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1. COUNTY COMMISSIONERS—MAY REMOVE OBSTRUCTIONS LOCATED ON COUNTY PROPERTY FOUND TO INTERFERE WITH USE OF COUNTY HIGHWAY—EXPENSE OF REMOVAL—MAY BE CERTIFIED TO PROPER OFFICIALS TO BE PLACED ON TAX DUPLICATE AGAINST PROPERTY OF PERSONS PRIMARILY RESPONSIBLE FOR OBSTRUCTION—SECTION 7204 G. C.
2. RETAINING WALL LOCATED ON PRIVATE PROPERTY—COUNTY COMMISSIONERS—TO REMOVE WITHOUT COMPENSATION—VIOLATION OF ARTICLE I, SECTION 19, CONSTITUTION OF OHIO.
3. COUNTY COMMISSIONERS—IN ABSENCE OF STATUTORY LIABILITY—NOT LIABLE IN OFFICIAL CAPACITY FOR NEGLIGENT DISCHARGE OF DUTIES.

SYLLABUS:

1. County commissioners may, pursuant to Section 7204 of the General Code of Ohio, remove obstructions located on county property if said obstructions are found to interfere with the use of the county highway. The expense incurred thereby may be certified to the proper officials to be placed upon the tax duplicate against the property of the persons who are primarily responsible for said obstruction being located on county property.

2. Removing without compensation, a retaining wall located on private property by the county commissioners is in violation of Article I, Section 19, of the Constitution of Ohio.

3. County commissioners, in the absence of statutory liability, are not liable in their official capacity for the negligent discharge of their duties.

Columbus, Ohio, April 26, 1949

Hon. Webb D. Tomb, Prosecuting Attorney
Seneca County, Tiffin, Ohio

Dear Sir:

This is to acknowledge receipt of your communication requesting my opinion on the following questions:

- “1. Do the commissioners have authority to remove a dam or retaining wall and certify the expense of removal to be placed

on the owners' tax duplicate, assuming (a) that the construction is upon the highway; and (b) that it is upon private property?

- "2. Would the county commissioners be liable, by reason of their failure to remove the dam, for damages to the traveling public or others caused by the dam forcing water over the highway?
- "3. If the commissioners are liable for failure to remove the dam, would they be relieved of such liability by placing proper warning devices on either side of the location where the water overflows the highway?"

The county commissioners are creatures of statute and have only those powers specifically granted to them by law and such as are necessarily implied therefrom.

Section 7204 of the General Code provides in part that:

"It shall be the duty of all persons, * * * using or occupying any part of a highway * * * with * * * any object or structure, * * * to remove from the bounds of such highway, * * * objects or structures when the same in the opinion of the county commissioners, constitute obstructions in any highway, other than the state highway system, * * * or interfere or may interfere, with * * * the use thereof by the traveling public. * * *

"It shall be the duty of such persons, * * * so occupying any part of a highway, * * * to relocate their properties within the bounds of such highway * * * thereon when the same, in the opinion of the county surveyor, constitute obstructions in any highway, other than roads and highways on the state highway system, * * * or interfere with * * * the use thereof by the traveling public.

"If, in the opinion of the county surveyor, such persons, * * * have obstructed any highway, other than roads and highways on the state highway system, * * * or if any of their properties are in his opinion, so located that they do or may interfere with the * * * highways * * * or the use thereof by the traveling public, said county commissioners shall notify such person * * * directing the removal of the obstruction or property or the relocation of such properties, and if such person, * * * shall not within five days proceed to remove or relocate the same and complete the removal or relocation of the same within a reasonable time, the county commissioners may remove or relocate the same by employing the necessary labor. The expense thereby incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the

amount thereof shall be certified to the proper official to be placed on the tax duplicate against the property of such person * * * as provided by law, to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the amount thereof may be collected from such person * * * by civil action by the state of Ohio on the relation of the county commissioners."

Therefore, in specific answer to (a) of Question 1, it is my opinion that county commissioners may, pursuant to Section 7204 of the General Code, remove obstructions located on county property found to interfere with the use of a county highway. The expense incurred thereby may be certified to the proper officials to be placed on the tax duplicate against the property owner.

