

5290

BOARDS OF COUNTY COMMISSIONERS:

1. MAY RELOCATE, ALTER CONSTRUCTION OR VACATE PORTIONS OF COUNTY OR TOWNSHIP HIGHWAYS IN COUNTIES WITHIN RESERVOIR DISTRICT CREATED BY UNITED STATES, UNDER AGREEMENT WITH UNITED STATES TO PAY COST — REQUIREMENT, PUBLIC NECESSITY OR WELFARE DEMANDS SUCH ACTION.
2. NO AUTHORITY TO CONVEY FLOWAGE EASEMENTS TO FEDERAL GOVERNMENT OVER PORTIONS COUNTY AND TOWNSHIP ROADS, CONSTRUCTION OF RESERVOIR — COUNTY HAS ONLY EASEMENT FOR PUBLIC TRAVEL.
3. UPON VACATION, COUNTY OR TOWNSHIP HIGHWAY, TITLE REMAINS IN ABUTTING LAND OWNERS — COMMISSIONERS HAVE NO TITLE TO CONVEY.
4. BOARD HAS NO POWER TO ENTER INTO PURPORTED AGREEMENT IN CONSTRUCTION OF DAM BY FEDERAL GOVERNMENT TO FOREVER SAVE HARMLESS FROM ANY DAMAGE TO HIGHWAYS, SUCH FEDERAL GOVERNMENT.
5. ROAD FORMING DIVIDING LINE BETWEEN TWO OR MORE COUNTIES — TO RECONSTRUCT, RELOCATE, ALTER OR LOWER — COUNTY COMMISSIONERS AS JOINT BOARD HAVE AUTHORITY TO UNDERTAKE AND COMPLETE SUCH IMPROVEMENT — SECTION 6874 G.C.

SYLLABUS:

1. Boards of county commissioners may relocate, alter the construction of or vacate portions of county or township highways in their counties that lie within the reservoir district created by the United States, under an agreement of the United States to pay the cost thereof, when they have determined that public necessity or welfare demands such action.

2. Boards of county commissioners have no authority to convey flowage easements over portions of the county and township roads to the Federal Government in connection with the construction of a reservoir, since such right of floodage creates an additional servitude, upon lands over which the county has an easement for public travel only.

3. Boards of county commissioners, upon the vacation of a county or township highway, have no title to such lands which may be conveyed, the title thereto remaining in the abutting landowners.

4. A purported agreement entered into by a board of county commissioners to maintain roads constructed or relocated by such board by reason of the construction of a dam by the Federal Government and forever to save harmless the Federal Government from any damage to the highways from the effects of such dam is beyond the power of such board.

5. When a road forming the dividing line between two or more counties must be reconstructed, relocated, altered or lowered, the county commissioners of the affected counties, sitting as a joint board, upon having determined that public necessity or welfare demands such action, have authority under Section 6874 of the General Code to undertake and complete such improvement.

Columbus, Ohio, July 8, 1942.

Hon. William A. Ambrose, Prosecuting Attorney,
Youngstown, Ohio.

Dear Sir:

I am in receipt of your letter wherein you request that I render an opinion with respect to certain questions of law propounded by the United States Engineer Office of the War Department, which questions of law effect the rights of the Counties of Mahoning, Stark and Portage. With your letter, you enclose the letter from the Engineer Office, from which I quote the following paragraphs:

“The United States of America, in pursuance of the Act of Congress approved June 22, 1936 (49 Stat. 1570), as amended by the Act of Congress approved June 28, 1938 (52 Stat. 1215), is now engaged in the prosecution of the Berlin Dam and Reservoir Project in Mahoning, Portage and Stark Counties, Ohio. Portions of certain county and township roads in said counties lie within the reservoir area of the Berlin Dam at such elevations that they must be relocated, abandoned and vacated. Other portions of certain county and township roads in said counties lie within the reservoir area of said dam at such elevations that they can be raised and reconstructed in such a manner that they will continue to be available for public use and need not therefore be relocated or abandoned.

