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HIGHWAY — WHEN PORTION IMPROVED, PART OF STATE HIGHWAY SYSTEM LOCATED WITHIN LIMITS OF MUNICIPALITY AND DIRECTOR DETERMINES CERTAIN DESIGNATED PROPERTY OF A PUBLIC UTILITY OBSTRUCTS OR INTERFERES WITH RECONSTRUCTION OR USE OF HIGHWAY THE DIRECTOR MAY REQUIRE THE PUBLIC UTILITY TO REMOVE OR RELOCATE AT ITS OWN EXPENSE SUCH PROPERTY — SECTION 1199 G.C. AUTHORIZES THE DIRECTOR TO PROCEED AT EXPENSE OF OWNER IF FAILURE TO COMPLY WITH ORDER — HOW COST PAID.

SYLLABUS:

1. *When in the improvement of a portion of a highway, which is a part of the state highway system located within the limits of a municipality, the Director of Highways determines that lines, pipes, mains, conduits or other objects or structures of a public utility located within the limits of such highway, by virtue of a franchise, license or otherwise, constitute obstructions to or interfere with the reconstruction of such highway or will interfere with the use of such highway when reconstructed, he may direct the owner of such utility property to remove or relocate the same at its own expense and if such direction is not complied with he may, as authorized by Section 1199, General Code, remove or relocate such property at the expense of such owner.*

2. *When in connection with the improvement of a state highway it becomes necessary to relocate or remove utility property located within the highway, the cost of such removal or relocation may not be paid by the Director of Highways, as a part of the construction cost of the highway, from moneys appropriated to the Highway Department, except to the extent authorized by Section 1199, General Code.*

Columbus, Ohio, May 8, 1941.

Hon. H. G. Sours, Director, Department of Highways,
Columbus, Ohio.

Dear Sir:

I am in receipt of your request for my opinion, which reads as follows:

“The Department of Highways, in the construction, reconstruction, maintenance and repair of the state highway system, both inside and outside of municipal corporations, is confronted with the problem of rearrangement of utility lines such as water, gas, electrical, steam, communication and signal, and the normal appurtenances thereto, and which are owned or operated by municipalities, private companies, counties, townships, individuals, firms and partnerships.

There has never been any question in the mind of the Department that in those cases where such utilities, either inside or outside of municipal corporations, and regardless of ownership, occupy a prior easement, and such easement is required for the improvement of a state highway, or in the interest of safety to the traveling public, the cost of rearranging such utility lines is a proper charge incident to the acquisition of a release of such prior easement.

It has been our understanding, however, that the owner of any such utility occupying a state highway, street, alley or other public way inside a municipal corporation, or a state highway outside thereof, is obligated to assume the cost of any rearrangement work made necessary by the improvement of the highway or to assure safety to the traveling public.

Accordingly, it is requested that we be formally advised upon the following questions:

1. Whether or not, regardless of ownership, the owner or operator of such utility lines and appurtenances thereto which occupy state highways, streets, alleys or other public ways inside of municipal corporations are required to make all necessary rearrangements at their own expense, in order to conform to highway improvements, or in the interest of safety to the traveling public.

2. Whether or not, regardless of ownership, the owner or operator of such utility lines and appurtenances thereto which occupy state highways, outside of municipal corporations are required to make all necessary rearrangements at their own expense, in order to conform to highway improvements, or in the interest of safety to the traveling public.”

It should be remembered that the Department of Highways of the State of Ohio is a department or agency created by statute, and being such, can have and exercise only such powers as have been granted to it

by the statutes creating it. Its functions are set forth in Section 1178, General Code, as follows:

“The functions of the department of highways shall be constructing, reconstructing, widening, resurfacing, maintaining and repairing *the state system of highways* and the bridges and culverts thereon, cooperating with the federal government in the construction, reconstruction, improvement, maintaining and repairing of post roads and other roads designated by the federal authorities and cooperating with the counties, townships, villages and other subdivisions of the state in the construction, reconstruction, improvement, maintaining, and repairing of the public roads and bridges of the state; and the enforcement of the laws of the state relating to the registration and licensing of motor vehicles, the laws relating to their use and operation on the highways, and all laws for the protection of the highways. * * *

The term “the state highway system” is defined in Section 1189, General Code, as follows:

“The state highways heretofore established by law shall, after the taking effect of this act, continue to be known as state highways and the system of state highways heretofore established by law shall, after the taking effect of this act, continue to be known as the state highway system.