In Volume 20, O. Jur., p. 811, at Section 146, it is said:

"Where the right to do so has not been acquired, by appropriation or otherwise, water falling upon a highway cannot be discharged upon a servient tenement in any different ways or places than the natural flow thereof, except that the county surveyor is authorized, under certain circumstances, to enter immediately upon abutting land for the construction of drainage ditches, provision being made for the subsequent ascertainment and payment of the damage occasioned thereby. Neither can the owner of the servient tract require that a ditch be constructed and maintained along the side of a highway to prevent the surface water falling thereon from descending naturally upon his land."

Article I, Section 19, of the Constitution of the State of Ohio, provides that:

"Private property shall ever be held inviolate but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money; and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

The retaining wall, assuming it is on private property, if removed without compensation, would be in violation of the Ohio Constitution, Article I, Section 19, *supra*.

Appropriation of same may be made by county commissioners pursuant to Section 7207 of the General Code of Ohio, which reads :

“The county surveyor or anyone acting under his authority, when authorized by the county commissioners or township trustees, may enter immediately :

1. Upon any lands adjacent to any of the highways in the county for the purpose of opening an existing ditch or drain, or for digging a new ditch or drain for the free passage of water for the drainage of highways.

2. Upon any lands adjoining rivers, streams, creeks, lakes, reservoirs, or ponds, to drive piles, throw up embankments, and perform such other labor as may be necessary to keep such rivers, streams, creeks, lakes, reservoirs or ponds within their proper channels or basins, and to prevent their encroachment upon the highways, bridges or culverts.

“3. Upon the lands adjoining a highway, which during the spring freshets or at a time of high water, are subject to overflow from such rivers, streams, or creeks, to remove or change the position of a fence or other obstruction preventing the free flow of water under or through a highway, bridge or culvert, whenever the county surveyor deems the same necessary for the protection of such highway, bridge or culvert.

“4. Upon any lands adjacent to highways, to remove any fence or other obstruction which causes snow to drift upon such highway and erect snow fences or other devices upon such lands to prevent the drifting of snow in or upon such highway.”

If lands are entered upon pursuant to Section 7207, supra, then compensation must be made according to Section 7208 of the General Code, which reads :

“When lands are entered upon under the provisions of the preceding section, the county surveyor shall agree with the owners of such lands, subject to the approval of the county commissioners or township trustees, as to the amount of compensation and damages, if any, already sustained or to be sustained by such owner, and the amount of such compensation and damages so determined, shall be paid by the county or townships.

“If the county surveyor is unable to agree with such owner upon the amount of compensation and damages thus already sustained or to be sustained, the amount thereof shall be determined by the county commissioners or township trustees, as the case may be. The amount shall be fixed after a hearing of which said

owner shall have notice in the manner provided in section 6913 of the General Code. The owners of such lands shall have the right to appeal to the probate court, on the question of compensation and damages as provided in the chapter of this act relating to road appeals.”

The statutory liability of county commissioners is found in Section 2408 of the General Code, and it reads as follows :

“The board of county commissioners may sue and be sued, plead and be impleaded in any court of judicature, bring, maintain and defend all suits in law or in equity, involving an injury to any public, state or county road, bridge, ditch, drain or water-course established by such board in its county, and for the prevention of injury thereto. The board shall be liable in its official capacity for damages received by reason of its negligence or carelessness in not keeping any such road or bridge in proper repair, and shall demand and receive, by suit or otherwise, any real estate or interest therein, legal or equitable, belonging to the county or any money or other property due the county. The money so recovered shall be paid into the treasury of the county, and the board shall take the treasurer’s receipt therefor and file it with the county auditor.”

In the case of *Weiherr, etc., v. Phillips, et al.*, 103 O. S. 249, at page 252, the court said :

“Since the enactment of that section a great deal of litigation throughout the different counties of the state has been predicated upon its provisions, and the courts have uniformly recognized the doctrine that those provisions are in derogation of the common law, and that therefore the provisions of the section must be strictly construed and the county commissioners cannot be held liable beyond the plain import of its terms.”

In view of the foregoing, it is therefore my opinion that :

1. County commissioners may, pursuant to Section 7204 of the General Code, remove obstructions located on county property, if said obstructions are found to interfere with the use of the county highway. The expense incurred thereby may be certified to the proper officials to be placed upon the tax duplicate against the property of the persons who are primarily responsible for said obstruction being located on county property.
2. Removing, without compensation, a retaining wall located on private property by the county commissioners, is in violation of Article I, Section 19, of the Constitution of Ohio.

3. County commissioners, in the absence of statutory liability, are not liable in their official capacity for the negligent discharge of their duties.

Respectfully,

HERBERT S. DUFFY,
Attorney General.
