

March 29, 2012

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
247 Columbus Avenue, Suite 319  
Sandusky, Ohio 44870-2636

SYLLABUS:

2012-009

1. When the Ohio Department of Transportation constructs a bridge outside of a municipal corporation to carry a county or township road over a state highway, the Ohio Department of Transportation is responsible pursuant to R.C. 5501.11(A)(1) for nonemergency maintenance of approaches, embankments, and safety devices that are part of the bridge structure. (2006 Op. Att’y Gen. No. 2006-051, approved and followed; 1927 Op. Att’y Gen. No. 461, vol. I, p. 765, syllabus, paragraph 1, overruled.)
2. A county does not have a duty under R.C. 5591.36 to maintain a guardrail on an embankment that is part of a bridge structure constructed by the Ohio Department of Transportation outside of a municipal corporation to carry a county road over a state highway. (1928 Op. Att’y Gen. No. 2940, vol. IV, p. 2713; 1928 Op. Att’y Gen. No. 2155, vol. II, p. 1250; and 1927 Op. Att’y Gen. No. 461, vol. I, p. 765, syllabus, paragraphs 3 and 4, overruled, in part, on the basis of statutory amendments.)



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OPINION NO. 2012-009

The Honorable Kevin J. Baxter  
Erie County Prosecuting Attorney  
247 Columbus Avenue, Suite 319  
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion whether a county, township, or the Ohio Department of Transportation (ODOT) is responsible for nonemergency maintenance of approaches, embankments, and safety devices that are part of a bridge structure located outside of a municipal corporation when (1) the road that passes over the bridge is a county or township road; (2) the road running beneath the bridge is a state highway; and (3) the bridge structure was constructed by ODOT as part of the construction of the state highway.<sup>1</sup>

#### **Duty of ODOT to Maintain Bridges Appurtenant to State Highways**

Your question has arisen in light of the conclusions and analysis set forth in 2006 Op. Att’y Gen. No. 2006-051. This opinion considered whether ODOT had a duty to maintain a bridge constructed by the state as part of the construction of a state highway when the road that passes over the bridge is a county or township road.<sup>2</sup> The opinion answered this question as follows:

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<sup>1</sup> Your question does not concern nonemergency maintenance of the wearing surface of a county or township road that passes over approaches and embankments that are part of a bridge structure constructed by the Ohio Department of Transportation (ODOT) as part of the construction of a state highway. As stated in your letter, nonemergency maintenance of the wearing surface of a county or township road that passes over a bridge structure constructed by ODOT as part of the construction of a state highway rests with the county or township, as determined pursuant to state law. *See* 2006 Op. Att’y Gen. No. 2006-051.

<sup>2</sup> 2006 Op. Att’y Gen. No. 2006-051 at 2-487 and 2-488 limited its analysis to the maintenance of bridges that carry a county or township road over a state highway that is not part of the interstate system. We similarly limit our analysis in this opinion and address only the nonemergency maintenance of approaches, embankments, and safety devices that are part of a bridge structure that carries a county or township road over a state highway that is not an interstate highway.

2. Pursuant to R.C. 5501.11(A)(1), ODOT is responsible for the ... maintenance ... of a bridge structure not located in a municipal corporation if the road that passes over the bridge is a county or township road and the road running beneath the bridge is a limited access state highway....<sup>3</sup>
3. When, as part of the construction of a state highway that is not a limited access highway, ODOT constructs a bridge not located in a municipal corporation to carry a county or township road over the state highway, the bridge is appurtenant to the state highway and ODOT is responsible for the ... maintenance ... of the bridge structure pursuant to R.C. 5501.11(A)(1).... (Footnote added.)

2006 Op. Att’y Gen. No. 2006-051 (syllabus, paragraphs 2 and 3).

In reaching these conclusions, the opinion relied on four statutes—R.C. 5501.01, R.C. 5501.11, R.C. 5535.01, and R.C. 5535.08—and the cases and Attorney General opinions that have interpreted those statutes. R.C. 5535.01 classifies the roads of Ohio as follows:

The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.

(A) State roads include the roads and highways on the state highway system.

