

7399

1. HIGHWAY CONSTRUCTION PROGRAM — SUBMITTED BY DIRECTOR OF HIGHWAYS TO HIGHWAY CONSTRUCTION COUNCIL—COUNCIL CONSIDERS PROJECTS TO BE FINANCED FROM HIGHWAY CONSTRUCTION AND BOND RETIREMENT FUND—LIMIT OF COUNCIL'S ACTION — STATE'S SHARE OF COST DETERMINED BY DIRECTOR OF HIGHWAYS — SECTIONS 5512.04 AND 5512.03 R. C.
2. EXPENDITURES FROM HIGHWAY CONSTRUCTION AND BOND RETIREMENT FUND—WRITTEN APPROVAL OF HIGHWAY CONSTRUCTION COUNCIL REQUIRED — PROJECT DESIGNATED AND EXPENDITURE APPROVED BY COUNCIL—PAYMENTS OF ESTIMATED AMOUNTS MAY BE MADE—EXPENDITURES IN EXCESS OF ESTIMATES REQUIRE WRITTEN APPROVAL OF COUNCIL—SECTIONS 5512.04 AND 5728.17 R. C.
3. HIGHWAY CONSTRUCTION COUNCIL — FUNCTION—REVIEW RECOMMENDATIONS OF DIRECTOR OF HIGHWAYS—APPROVE AND SUBMIT TO GENERAL ASSEMBLY AFTER APPROVAL BY GOVERNOR—GENERAL ASSEMBLY—AUTHORIZES, BY APPROPRIATION, EXPENDITURE OF FUNDS—MAJOR THOROUGHFARE CONSTRUCTION FUND—HIGHWAY CONSTRUCTION COUNCIL—NO AUTHORITY TO CONTROL EXPENDITURES, SECTION 5512.05, 5512.03, 5528.07 R. C.

4. APPROPRIATIONS — MAJOR THOROUGHFARE CONSTRUCTION FUND—CONSTRUCTION AND ACQUISITION OF RIGHTS OF WAY PROJECTS—NOT LIMITED BY AM. H. B. NO. 516, 101ST G. A. OR ELSEWHERE IN STATUTES TO ESTIMATE OF STATE'S SHARE IN PROGRAM—SUBMITTED BY DIRECTOR OF HIGHWAYS—NO AUTHORITY TO AWARD CONTRACT—COST UNREASONABLY IN EXCESS OF PRELIMINARY ESTIMATE—SECTION 5512.03 R. C.
5. CONTRACTS—HIGHWAY PROJECTS—HIGHWAY CONSTRUCTION AND BOND RETIREMENT FUND OF MAJOR THOROUGHFARE CONSTRUCTION FUNDS — TOTAL COST LIMITED BY SECTION 5525.10 R. C. TO COST ESTIMATED BY DIRECTOR OF HIGHWAYS—CHAPTER 5517, R. C. PLUS FIVE PERCENT OF ESTIMATED COST — EXCEPT AS PROVIDED IN SECTION 5525.15 R. C.

SYLLABUS:

1. Where the highway construction council acts under the provisions of Section 5512.04, Revised Code, in considering which if any of the construction projects listed in the program submitted to it by the director of highways, as provided in Section 5512.03, Revised Code, shall be designated for financing, as to the state's share of the cost, by expenditures from the highway construction and bond retirement fund, the council's action is limited to (1) designation of particular projects, and (2) approval of expenditures from such fund in the amounts of the estimated cost of the state's share as set out in such program submitted by the director; and the ultimate determination of the state's share of such cost is a matter for determination by the director by negotiation and contract with the participating federal and local authorities.

2. Under the provisions of Section 5512.04 and 5728.17, Revised Code, no expenditures can be made from the highway construction and bond retirement fund without written approval of the highway construction council. When a recommended project is designated by the council for financing from such fund as provided in Section 5512.04, Revised Code, and the expenditure of funds to meet the estimated cost of the state's share thereof is approved as provided in such section, no further approval by the council to make expenditures from such fund as to such project in an amount equal to such estimate is required; but expenditures from such fund, as to a particular project, in excess of such estimate must be further approved in writing by the council.

3. Under the provisions of Section 5512.05, Revised Code, it is the function of the highway construction council to review the recommendations of the director of highways submitted as provided in Section 5512.03, Revised Code, to approve such recommendations or some modification thereof, and to submit them, after approval by the governor, to the General Assembly. The ultimate approval of such contracts, and the authorization, by appropriation, of the expenditure of funds

in connection therewith, is the function of the General Assembly, and the highway construction council is without authority to control expenditures, as to such projects, from the major thoroughfare construction fund, created by Section 5528.07, Revised Code, following the submission of its recommendations to the General Assembly.

