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HIGHWAYS—COUNTY COMMISSIONERS AND DEPARTMENT OF HIGHWAYS MAY AGREE THAT DEPARTMENT ASSUME MAINTENANCE OF BRIDGE OR STRUCTURE CARRYING COUNTY ROAD OVER A FREEWAY—§5501.11 R.C.—AUTHORITY OF EACH PARTY—PRIMARY OBLIGATIONS, §§5501.02(D), 5501.11 R.C.

SYLLABUS:

1. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of a bridge or a structure carrying a county road or a city street within a municipality over a limited access highway or freeway.
2. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of bridges on state highways within municipalities.
3. Section 5501.02 (D) and Section 5501.11, Revised Code, authorize the Department of Highways of the State of Ohio to enter into an agreement with a Board of County Commissioners to maintain bridges or structures on the state highway system, although the primary obligation of maintenance is imposed upon the county.

Columbus, Ohio, January 27, 1958

Hon. John T. Corrigan, Prosecuting Attorney
Cuyahoga County, Cleveland, Ohio

Dear Sir:

Your request for my opinion reads, in part, as follows:

“The Ohio Department of Highways has submitted a proposed resolution to be adopted by the Board of County Com-

missioners of Cuyahoga County relating to the construction of a freeway known as State Route No. 1, wherein it is provided that:

Department of Highways agrees to assume all costs and responsibility for the maintenance of the structural features, including the painting, of all structures and bridges on State Route No. 1 in Cuyahoga County, including the local crossroad bridges constructed across State Route No. 1.

We accordingly submit for your consideration and written opinion the following questions:

1. Can the State of Ohio, by agreement, assume the maintenance of a bridge carrying a county road, which is *not* a state highway, over S.R. 1, which *is* a state highway? The bridges in question will be built by the State, at no cost to the County, in connection with the construction of S.R. 1.

2. Can the Department of Highways of the State of Ohio, by agreement, take over the maintenance of bridges on state highways within municipalities and thereby relieve the county of any obligations it may have for such maintenance?

3. Will the agreement as described in the resolution to be adopted by the Board of County Commissioners . . . and as suggested by the State Highway Department, be legally and permanently binding on the Department of Highways?

State Route No. 1 will be constructed as a fully controlled access highway. There will be no intersections at grade, the county roads and city streets will go over or under State Route No. 1 by means of a bridge or structure. Therefore, it becomes necessary to first determine whether these bridges or structures carrying county highways or city streets over or under a fully controlled access highway are part of the state highway system under the jurisdiction of the Director of Highways.

The first paragraph of Section 5511.02, Revised Code, grants the Director of Highways the authority as to limited access highways and freeways as follows:

“The Director of Highways may lay out, establish, acquire, open, *construct*, improve, maintain, regulate, vacate, or abandon “limited access highways” or “freeways” in the same manner in which the director may lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate, or abandon *highways*. The director, board, or municipal authority shall have all additional authority relative to such “limited access highways” or “freeways” as he possesses relative to highways, including the authority to acquire by gift, purchase, condemnation, or otherwise land acquired for right of way.” (Emphasis added)

It will be noted that the above quoted paragraph grants the Director of Highways the power to construct and maintain limited access highways or freeways in the same manner in which the Director may construct and maintain highways.

The authority of the Director to construct and maintain highways is found in Section 5501.11, Revised Code, as follows:

“The director of highways shall have general supervision of all roads comprising the state highway system. He may alter, widen, straighten, realign, relocate, establish, *construct*, reconstruct, improve, *maintain*, repair and *preserve any road or highway on the state highway system* and in connection therewith, relocate, alter, widen, deepen, clean out, or straighten the channel of any water course as he deems necessary, and purchase or appropriate the right to make waste dumps or borrow pits, and, where an established road has been relocated, establish, construct, and maintain such connecting roads between the old and new locations as will provide reasonable access thereto.” (Emphasis added)

Sections 5511.02 and 5501.11, Revised Code, as quoted above, do not mention specially the words “bridge” or “grade separations” in stating the Director’s power to construct and maintain. However, the word “highways” or “road” as mentioned in these sections include “bridge” or “grade separations.”

