

Note from the Attorney General's Office:

1960 Op. Att'y Gen. No. 60-1841 was overruled in part by
2006 Op. Att'y Gen. No. 2006-051.

1841

LIMITED ACCESS HIGHWAY—INTERSECTS WITH A COUNTY ROAD, BRIDGES, UNDERPASSES, APPROACHES AND GUARDRAILS WITHIN HIGHWAY RIGHT-OF-WAY, ARE INCLUDED IN STATE HIGHWAY SYSTEM AND SHOULD BE MAINTAINED BY STATE DEPARTMENT OF HIGHWAYS—§§5511.02, 5501.01, 5591.21., R. C.

SYLLABUS:

1. Where pursuant to Section 5511.02, Revised Code, the director of highways constructs a limited access highway which intersects with a county road, bridges, underpasses, approaches and guardrails constructed at the intersection, within the highway right-of-way, are included in the state highway system and are not a part of the county highway system.

2. Since under Section 5501.01, Revised Code, such bridges, underpasses, approaches and guardrails are included as part of the state highway, they should be maintained by the state department of highways which, under Section 5535.08, Revised Code, has the duty of maintaining all state roads.

3. Section 5591.21, Revised Code, requiring the board of county commissioners to keep in repair necessary bridges *over streams and public canals* does not apply to a bridge erected by the department of highways to carry a county road over a state limited access highway, said bridge being located within the right-of-way of the state highway.

Columbus, Ohio, November 22, 1960

Hon. George Cleveland Smythe, Prosecuting Attorney
Delaware County, Delaware, Ohio

Dear Sir:

I have before me your request for my opinion which reads:

“On county roads intersected by the Freeway either bridges or underpasses have been built in order to cross the Freeway.

"In each case we understand that sufficient right of way has been taken by the State to cover the entire approaches thereto.

"After these bridges, underpasses, approaches and guardrails are built by the State will they be a part of the County highway system?

"What will be the power or duties of the County Commissioners with respect to the acceptance thereof, maintenance and repair?

"Does the fact that these are entirely in the Freeway right of way have any significance?"

As I understand it, the "Freeway" to which you refer is the limited access highway known as Ohio Route No. 1 and also as Interstate Highway No. 71, and extending in a generally north-south direction. For convenience, I will hereafter refer to this highway as the "freeway."

Under the facts, the bridges, underpasses, approaches and guardrails, to which you refer, are constructed by the state on land within the right-of-way acquired by the state.

Section 5535.02, Revised Code, contains a definition of a "limited access highway" or "freeway", reading as follows:

"A 'limited access highway' or 'freeway' is a road, highway, or street, especially designated for through traffic, over which abutters have no easement or right of access by reason of the fact that their property abuts upon such highway. Access may be allowed only at highway intersections designated by the director of highways, board of county commissioners, or municipal authorities on roads within their jurisdiction, so as to eliminate cross traffic of vehicles."

The authority of the director of highways with regard to such highways is found in Section 511.02, Revised Code, reading:

"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 required for right of way.

“Where an existing highway, in whole or part, has been designated as, or included within, a ‘limited access highway’ or ‘freeway,’ existing easements of access may be extinguished by purchase, gift, agreement, or by condemnation.

“As an adjunct of any ‘limited access highway’ or ‘freeway’ the director, board, or municipal authority may lay out and construct highways and drives, to be designated as service highways, to provide access from areas adjacent to a limited access highway or freeway.

“A ‘limited access highway’ or ‘freeway’ is 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.

“Limitations imposed on the mileage of state highways shall not apply to highways established under this section.”

The director is granted similar authority by Section 5535.03, Revised Code.

It appears, therefore, that the director is authorized to maintain a freeway in the same manner in which he may maintain highways. In this regard, it will be noted that under Section 5535.08, Revised Code, the “state, county, and township shall each maintain its roads as designated in Section 5535.01 of the Revised Code.” Section 5535.01, provides 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. Such roads shall be maintained by the board of county commissioners.