To effect the changes in said roads necessitated by the prosecution of the said reservoir project, the United States proposes to enter into agreements with the County Commissioners of the aforesaid counties, whereby, in consideration of the payment of a sum of money to be determined by negotiation, the County Commissioners will undertake to make all the neces-

sary changes and adjustments to the portions of the said roads within their respective jurisdictions. * * *

In view of the consequent uncertainty as to the power of the County Commissioners so to contract, and the scope of their contractual powers in the premises, if such be found to exist, an opinion from your office is respectfully requested on the following questions:

(1) Do the County Commissioners of Mahoning, Portage and Stark Counties have power or authority, express or implied, to enter into contracts with the United States whereby the Commissioners can agree to effect such relocations, alterations and vacations of those portions of county and township roads that lie within the reservoir area of the Berlin Dam and Reservoir Project as are necessitated by the prosecution of said project, in consideration of the payment to them by the United States of a sum of money representing the cost of such work?

(2) Do said Commissioners have the authority to convey to the United States flowage easements over those portions of county and township roads within their respective jurisdictions which are affected by the said reservoir, but which are not affected in such manner as would require their relocation, alteration or vacation?

(3) Do the said County Commissioners have authority to convey to the United States by quitclaim deed all the right, title and interest of their respective counties in and to the land lying within the boundaries of such portions of county and township roads within their respective jurisdictions as must be vacated and abandoned by reason of the construction, operation and maintenance of the said dam and reservoir?

(4) Do the said County Commissioners have authority to obligate themselves, by contract with the United States, to maintain, as affected by the construction, operation and maintenance of the Berlin Dam and Reservoir, such portions of existing roads within the maximum limits of the said reservoir as are not to be abandoned or vacated, and to relocate said affected portions if it should become necessary that they be relocated at any future time?

(5) Do the County Commissioners have authority, by contract with the United States, formally and expressly to release, forever discharge and save harmless the United States from any and all liability or claims for damages, demands, actions or suits at law or in equity, arising either theretofore or thereafter out of any taking or appropriation of, or any injury or damage to, any and all county and township roads, highways, bridges, viaducts, and the appurtenances thereto, within their respective jurisdictions, or to any part of their respective county and township road systems, either caused by or in any way growing out of the construction, operation and maintenance of the Berlin

Dam and Reservoir, or caused by or in any way growing out of any of the abandonments, vacations and works of relocation and improvement which may be necessitated by the prosecution of the said dam and reservoir project?

(6) With respect to inter-county roads located on the dividing line between two counties, do the Commissioners of one of said counties, with the consent and approval of the Commissioners of the other county, have authority to undertake, by contract with the United States, to effect all of the work of relocation, alteration, reconstruction or elevation thereof that may be necessary by reason of the construction, operation and maintenance of the Berlin Dam and Reservoir, and to receive for the use of their county the full consideration to be paid by the United States for the work so performed with respect to said inter-county roads? Would such authority, if found to exist, be different where the affected portion of such an inter-county road may have to be relocated in such manner as thereafter to lie wholly within one of said counties, and to no longer be, as to such relocated portion, an inter-county road? * * *

One of the immediate purposes of the Berlin Dam and Reservoir is to safeguard and supplement the City of Youngstown's industrial water supply, which is being greatly taxed by reason of the increased use thereof by war industries. The schedule of construction for the Berlin Dam is understood to call for completion on or about the end of this year. In order that the road alteration program may be effected without hindrance to the operation of the Berlin Dam and to the fulfillment of its highly important purpose, it is essential that the necessary arrangements for that program be completed without delay, and in all events, before the completion of the construction of the dam. It is therefore respectfully requested that the questions herein propounded be given the earliest possible consideration by your office, to the end that a prompt opinion may be rendered thereon."

In approaching a question such as that presented in your inquiry, we must keep in mind that the board of county commissioners is a quasi-public body created by law, and that by reason of that fact it has such powers as have been expressly conferred upon it by statute, or as are necessarily implied from such statutes.

Commissioners v. Holcomb, 7 Ohio, Pt. 1, 232

State, ex rel., v. Yeatman, 22 O.S., 546

Commissioners v. Pittsburgh & W. R. Co., 45 O.S., 401

Jones v. Commissioners, 57 O.S., 189

Elder v. Smith, 103 O.S., 369

We must also keep in mind that an implied power is an incident to an express power, and that if there exists no express power with respect to a particular subject matter, there can be no implied power.