Section 5501.01, Revised Code, defines the words “road” or “highway” as used in the Highway Act as follows:

“road” or “highway” when used in Chapters 5501., 5503., 5505., 5511., 5513., 5515., 5517., 5519., 5521., 5523., 5525., 5527., 5529., 5531., and 5533., of the Revised Code includes *bridges*, viaducts, *grade separations* appurtenances, and approaches on or to such road or highway.” (Emphasis added)

The 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 and is incident to the construction of a freeway improvement.

In the case of *Kekic v. Linzell*, 73 Ohio Law Abs., 412, the plaintiff sought to enjoin the Director of Highways from appropriating property for a detour of a city street. The detour was to serve the traffic of the city street which was closed during the period the Director of Highways

was constructing a bridge to carry the city street over a fully controlled limited access highway. Plaintiff contended that since the city street was not a state highway, the state could not exercise eminent domain over property needed for the detour during the constructing of such a bridge. The Common Pleas Court of Cuyahoga County held that the bridge which would carry the city street over the fully controlled access highway was incident to the construction of a limited access highway or freeway. This case was appealed to the Court of Appeals of Cuyahoga and affirmed adopting the Common Pleas Court's decision. The motion to certify the case to the Supreme Court of Ohio was overruled.

Therefore, the Director of Highways has the authority to construct and maintain bridges or structures carrying county highways or city streets over or under all limited access highway or freeway. Further, said bridges or structures are incident to the construction of a limited access highway or freeway and are part of the state highway system.

Although these bridges or structures are part of the state highway system, they also may be part of the county highway system if it is a county road on the bridge or structure over the limited access highway or freeway or part of a city system of streets if it is a city street on the bridge or structure.

Section 5591.21, Revised Code, imposes the primary obligation on the Board of County Commissioners to maintain a bridge; as follows:

“The board of county commissioners shall construct and keep in repair necessary bridges over streams and public canals on or connecting state, county, and improved roads, except only such bridges as are wholly in municipal corporations having by law the right to demand, and do demand and receive, part of the bridge fund levied upon property therein.”

If the bridge on the state highway system carries a city street and is within the limits of a municipal corporation, the primary obligation to maintain is upon the county. It was stated in the second paragraph of the syllabus, Opinion No. 471, Opinions of the Attorney General for 1951, p. 213:

“2. A county primarily is obligated to keep in repair necessary bridges over streams and public canals on or connecting state and county roads within the limits of municipal corporations.”

It was stated at page 213 of the opinion:

“While the director may cooperate in the maintenance and repair of such bridges, the initiation of such work is ‘within his’ sole discretion and is subject to the consent of the council or other legislative authority of the municipality in which such bridge is located.”

Section 5501.02 (D), Revised Code, sets forth one of the functions of the department of highways to be:

“(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.”

The last paragraph of Section 5501.11, Revised Code, states that no duty attaches to the Director to maintain bridges within municipal corporations, but the Director may maintain the same with or without the cooperation of any municipal corporation or board of county commissioners. It is so stated as follows:

“Except in the case of maintaining, repairing, or centerline painting of state highways within villages, which shall be mandatory as required by Section 5521.01 of the Revised Code, no duty of constructing, reconstructing, widening, resurfacing, maintaining, or repairing state highways within municipal corporations, or the bridges and culverts thereon, shall attach to or rest upon the director, but he may construct, reconstruct, widen, resurface, maintain, and repair the same *with or without the co-operation of boards of county commissioners upon each municipal corporation consenting thereto.*” (Emphasis added)

In specific answer to your questions, you are advised as follows:

1. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of a bridge or a structure carrying a county road or a city street within a municipality over a limited access highway or freeway.

2. The Department of Highways of the State of Ohio by authority of Section 5501.11, Revised Code, may enter into an agreement with a Board of County Commissioners to assume the maintenance of bridges on state highways within municipalities.

3. Section 5501.02 (D) and Section 5501.11, Revised Code, authorize the Department of Highways of the State of Ohio to enter into an agreement with a Board of County Commissioners to maintain bridges or structures on the state highway system, although the primary obligation of maintenance is imposed upon the county.

Respectfully,

WILLIAM SAXBE

Attorney General