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1. HIGHWAYS—STATE DEPARTMENT OF—UNDER NO DUTY TO PROVIDE FOR DRAINAGE OF LAND ADJOINING STATE HIGHWAY WITHIN LIMITS OF MUNICIPAL CORPORATION—PROVISO, UNLESS REQUIRED TO DO SO BY COOPERATION CONTRACT—SECTION 5521.05 RC.
2. DRAINAGE—AS COUNTY WIDE PROJECT—WITHIN JURISDICTION OF COUNTY—WHEN RELATING TO CONDITIONS PECULIAR TO MUNICIPALITY, IT IS PROBLEM OF MUNICIPALITY—BEYOND JURISDICTION OF COUNTY AUTHORITIES.
3. CONSTRUCTION AND MAINTENANCE OF CULVERT—UNDER STATE HIGHWAY WITHIN LIMITS OF MUNICIPAL CORPORATION—TO PROVIDE OUTLET FOR SURFACE WATER COLLECTING ON HIGHWAY OR ADJOINING LAND—RESPONSIBILITY OF CITY UNDER NUISANCE PROVISIONS OF SECTION 715.47 RC.

SYLLABUS:

1. Unless required to do so by a cooperation contract under the provisions of Section 5521.05, Revised Code, the state department of highways is under no duty to provide for the drainage of land adjoining a state highway constructed within the limits of a municipal corporation.

2. Drainage as a county wide project is within the jurisdiction of the county even though affecting areas located within the corporate limits of a municipality; but when relating only to conditions peculiar to the municipality it is the problem of the latter, and beyond the jurisdiction of the county authorities.

3. The construction and maintenance of a culvert under a state highway located within the limits of a municipal corporation, in order to provide an outlet for surface water collecting on the highway or on adjoining land, is the responsibility of the city under the nuisance provisions of Section 715.47, Revised Code.

Columbus, Ohio, January 7, 1955

Hon. Morris O. Gibby, Prosecuting Attorney  
Harrison County, Cadiz, Ohio

Dear Sir:

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

“The following question has come up in this office:

“Whose duty is it to maintain or place a drainage ditch underneath a state road within an incorporated municipality—the state highway’s, county’s or municipality’s?”

“The water that goes through the drain is the result of natural surface water.”

Your question is one of drainage and involves the relative or correlative duties of state, county and municipality as an incident of highway construction. The authority and duty to construct and improve highways is in general distributed among the state Department of Highways, board of county commissioners, board of township trustees, and municipal corporations.

Provision is also made for cooperation between state, counties, and municipal authorities. In the case of road improvements constructed by the state highway department in connection with a county and a municipal corporation, Section 5521.02, Revised Code, G. C. 1178-43, provides that the board of county commissioners may cooperate with the director of highways in “establishing, constructing, reconstructing, resurfacing or widening a state highway,” and the board may in such circumstances agree to pay a portion of the cost of such work; and where a portion of the work embraced within such proposal covers an area within the limits of a municipal corporation, such proposal must be accompanied by the con-

sent of the municipality and evidenced by proper legislation of its legislative body. Where such cooperation agreement is provided by Section 5521.05, Revised Code, has been reached upon the basis set forth in the proposal, the board of county commissioners or municipal authority is required to adopt a resolution requesting the director of highways to proceed with the work, and is required to enter into a contract with the state providing for the payment by such county or municipal corporation of the agreed proportion of the cost involved.

It thus clearly appears that the duty of the state, if any, to provide drainage along or through a state highway as a part of an improvement, must necessarily be governed by the provisions of the cooperation agreement among them and the plans and profiles filed in the project, and where not required to do so by such agreement or by statute, the state department of highways is under no duty to provide for the drainage of surface water from adjacent lands.

Even where the state has agreed to assume the maintenance of such improvement the city is not wholly relieved of its responsibility. In the case of *Andrews v. Georgetown*, 34 Ohio App., 79, it was held:

“Under Section 3714, General Code, requiring municipal corporation to keep streets free from nuisance, defendant village was liable for inundation by surface water, although street was constructed and maintained by state highway department, pursuant to Section 1184, General Code, since state’s jurisdiction could be exercised only by consent of village under Section 1193-1, General Code.”

As concerning the powers and duties of the county in matters relating to drainage, we may note certain provisions of the statute. The Single County Ditches Law, Section 6131.02 et seq., Revised Code, G. C. 6443, authorizes the board of county commissioners upon the filing of a petition by any owner of land and upon its finding that the improvement is necessary for controlled drainage of any land, or to prevent the overflow of any land in the county, “to locate, construct, reconstruct, straighten, deepen, widen, box, tile, fill, wall, dam, or arch any ditch, drain, or watercourse.” To give effect to such powers Section 6137.01, Revised Code, provides:

“The board of county commissioners of each county is hereby authorized to establish and maintain a fund within each county for the repair, upkeep, and permanent maintenance of county or joint county ditches constructed for the purpose of drainage  
\* \* \*”