4. There is no provision in Amended House Bill No. 516, 101st General Assembly, or elsewhere in the statutes, which would limit the appropriations therein made from the major thoroughfare construction fund for programs and schedules of construction and acquisition of rights of way projects, to amounts equal to or less than the estimates of the state's share of the cost of each as set out in the programs submitted by the director of highways as provided in Section 5512.03, Revised Code. However, where such final estimate of cost, or the contract award cost, of any such project is so unreasonably in excess of such preliminary cost estimate that there is no identity between the project, as originally recommended, and that for which the final estimate is made, the award of a contract therefor by the director of highways is not authorized by law.

5. In awarding contracts for the construction of highway projects to be financed from the highway construction and bond retirement fund or from the major thoroughfare construction funds, the provisions of Section 5525.10, Revised Code, are applicable so as to limit the total cost thereof to the cost as estimated by the director of highways under the provisions of Chapter 5517., Revised Code, plus five per cent of such estimated cost, except as otherwise provided in Section 5525.15, Revised Code.

Columbus, Ohio, November 19, 1956

Hon. Frank J. Lausche, Governor of Ohio
Columbus, Ohio

Dear Governor Lausche:

Your request for my opinion raises the following questions:

"1. Under Sections 5512.04, does the Highway Construction Council have the duty and the power to determine what the state's share of the cost of any major thoroughfare project shall be?

"2. After the Highway Construction Council, as provided in Section 5512.04, has approved a project, does it have any further authority and control over it in (a) those instances where the state's share of the cost, because of the influx of Federal money, is less than that originally contemplated and (b) in those instances where the state's share of the cost is greater than the original contemplation because of a change in the formula adopted by the department?

"3. What is the legal effect of the language next to the asterisk on the first page of the document known as 'approval No. II' to which reference is made in Amend. H. B. No. 516?

"4. What is the legal situation in instances when the total cost of the project exceeds by 10% the original estimated cost but while at the same time the amount of bond money needed in the project is reduced because of the availability of other funds.

It may be helpful at the outset to observe that the Highway Construction Council is concerned with the approval of highway construction contracts in two different situations, i.e., (1) those in which it is proposed to finance the state's share of the cost by expenditures from the "highway construction and bond retirement fund," created by the terms of Section 5728.17, Revised Code, and (2) those in which it is proposed that the state's share of the cost be met by expenditures from the proceeds of the sale of major thoroughfare construction bonds issued as provided in Chapter 5528., Revised Code, and paid into the "major thoroughfare construction fund," as provided in Section 5528.07, Revised Code.

A general program for the construction of major thoroughfares and urban extensions thereof is submitted biennially by the director of highways to the council as provided in Section 5512.03, Revised Code. This section reads:

"Prior to the first day of December in each even numbered year the director of highways shall submit to the highway construction council a highway construction program containing recommendations for construction of highways on the major thoroughfares and urban extensions thereof in the state highway system. Such program shall contain:

"(A) Brief description of each project;

"(B) Estimated total cost of each project;

"(C) Estimated amount of funds, other than state funds available to defray the total cost of each project;

"(D) The priority for construction for each project."

We may note that in submitting this program no mention is made, with respect to any listed project, that the state's share of the cost is to be met from any designated source, or more precisely, that it is to be met from either of the two sources mentioned above.

The function of the council in acting on the program thus submitted is stated in Sections 5512.04 and 5512.05, Revised Code, as follows:

Section 5512.04:

"The highway construction council shall review the program for the construction of highways submitted to it by the director of highways.

“Within thirty days after the receipt of such highway construction program the council shall designate the projects to be financed from moneys to the credit of the highway construction and bond retirement fund and approve the expenditure of such money from the fund to pay the state’s share of the cost of such projects.

“The council shall notify the director of highways in writing of such designation and approval of expenditures and upon receipt thereof, the director of highways shall be authorized to encumber an amount sufficient to pay the state’s share of such project out of moneys to the credit of the state highway construction and bond retirement fund.

“The state’s share of the cost of such project shall be paid out of moneys credited to the state highway construction and bond retirement fund created pursuant to the provisions of section 17 (RC sec. 5728.17) of this act. Any moneys accruing from the provisions of this act, during the present biennium, are hereby appropriated for the purposes for which they were levied and collected under this act.”

Section 5512.05:

“The highway construction council shall review the recommendations of the director of highways submitted to it pursuant to section 5512.03 of the Revised Code.

