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CULVERTS—MANDATORY FOR TOWNSHIP TRUSTEES TO REPAIR IF ON TOWNSHIP ROADS—COUNTY COMMISSIONERS HAVE AUTHORITY TO REPAIR SUCH CULVERTS AS THEY DEEM NECESSARY—§§5535.01(C), 5571.02, 5591.21, R.C.

SYLLABUS:

Under the provisions of Sections 5535.01 (C) and 5571.02, Revised Code, it is mandatory for the board of township trustees to keep culverts on township roads in good repair, while under the provisions of Section 5591.21, Revised Code, the board of county commissioners has the authority to repair such culverts on connecting improved township roads as it deems necessary.

August 25, 1959

Hon. Robert C. Carpenter, Prosecuting Attorney
Seneca County, Tiffin, Ohio

Dear Sir:

Your recent letter requesting my opinion reads as follows:

“Under date of June 25, 1959, I received a letter from William H. Heim, Seneca County Engineer, which reads as follows:

“ ‘Dear Sir:

There appeared in the Question and Answer column of the Ohio Township News the following question and answer:

Q. Who is responsible for replacement of culverts on township roads, the County or the Township Trustees?

A. The Township Trustees are responsible for replacing culverts on township roads.

This answer was given by Mr. John Cianflona, Bureau of Inspection and Supervision of Public Offices.

We have, as long as I have been in office, considered culverts across the road in the same classification as bridges and since it is one of the duties of the County Engineer to maintain and construct bridges on the County and Township systems, we considered it our (the County) duty to do just that. Now, however, a new interpretation has been put forward.

I am, therefore, requesting that you get an opinion from the Attorney General, since the construction of culverts is a costly phase of our road work.

Please let me know when you receive the requested information.

Very truly yours,

s/William H. Heim
WILLIAM H. HEIM
Seneca County Engineer

N. B. The question and answer referred to appeared on page 15 of the Ohio Township News, June, 1959.'

"I informed him that in accordance with Opinion No. 1651 of the Attorney General, 1947, it was the dual responsibility of the county and township.

"He then wrote to the Bureau of Inspection and Supervision of Public Offices and we enclose a copy of the reply which he received dated July 2, 1959.

"We accordingly request your formal opinion on this matter."

First, I note that your question speaks of responsibility for "replacing" culverts on township roads, a term not used in the statutes. I take it that what you mean is putting culverts that have deteriorated because of long time use, the impact of natural elements, or both, to the point of becoming possible hazards, in such a condition that their safe use cannot be questioned, or, to use the statutory language: to keep them in good repair. This, then, is the sense in which your inquiry will be discussed.

Your letter indicates that you are familiar with Opinion No. 1651, Opinions of the Attorney General for 1947, page 92, and that you believe that the conclusion reached in that Opinion may be applicable to the problem at hand. The syllabus of said Opinion reads:

"While the statutes confer power and impose duties on Township Trustees to keep in repair all township roads within their respective townships, including bridges thereon, it is also made the duty of the County Commissioners of each county under the provisions of Section 2421, General Code, to keep in repair all necessary bridges over streams and public canals within such county, on all public highways, including township roads."

Section 2421, General Code, mentioned in the syllabus just quoted, is now Section 5591.21, Revised Code, which reads in its pertinent part:

“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. * * *”

(Emphasis added)

Former Section 2421, General Code, reads in part :

“The commissioners shall construct and keep in repair necessary bridges over streams and public canals on or connecting state and county roads, *free turnpikes, improved roads, abandoned turnpikes and plank roads in common public use*, except only such bridges * * *” (Emphasis added)

I note that in the revision the foregoing emphasized words were omitted, apparently because they were considered superfluous as roads of such character have ceased to exist. The section thus remains substantially unchanged. A more important fact to be noted, however, is that, while in the purview of this section the duty of county commissioners as to bridges apparently extends to all public roads within the county, this fact, of itself, does not necessarily offer a solution of the problem at hand unless “bridge” is to be taken as a generic term embracing culverts as well. As we shall see later, this question can be of crucial importance, depending upon the issue involved in a given situation.

I find that culverts are expressly mentioned in Chapter 5549., Revised Code, which deals with the acquisition of machinery and equipment by the boards of county commissioners and the boards of township trustees.

Section 5549.01, Revised Code, in so far as pertinent reads :

“The board of county commissioners may purchase such machinery, tools, or other equipment, including special wearing apparel, for the construction, improvement, maintenance, or repair of the highways, bridges, and *culverts under its jurisdiction* as it deems necessary. * * *” (Emphasis added)

Section 5549.04, Revised Code, provides :

“The board of county commissioners or board of township trustees *may* contract for and purchase such material as is necessary for the purpose of constructing, improving, maintaining, or repairing any highways, bridges, or *culverts* within the county, and may also appropriate additional land necessary for cuts and fills together with a right of way to or from such land for the removal of material. * * *” (Emphasis added)

Section 5549.21, Revised Code, provides in part:

“The board of township trustees *may* purchase or lease such machinery and tools as are necessary for use in constructing, reconstructing, maintaining, and repairing roads and *culverts* within the township, and shall provide suitable places for housing and storing machinery and tools owned by the township. * * *

(Emphasis added)

Broad discretionary authority is granted township trustees in Section 505.26, Revised Code, with respect to providing passage over streams within their respective townships, without expressly mentioning culverts.