Since municipalities are invariably part of the county, the problem of drainage is necessarily interwoven in the jurisdictions of those respective political entities. Hence, the courts have taken the position that drainage as a county wide project, is within the jurisdiction of the board of county commissioners even where the improvement extends over land situated in a municipality; but where it relates to purely local or municipal needs, it is the problem and responsibility of the municipality. Accordingly, it was held that unless specifically authorized by statute a board of county commissioners is without jurisdiction or authority to locate and construct a county ditch within the corporate limits of a municipality. *Pleasant Hill v. Commissioners*, 71 Ohio St., 133. The court in the latter case followed *Dayton v. Taylor*, 62 Ohio St., 11, where the court said:

“From a consideration and comparison of these several statutory provisions, giving to each full force and effect, we are led to conclude that the manner in which drainage shall be accomplished within a municipal corporation is a matter primarily and peculiarly within the discretion and control of the municipality itself.”

It is different when the improvement is essentially a county project. In *Greek v. Joy*, 81 Ohio St., 315 at 328, it was held that township trustees have jurisdiction to locate and construct a ditch within the township when it commences on farm lands outside the limits of an incorporated village and extends into or through such village to an outlet. Distinguishing the *Pleasant Hill* case *supra*, the court said:

“The ditch under consideration in that case was wholly within the village, and its drainage being amply provided for by the municipal code, action by the commissioners was not necessary to full relief. But proceedings for a township ditch could not be entertained by a village council to drain lands outside of the corporation, such as farm lands in this case.”

Rulings of the Attorney General are of like effect. In Opinion No. 347, Opinions of the Attorney General for 1927, page 595, it was held that county commissioners have jurisdiction to construct and improve ditches lying wholly within the county over the entire course when such ditches in their course pass into or through a municipality. The question submitted, involved a ditch running in the business section of the City of Bellefontaine, the request stating that at the time of high water or big rains considerable damage is done to property in the city, and that the county and city were in dispute as to who had jurisdiction, under Section

6443, General Code, Section 6131.02, R. C. To like effect see Opinion No. 2429, Opinions of the Attorney General for 1925, page 255.

It would appear, therefore, that the only circumstance under which the county might have any obligation to construct or maintain the culvert mentioned in your letter would be in case it formed a part of a ditch improvement constructed by the county. I have already pointed out the provision of Section 6137.01, Revised Code, relative to maintenance and repair of such ditches.

As to the duties and powers of municipalities in matters of drainage, Section 715.41, Revised Code, confers upon municipal corporations the power to drain by artificial means, at the expense of the municipal corporation, any lot or land within such municipal corporation on which water at any time accumulates and becomes stagnant, in a way prejudicial to public health, convenience or welfare by reason of not having a natural drainage outlet or which cannot be drained by natural channels. In case such drainage is beneficial to the owner of any lot or land so drained, such owner shall bear that part of the expense of the drainage in proportion to the benefits which result from the improvement.

Section 715.47, Revised Code, provides:

“A municipal corporation may fill or drain any lot or land within its limits on which water at any time becomes stagnant \* \* \* remove all obstructions from culverts, covered drains, or private property, laid in any natural watercourse, creek, brook, or branch, which obstruct the water naturally flowing therein, causing it to flow back or become stagnant, in a way prejudicial to the health, comfort, or convenience of any of the citizens of the neighborhood. If such culverts or drains are of insufficient capacity, the municipal corporation may make them of such capacity as reasonably to accommodate the flow of such water at all times. \* \* \*.”

Section 727.01, Revised Code, confers upon municipal corporations the further power to assess upon abutting, adjacent and contiguous or other specially benefited lots or lands in the municipal corporation, any part of the cost connected with an improvement by draining and repairing drains, watercourses, watermains, culverts, waterways or drains incidental thereto.

It appears to me that where the statute confers a power to deal with a matter which concerns the public health or welfare, such as an actual

or potential nuisance, there arises, by implication, a duty to exercise that power. In 43 American Jurisprudence, page 76, it is said:

“Powers conferred on public officers are generally construed as mandatory although the language may be permissive, where they are for the benefit of the public or of individuals. It is not necessary for a statute in direct terms to declare the duty of an officer in order to make it an imperative one. The duty may be deduced from the general provisions and scope of the statute, regard being had to the evil intended to be remedied and the object sought to be accomplished. \* \* \*.”

Accordingly, it is my opinion that:

1. Unless required to do so by a cooperation contract under the provisions of Section 5521.05, Revised Code, the state department of highways is under no duty to provide for the drainage of land adjoining a state highway constructed within the limits of a municipal corporation.

2. Drainage as a county wide project is within the jurisdiction of the county even though affecting areas located within the corporate limits of a municipality; but when relating only to conditions peculiar to the municipality it is the problem of the latter, and beyond the jurisdiction of the county authorities.

3. The construction and maintenance of a culvert under a state highway located within the limits of a municipal corporation, in order to provide an outlet for surface water collecting on the highway or on adjoining land, is the responsibility of the city under the nuisance provisions of Section 715.47, Revised Code.

Respectfully,

C. WILLIAM O'NEILL

Attorney General