“Within sixty days after the receipt of such recommendations the council shall approve such recommendations or some modification thereof and shall submit them within ten days after approval to the governor and a copy thereof shall be filed with the clerk of the senate and the clerk of the house of representatives. The governor shall, within ten days after acting upon the recommendations, notify the clerk of the senate and the clerk of the house of representatives of such action. Such recommendations when concurred in by the governor shall be submitted by the highway construction council, within ten days after such concurrence, to the general assembly and shall be the programs or schedules of acquisition of rights of way, highway construction, and reconstruction for which moneys derived from the sale of bonds issued pursuant to section 5528.01 of the Revised Code, may be appropriated.”

Here it will be seen that one of the principal functions of the council is to designate (1) those projects in which the state’s share of the cost is to be met by expenditures from the highway construction and bond retirement fund, and (2) those in which it is recommended to the governor and to the general assembly that the state’s share of the cost be met by expenditures of bond proceeds money, i.e., from the major thoroughfare construction fund.

As to expenditures from the highway construction and bond retirement fund, we may here note the following provision in Section 5728.17, Revised Code:

“No expenditures shall be made from the state highway construction and bond retirement fund, created by this section, without the written approval of the state highway construction council.”

This approval is mentioned also in Section 5512.04, *supra*, and by the terms of that section the council is required, upon receipt of the director's program, not only to designate the projects in which the state's share is to be met from the highway construction and bond retirement fund but also to “approve the expenditures of such money from the fund to pay the state's share.” Both such actions must be taken within thirty days of the receipt of the program. Thereafter, the director is authorized “to encumber an amount sufficient to pay the state's share” from this fund. Such funds have, of course, been appropriated in the current biennium for this purpose. See House Bill 929, 101st General Assembly, p. 147. Accordingly, to the extent that the state's share of the cost of such projects, thus approved for financing from the highway construction and bond retirement fund, can be met within the cost estimates listed in the director's program submitted as provided in Section 5512.03, *supra*, the council's designation and approval, accomplished within the thirty day period noted above, would appear to end the matter so far as that agency is concerned with the approval of expenditures from this source.

Coming now to your first specific question you ask whether the council may determine under the provisions of Section 5512.04, Revised Code, what the state's share of the cost of any major thoroughfare project is to be.

Nowhere in the statute relating to the highway construction council do I find any provision for a determination, or the approval of a determination, by the council of a division of costs as between (1) the state and (2) the federal government and local subdivisions of the state. The director of highways, of course, is given authority in clear terms to negotiate agreements as to such cost division on behalf of the state with such other participating agencies. See Sections 9.20, 5501.02, 5501.011, 5531.02 and 5531.04, Revised Code.

It is to be noted, however, that Section 5512.03, Revised Code, provides for the director's program, as submitted to the council, to include (1) the estimated total cost of each project, and (2) the estimated amounts available, from sources other than state funds, to meet such total cost; and thus that program is sufficient to apprise the council of the director's estimate of the state's share as to each project.

Accordingly within the statutory thirty day period of council consideration, as provided in Section 5512.04, Revised Code, it is clear that the council might take such estimated division into consideration in reaching a decision (1) to withhold approval for any purpose, (2) to approve for financing from the highway construction and bond retirement fund, or (3) to recommend for approval by the Governor and the General Assembly for financing from the main thoroughfare construction fund. However, in view of the plain language of Sections 5512.04 and 5512.05, Revised Code, it would appear that when the council has made a determination to proceed with either the second or third alternative above, it has exhausted its powers with respect to a particular project. Certainly this would be true of those projects recommended for financing as provided in Section 5512.05, Revised Code, and as to these projects approved for financing as provided in Section 5512.04, Revised Code, to the extent that actual cost of the state's share does not exceed the estimates thereof as approved for expenditure coincident with the approval of the project as provided in Section 5512.04, Revised Code.

Accordingly, your first specific question must be answered in the negative.

Coming now to your second question, it is clear from what has been said above that where a share of the cost of a project, approved by the council as provided in Section 5512.04, Revised Code, is assumed by the federal government in an amount greater than anticipated by the program submitted to the council as provided in Section 5512.03, Revised Code, and the state's share is reduced below the amount therein estimated, the council is without any further authority or control over that project; and the first part of this question must be answered in the negative.

As to the second part of this question, where the actual amount of the state's share of the cost of a project, for any reason, exceeds the amount approved by the council and encumbered by the director, both as provided in Section 5512.04, Revised Code, it would appear to be necessary to secure

the council's approval of the added expenditure, this by reason of the "approval provisions" already pointed out in that section and in Section 5728.17, Revised Code.

