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SIDEWALK ALONG HIGHWAY—COUNTY COMMISSIONERS AND TOWNSHIP TRUSTEES MAY MAINTAIN AND CHARGE THE MONEYS IN GENERAL FUND NOT OTHERWISE APPROPRIATED—ABUTTING PROPERTY OWNERS NOT LIABLE FOR COSTS OF REPAIR.

SYLLABUS:

Where a sidewalk was originally constructed by order of the county commissioners or township trustees along a state road under authority of Sections 7205 and 7206 of the General Code, it may be maintained by said county commissioners or township trustees and the cost thereof expended from county or township funds, but no portion of such cost may be assessed against abutting property owners.

COLUMBUS, OHIO, June 7, 1928,

HON. D. A. BAIRD, *Prosecuting Attorney, Elyria, Ohio.*

DEAR SIR:—This will acknowledge the recent communication of your office, as follows:

“Approximately three years ago the county commissioners of Lorain County and the trustees of Elyria Township constructed a sidewalk along side of a state highway in this county, under the supervision of the county surveyor and in accordance with Sections 7205 and 7206 of the General Code, which provided for the construction of a sidewalk. It seems that this sidewalk has come to be in a bad state of repair and the request has been made to the township trustees and the county commissioners to repair and maintain the sidewalk constructed by both boards.

We are unable to find any provision in the law of this state concerning the repair and maintenance of these sidewalks. Is it your opinion that the authority to construct the sidewalk carries with it the authority to maintain and repair them, and if the statute concerning the construction carries with it the authority to repair the sidewalks, are the costs of repair to be assessed the same as in construction of a sidewalk, and must the repair and improvement also be under the direction of the county surveyor?”

Sections 7205 and 7206 of the General Code, to which you refer, are as follows:

Section 7205. “The county surveyor, upon the order of the county commissioners or township trustees, shall construct or cause to be constructed sidewalks of suitable materials, along the public highway, without any municipal corporation, upon the petition of a majority of the abutting property owners, and the expense of the construction of such sidewalks shall be paid by the county or township and the abutting property owner or owners in such proportion as may be determined by the county commissioners or township trustees. Provided, however, that the abutting property owners shall pay not less than twenty-five per cent of the cost of said sidewalks, and the county commissioners or township trustees may assess all of the cost of said sidewalks against the abutting property owners in proportion to benefits accruing to such property. The county commissioners or township trustees may, by unanimous vote, order the construction of sidewalks along the public highway without a municipal corporation, without a petition therefor, and may assess all or any part of the cost thereof against abutting property owners,

provided, however, that notice shall first be given by publication for three successive weeks in some newspaper of general circulation within the county, stating that it is the intention of said county commissioners or township trustees to construct said sidewalks, and fixing a date for hearing on said improvement. Notice to all abutting property owners shall be given by two publications in a newspaper of general circulation in said county at least ten days prior to the date fixed in said notice for the making of such assessments, and such notice shall state the time and place when abutting property owners will be given an opportunity to be heard with reference to said assessments, and the county commissioners or township trustees shall determine whether said assessments shall be paid in one or more installments."

Section 7206. "The county surveyor is hereby authorized to establish the grade and width of sidewalks constructed along the highways within the county and outside of any municipal corporation therein situated, and to designate the character of construction, and shall have general supervision of the same. No provision hereinbefore made for the construction of sidewalks shall prevent the state highway commissioner, county surveyor or township trustees from granting permission to the abutting property owners to construct sidewalks in front of their properties and along the public highway, but such sidewalks shall be constructed subject to the approval of the proper authorities."

These are the only sections of the General Code which in any way deal with the construction, maintenance and repair of sidewalks by county commissioners or township trustees. As you observe, the express authority of Section 7205 only extends to the original construction of the sidewalk and it further prescribes that the cost thereof shall be borne in certain specified ways. If the improvement is petitioned for, the abutting property owners must pay at least twenty-five per cent and the county commissioners or township trustees are authorized to assess up to the full amount of the cost if they see fit. If the commissioners or trustees act by unanimous vote, the improvement may be constructed without petition and all or any part of the cost assessed. This leads to the conclusion that if the public authorities are so inclined, the total expense may be borne by the public and nothing assessed in a proper case.

