Ohio Company
Braun, Bosworth & Co. , Inc.
Stranahan , Harris & Co. , Inc.
McDonald & Company
Prescott, Shepard & Co. , Inc.
The Weil, Roth & Irving Company

By: Blyth & Co. , Inc.

Per _____
T. Henry Boyd
Vice President

B. J. Van Ingen & Co. , Inc.

Per _____
James G. Couffer
Vice President

The Ohio Company

Per _____
Dennis E. Murphy
Vice President "

The Chairman reported the death of Ray F. Smock, Secretary of
Highways of the Commonwealth of Pennsylvania, and suggested the

adoption of a resolution of sympathy by the Commission. He reported that he, together with the Governor of Ohio, had attended the preview and dedication ceremonies of the Western Extension of the Pennsylvania Turnpike on November 26, 1951. The Chairman then exhibited a collection of newspaper editorials and reports which had been published since the release of the letter of November 20. He reported that he had received in the mail a copy of a resolution adopted by the Board of Commissioners of the Cleveland Metropolitan Park District which authorized the counsel of that Board to take such steps as may be legally available to prevent the construction of the Ohio Turnpike as now approved. The Chairman stated his understanding that a copy of the resolution was sent to the Governor of Ohio and to the Director of Highways and that copies have been furnished to the members of the Commission, but the Chairman pointed out that the matter is not officially before the Commission.

The Chairman reported the conversation of himself and the Governor of Ohio with the Chairman of the New Jersey Turnpike Authority who had told them of the difficulty which New Jersey had experienced with its turnpike legislation. He then read the following letter which had been received from the Chairman of the New Jersey Turnpike Authority:

"Hon. James W. Shocknessy, Chairman Ohio Turnpike Commission State Office Building Columbus 15, Ohio	Trenton, New Jersey November 26, 1951
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My dear Mr. Chairman:

I was deeply interested in hearing from both Governor Lausche and from you that the original Act creating your Turnpike Commission did not provide for reasonably prompt possession in cases where property is to be acquired through condemnation.

It is rather a coincidence that the New Jersey Turnpike Authority was faced with the same situation. The difficulty was not discovered until the Authority began negotiating for the sale of its securities.

The matter was immediately discussed with Governor Driscoll, who arranged to place it on the legislative calendar at once. The attached revision to the New Jersey Turnpike Authority Act was the result, both houses of our legislature acting promptly to cure the defect. Other powers were also included in the amendment, but the bill was intended primarily to correct the acquisition procedure deficiency.

It is readily understandable that securities of a revenue bond nature cannot possibly be sold by an Authority or Commission that does not have the right of immediate possession in condemnation actions. In our case, realizing that we had no power of taxation, we provided for immediate possession upon the filing of the petition together with a deposit equal to the amount of our appraisal, adding, for the protection of the property owner, a requirement that we deposit in a separate trust account twice that sum.

It is worth mentioning that we were successful in New Jersey in obtaining the great bulk of the 3900 real estate parcels involved in the acquisition of right-of-way by negotiation with the owners. It was necessary to resort to condemnation in only a little more than 100 cases.

The right to immediate possession is vital, both for financing and for reasonably expeditious acquisition of the right-of-way for any toll road. I hope our experience will serve to point the way for your legislative program.

With warm personal regards,

Sincerely yours,

Paul L. Troast
Chairman "

The Chairman stated that he had been asked by a member of the press whether the Commission had not been cognizant of the impediment in the turnpike statute prior to receipt of the letter from the Financial Advisor. In direct response to the question he stated that the Chairman and the members of the Commission and its counsel have been aware of all provisions of the Turnpike Act and have been aware of all limitations upon their authority including that with respect to acquiring possession of right-of-way under the existing law, but that it had not been properly demonstrated that the existing law was inadequate until the financial feasibility of the project was at issue. It was neither appropriate nor necessary, said the Chairman, that the Commission take any action with respect to the existing law prior to this time. He said that he has never conceived the mission of this Commission to be to seek legislation but rather that its mission is to make effective the responsibility imposed upon the Commission by the General Assembly under the specific authority granted by the Assembly. He stated that he did not conceive it to be the mission of the Ohio Turnpike Commission to tell the General Assembly that it had not drafted an adequate piece of legislation, but that the Commission was under a duty to proceed with the assumption that the legislature in its wisdom had considered all matters which might affect the effectuation of the purposes which it envisioned when

it adopted the law. He said that it was his hope at all times that the legislature, having contemplated that the Commission would have to seek financing through private sources, had also contemplated the amount of authority that it wanted to confer upon the Commission and until the Commission learned that it could not fulfill its mission under the existing law, it had no right to take any position contemplating that the existing law is inadequate.