Before going on to your third question I may point out here, for purposes of emphasis, that your second question, and my discussion of it, relates solely to projects approved by the council as provided in Section 5512.04, Revised Code, and not to projects recommended by the council for approval as provided in Section 5512.05, Revised Code.

Coming now to your third question, we may note the following provision in Section 2 of Amended House Bill No. 516 (126 Ohio Laws 871, 872):

"There is hereby appropriated to the department of highways out of money in the state treasury to the credit of the major thoroughfare construction fund, created by section 5528.07 of the Revised Code, not otherwise appropriated, the sum of \$216,372,000 for the purpose of paying the state's share of the cost of programs or schedules of acquisitions of rights of way and highway construction and reconstruction on major thoroughfares on the state highway system and urban extensions thereof as set forth in approval No. II of the state highway construction council's report concurred in by the governor and submitted to the 101st General Assembly on February 9, 1955, pursuant to the provisions of section 5512.05 of the Revised Code and in accordance with section 2, Article VIII of the constitution. If, due to circumstances beyond the control of the director of highways, one or more projects set forth in said approval No. II cannot be completed or contracted for prior to June 30, 1957, the funds hereby appropriated for such projects, together with funds which may become available as the result of contracts let below their estimated cost, or as the result of increased federal matching funds, may be used for such additional projects as are listed as approved by the state highway construction council in table I of said report and not completed or contracted for as of July 1, 1955, and to pay additional cost which may be incurred as a result of modifications approved by the state highway construction council of projects set forth in approval No. II, and other programs or schedules or partial programs or schedules of acquisition of rights of way and highway construction and reconstruction on major thoroughfares of the state highway system which are recommended by the director of highways and approved by the state highway construction council with the concurrence of the governor and transmitted by the state highway construction council to the clerk of the Senate and the clerk of the House of Representatives and by them transmitted to the members of the General Assembly."

The language on page 1 of approval No. II, thus referred to, and mentioned in your inquiry, appears as a footnote as related to the figures appearing in the two columns in which there is set out following each project the estimated (1) cost from bonds, and (2) total cost, of each such project. This language is as follows :

“The cost figures are not a part of the official approval. The amounts represent estimates based on current information. It is agreed between the Department of Highways and the State Highway Construction Council that any project with a final estimated cost exceeding the amounts shown herein by more than ten per cent will be subject to further approval by the State Highway Construction Council.”

By referring to Section 5512.05, Revised Code, it will be seen that the council's action thereunder is limited to approval of “such recommendations or some modification thereof.” The expression “such recommendations” clearly refers to the director's “recommendations for construction of highways on the major thoroughfares and urban extensions thereof,” made to the council as provided in Section 5512.03, Revised Code. Although the program thus submitted contains the director's cost estimates as to each project involved, it is nevertheless the project itself that is approved rather than the expenditure of funds in the amounts thus estimated. The final approval of such projects rests with the General Assembly, as does the authorization, set out by an actual appropriation in Amended House Bill No. 519, supra, to expend the funds necessary therefor, the precise amount necessary as to each project being obviously not capable of ascertainment until a contract is actually awarded to a bidder.

On this point, Section 5528.07, Revised Code, provides :

“* * * Moneys to the credit of the major thoroughfare construction fund may be expended, when appropriated by the general assembly, to meet the requirements of programs or schedules of acquisition of rights of way, highway construction, and reconstruction, which the state highway construction council with the concurrence of the governor shall submit to the general assembly, on major thoroughfares on the state highway system as denominated pursuant to section 5512.02 of the Revised Code and urban extensions thereof.”

In Amended House Bill No. 519, supra, there is found an appropriation of \$216,372,000 “for the purpose of paying the state's share of the cost of programs or schedules of acquisition of rights of way and highway con-

struction * * * as set out in approval No. II of the state highway council's report * * *." Quite clearly the estimate of the cost of the state's share as to each project is a part of the "programs" thus approved by the council and it is the cost estimates in these amounts which the General Assembly had before it when it made the appropriation.

However, there is nothing in Amended House Bill No. 519, *supra*, indicative of an intent to make the appropriation therein available, as to each project, only in the precise amount of such estimates. The estimates included in the programs processed as provided in Section 5512.05, Revised Code, are necessarily preliminary in nature, and actual cost estimates are made after a particular project is given further study, as provided in Chapter 5517., Revised Code, as to construction projects generally. These actual cost estimates can be exceeded by five per cent in the awarding of a contract as provided in Section 5525.10, Revised Code, but even this limitation is not applicable in cases where the director elects to keep his estimate confidential. See Section 5525.15, Revised Code.