(B) County roads include all roads which are or may be established as a part of the county system of roads as provided in sections 5541.01 to 5541.03, inclusive, of the Revised Code, which shall be known as the county highway system....

(C) Township roads include all public highways other than state or county roads.

R.C. 5535.08(A) requires “[t]he state, county, and township [to] each maintain its roads, as designated in [R.C. 5535.01],” and R.C. 5501.11(A)(1) mandates that ODOT maintain “the state system of highways and the bridges and culverts thereon.” *See also* R.C. 5501.31; R.C. 5511.02-.03; R.C. 5535.07. And, R.C. 5501.01(C) provides further that, for purposes of R.C. Chapters 5501 and 5535, as well as other chapters in R.C. Title 55, the terms “road” and “highway” are defined to include “all appurtenances to the road or highway, including but not limited to, bridges, viaducts, grade separations, culverts, lighting, signalization, and approaches on or to such road or highway.”

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<sup>3</sup> As used in the statutes governing state roads and highways, a “limited access highway” or “freeway” is defined as “a highway especially designed for through traffic and over which abutting property owners have no easement or right of access by reason of the fact that their property abuts upon such highway, and access to which may be allowed only at highway intersections designated by the director [of ODOT].” R.C. 5511.02; *see* 2006 Op. Att’y Gen. No. 2006-051 at 2-494 n.4.

2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507 reviewed the foregoing language of the aforementioned statutes and summarized that it is a general rule that, pursuant to R.C. 5501.11(A)(1), ODOT is primarily responsible for the maintenance of a state highway located outside of a municipal corporation.<sup>4</sup> See R.C. 5501.31; R.C. 5511.02-.03; R.C. 5535.07; R.C. 5535.08(A). The opinion also determined that this duty extends to maintaining the bridges on, and other appurtenances to, a state highway. See 2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507; see also *Estate of Marlee Grace Morgan v. ODOT*, 2010-Ohio-5969, 2010 Ohio App. LEXIS 5018, at ¶11 (Franklin County Dec. 7, 2010) (“from R.C. 5501.11(A) and [R.C.] 5535.08(A) arises ODOT’s legal duty to maintain the state highways, as well as all appurtenances thereto, in a reasonably safe condition”).

We approve and follow 2006 Op. Att’y Gen. No. 2006-051’s determination that, when ODOT constructs a bridge outside of a municipal corporation to carry a county or township road over a state highway, ODOT is responsible pursuant to R.C. 5501.11(A)(1) for nonemergency maintenance of the bridge and other appurtenances to the state highway. See also 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70 (overruled, in part, on other grounds by 2006 Op. Att’y Gen. No. 2006-051 (syllabus, paragraph 1)); 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32.

### **Maintenance of Approaches and Embankments to a Bridge Structure that Is Part of the State Highway System**

“Appurtenances” to a state highway are objects that are necessary accessories to the state highway. See *Merriam-Webster’s Collegiate Dictionary* 62 (11th ed. 2005) (defining “appurtenance” to mean “accessory objects”); see also *Szilagy v. Taylor*, 63 Ohio App. 105, 106, 25 N.E.2d 360 (Summit County 1939) (“[t]hings pass as incidents to or appurtenances of realty when they are attached thereto and are essential to its use”); *Paul v. First Nat’l Bank of Cincinnati*, 52 Ohio Misc. 77, 85, 369 N.E.2d 488 (C.P. Hamilton County 1976) (“[t]he word ‘appurtenance’ means more than rights of way or other incorporeal rights: it includes an article adapted to the use of the property to which it is connected and which is intended to be a permanent accession to the freehold”). For purposes of various chapters of R.C. Title 55 dealing with road and highway maintenance, appurtenances to a state highway include, but are not limited to, “bridges, viaducts, grade separations, culverts, lighting, signalization, and approaches on or to” a state highway. R.C. 5501.01(C) (emphasis added). A bridge constructed by ODOT outside of a municipal corporation to carry a county or township road over a state highway thus is an appurtenance to the state highway and part of the state highway. See *id.*; 2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507; 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32. This means that, pursuant to R.C. 5501.11(A)(1), ODOT is responsible for nonemergency maintenance of the bridge and the objects that are necessary accessories to the bridge. See R.C. 5501.31; R.C. 5511.02-.03; R.C.