In addition to the state highways heretofore established under authority of law, the director shall have authority to designate additional state highways or change existing state highways after notice and hearings as hereinafter provided. * * *

The state highway routes into or through municipal corporations, as the same are now designated or indicated by state highway route markers erected thereon, or as the same may hereafter be designated or indicated as provided herein, are hereby declared to be state highways and a part of the state highway system. Any routes of the state highway system into or through municipal corporations not now designated by the erection of state highway route markers thereon shall be so designated prior to the first Monday of January, 1930. The director of highways shall be authorized to make any changes which he may think proper in the present routes of the state highway system into or through municipal corporations without notice, provided such changes are made prior to the first Monday of January, 1930. The director is hereby authorized to erect state highway route markers and such other signs directing traffic as he may think proper upon those portions of the state highway system lying within municipal corporations, and the consent of such municipal corporations to such erection and marking shall not be necessary. Subsequent to the first Monday of January, 1930, no change in the route of any state highway

through a municipal corporation shall be made except after notice and hearing as hereinbefore provided. No duty of constructing, reconstructing, maintaining and repairing such state highways within municipal corporations shall attach to or rest upon the director of highways; but such director shall be authorized to enter upon such state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain and repair the same, in such manner as may be provided by law, provided the municipal corporation first consents thereto by resolution of its council or other legislative body. The director shall place in the files of the department a record of the routes of all such state highways within municipal corporations, and shall from time to time cause the same to be corrected and revised to show all changes and additions to the date of such correction, and a copy of such record or any pertinent part thereof certified by the director to be a true and correct copy shall be admissible in evidence in any court of the state for the purpose of proving the existence and location of any state highway within a municipal corporation.

When any road or street into or through a municipality is designated as a state highway, such action shall in no way relieve the county commissioners of their obligations for the construction or maintenance of bridges as set forth in General Code section 7557."

Section 1198, General Code, grants to the Department of Highways the power to grant consents to persons, firms or corporations to occupy a portion of the public road or highway when such occupation "will not incommode the traveling public." In Section 1199, General Code, the legislature has further provided, with reference to such occupancy, that:

"It shall be the duty of all individuals, firms and corporations using or occupying any part of a road or highway on the state highway system, or the bridges or culverts thereon, with telegraph or telephone lines, steam, electrical or industrial railways, oil, gas, water or other pipes, mains, conduits, or any object or structure, other than by virtue of a franchise or permit legally granted and in force and effect, to remove from the bounds of such road or highway, bridge or culvert, their poles and wires connected therewith, and any and all tracks, switches, spurs, or oil, gas, water, or other pipes, mains, conduits, or other objects or structures, when the same in the opinion of the director constitute obstructions in such roads, or highways, or the bridges and culverts thereon, or interfere or may interfere with the contemplated construction, reconstruction, improvement, maintenance or repair of such roads or highways, or the bridges and culverts thereon, or interfere or may interfere with the use of such roads or highways, or the bridges and culverts thereon, by the traveling public.

It shall be the duty of all individuals, firms, or corporations

so occupying any road or highway on the state highway system, or the bridges or culverts thereon, under and by virtue of a franchise or permit legally granted and in force and effect, to relocate their properties and all parts thereof within the bounds of such road or highway, bridge or culvert when the same in the opinion of the director constitute obstructions in any such road or highway, bridge or culvert, or interfere with, or may interfere with the contemplated construction, reconstruction, improvement, maintenance or repair of such road or highway, bridge or culvert, or interfere with, or may interfere with the use of such road or highway, or bridge or culvert, which relocation within the bounds of such road or highway, or bridge or culvert, shall be in the manner and to the extent prescribed by the director.

If, in the opinion of the director, such individuals, firms or corporations have obstructed any road or highway on the state highway system, or the bridges or culverts thereon, or if any of their properties are, in his opinion, so located that they do or may interfere, with the contemplated construction, reconstruction, improvement, maintenance or repair of such road or highway, or bridge or culvert, or, if, in his opinion, they interfere with, or may interfere with the use of such road or highway, or bridge or culvert, by the traveling public, said director shall notify such individual, firm or corporation directing the removal of such obstruction or properties, or the relocation of such properties, as the case may be, and, if such individual, firm or corporation shall not within five days from the service of such notice proceed to remove or relocate the same and complete the removal or relocation of the same within a reasonable time, the director may remove or relocate the same by employing the necessary labor, tools and equipment. The costs and expense thereof shall, in the first instance, be paid by the director out of any appropriation of the department of highways available for the construction, reconstruction, improvement, maintenance or repair of highways, and the amount thereof shall be certified to the attorney general for collection by civil action. Said notice shall be served by the sheriff in the manner as summons in civil actions."

In Section 1189-2, General Code, the legislature has made additional provisions with reference to the improvement of that part of the state highway system which lies within the geographic limits of a municipality.

