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DIRECTOR OF HIGHWAYS—DIRECTOR OF HIGHWAYS MAY USE HIGHWAY FUNDS TO FINANCE THE RELOCATION AND RECONSTRUCTION OF A GRADE SEPARATION STRUCTURE PROVIDED HE DEEMS IT NECESSARY TO RELOCATE AND RECONSTRUCT THE SAME OUTSIDE THE RIGHT-OF-WAY ROAD—§5523.19, R.C.

## SYLLABUS:

Pursuant to Section 5523.19, Revised Code, the director of highways may use highway funds, in the proportion called for in such section, to finance the relocation and reconstruction of a grade separation structure which was not constructed in accordance with grade crossing elimination legislation, and which is situated on a road on the state highway system, provided the director deems it necessary to relocate and reconstruct the same in whole or in part outside the right of way of such road.

Columbus, Ohio, June 13, 1961

Hon. E. S. Preston, Director  
Department of Highways, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“The construction of Interstate Route No. 75 in the City of Toledo Ohio requires the modification of the existing street system and State Highways in the vicinity of the New York Central Railroad. These modifications of existing facilities are generally routine. However, one contemplated change in existing facilities raises a question as to the legality of using State Highway funds to reconstruct an existing highway structure over the tracks of the New York Central Railroad.

“The particular item in question is the grade separation structure carrying Broadway Avenue, State Route No. 2, over the tracks of the New York Central Railroad. This structure is presently operating under full legal loading although it is generally considered inadequate for present highway needs. The contemplated construction of Interstate Route No. 75 will close to highway traffic an existing railway-highway grade separation structure on Sumner Street which is located about six hundred feet east of the Broadway Avenue structure and will divert additional highway

traffic to the Broadway Avenue structure which will accentuate the present inadequacies of the structure. Recognizing this situation it is the proposal of the State Highway Department, in cooperation with the City of Toledo and Lucas County, to reconstruct the Broadway Avenue grade separation structure to provide an adequate highway facility for both present and future needs.

“The construction proposed is not a problem in itself, however, the history of the existing Broadway Avenue structure does pose a question with respect to the application of existing Ohio Statutes.

“In accordance with the findings of the Ohio Circuit Court in the case of the City of Toledo v. The Lake Shore and Michigan Southern Railway Company, 17 CC, Page 265, the railway company, now the New York Central System, owns and maintains the existing Broadway Avenue structure over the tracks of the railroad. There is no evidence of a defined dedicated public right-of-way across the property of the railroad company other than the physical limits of the structure. The construction proposed will extend beyond the limits of the existing structure.

“Section 5523.19 of the Revised Code of Ohio provides for the reconstruction of separated crossings not constructed under certain sections. In view of the above section of the Revised Code and the legal proceedings and decision of the court hereinbefore referred to with respect to this structure I respectfully request your opinion as to my authority to use highway funds to finance the replacement of the existing grade separation structure carrying Broadway Avenue over the tracks of the railroad company.

“Due to the impending delay in progressing Interstate Highway projects, your early opinion in this matter is urgent. Any special consideration you may give will be greatly appreciated.”

The history of railroad grade crossing elimination legislation is set forth in Opinion No. 2048, Opinions of the Attorney General for 1950, page 498. The first such legislation appears to have been enacted in 1893 (90 Ohio Laws 359). An examination of the opinion in *The City of Toledo v. The Lake Shore and Michigan So. Ry. Co.*, 17 C.C., 265, 32 C.D., 136 (1893), reveals that the grade separation structure in question was not constructed in accordance with any such grade crossing elimination legislation. Your attention, therefore, is directed to Section 5523.19, Revised Code, reading as follows :

“When a separated crossing, which was not constructed in accordance with sections 4957.01 to 4957.26, inclusive, or sections

5561.01 to 5561.15, inclusive, of the Revised Code, is situated on a road or highway on the state highway system or an extension thereof, and is so located that in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway or extension, the director of highways deems it necessary to relocate and reconstruct the same in whole or in part outside the right of way of such road or highway or extension thereof, or when, in the opinion of the director, a separated crossing which was not constructed in accordance with such sections, and which separated crossing is located on a road or highway on the state system or an extension thereof, which road or highway was laid out and opened after the construction of the railroad, is in need of widening, reconstruction, or realignment in order to provide for the safety and convenience of the traveling public having occasion to use such road or highway or extension thereof, the director may relocate and reconstruct, widen, reconstruct, or realign the same.

“The director may take such action and initiate and prosecute such proceedings as provided in sections 5523.01 to 5523.18, inclusive, of the Revised Code, to secure the elimination of existing grade crossings. The cost and expense of such relocation and reconstruction, widening, reconstruction, or realignment shall be borne by the state, or by the state and any other political subdivision in which the crossing is located, and by the railroad company in the proportions set out in sections 5523.01 to 5523.20, inclusive, of the Revised Code, in relation to the elimination of existing grade crossings, unless otherwise agreed upon.

“Every person or company owning, controlling, managing, or operating a railroad in this state shall maintain and keep in good repair good, safe, adequate, and sufficient crossings and approaches thereto, whether at grade or otherwise, across its tracks, at all points other than crossings separated in accordance with sections 4957.01 to 4957.26 and 5561.01 to 5561.15, inclusive, of the Revised Code, or in accordance with sections 5523.01 to 5523.20, inclusive, of the Revised Code, and other than separated crossings relocated and reconstructed, widened, reconstructed, or realigned in accordance with this section, where such tracks intersect a road or highway on the state highway system or an extension thereof.”

The duty to maintain and keep in good repair “good, safe, adequate, and sufficient crossings,” which were not constructed in accordance with grade crossing elimination legislation, is an obligation of the railroad company imposed by the final paragraph of Section 5523.19, *supra*, except that the director may relocate, reconstruct, widen, or realign in accordance

with this section. Opinion No. 2555, Opinions of the Attorney General for 1947, page 652.

The first paragraph of Section 5523.19, *supra*, provides that the director of highways may relocate and reconstruct, widen, reconstruct, or realign such crossings when the crossing is located on a road on the state highway system which road was laid out and opened after the construction of the railroad, or when it is necessary to relocate and reconstruct such crossing in whole or in part outside the right of way of such road. Since the road in question was laid out and opened prior to the construction of the railroad according to the facts in the *City of Toledo* case, *supra*, it will only be necessary for the purpose of this opinion to consider whether such crossing will be relocated and reconstructed in whole or in part outside the right of way of such road.

According to your request there is no evidence of a defined dedicated public right-of-way across the property of the railroad company other than the physical limits of the structure, and the construction proposed will extend beyond the limits of such structure. It appears, therefore, that the grade separation structure will be relocated and reconstructed in part outside the right of way across the property of the railroad.

It is my opinion, therefore, and you are accordingly advised that pursuant to Section 5523.19, Revised Code, the director of highways may use highway funds, in the proportion called for in such section, to finance the relocation and reconstruction of a grade separation structure which was not constructed in accordance with grade crossing elimination legislation, and which is situated on a road on the state highway system, provided the director deems it necessary to relocate and reconstruct the same in whole or in part outside the right of way of such road.

Respectfully,  
MARK MCELROY  
Attorney General