

OPINION NO. 81-007**Syllabus:**

1. R.C. 5591.02 and R.C. 5591.21 require that the board of county commissioners repair the sidewalks on a bridge located within a city over which pass a city street and a state highway which is not part of the interstate highway system. While the city has certain responsibilities with respect to such bridge pursuant to R.C. 723.01, it does not have the duty of actual repair. (1974 Op. Att'y Gen. No. 74-007 modified.)
2. R.C. 5591.02 and 5591.21 place a duty on the county commissioners to repair a bridge located on an improved road of general and public utility running into or through a city within the county, which road is not a state or county road. The determination of whether a road is an improved road of general and public utility is a question of fact to be determined in the first instance by the county commissioners. (1957 Op. Att'y Gen. No. 811, p. 316, paragraph two of syllabus, approved and followed.)

To: Peter R. Selbel, Defiance County Pros. Atty., Defiance, Ohio

By: William J. Brown, Attorney General, March 13, 1981

I have before me your opinion request in which you raise the following questions:

1. Who has the duty to repair the sidewalks on a bridge in a city over which pass a city street and a state highway which is not part of the interstate highway system?

2. Do the county commissioners have any duty to repair a bridge located within a municipal corporation which is not a part of a county road and not part of the state highway system, although general traffic does have access to and utilize such bridge?

It is my understanding that the bridge in the first question you pose is located within a city and that two state highways pass over the bridge. You ask who must repair the sidewalks located on such bridge. Because a sidewalk is treated as part of the bridge on which it is located, the statutes which establish the duty to repair bridges also govern the duty to repair sidewalks located on the bridges. Cooper v. Bradlyn, 123 Ohio St. 392, 175 N.E. 603 (1931); 1957 Op. Att'y Gen. No. 790, p. 309.

R.C. 5501.11 states that it is a function of the Department of Transportation to "repair the state system of highways and the bridges. . .thereon." This section is, however, limited by R.C. 5501.31, which states:

Except in the case of. . .repairing. . .state highways within villages, which shall be mandatory as required by section 5521.01 of the Revised Code, no duty of. . .repairing state highways within municipal corporations, or the bridges. . .thereon, shall attach to or rest upon the director, but he may. . .repair the same with or without the co-operation of any municipal corporation, or with or without the co-operation of boards of county commissioners upon each municipal corporation consenting thereto. (Emphasis added.)

These sections authorize the Director of Transportation to repair bridges located on state highways within municipal corporations, but place no duty on the Director to do so, unless the state highway is located within a village. Because the state highway bridge in the question you pose is not located within a village, the Director of Transportation has no duty to repair the bridge.

R.C. 723.01 reads as follows:

Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept open, in repair, and free from nuisance. (Emphasis added.)

R.C. 5591.02 states: "The board of county commissioners shall construct and keep in repair all necessary bridges in municipal corporations on all state and county roads and improved roads which are of general and public utility, running into or through such municipal corporation." (Emphasis added.) R.C. 5591.21 reads in part as follows: "The board of county commissioners shall construct and keep in repair necessary bridges over streams and public canals on or connecting state, county, and improved roads." (Emphasis added.) According to these two sections, if a bridge located within a municipality connects a state or county road or improved road of general and public utility, then the board of county commissioners must keep the bridge in repair.

¹Since your question is limited to state highways which are not part of the interstate highway system, my analysis is also so limited. You have also stated that a city street passes over the bridge in question. This fact is pertinent only because it indicates that such bridge is located within a municipality. The statutes governing the duty to repair bridges on state highways speak in terms of bridges located within municipal corporations or bridges located on state highways within municipal corporations whether or not a city street also passes over such bridge.

Because of the similarity in the wording of R.C. 723.01 and R.C. 5591.02 and 5591.21, confusion has arisen as to whether the county or the city is responsible for repairing bridges which are located within the city and which connect a state road. It is a well-settled rule of statutory construction that "[a] special statute covering a particular subject-matter must be read as an exception to a statute covering the same and other subjects in general terms." State ex rel. Steller v. Zangerle, 100 Ohio St. 414, 414, 126 N.E. 413, 413 (1919). R.C. 723.01 provides generally that the legislative authority of a municipal corporation shall cause any public way or public grounds within a municipal corporation "to be kept open, in repair, and free from nuisance." R.C. 5591.02 and R.C. 5591.21, however, provide more specifically that the county commissioners shall be responsible for the construction and repair of certain bridges within municipalities. These provisions of R.C. Chapter 5591 appear to provide an exception to the general rule stated in R.C. 723.01. 1957 Op. Att'y Gen. No. 790, p. 309 ("[R.C. 723.01] is general in application, however, and when the specific question of responsibility for county bridges in municipal corporations arises, [R.C. 5591.02 and .21] must be examined").

In interpreting R.C. 5591.02 and R.C. 5591.21, the courts have placed on the county commissioners the duty for actual repair of a bridge which is located within a municipality and which connects a state or county road. Interurban Railway and Terminal Co. v. City of Cincinnati, 94 Ohio St. 269, 278, 114 N.E. 258, 260 (1916) ("the provisions of the statute. . . in clear and unmistakable language, place upon the county commissioners the duty of constructing and keeping in repair necessary bridges in cities and villages on state or county roads of general public utility running into or through such cities. . .").