That section reads:

“The board of township trustees *may* purchase, appropriate, construct, enlarge, improve, rebuild, repair, furnish, and equip a township hall, a township park, and *bridges and viaducts over streets, streams, railroads, or other places where an overhead roadway or footway is necessary*, and such board may acquire sites for any of such improvements.” (Emphasis added)

Like authority is given to boards of township trustees in Section 505.46, Revised Code, with respect to foot-bridges for the purpose of providing convenient access to the public schools within a township, provided the cost does not exceed a thousand dollars. Township trustees also possess discretionary authority as to the *construction, reconstruction, or improvement of all public roads within their jurisdiction*, pursuant to provisions of Section 5571.01, Revised Code, while *as to the maintenance* of such roads, the duty of township trustees appears to be mandatory and that of county commissioners discretionary only, as provided in Sections 5535.01 and 5571.02, Revised Code.

Section 5571.01, Revised Code, reads in part:

“The board of township trustees *may* construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township. * * *

The pertinent part of Section 5535.01, Revised Code, provides:

“The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.

“ * * *

“(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.” (Emphasis added)

Section 5571.02, Revised Code, provides in part:

“The board of township trustees *shall have control of the township roads of its township and shall keep them in good repair.* The board of township trustees may, with the approval of the board of county commissioners or the director of highways, maintain or repair a county road, or intercounty highway, or state highway within the limits of its township. * * *

Noting the fact that Section 5571.02, Revised Code, was formerly Section 3370, General Code, I invite your attention to *State ex rel. Rogers v. Taylor*, 152 Ohio St., 241, decided in 1949, where the syllabus reads as follows:

“1. Under the provisions of Sections 3370, 3374-2 and 3375, *General Code, township trustees are charged with the duties to repair and drag township roads* and to cut all brush, briars and weeds growing along such public highways.

“2. These provisions are *mandatory.*

“3. The duties enjoined thereby may be commanded by a writ of mandamus.” (Emphasis added)

To the same effect is *Adamson ex rel. v. Wetz*, 69 O.L.A., 281, decided in 1952 by the Court of Appeals of Montgomery County.

In order to determine whether or not the law just cited may have a bearing on the precise problem involved, to-wit: upon whom is the responsibility for the maintenance of culverts on township roads, it becomes necessary, at this point, to retrace my steps and find the answer to the question as to the exact status of culverts in juxtaposition with bridges.

Section 5501.01, Revised Code, states:

“ ‘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.”

This section, the only one of its kind which I find in the chapters dealing with highways, brings me no nearer to the solution of the immedi-

ate question, since culverts are not included therein; besides, even if they were, the question would still be left hanging in view of the fact that chapters of the Revised Code, which are included, do not relate to the problem at hand. No less barren, I find, is the case law of Ohio. Turning now to Webster's New International Dictionary (Second Edition), it defines "culvert" as:

"A traverse drain or waterway under a road, railroad, canal, etc.; an arched drain or sewer; also, a conduit."

On the other hand, "bridge" is defined in the same dictionary as:

"A structure erected over a depression or an obstacle, as over a river, chasm, roadway, railroad, etc., aqueduct; * * *; anything supported above a place or object after the manner of a bridge or serving as a support for something or as a way over something; in general anything bridgelike in form or position; * * *"

Reading the definitions of the two terms side by side it becomes clear that there is sufficient variance between them so as to permit differentiation, and also so much essential similarity that the inclusion of "culvert" as coming within the meaning of "bridge" seems to be warranted. This, I find, is precisely the view taken in jurisdictions outside Ohio where the courts faced the problem with which we are concerned herein; in other words, differentiation was either given the stamp of approval or disapproval, depending on the character of controversy in which the question had arisen. For example, in *Cleveland v. Town of Washington*, 65 A. 584, 79 Vt. 498, the syllabus reads:

"The words '*bridge*' and '*culvert*' as used in the statute giving an action for damages caused by reason of insufficiency of 'any bridge or culvert' are not synonymous."

(Emphasis added)

Likewise in *Board of Commissioners v. Bailey*, 23 N.E. 672, 122 Ind. 498, where it was held:

"A *culvert* or arched passage-way designed merely for the purpose of draining surface-water off a road is not a *bridge*, within the contemplation of Rev. St. Ind. 1881, par. 2880, 2885, 2892, defining the power and duty of county commissioners in respect to the erection and repair of bridges over streams or water courses, so as to render the commissioners liable for personal injuries sustained by reason of its being permitted to remain out of repair." (Emphasis added)

But a view opposite to the one expressed in the cases just cited was adopted in a case where the question before the court was whether or not county commissioners were authorized to pay a claim based on a contract for the construction and repair of bridges and culverts, although the statute involved spoke only of contracts for "bridge construction and repair." In *Central Bridge Construction Co. v. Saunders County*, 184 N.W. 220, 106 Neb. 484, the court stated in the course of its opinion, 184 N.W., page 223, as follows:

"* * * *the validity act is broad enough to cover both bridge and culvert construction* for the reason: (1) A culvert is easily within Webster's definition of a bridge:

" 'A structure erected over a depression or an obstacle as over a river, chasm, roadway, railroad, etc., carrying a roadway for passengers, vehicles,' etc. * * *.