State, ex rel. The Bentley & Sons Co., v. Pierce, 96 O.S., 44

Power has been granted to boards of county commissioners to locate, alter, change and vacate county roads. Thus, Section 6860 of the General Code reads:

“The county commissioners shall have power to locate, establish, alter, widen, straighten, vacate or change the direction of roads as hereinafter provided. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the director of highways shall be had.”

Section 6862 of the General Code further provides in part that:

“When the county commissioners are of the opinion that it will be for the public convenience or welfare to locate, establish, alter, widen, straighten, vacate or change the direction of a public road they shall so declare by resolution, which resolution shall set forth the general route and termini of the road, or part thereof, to be located, established, or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed. * * *”

Section 6874 of the General Code makes the provision that if the highway sought to be constructed, improved or relocated is on the county line or extends as a continuous road between, into or through one or more adjoining counties, the county commissioners of the affected counties shall sit as a joint board in the proceedings with reference to such improvements.

Section 6906 of the General Code is a general grant of power to the boards of county commissioners to construct, alter, widen, etc., highways. Such section, in so far as material to your inquiry, reads:

“The board of county commissioners of any county shall have power, as hereinafter provided, to construct a public road by laying out and building a new public road, or by improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, altering, straightening, vacating, changing the direction, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or by

otherwise improving the same, and where an established road has been relocated, to construct and maintain such connecting roads between the old and new locations as will provide reasonable access thereto. * * * Provided, the provisions of this section shall have no application to roads or highways on the state highway system, except such portions of the state highway system which the board of county commissioners may construct under plans and specifications approved by the director of highways and under his supervision and inspection as provided by law."

I have not attempted to analyze the statutory provisions with respect to the manner in which the authority granted to the boards of county commissioners may be exercised in connection with the purposes under consideration, for the reason that each of the prosecuting attorneys of the counties affected by the improvement under consideration is undoubtedly familiar with such statutory provisions.

From the statutory provisions above referred to, you will observe that the General Assembly has granted to boards of county commissioners specific authority on their own motion to relocate, improve, alter or vacate roads or portions thereof which are not a part of the state highway system when, as and if *they shall have determined that public necessity or welfare demands such action.*

The right of the boards of county commissioners to make conveyances of or agreements with respect to lands within the limits of a highway is necessarily dependent upon the nature of the public's interest in and over such lands. We must keep in mind the fact that the board of county commissioners possesses only an easement to use such lands for purposes of public travel, and that it can convey no interest greater or more than it possesses.

Dayton Electric Railway Co. v. Scott, 101 O.S., 13, 16

Phifer v. Cox, 21 O.S., 248

Callen v. Columbus Edison Electric Light Co., 66 O.S., 166

Daily v. State, 51 O.S., 348

Ohio Bell Telephone Co. v. Watson Co., 112 O.S., 385

As was held in the first and second paragraphs of the syllabus of the last case above cited:

"1. In this state the fee to the country highway is in the

abutting owner, and the public has only the right of improvement thereof and uninterrupted travel thereover.

2. An owner of land abutting upon a country highway, whose title extends to the center of the road along the side of which are located shade trees, has a property right in such trees, and the same may not be interfered with, unless by consent of such owner or first making compensation according to law."

The right of the public in and to the lands within the limits of the highway or, as sometimes expressed, "within the right-of-way" is well described by the court in *Daily v. State*, supra, pages 356, 357:

"Whatever may be the rule in other states, we have supposed that the question of the right in the highway of a landowner whose title extends to the center of the road, is not an open one in Ohio. The question has been the subject of adjudication in a score of cases decided by this court, notably in the following: *Bingham v. Doane*, 9 Ohio, 167; *Crawford v. Delaware*, 7 Ohio St., 459; *Street Railway v. Cumminsville*, 14 Ohio St., 523; *Hatch v. Railroad Co.*, 18 Ohio St., 123; *McClelland v. Miller*, 28 Ohio St., 502; *Railroad Co. v. Williams*, 35 Ohio St., 168; *Railroad Co. v. O'Harra*, 48 Ohio St., 343. Perhaps the principle is not better stated than in *Railroad v. Williams*, supra, opinion by Gilmore, C.J., as follows:

'As between the public and the owner of land upon which a common highway is established, it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public, for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases, it reverts to him free from incumbrance.' * * *"

Such statement must now be slightly modified for the reason that since its utterance the general assembly has enacted Section 5561 of the General Code which exempts such property from taxation while being used for highway purposes. Otherwise, it seems to be supported by later decisions.

