

3401

COUNTY COMMISSIONERS—NO AUTHORITY TO PURCHASE
 SPRAYING MACHINE AND EQUIPMENT TO SPRAY TREES
 WITHIN COUNTY HIGHWAYS—DUTCH ELM DISEASE.

SYLLABUS:

County commissioners have no authority to purchase a spraying machine and equipment for the spraying of trees within county highways, which trees are infected with Dutch Elm disease.

Columbus, Ohio, July 7, 1948

Hon. William A. Ambrose, Prosecuting Attorney
 Mahoning County, Youngstown, Ohio

Dear Sir:

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

“The County Commissioners have requested that I obtain your opinion, first as to their legal authority to purchase a ‘Spraying Machine and Equipment’ to spray trees within the public highways of the County, infected with, or to prevent ‘Dutch Elm disease’?”

“If the answer to this question is in the affirmative then further questions arise as follows:

“Second: Could various townships in the County make a contribution towards, or participate in, its purchase, and pay, a sum to be established, for the spraying of trees, along township roads?”

“Third: Could the County use such Sprayer, equipment and materials to spray trees owned by private individuals and charge a fixed price therefor, when such trees are adjacent to the highway?”

“Fourth: Could such equipment be used to spray trees not located within or adjacent to the highway, which are privately owned, and receive compensation therefor?”

The general authority of the county commissioners as to county roads is set out in Section 6906, General Code, which provides in part as follows:

“The board of county commissioners of any county shall have power, as hereinafter provided, to construct a public road

by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, altering, straightening, vacating, changing the direction, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by otherwise improving the same, and where an established road has been relocated, to construct and maintain such connecting roads between the old and new locations as will provide reasonable access thereto. * * *

The only provision of this statute which has any bearing on the question you have presented is the phrase "or by otherwise improving the same," which phrase follows the list of specific improvements that the commissioners are authorized to make. While the control of disease in trees along the highways might under some circumstances be an "improvement" of those highways, it seems clear that as used in the statute set out above the phrase in question was intended to refer only to physical improvements of the roadway in addition to the ones specifically enumerated.

Specific reference to trees and shrubs adjacent to highways is made by Sections 7209 and 7210, General Code, dealing with the powers and duties of the county engineer. Those sections provide as follows:

Section 7209, General Code.

"The state highway commissioner may by a permit in writing authorize the owners of property adjoining inter-county highways and main market roads at their own expense to locate and plant trees and shrubs along inter-county highways and main market roads, subject to his approval as to kind, size and location. The county surveyor shall have the same authority on county roads and the township trustees on township roads."

Section 7210, General Code.

"With the consent of the abutting land owner the county surveyor shall have control of all trees and shrubs in the county roads of his county and the township trustees shall have control of all trees and shrubs in the township roads of their township. Provided, however, that the Ohio state agricultural or other proper department may, with the consent of the proper authorities, and abutting land owner take charge of the care of such trees, and such department shall have authority with the consent of the proper authorities of the township, county or state to plant trees along the public highway and such department may use any funds available for the development of forestry in the state

to pay the expense of the planting and care of such trees. The ownership of all trees so planted, shall remain in the public."

Assuming that the commissioners may properly expend county funds for any lawful activity of the county engineer, these sections present a problem of construing the general provision that "the county surveyor shall have control of all trees and shrubs in the county roads of his county." Is such control for all purposes, including control of disease; or is it simply control for purposes of highway improvement and relocation?

In my opinion, the answer to this question is found in Sections 1127 to 1132, General Code, dealing with the control of plant diseases. The pertinent parts of these sections are as follows:

Section 1127, General Code.

"The director of agriculture through the inspector or deputies shall have the authority to inspect any field or farm crop, orchard, fruit or garden plantation, park, cemetery, private premises, public place, and any place or any article whatsoever which might become infested or infected with or serve as a carrier for dangerous or harmful insects or plant diseases. * * *"

Section 1128, General Code.