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<sup>4</sup> A county or township may cooperate with ODOT in the maintenance of a state highway. See 2006 Op. Att’y Gen. No. 2006-051 at 2-491 n.2; see, e.g., R.C. 5501.11(A)(4); R.C. 5521.06; R.C. 5571.02.

5535.07; R.C. 5535.08(A); 2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507; *see also* 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32.

When ODOT constructs a bridge outside of a municipal corporation to carry a county or township road over a state highway, ODOT must provide approaches to, or a means by which motor vehicles may access, the bridge. *See generally Dep’t of Highways v. Ashland Pipe Line Co.*, 2 Ohio Misc. 179, 184, 208 N.E.2d 162 (C.P. Richland County 1965) (“[a]n ‘approach’ means a road devoted solely to gaining access to a state highway”); 1928 Op. Att’y Gen. No. 2767, vol. IV, p. 2429, at 2430 (“a proper definition of the terms ‘approaches’ and ‘ways’ would manifestly include the means of access to the bridge for pedestrians as well as vehicles”); *Merriam-Webster’s Collegiate Dictionary* 61 (11th ed. 2005) (an “approach” is “a means of access”). In addition, ODOT may need to construct embankments to support the approaches to the bridge in order to (1) increase grade separation between the state highway and the county or township road or (2) create an underpass for the state highway. *See generally* 1958 Op. Att’y Gen. No. 1605, p. 29, at 31 (“[t]he purpose of these bridges or structures carrying county highways or city streets over or under State Route 1 is to eliminate direct access to this freeway”); *Merriam-Webster’s Collegiate Dictionary* 405 (11th ed. 2005) (an “embankment” is “a raised structure (as of earth or gravel) used esp. to hold back water or to carry a roadway”).

Pursuant to R.C. 5501.01(C), “grade separations ... and approaches on or to” a state highway are “appurtenances” or objects that are necessary accessories to a bridge constructed by ODOT to carry a county or township road over a state highway and are part of the state highway. *See generally Dep’t of Highways v. Ashland Pipe Line Co.*, 2 Ohio Misc. at 184 (for purposes of R.C. 5501.01(C), “[a] road becomes an approach and a part of the state highway system when the road is used solely as an access road to a state highway”); 1960 Op. Att’y Gen. No. 1841, p. 667, at 670 (when, pursuant to R.C. 5511.02, the director of highways (now director of ODOT) constructs a limited access highway that intersects with a county road, bridges, underpasses, approaches, and grade separations are “appurtenances” to the highway and are included in the state highway system). Because the bridge is part of the state highway, ODOT is required pursuant to R.C. 5501.11(A)(1) to maintain the appurtenances or objects that are necessary accessories to the bridge. *See* R.C. 5501.31; R.C. 5511.02-.03; R.C. 5535.07; R.C. 5535.08(A); 2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507; *see also* 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32. Therefore, when ODOT constructs a bridge outside of a municipal corporation to carry a county or township road over a state highway, ODOT is responsible pursuant to R.C. 5501.11(A)(1) for nonemergency maintenance of approaches and embankments that are part of the bridge structure.

### **Maintenance of Safety Devices on a Bridge Structure that Is Part of the State Highway System**

Your question also concerns nonemergency maintenance of safety devices that are part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county or