The Chairman stated that the only group of investment bankers who have indicated interest in financing the project have said that they will not finance it under the existing law. He stated that he had advised the Governor of Ohio of the dilemma and that under existing legislation it is impossible to obtain financing for the building of the turnpike. The Chairman advised the Commission that the Governor had invited the members to attend a conference on November 29 in the Governor's office where he expects to discuss this matter with a group of representative citizens from all over Ohio and to consider with them whether or not a special session should be called to cure the manifest defect in the turnpike legislation. The Chairman concluded with the statement that the fact of the impairment in the law did not become demonstrable until November 20, 1951 when the financiers had said that they would not finance the project.

The Chairman advised the Commission that counsel for the Financial Advisor had stated informally that if appropriate legislation amending the existing law to permit prompt possession of property is passed, the Financial Advisor would not require any judicial determination before proceeding with the financing, it being their belief that there would be no question of constitutionality involved. He said that if counsel for the Commission report that they believe the conclusion of the financiers to be valid from the financier's standpoint, then he believed that the Commission should make the reports of counsel available to the Governor of Ohio for his scheduled conference. In order that no time would be lost in the event that a recommendation was made to the legislature, he expressed the hope that the Commission would request its counsel to draft legislation prospectively which would eliminate the defect, and to consult with counsel for the financiers to determine that the recommendation they may make will be considered adequate by the financiers. He discussed briefly the availability of steel for the project and stated his understanding that it is the belief of the steel industry that steel will be available in the third quarter of 1952, and that he had been advised by the Consulting Engineer that approximately 20% of the turnpike project might be expected to be completed in 1952.

At the request of the Chairman Mr. Henry Crawford, representative of Bond Counsel, then made the following report:

"James W. Shocknessy, Chairman
Ohio Turnpike Commission
Columbus, Ohio

November 27, 1951

Re: Condemnation Procedure

Dear Sir:

On November 20, 1951 the Financial Advisor to the Ohio Turnpike Commission reported that although the project for the construction of the Ohio Turnpike is feasible from an engineering standpoint and appears to be a sound financial undertaking, nevertheless, the revenue bonds of the Commission are not saleable because the Ohio Turnpike Act does not contain procedure for the prompt acquisition of right-of-way necessary for the construction of the highway.

At the time of that meeting you advised that the Commission would hold a meeting at an early date, at which time we would be expected to report to the Commission our views with regard to the conclusion so stated by the Financial Advisor.

Questions concerning the exercise of the powers of condemnation of the Commission have been under consideration by us for some time. The Turnpike Act requires that in condemnation cases compensation must first be made to the owner before property may be taken; there is no provision for the deposit in money of security for the compensation, and it does not clearly appear that there is any statute of the State which would be applicable to the proceedings of the Commission which would permit the payment into court of a jury verdict after its confirmation by judgment of the court, following which possession might be taken, despite any appeal or further proceedings.

The matter, however, was not pressed for complete investigation, pending receipt of the engineering reports showing construction costs and estimated net operating revenues, as it has been clear that the Turnpike Act grants to the Commission the substantive powers needed for the construction and operation of the Turnpike, once it has the funds therefor.

Section 1208 clearly and unmistakably gives to the Turnpike Commission the power to take any necessary land or rights-of-way through the exercise of the power of eminent domain, but provides that the Commission shall have the same powers and be governed by the same procedure as the State

Highway Director insofar as applicable, provided, however, that a compensation for the property so taken shall first be made in money as provided by law. The statute, therefore, is more restrictive than is required by Article I, Section 19 of the Constitution. Under the Constitution the legislature could provide for taking of property upon the securing of compensation by the deposit of money.

The Commission therefore is expressly directed to follow the procedure applicable to the Director of Highways, but is required to make compensation, as distinguished from a deposit of security for compensation, before property is taken.

Investigation of the statutes regarding the powers of the Director of Highways indicates that there is no provision for the Director to make compensation to the owner after a verdict and judgment thereon, but pending appeal or other proceedings in the case.

It has been suggested that the sections of the Code relating to private utility corporations are applicable to condemnation proceedings instituted by the Turnpike Commission. That such is not the case appears to be evident from a study of said Section 1208 of the Code.

For these reasons we are impelled to advise you that in the acquisition of lands or interests in lands for the Ohio Turnpike, the Ohio Turnpike Commission has no assurance of obtaining either immediate possession of the property upon the filing of a condemnation proceedings, or of obtaining possession immediately after the trial of the case to a jury and the entry of a judgment thereon. Assuming that all cases could be brought to trial promptly after they are instituted, nevertheless, the right to possess the property can be delayed by appeals and if any of such appeals are successful, the right to possession would be further delayed pending a new trial and the possibility of further appeals. It is therefore evident that there is no assurance that possession of all tracts of land needed for the construction of the Turnpike can be obtained within a short period of time. How long a delay might be encountered cannot be accurately forecast but it is readily conceivable that the delays might extend over a period of several years.