The rights of the person from whom lands have been acquired for highway purposes by the county in rural districts are aptly stated by Judge Laubie in *Hays v. Columbiana Telephone Company*, 21 O.C.C., 480, 481, as follows:

“In the highways in the country the owner of the land from whom the highway is obtained retains the legal title. He not only retains the legal title, but the right to all uses of the land, within the limits of the highway, which are not inconsistent with the right of passage in the public — the only right which the public acquire, including, of course, the right to make the highway suitable for such passage. He may cultivate it, plant trees, and do anything that he chooses in the way of its use which is not inconsistent with, and does not obstruct, public travel; but no other person, or company, has the right so to use it, or to dig holes in it and plant poles therein for telephone purposes, without his consent, any more than such person or company could plant fruit trees to raise fruit for sale.”

Bearing such established principles in mind, I have been unable to find any provision of law which would prevent any of the boards of county commissioners to enter into agreements such as suggested in your first inquiry, providing they, in the use of their discretion, have determined that it “will be for the public convenience or welfare” to make such relocations, alterations and vacations of such portions of the county or township roads. Such power is in the county commissioners rather than in the township trustees. (See *State v. Neitz*, 58 O.App., 135; Opinions of the Attorney General for 1927, page 93; Opinions of the Attorney General for 1928, page 198; Opinions of the Attorney General for 1930, page 1170; Opinions of the Attorney General for 1931, page 88.) Since the county commissioners have express statutory authority to make such relocations, alterations and vacations of portions, upon having made such determination, I am unable to find any provision of law which would inhibit such improvement in cooperation with a coordinating improvement being made in the same vicinity by the Federal Government. I am therefore impelled to answer your first inquiry in the affirmative.

With respect to your second inquiry, a more serious question arises. In view of the reasons above set forth, it would seem that the “flowage easements” over property being used for county highways are in the abutting property owner rather than the county. It therefore appears to me that your second inquiry must be answered in the negative.

Prior to the adoption of Section 1178-4 of the General Code, the di-

rector of highways had and exercised substantially the same powers with respect to the highways on the state highway system as did the boards of county commissioners with respect to the remaining highways. On April 29, 1937, the General Assembly enacted Section 1178-4 of the General Code (117 O.L., 474) in an act entitled:

“AN ACT

To further supplement section 1178 of the General Code by the enactment of supplemental section 1178-4, authorizing the director of highways to enter into agreements with the United States in connection with the construction, reconstruction, relocation, maintenance and repair of highways and the relinquishing of property rights and land under his jurisdiction and control when made necessary by river improvements and to declare an emergency.”

Such section reads:

“The director of highways is hereby authorized to enter into agreements with the secretary of war or other proper official of the United States of America in connection with the construction, reconstruction, relocation, maintenance and repair, made necessary by river improvements, to highways and lands under jurisdiction and control of the director of highways.

The director of highways is hereby authorized and empowered to relinquish to the United States of America any and all property rights of the state of Ohio in existing highways and lands under his jurisdiction and control, required in connection with river improvements; to release the United States of America from any and all claims for damages to the said highways and lands resulting from the construction, operation and maintenance of said river improvements; and to accept reimbursement therefor from the United States of America or any department or agency thereof, provided, however, that said agreements and other papers relating thereto shall first be submitted to the attorney general of Ohio for approval. The director shall credit any moneys so received to the proper funds of the department of highways of Ohio.

The term ‘highways’ as used in this act shall include bridges, viaducts, appurtenances and approaches thereto.”

In such act no similar powers are granted to boards of county commissioners with respect to county and township roads. My research fails to disclose any similar grant of power to boards of county commissioners with respect to county and township highways. Such fact would seem to indicate a feeling at least on the part of the legislature

that neither the highway director with respect to state highways nor the county commissioners with respect to county highways had the powers granted by such act, prior to the enactment of Section 1178-4 of the General Code. The fact that the General Assembly granted the powers therein enumerated to the state director of highways but refrained from making a similar grant of power to boards of county commissioners would tend to indicate a legislative intent that the county commissioners should not possess such powers.