township road over a state highway.<sup>5</sup> ODOT has a general duty to maintain state highways in a reasonably safe condition. See R.C. 5501.11(A)(1); R.C. 5511.02-.03; R.C. 5535.07; R.C. 5535.08(A); *White v. ODOT*, 56 Ohio St. 3d 39, 42, 564 N.E.2d 462 (1990); *Imburgia v. ODOT*, 114 Ohio Misc. 2d 38, 41, 759 N.E.2d 482 (Ct. Claims 1999); *Steele v. ODOT*, 162 Ohio App. 3d 30, 2005-Ohio-3276, 832 N.E.2d 764, at ¶8 (Franklin County 2005). This duty includes a requirement that ODOT place or erect safety devices on a state highway to protect the traveling public from foreseeable danger or harm. See *White v. ODOT*, 56 Ohio St. 3d at 42 (recognizing that ODOT must “exercise ‘ordinary, reasonable care’ in maintaining” state roads and highways); *Imburgia v. ODOT*, 114 Ohio Misc. 2d at 41 (“[a]lthough the state is not an insurer of the safety of its highways, once it becomes aware of a dangerous condition on the highway, it is required to take the reasonable care that is necessary to ensure that the traveling public is protected from injury”); *Steele v. ODOT*, 162 Ohio App. 3d at ¶8 (“[a]lthough ODOT is not an insurer of the safety of its highways, ODOT owed appellants a duty of care, which was to maintain its highways in a reasonably safe condition for the motoring public”); 1959 Op. Att’y Gen. No. 858, p. 569 (syllabus, paragraph 1) (the State Highway Department (now ODOT) is authorized by R.C. 4511.10 “to place and maintain traffic control devices on all state highways, for the purpose of guiding, warning and regulating traffic”).

As explained previously, ODOT is required pursuant to R.C. 5501.11(A)(1) to maintain the appurtenances or objects that are necessary accessories to a bridge structure constructed by ODOT outside of a municipal corporation to carry a county or township road over a state highway. Pursuant to R.C. 5501.01(C), “signalization” is included as an “appurtenance” to a state highway. “Signalization” of a state highway is the act of equipping the highway with signs to guide, warn, or regulate traffic. See *Merriam-Webster’s Collegiate Dictionary* 1159 (11th ed. 2005) (defining “signalization” as “to place traffic signals at or on”). Thus, a traffic safety sign that serves to guide, warn, or regulate the public traveling on a state highway located outside of a municipal corporation, including a sign on a bridge that is part of such a state highway, is within the meaning of the term “signalization,” as used in R.C. 5501.01(C), and is an appurtenance to the state highway that ODOT is required to maintain pursuant to R.C. 5501.11(A)(1).

In addition, the Ohio Supreme Court and the Attorney General have determined that a traffic control device, guardrail, or other object that promotes safety on a state highway is an appurtenance or object that is a necessary accessory to the state highway. See *Fankhauser v. City of Mansfield*, 19 Ohio St. 2d 102, 109, 249 N.E.2d 789 (1969) (“[t]raffic control signals, in this day of swift travel by high powered vehicles, are as necessary to orderly travel in urban areas as the surface of the road itself. Perhaps, in the past, traffic signals were of less importance than now, but they are now as much a part of our streets and highways as median strips, safety islands, or guard rails”); *State ex rel. Walter v. Vogel*, 169 Ohio St. 368, 372, 159 N.E.2d 892 (1959) (“[i]t is for safety reasons generally that the ‘road’ or ‘highway’ of today may include such features as banked curves, lines permitting or

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<sup>5</sup> For the purpose of this opinion, the term “safety devices” includes, but is not limited to, guardrails, traffic control devices, and other apparatuses placed or erected by ODOT as part of a bridge structure to protect persons from danger or harm.

forbidding passing, lines marking the center and edges of the road, mowed and shrubbed parkways between opposing traffic lanes, lights, which are not ‘traffic lights or signals,’ at particularly dangerous intersections, and many other incidental and appurtenant features which contribute to safety in the operation of motor vehicles on such highways”); 1960 Op. Att’y Gen. No. 1841, p. 667, at 670 (“a ‘guardrail’ may logically be considered an ‘appurtenance’ of a highway”); *see also Mech. Contractors Ass’n of Cincinnati v. State of Ohio*, 64 Ohio St. 2d 192, 198, 414 N.E.2d 418 (1980) (Holmes, J., dissenting) (“[b]ecause of their contribution to the safety of highway travel, I would find that the [roadside rest area] facilities in question are appurtenances within the meaning of R.C. 5501.01(C)”); 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraph 2) (“guard rails in dangerous places are necessary to render the public roads and highways reasonably safe for travel and are an integral part of the roads and highways”). *See generally Slyder v. Bd. of County Comm’rs of Preble County*, 133 Ohio St. 146, 148-49, 12 N.E.2d 407 (1938) (syllabus, paragraph 1) (guardrails are intended to serve both as a warning and a barrier); *Harrigan v. Bd. of Comm’rs of Lawrence County*, 13 Ohio App. 408, 411, 31 Ohio C.C. (n.s.) 449 (Lawrence County 1919) (“the principal purpose[] of guard rails is to warn drivers of the exact point of danger so that they may know where to drive to avoid it, just as a light-house warns of the danger near it”).