Bearing in mind, therefore, that what the council has recommended and the General Assembly has approved, is a program of *projects*, and this on the basis of *preliminary* cost estimates, it becomes necessary to conclude that there is no legal requirement that contract awards by the director be limited to those cases where the award is equal to or less than the amount of such preliminary estimates. We may conclude, also, that the general provisions of Sections 5525.10 and 5525.15, Revised Code, are applicable to those cases where the bid is in excess of the actual estimate made as provided in Chapter 5517., Revised Code.

There must, however, in any such case be an identity of projects as between (1) those which the council has recommended and the General Assembly has approved, and (2) those for which the director awards a contract. There must obviously be a point at which the cost of the latter will so greatly exceed the preliminary estimate of the cost of the former that the two are not identical. Whether this has occurred in a specific case is a question which is very largely one of fact, and hence one with regard to which no definite rule of law can be stated. The most I can say is that the award cost must not unreasonably exceed the amount of the preliminary estimate which was the basis of the council's action as provided in Section 5512.05, Revised Code.

From all that has been said above with regard to your third question it becomes clear that the council's attempted limitation on its approval of

the projects set out in approval No. II is without any legal effect or significance.

As to your fourth question, much that has been said above is applicable here also. In this case, also, the sole question presented is that of identity of the project recommended by the council and that for which a construction contract award is made, and, as I have indicated, that is a fact question which would be resolved by considering whether the actual contract award cost is so unreasonably in excess of such original estimate that identity of the projects is lost. The circumstance that the state's actual share of the cost in such case is reduced to or below the original estimate thereof, due to increased federal or local participation, is a matter of no moment.

Accordingly, in specific answer to your inquiry, it is my opinion that :

1. Where the highway construction council acts under the provisions of Section 5512.04, Revised Code, in considering which if any of the construction projects listed in the program submitted to it by the director of highways, as provided in Section 5512.03, Revised Code, shall be designated for financing, as to the state's share of the cost, by expenditures from the highway construction and bond retirement fund, the council's action is limited to (1) designation of particular projects, and (2) approval of expenditures from such fund in the amounts of the estimated cost of the state's share as set out in such program submitted by the director; and the ultimate determination of the state's share of such cost is a matter for determination by the director by negotiation and contract with the participating federal and local authorities.

2. Under the provisions of Sections 5512.04 and 5728.17, Revised Code, no expenditures can be made from the highway construction and bond retirement fund without written approval of the highway construction council. When a recommended project is designated by the council for financing from such fund as provided in Section 5512.04, Revised Code, and the expenditure of funds to meet the estimated cost of the state's share thereof is approved as provided in such section, no further approval by the council to make expenditures from such fund as to such project in an amount equal to such estimate is required; but expenditures from such fund, as to a particular project, in excess of such estimate must be further approved in writing by the council.

3. Under the provisions of Section 5512.05, Revised Code, it is the function of the highway construction council to review the recommendations

of the director of highways submitted as provided in Section 5512.03, Revised Code, to approve such recommendations or some modification thereof, and to submit them, after approval by the governor, to the General Assembly. The ultimate approval of such contracts, and the authorization, by appropriation, of the expenditure of funds in connection therewith, is the function of the General Assembly, and the highway construction council is without authority to control expenditures, as to such projects, from the major thoroughfare construction fund, created by Section 5528.07, Revised Code, following the submission of its recommendations to the General Assembly.

4. There is no provision in Amended House Bill No. 516, 101st General Assembly, or elsewhere in the statutes, which would limit the appropriations therein made from the major thoroughfare construction fund for programs and schedules of construction and acquisition of rights of way projects, to amounts equal to or less than the estimates of the state's share of the cost of each as set out in the programs submitted by the director of highways as provided in Section 5512.03, Revised Code. However, where such final estimate of cost, or the contract award cost, of any such project is so unreasonably in excess of such preliminary cost estimate that there is no identity between the project, as originally recommended, and that for which the final estimate is made, the award of a contract therefor by the director of highways is not authorized by law.

5. In awarding contracts for the construction of highway projects to be financed from the highway construction and bond retirement fund or from the major thoroughfare construction funds, the provisions of Section 5525.10, Revised Code, are applicable so as to limit the total cost thereof to the cost as estimated by the director of highways under the provisions of Chapter 5517., Revised Code, plus five per cent of such estimated cost, except as otherwise provided in Section 5525.15, Revised Code.

Respectfully,

C. WILLIAM O'NEILL
Attorney General