"The director of agriculture through the inspector and deputies is hereby empowered to investigate outbreaks of dangerous insect or plant disease occurring within the state and to prescribe and enforce such preventive and remedial measures as he may deem necessary to the control or eradication of such outbreaks, and for such purposes shall have free access to any property or premises within the state."

Section 1129, General Code.

"The director of agriculture is hereby empowered to prohibit and prevent the removal or shipment or transportation of nursery stock or any other article of any character whatsoever capable of carrying any injurious or harmful insect pests or plant disease from any private or public property or property held or controlled by the state or any section of the state. * * *"

Section 1130, General Code.

"It shall be unlawful for any person in this state knowingly to permit any destructive or dangerously harmful insect or plant disease to exist in or on his premises. It shall also be unlawful knowingly to sell or offer for sale any nursery stock infested or infected with such insect or disease."

Section 1132, General Code.

“(1) If the inspector or deputy shall find on examination any nursery, greenhouse, field or farm, crop, orchard, small fruit plantation, park, cemetery, or any private or public premises infested or infected with injurious insects or plant disease, he shall notify the owner or person having charge of such premises to that effect, and the owner or person having charge of the premises shall within seven days after such notice cause the removal and destruction of such trees, plants, shrubs or other plant material if they cannot be successfully treated; otherwise he shall cause them to be treated or apply any other preventive or remedial measures for the control or retardment of said injurious insects or plant disease on said premises as the director of agriculture may direct. Likewise, preventive measures shall be required and shall be enforced in the same manner on any such additional premises in the vicinity of the premises where said injurious insect or plant disease was found as seems necessary in accordance with the judgment of the director of agriculture. No damages shall be awarded to the owner for the loss or destruction of infested or infected trees, plants, shrubs, or other plant material, or reimbursement made for expenses incurred incident to the application of said prescribed preventive or remedial measures, under this act. Such infested or infected trees, plants, shrubs, or other plant material shall be deemed to be a public nuisance.

“(2) In case the owner or person in charge of such premises shall refuse or neglect to carry out the orders of the director of agriculture within seven days after receiving written notice, the director of agriculture may proceed to treat or destroy the infested or infected plants or plant material or to apply any other necessary preventive or remedial measure. The expense thereof shall be assessed, collected and enforced, as taxes are assessed, collected and enforced, against the premises upon which such expense was incurred. The amount of such expense when collected shall be paid to the director of agriculture and by him deposited with the state treasurer, for disposition as hereinafter provided.”

I have set out these sections at length for the purpose of showing that the general assembly has outlined a comprehensive plan for the control of plant diseases on a statewide basis under the supervision of the director of agriculture. Under familiar principles of statutory construction, the terms of a specific enactment, rather than general language dealing with the same subject, must be held to set out the intention of the legislative body.

By the specific plan outlined, the general assembly has indicated its intention that the eradication of plant diseases shall be accomplished by the department of agriculture at the expense of the owner of the trees and other plants affected. Nothing in the act contemplates the expenditure of public funds for such disease control. The only exception to this plan is the specific provision in Section 7210, *supra*, that proper departments of the state of Ohio may plant trees along highways and use state funds to pay the expense of their planting and care. The fact that specific authorization was given for this expenditure of state funds, while no mention was made of county funds, strengthens my conclusion that the general assembly did not contemplate that county funds should be extended for planting or care of trees.

It is therefore my opinion that the provisions of Sections 7209 and 7210, General Code, do not attempt to give county engineers power to control plant diseases, and in specific answer to your first question you are advised that county commissioners have no authority to purchase a spraying machine and equipment for the spraying of trees within county highways, which trees are infected with Dutch Elm disease.

Since your other questions presuppose an affirmative answer to your first question, I do not consider it necessary to consider them further.

Respectfully,

HUGH S. JENKINS,
Attorney General.