"Appellant cites a number of cases involving construction of statutes, to the effect that a culvert is not a bridge, but they were all cases involving the liability of municipal corporations for damages by reason of defective bridges, calling for strict construction of the statutes declaring liability; *the statute in question is remedial and should receive a liberal construction.*"

(Emphasis added)

Spelling out this view, which I believe can be safely adopted as applicable to the question at hand, it would seem that under the provisions of Section 5591.21, *supra*, it is the duty of county commissioners to construct and maintain necessary culverts no less than "necessary bridges" and that the words, "on *connecting* state, county and *improved roads*," extend such duty to such township roads as well. But does this furnish the complete answer to your inquiry? Apparently not, for it leaves unanswered the question as to the responsibility for the construction and maintenance of culverts on roads within a township that the county commissioners may consider unnecessary, and on township roads unconnected with state or county roads. In *State ex rel. v. Commissioners*, 49 Ohio St., 301, it was held:

"The expediency of the construction or repair of a bridge, under Section 4938, Revised Statutes, rests in the administrative discretion of the county commissioners, and such discretion cannot be controlled by mandamus."

Returning to Section 5549.04, *supra*, in which culverts are expressly mentioned, I find that the authority for their construction and maintenance

anywhere within a county is discretionary with both the county commissioners and township trustees. The discretionary "may" is also found in Section 5549.01, *supra*, which authorizes county commissioners to purchase machinery for the construction and maintenance of culverts, and also in analogous Section 5549.21, *supra*, giving like authority with respect to culverts to township trustees. However, as we have seen, the Legislature used the word "shall" in Section 5571.01 (C), Revised Code, with respect to the duty of township trustees as to the maintenance of township roads within its township; and the same word, which the courts in *State ex rel. Rogers v. Taylor, supra*, and in *Adamson ex rel. v. Wetz, supra*, stated places a mandatory duty on the board of township trustees to, among other things, *repair the township roads*, is also found in Section 5571.02, *supra*. The significance of the word "shall" in these two sections, together with the judicial interpretations placed upon Section 5571.02, *supra*, becomes apparent when read alongside with two opinions of one of my predecessors, Opinion 2500, Opinions of the Attorney General for 1925, page 333, and Opinion 2557, Opinions of the Attorney General for 1925, page 389, in which culverts were the subject of discussion in connection with problems analogous to the one at hand. In Opinion 2500 for 1925, it was stated at page 335:

"Whether or not the term 'public road' includes culverts is not so easy of solution. While a number of statutes would seem to indicate that the legislation treats culverts, like bridges, as a separate and distinct part or project in a road improvement, yet it is believed that the provisions are not strictly clear to limit the term 'road' in its generic sense. This is particularly true when consideration is given to the fact that there is no legislation making separate and detailed provision for the construction of culverts by county commissioners other than what may be said to be found in chapter six.

"It would follow that culverts are included within the meaning of the term 'public road' and that the cost and expense of constructing culverts may be considered as a part of the cost of the improvement and be divided between the county, township, village and land owners." (Emphasis added)

Referring to the Opinion just cited, Opinion No. 2557 for the same year, states on page 390:

"The question involved in the opinion referred to was whether or not the term 'public roads' as used in Section 6906 of the General Code included within its meaning bridges and cul-

verts, and it was held therein, upon a consideration of all legislation upon the subject of roads, bridges and culverts, that the term did not include bridges within its meaning, *but did include culverts within its meaning. * * ** (Emphasis added)

The conclusion at which I arrive in the light of the foregoing may be summarized as follows :

The word "bridge" as used in Section 5591.21, Revised Code, is synonymous with "culvert"; accordingly, the board of county commissioners has the power and authority to construct and keep in repair such culverts on connecting improved township roads as are deemed necessary by such board.

The term "township roads" in Sections 5535.01 (C) and 5571.02, Revised Code, includes "culverts," and the mandatory duty of the board of township trustees to maintain and to keep in good repair township roads under their control therefore extends to such culverts on township roads.

Accordingly, as to your specific question, it is my opinion and you are advised :

Under the provisions of Sections 5535.01 (C) and 5571.02, Revised Code, it is mandatory for the board of township trustees to keep culverts on township roads in good repair, while under the provisions of Section 5591.21, Revised Code, the board of county commissioners has the authority to repair such culverts on connecting improved township roads as it deems necessary.

Respectfully,

MARK McELROY

Attorney General