For these reasons, R.C. 5501.11(A)(1) requires ODOT to maintain a traffic control device, guardrail, or other safety device on a state highway located outside of a municipal corporation, including a safety device on a bridge that is part of such a state highway. *See* R.C. 4511.10 (ODOT “may place and maintain traffic control devices, conforming to its manual and specifications, upon all state highways as are necessary to indicate and to carry out [R.C. 4511.01-.78 and R.C. 4511.99], or to regulate, warn, or guide traffic. No local authority shall place or maintain any traffic control device upon any highway under the jurisdiction of [ODOT] except by permission of the director of transportation”);<sup>6</sup> 1960 Op. Att’y Gen. No. 1841, p. 667 (syllabus, paragraph 1) (when, pursuant to R.C. 5511.02, the director of highways (now director of ODOT) constructs a limited access highway that intersects with a county road, “guardrails constructed at the intersection, within the highway right-of-way, are included in the state highway system”); *see also* 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraph 2) (“the Department of Highways and Public Works [(now ODOT)] may expend funds appropriated for the construction or maintenance and repair of state roads for the purpose of paying the whole or a part of the cost of erecting and maintaining guard rails at dangerous places. Such authority is necessarily to be implied from [G.C. 1178 (now R.C. 5501.11)] and related sections of the General Code”).

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<sup>6</sup> As used in R.C. Chapters 4511 and 4513, the term “traffic control devices” means “all flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic, including signs denoting names of streets and highways.” R.C. 4511.01(QQ).

### **County Maintenance of Guardrails on a Bridge Structure that Is Part of the State Highway System**

We have determined that, pursuant to R.C. 5501.11(A)(1), ODOT is required to maintain a guardrail on a bridge structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway. We must consider whether R.C. 5591.36 imposes a similar duty upon a board of county commissioners. R.C. 5591.36 provides:

The board of county commissioners shall erect and maintain on county roads, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high.<sup>7</sup> The board also shall protect, by guardrails, all embankments with a rise of more than eight feet in height and with a downward slope of greater than seventy degrees, where the embankments have an immediate connection with a county road. (Footnote added.)

More than 84 years ago the Attorney General and one Ohio court determined that “[t]he duty enjoined on county commissioners to erect and maintain guard rails at the places specified and in accordance with the provisions of [G.C. 7563 (now R.C. 5591.36)] was not removed by the passage of the State Highway law (105-106 v. 623—[G.C. 1178 (now R.C. 5501.11)] and related sections) or any later amendment thereto.” 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraph 3); *accord Harrigan v. Bd. of Comm’rs of Lawrence County*; 1928 Op. Att’y Gen. No. 2940, vol. IV, p. 2713 (syllabus); 1928 Op. Att’y Gen. No. 2155, vol. II, p. 1250 (syllabus). On the basis of this determination, it could be asserted that, when ODOT constructs a bridge outside of a municipal corporation to carry a county road over a state highway, the board of county commissioners is, along with ODOT, responsible for nonemergency maintenance of a guardrail on an embankment that is part of the bridge structure. *See* 1928 Op. Att’y Gen. No. 2940, vol. IV, p. 2713, at 2715; 1928 Op. Att’y Gen. No. 2155, vol. II, p. 1250 (syllabus); 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraphs 3 and 4).

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<sup>7</sup> R.C. 5591.36 requires a board of county commissioners to “erect and maintain on county roads, where not already done, one or more guardrails on each end of a county bridge, viaduct, or culvert more than five feet high.” Insofar as your question concerns a bridge that is part of the state highway system, rather than a county bridge, this provision of R.C. 5591.36 has no application to your particular question. *See* 1940 Op. Att’y Gen. No. 2368, vol. I, p. 527 (syllabus, paragraph 1) (“[t]he duty of a board of county commissioners to erect and maintain guard rails at bridges and bridge approaches is limited to county bridges and approaches thereto and then only under the conditions set forth in [G.C. 7563 (now R.C. 5591.36)]”); 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraph 4) (“[i]t is not the legal duty of county commissioners to erect and maintain guard rails at all fills, dangerous curves, and other points of danger on inter-county highways or at all approaches to bridges, but only at the places specified in [G.C. 7563 (now R.C. 5591.36)], not located in a municipality receiving a part of the bridge fund”); *see also* 2006 Op. Att’y Gen. No. 2006-051 at 2-503 through 2-506 (a bridge structure that is constructed by ODOT to carry a county or township road across a state highway is part of the state highway system).