In view of such fact and the limited ownership of the county of lands being used for county and township highways, which title reverts to the abutting property owners upon abandonment or vacation of the highway, it would seem that your third inquiry must be answered in the negative.

Sections 6965 to 6989, both inclusive, 7181 to 7219, both inclusive, 7465 and 7467 of the General Code not only grant authority to boards of county commissioners to maintain in repair the roads constructed by them, as well as all roads on the county system of highways, but place the duty on them so to do under the supervision of the county engineers.

The courts have held that if such roads are not maintained in repair and the county has notice of such defective condition, the county is liable for damages resulting from such defective condition.

Village of Shelby v. Clagett, 46 O.S., 549

City of Dayton v. Taylor's Adm'r., 62 O.S., 11

City of Circleville v. Sohn, 59 O.S., 285

In fact, it is specifically so provided in Section 2408 of the General Code with respect to a county.

It has, in fact, been held that where the duty to maintain highways has been placed upon a board and provision for obtaining funds for the purpose has been provided as in Ohio, such duty may be enforced by mandamus.

Reger v. Madison Township (N.J.), 71 Atl., 1115

Since it is the duty of the county commissioners to maintain such

roads in a constant state of repair, an agreement on their part to do that which they were already bound to do could scarcely be held to be sufficient consideration to support a reciprocal agreement on the part of the United States Government. However, you further ask in your fourth inquiry whether a board of county commissioners may agree at any time in the future to relocate a portion of the road if it should become necessary. As I have above pointed out, the county commissioners not only have the power but the duty to relocate a portion of a road or the road itself when in the use of their discretion they have determined such relocation by reason of public convenience or welfare to be necessary; however, even though such power and duty exist, it does not necessarily follow that an agreement binding upon their successors in office could be entered into. There is a well established rule that one public official or board cannot enter into an agreement binding the conduct of his or its successors in office. However, since, if, as I have above pointed out, the commissioners have determined it to be necessary to relocate a road or portion thereof, it is their duty so to do, then an agreement to do that which they were already bound to do would be void, and it is unnecessary to consider further their powers in this respect. Such being true, your fourth inquiry must be answered in the negative.

The reasons given to your third inquiry lead to the conclusion that it is beyond the powers of the board of county commissioners to enter into a binding agreement such as suggested in your fifth inquiry.

With respect to your sixth inquiry, the provisions of Section 6874 of the General Code, above referred to, grant to boards of county commissioners of neighboring counties, when sitting as a joint board, the same rights with respect to the improvement, alteration, relocation, etc., of highways located on the line of contiguous counties or which run into or through adjoining counties. In view of such fact, my answer to your sixth inquiry is similar to that given to your first inquiry.

Specifically answering your inquiries, it is my opinion that:

1. Boards of county commissioners may relocate, alter the construction of or vacate portions of county or township highways in their counties that lie within the reservoir district created by the United States, under an agreement of the United States to pay the cost thereof, when they have determined that public necessity or welfare demands such action.

2. Boards of county commissioners have no authority to convey flowage easements over portions of the county and township roads to the Federal Government in connection with the construction of a reservoir, since such right of floodage creates an additional servitude, upon lands over which the county has an easement for public travel only.

3. Boards of county commissioners, upon the vacation of a county or township highway, have no title to such lands which may be conveyed, the title thereto remaining in the abutting landowners.

4. A purported agreement entered into by a board of county commissioners to maintain roads constructed or relocated by such board by reason of the construction of a dam by the Federal Government and forever to save harmless the Federal Government from any damage to the highways from the effects of such dam is beyond the power of such board.

5. When a road forming the dividing line between two or more counties must be reconstructed, relocated, altered or lowered, the county commissioners of the affected counties, sitting as a joint board, upon having determined that public necessity or welfare demands such action, have authority under Section 6874 of the General Code to undertake and complete such improvement.

Respectfully,

THOMAS J. HERBERT
Attorney General.