The city's responsibility with respect to a bridge which is located within the city and over which passes a state road has been characterized as a duty to keep such structure free from nuisance.² While the city has certain responsibilities with respect to such a bridge, it does not have the duty of actual repair. Interurban Railway & Terminal Co. v. City of Cincinnati, 94 Ohio St. 269, 279, 114 N.E. 258, 260 (1916) ("[i]t undoubtedly would be the duty of the city authorities to take necessary steps to protect and safeguard the public, by placing barriers or otherwise, or possibly by making temporary repairs and giving notice of the defective condition. They may make extensive repairs, but are not required by statute to do so").

In 1974 Op. Att'y Gen. No. 74-007, I stated in paragraph two of the syllabus that "[a] municipal corporation has a statutory duty to maintain and repair state highways within its limits, including bridge structures, which are a part of such highways." I note, however, that two of the cases³ cited as support for the foregoing proposition involved public ways located within a city which were not also state roads. Although it is clear that a city has a statutory duty to maintain and repair its own city streets which are not also state or county roads, neither

²Fankhauser v. City of Mansfield, 19 Ohio St. 2d 102, 106, 249 N.E.2d 789, 791 (1969) ("[R.C. 723.01] creates liability for the maintenance by the municipality of a nuisance, rather than liability for negligence"). See, e.g., Ditmyer v. Bd. of County Comm'rs, 64 Ohio St. 2d 146, ___ N.E.2d ___ (1980) (suggesting that snow removal may be the responsibility of a municipality under its duty established by R.C. 723.01 to keep roads within the municipality "free from nuisance"); Mooney v. Village of St. Mary's, 15 Ohio C.C. 446 (Auglaize County 1897). See also R.C. 723.54 ("[a] municipal corporation shall not be liable for damages under section 723.01 of the Revised Code for injuries to persons or property on bridges for which the municipal corporation does not have the responsibility of maintenance or inspection").

³Robert Neff and Sons, Inc. v. Lancaster, 21 Ohio St. 2d 31, 254 N.E.2d 693 (1970); Fankhauser v. City of Mansfield, 19 Ohio St. 2d 102, 249 N.E.2d 789 (1969).

case discussed the nature of the city's duty with respect to a city street which is also a state or county road. The third case cited in Op. No. 74-007, State ex rel. City of Cleveland v. Mashette, 8 Ohio St. 2d 11, 221 N.E.2d 704 (1966), involved the maintenance of a portion of an interstate highway running through a city. Although the court stated that the duty to maintain such highway is a "joint" obligation of the city and the state, the court explained that the state must maintain the highway while the city is obligated to keep such road free from nuisance. As noted above, the duty to keep a road free from nuisance does not appear to be the same as the duty of actual repair.⁴ Upon reconsideration and based on the foregoing discussion, I believe that R.C. 723.01 does not require a municipality to perform the actual repairs to a bridge (or to a sidewalk on the bridge) which is on a state highway and located within a municipality.

I conclude, therefore, that the board of county commissioners must repair the sidewalks on a bridge in a city over which passes a state highway which is not part of the interstate highway system.

The second question asks whether the county commissioners are required to repair a bridge located within a municipal corporation which is not part of a county road and not part of the state highway system, although general traffic does have access to and utilize such bridge. The duties of the county commissioners to repair bridges are outlined in R.C. 5591.02 and 5591.21, as set out above. These sections impose a duty on the commissioners to keep in repair bridges located within a municipality on state, county, and improved roads which are of general and public utility, and which run into or through such municipal corporation.

Whether a particular bridge is located on an improved road of general and public utility, running into or through a municipal corporation, is a question of fact to be determined in the first instance by the board of county commissioners, subject to judicial review for abuse of discretion. City of Hamilton v. Van Gordon, 84 Ohio L. Abs. 202, 205, 164 N.E. 2d 463, 466 (1959); 1957 Op. Att'y Gen. No. 811, p. 316. In determining whether the road on which a bridge is located is an improved road of general and public utility, running into or through a municipal corporation, the county commissioners must examine "the general, as distinguished from local, use of such bridge." City of Washington Court House v. Dumford, 22 Ohio App. 2d 75, 77, 258 N.E. 2d 261, 263 (Fayette County 1969). Should the board of county commissioners determine that the road described in the second question is an improved road of general and public utility, running into or through a municipal corporation, the county commissioners have a duty to repair such bridge.

It is my opinion, and you are advised, that:

⁴See Mooney v. Village of St. Mary's. But see Lengyel v. Brandmiller, 139 Ohio St. 478, 40 N.E.2d 909 (1942); City of Youngstown v. Sturgess, 102 Ohio St. 480, 132 N.E. 17 (1921); 1957 Op. Att'y Gen. No. 790, p. 309; 1951 Op. Att'y Gen. No. 471, p. 211 (the county is primarily responsible for the repair of a bridge located on a state road within a municipality; the city's responsibility is secondary).

⁵R.C. 5591.02 and 5591.21, as they refer to improved roads, must be read *in pari materia*; the legislature intended that "improved roads," as used in R.C. 5591.21, be limited by the words "which are of general and public utility, running into or through such municipal corporation" contained in R.C. 5591.02. City of Washington Court House v. Dumford, 22 Ohio App. 2d 75, 258 N.E.2d 261 (Fayette County 1969); City of Hamilton v. Van Gordon, 84 Ohio L. Abs. 202, 164 N.E.2d 463 (C.P. Butler County 1959).

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