However, amendments in the intervening years to the statutes governing the maintenance of county roads and state highways indicate that a county and ODOT do not each have a duty to maintain a guardrail on an embankment that is part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway. In 1945, the General Assembly enacted the following language in G.C. 1178 (now R.C. 5501.11): “The word ‘road’ or ‘highway,’ when used in this act shall be deemed to include bridges, viaducts, grade separations, appurtenances and approaches on or to such road or highway.” 1945-1946 Ohio Laws 455, 457 (Am. S.B. 204, filed July 12, 1945). Thus, in 1945, pursuant to G.C. 1178 (now R.C. 5501.11), ODOT became responsible for the maintenance of a guardrail or other appurtenance on an embankment that is part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway.

In 1953, the language used to define the words “road” or “highway” was moved, unchanged, from G.C. 1178 (now R.C. 5501.11) to R.C. 5501.01. See 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953) (to recodify the entire General Code as the Revised Code) (setting forth R.C. 5501.01 on page 3 of Title LV (roads-highways-bridges) of the 1953 Revised Code). To this day, R.C. 5501.01 makes appurtenances to a road or highway a part of the road or highway on which they are located. Further, when R.C. 5501.01 is read in conjunction with R.C. 5501.11, in its prior and present iterations, guardrails and other appurtenances to a state highway are a part of the state highway, and ODOT must maintain those guardrails and other appurtenances.<sup>8</sup> See 2006 Op. Att’y Gen. No. 2006-051 at 2-489 through 2-507; 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32; see also *Estate of Marlee Grace Morgan v. ODOT*, 2010-Ohio-5969, at ¶11.

The legislative history of R.C. 5591.36 also demonstrates that a county does not have a duty under that statute to maintain a guardrail on an embankment that is part of the state highway system. In 1929, the General Assembly amended G.C. 7563 (now R.C. 5591.36) to read as follows:

[A board of county commissioners] shall also protect, by suitable guard rails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, *other than state highways*, or are adjacent thereto, in an unprotected condition, but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality, *and on state highways such guard rails shall be erected and maintained by the department of state highways* [(now ODOT)].

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<sup>8</sup> The first syllabus paragraph of 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 states that “[t]here is no legal duty placed upon the Department of Highways and Public Works [(now ODOT)] to erect and maintain guard rails at either fills, dangerous curves and other dangerous places on inter-county highways and main market roads, or at approaches to bridges.” To the extent that R.C. 5501.11(A)(1) now requires ODOT to maintain a guardrail that is part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county or township road over a state highway, we overrule the first syllabus paragraph of 1927 Op. Att’y Gen. No. 461, vol. I, p. 765.

1929 Ohio Laws 67, 67 (Am. S.B. 135, filed Apr. 13, 1929).

While R.C. 5591.36 has been amended several times since 1929, the General Assembly has not in these amendments expressed an understanding that a county has a duty under R.C. 5591.36 to maintain a guardrail on a bridge or embankment that is part of the state highway system. *See generally* 1940 Op. Att’y Gen. No. 2368, vol. I, p. 527 (syllabus, paragraph 2) (“[b]y the express provisions of [G.C. 7563 (now R.C. 5591.36)], a board of county commissioners is required to protect by suitable guard rails all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, other than state highways, or are adjacent thereto, in an unprotected condition”). To the contrary, the amendments clarify that a county’s duty to maintain a guardrail on an embankment is contingent upon the embankment being a part of the county system of roads and highways. *See, e.g.*, 2001-2002 Ohio Laws, Part II, 3500, 3523-24 (Am. Sub. S.B. 106, eff. April 9, 2003) (deleting the term “public highway” from R.C. 5591.36 and inserting the term “county road”).