In the event of an improvement under authority of these sections, the county surveyor is charged with the obligation of doing the work or causing it to be done. It is to be observed that no mention is made of any fund from which the portion of the improvement to be paid for by the county or township, as the case may be, is to be derived. In the absence of any specific provision therefor, it would seem that any moneys in the general county fund or township fund not otherwise appropriated might be, upon proper action by the county commissioners or township trustees, devoted to this purpose.

Your specific question is, however, whether or not the sidewalk constructed along a state road by the county commissioners and township trustees may be repaired under authority of Sections 7205 and 7206, and if so how the expense thereof shall be borne. As I have before stated, the statutes are silent on the subject of maintenance and repair. It would seem, however, that where authority is conferred to construct an improvement, of necessity there must exist, as an incident thereto, the right and authority to maintain that improvement in a proper state of repair. The one is generally a necessary incident of the other. While county commissioners and township trustees are creatures of statute and are ordinarily limited to those powers which are expressly conferred upon them and those necessarily incident thereto, I am of the opinion that in this case the power to repair or maintain the sidewalk must be construed as necessarily incident to the right to construct.

There exists considerable doubt as to how the expense of such repair or maintenance should be borne. You have not advised me specifically how the expense of the original construction was met, but I assume from your statement that at least a portion of the cost of the improvement was paid by the county commissioners and the township trustees. I seriously doubt the right of either the county commissioners or the township trustees to assess any part of the cost of maintenance and repair. It is a well known principle of statutory construction that statutes providing for assessments are to be strictly construed. In this instance the only authority for assessing is with respect to original construction and in my opinion the failure to make provision for any assessment with respect to maintenance and repair is fatal to that right. This does not, however, mean that the sidewalk cannot be maintained or repaired. The original improvement, having been made under authority of the county commissioners and township trustees, is a public improvement and, as such, I deem it within the power of these subdivisions to make proper provision out of general funds for such maintenance and repair. I am accordingly of the opinion that a sidewalk originally constructed by order of the county commissioners or township trustees along a state road, under authority of Sections 7205 and 7206 of the General Code, may be maintained and repaired by such county commissioners or township trustees, but no portion of the cost thereof may be assessed against the abutting property owners.

It is to be noted that in the instance you cite the sidewalk was evidently constructed by cooperation of the county commissioners of Lorain County and the township trustees of Elyria Township. The sections quoted above do not contemplate any joint action on the part of county commissioners and township trustees with relation to the construction of sidewalks. Since, however, the authority is vested in either one of these boards to effect the construction of a sidewalk on the same public highway, it is readily conceivable that the proceedings of the two boards might be so coordinated as to constitute virtually a joint construction of one sidewalk. Apparently this was done in the present instance and I see no objection to taking similar steps in the case of maintenance and repair. That is to say, the county commissioners may assume the obligation of repairing a certain portion of the sidewalk and the trustees may take care of the remainder.

You further inquire whether the repair and improvement must be under the direction of the county surveyor. Inasmuch as the original construction is definitely placed under the supervision and control of the county surveyor, it seems to me that any maintenance or repair work should likewise be under his supervision and control. Accordingly, I am of the opinion that the county surveyor should direct any work incident to the maintenance and repair of sidewalks constructed under authority of Sections 7205 and 7206 of the General Code.

In reaching the above conclusion as to the lack of power to assess abutting property owners for maintenance and repair, I do not wish to be understood as holding that in no event could an entire reconstruction of sidewalks be assessed. I feel that where the sidewalk is in such a state that it requires an entire replacement thereof it would be entirely proper for the county commissioners or the township trustees, as the case may be, to proceed as if on original construction, and in that event assessments could be made in accordance with the provisions of Section 7205, General Code.

Respectfully,

EDWARD C. TURNER,
Attorney General.