

1371

PRIMARY DUTY FOR REPAIR AND MAINTENANCE OF A
CULVERT AT INTERSECTION OF STATE HIGHWAY AND
TOWNSHIP HIGHWAY—§§5501.02, 5517.02, 5525.19, R.C.

SYLLABUS:

Pursuant to the provisions of Sections 5501.02, 5517.02 and 5525.19, Revised Code, the primary duty for repair and maintenance of a culvert located within the right-of-way of a state highway, at the intersection of such highway with a township highway, such culvert being necessary for the free flow of water in a drainage ditch running parallel to the state highway, rests upon the department of highways and should be paid for as provided in Section 5525.19, Revised Code.

Columbus, Ohio, May 23, 1960

Hon. John S. Ballard, Prosecuting Attorney
Summit County, Akron, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“In a township of this County, there is a state highway which is intersected at right angles by a township highway. A highway ditch runs parallel to the state highway within the right-of-way lines, and at the intersection of the township and state highways this drainage ditch crosses the township highway by means of a culvert which is also within the right-of-way lines of the state highway.

“Although it is understood that the township or county *may* maintain this culvert, our question is which political body, township, county or state, has the primary financial *duty* of repairing and maintaining this culvert?”

Section 5543.12, Revised Code, provides in part:

“The county engineer or anyone acting under his authority, when authorized by the board of county commissioners or board of township trustees, may enter immediately:

“(A) Upon any lands adjacent to any of the highways in the county for the purpose of opening an existing ditch or drain, or for digging a new ditch or drain for the free passage of water for the drainage of highways.

“* * *”

It is clear that pursuant to Section 5543.12, *supra*, the board of county commissioners or the board of township trustees may authorize the county engineer to enter upon any land for the purpose of opening

an existing ditch or drain, or for digging a new ditch or drain for free passage of water for drainage of highways. The use of the words "any land" and of the plural "highways" with which the sentence of quoted subsection (A) ends, indicates that such authority may be exercised by either the board of county commissioners on any highway within the county, or a board of township trustees on a highway in the township.

I note that it is stated in your letter that the drainage ditch, which is running parallel to the state highway, crosses the intersecting township highway by means of a culvert. Section 5501.02, Revised Code, states in part:

"The functions of the department of highways shall be:

"(A) To establish state highways on existing roads, streets, and new locations and to construct, reconstruct, widen, resurface, maintain, and *repair* the state system of highways and the *bridges and culverts thereon*;

"* * *

"(D) To co-operate with the counties, municipal corporations, townships, and other subdivisions of the state in the establishment, construction, reconstruction, maintenance, *repair*, and improvement of the public roads and *bridges*." (Emphasis added)

It is to be noted that subsection (A) of this section of the Code apparently places upon the state highway department, among other things, the duty to repair bridges and culverts on state highways, but with respect to the duty of the state highway department to cooperate with counties, municipal corporations, townships and other subdivisions of the state, subsection (D) when speaking of repair, mentions bridges but is silent in regard to culverts. It would appear, therefore, that the duty of repairing culverts on highways constituting the state system of highways rests upon the department of highways.

Such conclusion is fortified by the provisions of Section 5511.01, Revised Code, wherein the state highway system is defined as "all state highways established by law," and it is stated in the eighth paragraph of such section:

"No duty of constructing, reconstructing, maintaining, and *repairing* such state highways *within municipal corporations* shall attach to or rest upon the director; but he may enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair the

same provided the municipal corporation first consents thereto by resolution of its legislative authority.* * *

(Emphasis added)

While the repairing of culverts on state highways within municipal corporations is not included in the cited section, it is noteworthy that no other subdivision of the state is mentioned therein.

Section 5517.02, Revised Code, contains the provisions with regard to estimates and contracts and the circumstances under which the director of highways may proceed under a force account. In this connection "culverts" are expressly mentioned, first, in the provision for proceeding by contract, and also in the provision relative to performance of work on bridges or "culverts" by force account in case the estimated cost is less than six thousand dollars.

In Section 5517.03, Revised Code, provision is made for the closing of state highways to traffic in connection with maintenance and repair, whereby the director of highways is given the exclusive authority of determining "whether such improvement will require the closing to traffic of the highway, bridge or *culvert* involved and, if found by him necessary to close the same to traffic, the extent to which the same shall be closed." The word "culvert" is found repeatedly in the same section in connection with other provisions contained therein.

Section 5525.19, Revised Code, provides in part:

"The cost and expense of the establishment, construction, reconstruction, improvement, maintenance, and repair of a highway under Chapters 5501., 5503., 5505., 5511., 5513., 5515., 5517., 5519., 5521., 5523., 5525., 5527., 5529., 5531., and 5533., of the Revised Code, shall be paid by the treasurer of the state upon the warrant of the auditor of state. * * *" (Emphasis added)

Therefore, in answer to your specific question, I am of the opinion and you are advised that pursuant to the provisions of Sections 5501.02, 5517.02 and 5525.19, Revised Code, the primary duty for repair and maintenance of a culvert located within the right-of-way of a state highway, at the intersection of such highway with a township highway, such culvert being necessary for the free flow of water in a drainage ditch running parallel to the state highway, rests upon the department of highways and should be paid for as provided in Section 5525.19, Revised Code.

Respectfully,

MARK McELROY
Attorney General