The report you have received from the Financial Advisor makes it evident that the revenue bonds of the Commission are unmarketable solely because of the uncertainty as to when possession of properties can be taken, when construction can be commenced, and completed, and when revenues essential for the payment of the bonds can be derived from the project.

Therefore, as Bond Counsel to the Commission, we advise that in our opinion an appropriate amendment of General Code Section 1208 is essential in order to make certain that the Commission can obtain possession of all properties necessary without any substantial delay.

Respectfully submitted,

Squire, Sanders & Dempsey "

The Chairman then called upon Mr. Dunbar, the Attorney for the Commission, and Mr. Dunbar gave the following report:

"Ohio Turnpike Commission November 28, 1951
Columbus, Ohio

Subject: Appropriation of Property by Commission

Gentlemen:

I was present in New York last week when representatives of the Financial Advisor to the Commission told the Commission that, in their opinion, what they characterized as a "deficiency" in the Ohio Turnpike Act would make the sale of revenue bonds impossible. I have examined the letter addressed to Mr. Shocknessy as Chairman of the Commission, dated November 20, 1951, and signed by a committee of the Financial Advisor, wherein they confirmed the oral statements made to you. The last paragraph of that letter is as follows:

'Our counsel have reviewed and studied extensively the Ohio Turnpike Act, and based upon their advice to us it is our considered judgment that Section 8 of the Act, which provides for the appropriation of property, is deficient in that the Commission would be subject to interminable and expensive delay in acquiring possession of the necessary rights-of-way. We believe that this deficiency makes the sale of revenue bonds impossible.

Were it not for this deficiency, we believe that we could successfully underwrite the issue. '

You instructed me to examine this statement of the financiers, to consult with their counsel, and to report to you at your meeting today whether or not the position taken by them is valid from their standpoint, and if so, whether and how their objection might be met.

The power to take private property for public purposes has been said to be an inherent attribute of sovereignty. In other words, in the very nature of things, private -property rights must yield, when necessary, to public needs. The Ohio Constitution, in section 19, article I, dictates that "Private property shall ever be held inviolate but subservient to the public welfare. "

In Ohio, the exercise of the power to appropriate is subject to a very important qualification imposed by the same section of the Constitution. The portion of that section which is applicable when property is taken for a toll road -- but not when it is taken for a free road -- requires that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; * * *." No matter for what purpose the property is taken, the amount of the compensation to be paid must be determined by a jury, whether before or after the taking.

By section 7 of what is commonly referred to as the Ohio Turnpike Act, being section 1207 of the General Code of Ohio, the Ohio Turnpike Commission is authorized and empowered to buy any property which it deems necessary or convenient for the construction or operation of any turnpike project, upon such terms as may be agreed upon between it and the property owner. The legislature recognized, however, that in some instances it would be possible that the Commission would not be able to arrive at an agreement with property owners. It, therefore, also enacted section 1208 of the General Code, which provides in part as follows:

"The commission is hereby authorized and empowered to acquire by appropriation any land, property, rights, rights-of-way, franchises, easements or other property necessary or proper for the construction or the efficient operation of any turnpike project. For the appropriation of such property the commission shall have the

same powers and be governed by the same procedures as the state highway director, insofar as applicable; provided, however, that a compensation for the property so taken shall first be made in money as provided by law; * * * "

By this section the legislature conferred the power of eminent domain upon the Commission. The Supreme Court of Ohio settled the question of the constitutionality of this grant of power in the case of State ex rel. Allen et al. vs. Ferguson, Auditor, 155 OS 26, 44 00 63. In that case, State Auditor Ferguson contended that the Turnpike Act is unconstitutional because it purports to authorize the appropriation of private property for the construction of roads or turnpikes upon which tolls are to be charged, which Mr. Ferguson claimed would be in violation of section 19 of article I of the Ohio Constitution. The Supreme Court held that this claim was unfounded.

From what the investment bankers' group said in their letter of November 20, and from what their counsel have told me in my discussions with them, it is apparent that their objections are as to (1) what they consider to be procedural deficiencies in the existing statutes, and (2) the failure of the existing statutes to provide expressly for the taking of possession of needed property by the Commission after it has protected the owners' interests by making a payment or deposit of money, as would be permitted by section 19 of article I of the Constitution.

