

4006.

CHANGE OF GRADE—STATE HIGHWAY THROUGH VILLAGE—VILLAGE AND COUNTY NOT LIABLE FOR SUCH CHANGE WITHOUT APPROVAL OF DIRECTOR OF HIGHWAYS.

SYLLABUS:

1. *There is no legal liability on a village, where the State Highway Department has changed the established grade of a state highway within its corporate limits, even though such village has consented to such improvement when it has not entered an agreement with the State Highway Department to share in the cost thereof.*

2. *The county commissioners, when cooperating with the State Highway Department in the construction or improvement of a state highway, can not be held directly liable for damages caused by a change of the established grade of such highway since such improvement is under the control and supervision of the State Highway Department, and can only contribute to the payment of such damages as are a part of the cost of construction, in the proportion specified in the agreement with the State Highway Department, when such expenditures have been approved by the Director of Highways.*

COLUMBUS, OHIO, January 28, 1932.

HON. DAVID CREGER, *Prosecuting Attorney, Upper Sandusky, Ohio.*

DEAR SIR:—Your recent request for my opinion reads as follows:

“A portion of Federal Route No. 30N, being Bucyrus-Upper Sandusky State Highway No. 200, Section H, is being improved just each of Upper Sandusky and partly in Upper Sandusky corporation; the village council having passed a resolution authorizing the State Highway Department to proceed inside the corporation. Just east of the built up portion of Upper Sandusky and wholly inside the corporation limits the grade of a hill is being reduced from a 10% grade to a 5% grade, necessitating a fill of approximately 10 feet directly opposite a livery barn and miniature golf course. The owner of this property is now asking the state, village or county for damages.

The county commissioners are participating to the extent of approximately 25% on the bridge alone on this project. The bridge is about 1000 feet east of the hill, but the entire improvement is one project in two proposals. The village is not participating in the costs.

Upon whom does the liability for damages fall? The county commissioners are willing to assume a certain portion of these damages if they are legally responsible for the same. May they do so? To what extent is the village and state responsible?”

You do not present the papers evidencing the contract or agreement between the State Highway Department and the Board of County Commissioners. I therefore express no opinion or interpretation of its contents of obligations.

You state that the village has consented to the improvement within its limits, but that there is no agreement between the state and such village that the village is to share any of the expense of the improvement. You further state that there is an agreement on the part of the County Commissioners to participate to the extent of “approximately 25% on the bridge alone on this project.”

While the grade being eliminated or decreased lies wholly within the limits of the village, this improvement is being made by the State Highway Department under the authorization of Sections 1191, et seq., of the General Code as amended and supplemented in Am. S. B. 294 (114 O. L., 509). Such sections place the duty of preparing the plans, of supervision and of the letting of the contracts for the improvement on the State Highway Department when the improvement is on the state highway system.

The Court of Appeals of Perry County in a well reasoned opinion rendered in a case arising out of a similar set of facts brought against the board of county commissioners, held, as stated in the first paragraph of the syllabus of *Sheppard vs. County Commissioners*, 26 O. L. R. 81, that:

“An action does not lie against county commissioners for damages to the approaches of abutting owners to a highway through its improvement or change of grade, when the work is done by the state highway department.”

This decision is deduced from the reasoning that the construction of the road was being made by the State Highway Department and not by the county commissioners, and that for the reason no control over the construction was vested in the commissioners, no liability could attach. Applying this reasoning to the facts in your request, it is made to appear that there is no legal liability upon the county, unless such liability is created by the agreement made between the board of county commissioners and the State Highway Department. Such agreement not being before me, I cannot express an opinion thereon. However, under the language contained in section 1191-2, General Code, as amended, the county commissioners would have no legal liability or authority to pay any claim until such claim has been approved by the Director of Highways. Such section, in so far as material, reads as follows:

“Sec. 1191-2. Where county commissioners, under the authority of sections 1191 and 1191-1 of the General Code, cooperate with the department of highways, said commissioners shall be authorized, *with the approval* of the director, to purchase or appropriate such property,” etc.

I might also call attention to the last clause of section 1191-1, General Code, which provides for distribution of funds where the county commissioners cooperate with the Department of Highways in the construction of an improvement of the type at hand, which clause reads as follows:

“which funds shall be disbursed upon the requisition of the state department of highways, or otherwise as may be provided by law.”

I find no authority in the statutes for the payment of any claim by the county commissioners, without the approval of the Director of Highways, when the county is cooperating with the State Highway Department in the construction, alteration or repair of a state highway.

I must, therefore, conclude that the county commissioners, when cooperating with the State Highway Department in the construction of a state highway, have no legal liability for any damages caused by the construction of such highway, except such as may be created by virtue of the agreement with the State Highway

Department to share in the cost of construction, and that it has no authority to pay any claims, which are part of the cost of such highway, without the approval of the Director of Highways.

Your question as to whether or not there is liability on the part of the State for change of grade in the construction of state highways, is under consideration by this office in other matters and has not yet been determined, and since it is not of specific import to the county, I am expressing no opinion herein.

Specifically answering your inquiries, I am of the opinion that:

1. There is no legal liability on a village, where the State Highway Department has changed the established grade of a state highway within its corporate limits, even though such village has consented to such improvement when it has not entered an agreement with the State Highway Department to share in the cost thereof.

2. The county commissioners, when cooperating with the State Highway Department in the construction or improvement of a state highway, can not be held directly liable for damages caused by a change of the established grade of such highway since such improvement is under the control and supervision of the State Highway Department, and can only contribute to the payment of such damages as are a part of the cost of construction, in the proportion specified in the agreement with the State Highway Department, when such expenditures have been approved by the Director of Highways.

Respectfully,

GILBERT BETTMAN,  
*Attorney General.*

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4007.

CIGARETTE TAX--UNNECESSARY TO HAVE LICENSE FOR SALE OR  
DISPOSAL OF CIGARETTE WRAPPERS.

*SYLLABUS:*

*Persons selling or giving away cigarette wrappers in Ohio are not required to secure a license under the terms of Amended Senate Bill No. 324 of the 89th General Assembly.*

COLUMBUS, OHIO, January 28, 1932.

HON. CHAS. D. HAYDEN, *Prosecuting Attorney, Mt. Vernon, Ohio.*

DEAR SIR:—This acknowledges receipt of your recent inquiry which reads as follows:

“Will you please render me an opinion on the construction of the term, ‘cigarette’ as defined in Section 5894-1 of the General Code of Ohio, being Amended Senate Bill No. 324, passed June 24, 1931?”

The original Section 5894 was repealed by Sections 5894-1 to 5894-25. The original Section 5894 provided a certain license fee for persons engaged in the trafficking of cigarettes, CIGARETTE WRAPPERS, etc.

As defined in Section 1 of the Amended Act, cigarette wrappers are not included within the statutory definition of cigarettes. Section 5 of the