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LIMITED ACCESS STATE HIGHWAY—ANNEXATION TO MUNICIPAL CORPORATION—JURISDICTION OVER HIGHWAY—§§5511.02, 5535.03 R.C.

SYLLABUS:

When an area including a portion of a limited access state highway is annexed to a municipality, the Director of Highways retains jurisdiction as to the limited access feature of the state highway so annexed.

Columbus, Ohio, October 28, 1958

Hon. Charles M. Noble, Director of Highways  
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“In 1954, the highway department improved 4.3 miles of U. S. Ohio Highway 52 in Brown County of which approximately .9 mile was located in the Village of Aberdeen and the remainder 3.4 miles was located immediately north of the corporation line of said village. The said portion of said highway lying outside the village and a part of said improvement was declared to be limited access by the director of highways and purchase of right of way was upon said basis. The extinction of said access was at substantial cost to the state. After the declaration of said limited access and the extinguishing of the right of access, approximately one mile of said highway the subject of said improvement and lying outside of said village was annexed to the village. It is the contention of the village as indicated by the resolution of its council, enclosed herewith, that it now has the power to ignore the limited access provision relating to the highway so annexed and may open streets and alleys intersecting said highway without the consent of the director of highways. It is the contention of the department that the state having acquired said limited access at great expense has a vested interest that cannot be destroyed by such annexation procedure. You are further advised that this question frequently arises throughout the state.

“In view of the premises your opinion is respectively requested as to the jurisdiction and respective rights of the state and village.”

Your request presents the following legal question, "When an area including a portion of a limited access state highway is annexed to a municipality, does the State retain jurisdiction as to the limited access feature of the state highway or does the municipality acquire control over said limited access feature of the state highway in the annexed area?"

Section 5511.02, Revised Code, is the "limited access" statute of the Highway Act. Said statute is as follows:

"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."

It will be noted that the above quoted section authorized the Director of Highways not only to lay out, establish, *etc.*, but also to abandon the limited access highways. The statute further empowers the Director of Highways to allow access only at highway intersections designated by him.

Section 5535.03, Revised Code, grants authority to different political subdivisions to establish, construct and vacate freeways. Said section is as follows:

“The director of highways, board of county commissioners, and municipal authorities may lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon the use of freeways within this state in the same manner in which they may lay out, establish, acquire, open, construct, improve, maintain, regulate, vacate or abandon the use of roads, highways or streets. Such director, board, and municipal authorities shall have all additional authority and power, relative to such freeways, as they possess relative to roads, highways, or streets, including the authority and power to acquire by gift, purchase, condemnation, or otherwise, such lands as are required for rights of way, and to be provided for from any available funds.

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

The municipal authorities are granted the right of abandon the use of freeways. There is no express authority granted to any political subdivision to abandon freeways established or constructed by another political subdivision. This being so, it would appear that the power to vacate or abandon such roads, if not limited to a complete vacation of the road as such, when applied to the vacation of the limited access feature must be deemed limited to those cases where the limited access feature is vacated or abandoned by the same public agency under whose authority the limited access easements were acquired and paid for.

Any other view would obviously make possible the unjust enrichment of abutting property owners who had been paid for such limited access easements by one public agency where another agency, subsequently acquiring “control” of the public way, should decide to restore such property rights to the abutting owners without any restoration of the purchase price by them.

It is my view that when such limited access rights are acquired from the owners of abutting lands the traveling public is given a right to continued use of the road in that status, and that this public right cannot be abridged in the absence of express statutory authority so to do. In this situation the right of the general public to have these roads continued in a limited access status would appear to be founded in a trust relationship in which the public is the beneficiary. This view is stated in *Railroad Co. v. Defiance*, 52 Ohio St., 262, as follows:

“\* \* \* 5. The powers conferred on municipal corporations with respect to the opening, improving, and repairing of their streets and public ways, are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interests may acquire; and they cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given to do so; much authority is not given by section 3283, of the Revised Statutes.

“6. Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the power agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant. \* \* \*”

This case was decided in 1895, but that the rule thus stated was not affected by the “Home Rule” amendments of 1912, Article XVIII, Ohio Constitution, is made clear by the court in *Wooster V. Arbenz*, 116 Ohio St., 281, where it was held:

“\* \* \* 2. Section 3714, General Code, imposes upon municipalities the obligation to keep streets, alleys, and other highways within the municipality open, in repair, and free from nuisance; *the legislation imposing this duty is an exercise of the sovereignty of the state, and municipalities as creatures of the same sovereignty are subject to the liability which follows a failure to discharge that duty.* \* \* \*” (Emphasis added)

Therefore, it is my opinion and you are advised that when an area including a portion of a limited access state highway is annexed to a municipality, the Director retains jurisdiction as to the limited access feature of the state highway so annexed.

Respectfully,  
WILLIAM SAXBE  
Attorney General