Such section reads, in part, as follows:

"The director may at his discretion construct, reconstruct, improve, widen, maintain or repair any section of state highway within the limits of a municipal corporation, and also the bridges and culverts thereon, and pay the entire cost and expense thereof from state funds; but he shall first obtain the consent of the

council or other legislative authority of such municipal corporation. Any such municipal corporation may cooperate with the director in such construction, reconstruction, improvement, widening, maintenance or repair, and may pay such portion of the cost of such work as may be agreed upon between the municipality and the director. The council or other legislative authority of any municipal corporation, desiring to co-operate as herein provided, may by resolution propose such cooperation to the director, and a copy of such resolution, which resolution shall set forth the proportion of the cost and expense to be contributed by the municipality, shall be filed with the director. The director shall thereupon cause to be prepared the necessary surveys, plans, profiles, cross-sections, estimates and specifications for such work, and copies thereof shall be filed by him with the council or other legislative authority of the municipality. After the council or other legislative authority has approved such surveys, plans, profiles, cross-sections, estimates and specifications, and after the municipality has provided the funds necessary to meet the portion of the cost of the work assumed by it, the municipality shall enter into a contract with the state of Ohio providing for the payment by such municipality of the agreed portion of the cost. The form of such contract shall be prescribed by the attorney general and all such contracts shall be submitted to the attorney general and approved by him before the director shall be authorized to advertise for bids. * * *

From the foregoing statutory provisions it would appear that the State Highway Department is only empowered to improve highways when they are a part of the state highway system. It may, however, cooperate with boards of county commissioners and township trustees with reference to county and township highways to the extent authorized by statute. As you will have observed from that part of Section 1189, General Code, above quoted, the Director of Highways has "no duty of constructing, reconstructing, maintaining and repairing such state highways within municipal corporations." Such section, however, does grant to the state director the right to make such improvements as provided by law when the municipal corporations within which the portion of the state highway exists "first consents thereto by resolution of its council or other legislative body."

For the purposes of this opinion I am assuming that such consent has been duly given by the municipalities for the reconstruction of the highway. If such assumption be correct, then we must refer to other provisions of statute in order to determine the meaning of the phrase "as may be provided by law," as contained in the 8th paragraph of Section 1189, General Code. I believe that it may be fair to assume that the

utility lines and appurtenances referred to in your inquiry were placed in, upon or under the highway "under and by virtue of a franchise or permit legally granted"; if so, then the specific language of section 1199, General Code, is to the effect that "it shall be the duty of all individuals, firms or corporations so occupying any road or highway on the state highway system, * * * to relocate their properties and all parts thereof within the bounds of such road or highway * * * when the same in the opinion of the director * * * interfere with, or may interfere with the contemplated construction, reconstruction * * * of such road or highway * * * or interfere with the use of such road or highway, * * * which relocation within the bounds of such road or highway, * * * shall be in the manner and to the extent prescribed by the director." If, however, such assumption be incorrect, similar requirements are made in the preceding paragraph of such section with respect to such property upon, under or over a highway without a franchise. Such section definitely indicates that the cost of such relocation of property shall be borne by the owner of the utility property, for in the last paragraph of such section it is provided that if the property is not removed or relocated by the owner within five days after receipt of notice from the director so to do, he may remove or relocate the same; that "the costs and expense thereof shall, in the first instance, be paid by the director out of any appropriation of the department of highways available for the construction * * * of highways, and the amount thereof certified to the attorney general for collection by civil action."

While the General Assembly has not enumerated the items which make up or constitute "cost of construction" of a highway, it would seem to me that it has, in Section 1199, General Code, evinced its intent that the cost of removing or relocating public utility property within the confines of a highway shall not constitute a part of such cost. In the construction of statutes the cardinal rule is to determine and give effect to the legislative intent as expressed in the enactment. Since the General Assembly has, in its enactments, clearly indicated its intent that the cost of relocating public utility lines within the confines of a highway is to be paid by the owner of such public utility property, I am of the opinion that such cost may not be borne by the Highway Department as a part of construction.

In your inquiry you indicate that there may be cases where a utility is the owner of an easement over lands being acquired by the Highway

Department for highway purposes, by virtue of which it has thereon constructed utility lines which must be removed or relocated in order to proceed with the contemplated improvement. You state that there has never been in the mind of the Highway Department any question concerning the cost of such relocation or removal in view of such expressed statement. I have herein given no consideration to such question and express no opinion thereon.

Specifically answering your inquiries, it is my opinion that:

1. When in the improvement of a portion of a highway, which is a part of the state highway system, located within the limits of a municipality, the Director of Highways determines that lines, pipes, mains, conduits or other objects or structures of a public utility located within the limits of such highway, by virtue of a franchise, license or otherwise, constitute obstructions to or interfere with the reconstruction of such highway or will interfere with the use of such highway when reconstructed, he may direct the owner of such utility property to remove or relocate the same at its own expense and if such direction is not complied with he may, as authorized by Section 1199, General Code, remove or relocate such property at the expense of such owner.

2. When in connection with the improvement of a state highway it becomes necessary to relocate or remove utility property located within the highway, the cost of such removal or relocation may not be paid by the Director of Highways, as a part of the construction cost of the highway, from moneys appropriated to the Highway Department, except to the extent authorized by Section 1199, General Code.

Respectfully,

THOMAS J. HERBERT,

Attorney General.