Moreover, as demonstrated above, in 1945, the General Assembly transferred from a county to ODOT the duty to maintain a guardrail or other appurtenance on an embankment that is part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway. *See* R.C. 5501.01(C); R.C. 5501.11(A)(1). Accordingly, in light of the legislative history of R.C. 5501.01, R.C. 5501.11, and R.C. 5591.36, it follows that R.C. 5591.36 applies only to guardrails on embankments that are part of the county system of roads and highways.

As explained in 2006 Op. Att’y Gen. No. 2006-051 at 2-489 and 2-507, when ODOT constructs a bridge outside of a municipal corporation to carry a county road over a state highway, the bridge and other appurtenances to the state highway are part of the state highway system, not the county system of roads and highways. *See* R.C. 5501.01(C); R.C. 5501.11(A)(1); *see also* 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32. And, except for the wearing surface of the county road, which is part of the county system of roads and highways, ODOT, rather than the county, is responsible for maintaining the bridge and all appurtenances thereto. *See* 2006 Op. Att’y Gen. No. 2006-051 at 2-489 and 2-507; 1960 Op. Att’y Gen. No. 1841, p. 667, at 668-70; 1958 Op. Att’y Gen. No. 1605, p. 29, at 30-32.

In other words, the bridge and other appurtenances are conjoined or associated with the state highway, rather than the county road that passes over the bridge. *See* R.C. 5501.01(C); R.C. 5501.11(A)(1). The bridge and other appurtenances, including the approaches and embankments of the bridge structure, thus are not part of the county road that passes over the bridge. For this reason, an embankment that is part of a bridge structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway does not have an immediate connection with a county road for purposes of R.C. 5591.36. *See generally* R.C. 5541.02 (“[n]o state or intercounty highway or part of it shall be included in the system of county highways”). Therefore, a county does not have a duty under R.C. 5591.36 to maintain a guardrail on an embankment that is part of a bridge

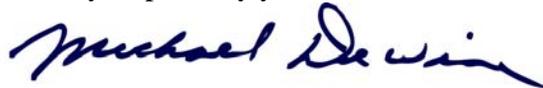
structure constructed by ODOT outside of a municipal corporation to carry a county road over a state highway.<sup>9</sup>

### Conclusions

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. When the Ohio Department of Transportation constructs a bridge outside of a municipal corporation to carry a county or township road over a state highway, the Ohio Department of Transportation is responsible pursuant to R.C. 5501.11(A)(1) for nonemergency maintenance of approaches, embankments, and safety devices that are part of the bridge structure. (2006 Op. Att’y Gen. No. 2006-051, approved and followed; 1927 Op. Att’y Gen. No. 461, vol. I, p. 765, syllabus, paragraph 1, overruled.)
2. A county does not have a duty under R.C. 5591.36 to maintain a guardrail on an embankment that is part of a bridge structure constructed by the Ohio Department of Transportation outside of a municipal corporation to carry a county road over a state highway. (1928 Op. Att’y Gen. No. 2940, vol. IV, p. 2713; 1928 Op. Att’y Gen. No. 2155, vol. II, p. 1250; and 1927 Op. Att’y Gen. No. 461, vol. I, p. 765, syllabus, paragraphs 3 and 4, overruled, in part, on the basis of statutory amendments.)

Very respectfully yours,



MICHAEL DEWINE  
Ohio Attorney General

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<sup>9</sup> Previously the Attorney General concluded that a county has a duty under R.C. 5591.36 to maintain in certain situations a guardrail on an embankment that is part of a state highway. *See* 1928 Op. Att’y Gen. No. 2940, vol. IV, p. 2713, at 2715; 1928 Op. Att’y Gen. No. 2155, vol. II, p. 1250 (syllabus); 1927 Op. Att’y Gen. No. 461, vol. I, p. 765 (syllabus, paragraphs 3 and 4). In light of the legislative history of R.C. 5501.01, R.C. 5501.11, and R.C. 5591.36 set forth above, we overrule these earlier opinions, to the extent that they are inconsistent with this opinion, on the basis of statutory amendments.