“(C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of county commissioners may assist the board of township trustees in maintaining all such roads. This section does not prevent the board of township trustees from improving any road within its township.”

Significant in the instant question are the provisions of Section 5501.01, Revised Code, reading 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.”

Under the above provisions, bridges and approaches are specifically mentioned as being part of the highway. Also, while the section does not directly refer to “underpasses” and “guardrails,” I believe that the words “grade separations” would include “underpasses” and that a “guardrail” may logically be considered an “appurtenance” of a highway. It follows, therefore, that when the director of highways constructs a freeway under Section 5511.02, *supra*, bridges, underpasses, approaches and guardrails on or to such freeway are a part of the freeway.

In the case of *Hawks v. Board of County Commissioners of Adams County*, 35 Ohio App., 247 (1929), the court considered the question of damages where a personal injury was allegedly caused by a defective condition of a bridge. In deciding on the question of control of the bridge, the court held in the fourth headnote:

“Road, if taken over by state as whole, would include bridge which is part of road (Section 7464, General Code 106 Ohio Laws, 648).”

In view of the foregoing I conclude: (1) the freeway is a state highway which the director of highways is required to maintain; (2) the bridges, underpasses, approaches and guardrails were constructed by the director as a part of, and within the right-of-way, the freeway, and constitute a part of the state highway system; (3) the director of highways has the same duty to maintain such bridges, underpasses, etc., as he has to maintain the remainder of the freeway; and (4) the board of county commissioners has no duty or power to accept such bridges, underpasses, etc., as a county road, nor to maintain the same.

I am aware that your request refers to “maintenance and repair” and that I have referred to the duty of “maintenance” only. I am of the opinion, however, that the word “maintain” as used in Section 5535.08, Revised Code, includes the word “repair” and do not deem it necessary to treat each separately in this instance. (See *Weihr v. Phillips*, 103 Ohio St., 249).

I am further aware that my conclusions in the instant case may be somewhat in conflict with those reached by my predecessor in Opinion No. 1605, Opinions of the Attorney General for 1958, page 29, in which the syllabus reads:

"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, authorizes 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."

At page 32 of Opinion No. 1605, *supra*, it is stated:

"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 a 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."

I cannot agree with my predecessor that bridges or structures which are part of the state highway system may also be part of a county highway system. Under Section 5535.01, Revised Code, the public highways of the state are divided into three classes: state roads, county roads, and township roads. There is no provision in law for a road to be in two classes.

I must also disagree with the interpretation given to Section 5591.21, Revised Code, by Opinion No. 1605, *supra*. The section quite clearly refers to bridges "over streams and public canals," and, a bridge *over a road* does not fall in this category. Accordingly, Section 5591.21, *supra*, does not require that the board of county commissioners maintain a bridge which carries a road *over a state highway* and which was constructed by the state department of highways for that purpose.

It should be mentioned relative to the question presented by your request that pursuant to Section 315.13, Revised Code, it is the duty of the county engineer to make "all emergency repairs on all roads, bridges, and culverts in the county, including state highways." The section further states that the cost of repairs should be paid out of the "county engineer's emergency repair fund" if moneys have been appropriated by the board of county commissioners for such fund and:

"Necessary repairs, the total cost of which is not more than one thousand dollars, shall be deemed as necessary for emergency repairs."

I am assuming, however, that your request is not concerned with emergency repairs such as contemplated by the section.

In conclusion, it is my opinion and you are advised:

1. Where pursuant to Section 5511.02, Revised Code, the director of highways constructs a limited access highway which intersects with a county road, bridges, underpasses, approaches and guardrails constructed at the intersection, within the highway right-of-way, are included in the state highway system and are not a part of the county highway system.

2. Since under Section 5501.01, Revised Code, such bridges, underpasses, approaches and guardrails are included as part of the state highway, they should be maintained by the state department of highways which, under Section 5535.08, Revised Code, has the duty of maintaining all state roads.

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Respectfully,

MARK McELROY

Attorney General