The statutes (GC 1178-37 to -39) pertaining to appropriations by the state highway director provide for his taking possession of property before he has paid for it or secured the payment by a deposit of money. (GC 1178-37 does provide for a so-called "deposit", but since 1178-38 requires its return to the director if it is not accepted by the landowners, it cannot be a deposit for security of the character prescribed in the Constitution, and therefore it is, in effect, a mere arrangement for tender.) This taking before paying or securing payment is constitutionally permissible in the case of the highway director, for he takes property for roads which are "open to the public, without charge." Since these statutes contain this provision regarding the time of taking possession, they are silent as to when possession may be taken by someone else attempting to act under them -- in this case the Turnpike

Commission -- when that someone else is prohibited by the Constitution from taking possession before payment or deposit. This is the major deficiency which gave rise to the investment bankers' letter.

I do not believe that it is necessarily impossible for the Commission to function under the existing statutes, but it appears virtually certain that the deficiencies and omission to which I have referred will produce expensive and more or less protracted litigation. While it is not certain, it is possible that the Commission could not take possession of property, nor the landowner receive any payment, until all appeals, and perhaps subsequent retrials and further appeals, should have been completed. Therefore, answering your first question, it is my opinion that the position taken by the ~~investment bankers~~ is valid from their standpoint.

Your second question was whether and how the objection of the bankers might be met. The answer is: it can be met -- by appropriate amendment of section 1208.

Any such amendment could and should provide for the taking of possession by the Commission after paying or making a deposit of money to secure the payment to the landowners of whatever a jury would determine should be paid to him. Thus the essential needs of the public would be served, and yet the interests of the landowners would be fully protected -- in the same way, and to the same extent, as they are protected when property is appropriated, under various Ohio statutes, by the superintendent of public works, by cities, by railroads, by public utility companies, and various others.

Such an amendment would be constitutional; that is, it can readily be so drawn as to meet the requirements of section 19 of article I of the Constitution.

Respectfully submitted,

Frank C. Dunbar, Jr. "

In the absence of any questions the reports of counsel were received and the Secretary-Treasurer was instructed to deliver them, together with the letter from Mr. Troast, to the Governor of Ohio and also to provide copies for the members of the Commission.

A motion was made by Mr. Teagarden, seconded by Mr. Kauer, that the Secretary be authorized to address a letter to Mr. Troast extending the thanks of the Commission for his letter spontaneously offered giving the Commission the benefit of his experience. A vote by ayes and nays was taken and all members present responded to roll call and voted aye. The vote was as follows:

Ayes, McKay, Teagarden, Shocknessy, Kauer
Nays, None

The Chairman declared the motion adopted.

A motion was made by Mr. Teagarden, seconded by Mr. Kauer, that the following resolution be adopted:

WHEREAS, Ray F. Smock as Secretary of Highways for the Commonwealth of Pennsylvania and as a member of the Pennsylvania Turnpike Commission, has strengthened the bond of friendship and cooperation between the states of Pennsylvania and Ohio by his willing assistance, wise counsel and firm support of the endeavors of the Ohio Turnpike Commission;

NOW, THEREFORE, BE IT RESOLVED that the Ohio Turnpike Commission expresses its most sincere regrets at his untimely death, and extends its condolences to his associates in the Pennsylvania Turnpike Commission upon the loss of this splendid public servant.

A vote by ayes and nays was taken and all members present responded to roll call and voted aye. The vote was as follows:

Ayes, McKay, Teagarden, Shocknessy, Kauer
Nays, None

The Chairman declared the motion unanimously adopted.

The Chairman inquired of Mr. Dunbar and Mr. Crawford as to the time which would be required by them for the preparation of a suitable amendment to the Turnpike Act in the event that the Governor of Ohio should call a special session of the General Assembly and should ask for a recommendation. Counsel agreed that a suitable amendment could be drafted for consideration at the meeting scheduled for December 4, 1951 and were instructed by the Chairman so to do.

Mr. Dennis Murphy, representative of the Financial Advisor, stated that the report of the Chairman had indicated the attitude of the Financial Advisor quite clearly.

There being no further business to come before the meeting, a motion was made by Mr. Kauer, seconded by Mr. McKay, that the meeting adjourn subject to call of the Chairman. A vote by ayes and nays was taken and all members present responded to roll call and voted aye. The vote was as follows:

Ayes, McKay, Teagarden, Shocknessy, Kauer
Nays, None

The Chairman declared the meeting adjourned. The time of adjournment was 11:30 o'clock a. m.

Approved as a correct transcript of
the proceedings of the Ohio Turnpike
Commission.


F. G. Kauer
Secretary-Treasurer

Dec. 4, 1951