

2399.

ROAD MARKERS—OHIO REVOLUTIONARY MEMORIAL TRAIL—
COUNTY COMMISSIONERS HAVE NO AUTHORITY TO PROVIDE
MONEY FOR ERECTION OF SUCH MARKERS—EXCEPTION.

SYLLABUS:

1. *County commissioners have no authority to contribute money to the Ohio Revolutionary Memorial Commission to be expended in furnishing markers for the Ohio Revolutionary Memorial Trail.*
2. *County commissioners have no authority to provide money for or to erect, even otherwise than through the instrumentality of the Ohio Revolutionary Memorial Commission, markers designating historical sites along said Revolutionary Trail.*
3. *Under authority of Section 7196, General Code, the county commissioners may authorize the county surveyor to erect and maintain at intersecting roads on the Ohio Revolutionary Memorial Trail, signposts the design of which shall be approved by the State Highway Director, and bearing merely the name of said trail; whereupon it shall be the duty of the county surveyor to erect and maintain such signposts.*

COLUMBUS, OHIO, September 30, 1930.

MR. A. D. HOSTERMAN, *Chairman, Ohio Revolutionary Memorial Commission, Springfield, Ohio.*

DEAR MR. HOSTERMAN:—I wish to acknowledge the receipt of your letter making the following statement and request:

“Referring to the interview I had with Mr. Hoover at your office yesterday, our Commission is very hopeful you can legally advise us that county commissioners can purchase markers of the type our Commission is erecting over the approximately 1400 miles of the Revolutionary Memorial Trails already layed down covering the western part of Ohio.

The situation is this, we have found the Revolutionary Trails cover almost double the number of miles originally contemplated. With the purchase of the farm at the battlefield and the contract already let for markers erected by the State Highway Department over the Trails System, the remaining balance in our funds appropriated by the last Legislature will not enable us to put up all of the markers and particularly the Type C or large historical markers that ought to be placed at once.

For your information I would state, our route markers have plaques giving information as to the march or marches along with information as to the distance ahead to important historical points.

We cannot give the information on the plaques necessary without the historical markers being in position. Under our contract for markers and all that we think that will be available out of our funds, we are arranging for one Type C or historical marker in each county. In many of the counties, there are a number of very important historical situations that ought immediately be set up on historical markers and referred to on the plaques of the route markers.

We have just completed the survey with the result that quite a number of the counties have ordered and will pay for quite a number of extra Type C markers if they can legally do so.

This as I explained to Mr. Hoover, would in the long run save consider-

able money to the State by the counties paying for part of these historical markers and besides that, enable us to get the marking system more nearly completed and in much better shape right away.

The orders that have been placed for extra markers by various counties with the full approval of the county commissioners, are now held subject to your opinion as to whether the counties can legally order and pay for these markers.

It is very important that this matter be determined very promptly so that the markers, if they can be ordered and paid for by various county commissioners, can be made and put up along with the markers of our commission under our arrangements with the Highway Department.

I hope you can in some way make it possible for such county commissioners as are willing and desire to do so, to purchase these historical markers to become a part of the State System and handled through our commission although paid for by the counties and not at first hand by the State."

The statute entitled "An Act to provide for the creation of an Ohio revolutionary memorial" (113 O. L. 547), under which your commission functions, provides in so far as is relevant:

"Section 3. The course of the Ohio revolutionary memorial trail shall be designated by said commission, along roads now existing, and shall extend from near Toledo to Cincinnati, the aim being to pass through as many of Ohio's historical sites of the Revolutionary War and the War of 1812 as possible, consistent with fairly direct lines, and to approximate in general (where feasible), the lines of march of American, British, and Indian expeditions of those periods, and also, wherein reasonably practicable, to include historical sites of importance not connected with said two periods, as well as sites of archaeological, geological and scenic interest, with the purpose of affording maximum interest and education. Along said trail the commission shall erect at the principal unmarked historic locations such stone markers, bronze tablets, monuments, and statues as in the judgment of the commission are suitable and appropriate, having in view the relative importance of the site or event to be marked or commemorated. * * *

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The commission is authorized to erect the following:

* * * * *

Approximately 35 monuments or markers with bronze tablets or appropriate inscriptions, of various sizes, at points of historic interest along the trail where no suitable marker or monument exists, with at least one marker in each county through which the trail passes, including the following sites: * * *

The commission may erect along the trail stone mile posts or other markers of a distinctive and uniform character giving information as to distances to points of historic, geological, archaeological, or scenic interest. Upon request of the commission, the Director of Highways shall assist in the erection and location of such markers, and furnish for such work, equipment, motor trucks, and labor.

* * * * *

Section 8. * * *

The commission is empowered to receive in the name of and for the State of Ohio, gifts and contributions, for the purposes of this act, of real or

personal property, including articles of historical or archaeological interest, money and services."

From the foregoing excerpts, it is obvious that the Ohio Revolutionary Memorial Commission has the power to receive on behalf of the state either money to purchase the markers for which said act provides, or the actual markers themselves. But whether a board of county commissioners has the power to contribute such markers or money for their purchase is a distinct question requiring a consideration of the powers of county commissioners.

In 11 Ohio Jurisprudence 332 one finds a very clear statement of the nature of powers of county commissioners:

" * * * the powers of county commissioners are statutory, both as to source and as to extent.

The original act establishing boards of county commissioners gave them 'authority to do and perform any act or duty required and enjoined by law'. Although this language does not appear in the present statute, it continues to be true that boards of county commissioners, being creatures of statute, have such powers, and such only, as are conferred by statute. Some courts have gone so far as to say that the board of county commissioners cannot go beyond the limits of the powers expressly granted by law. The decisions generally, however, recognize that the commissioners have certain implied powers, in addition to those given in express terms. But such implied powers exist only as necessitate and to the extent that they are essential as an incident to the very existence of the board, or to the complete discharge of all the powers, duties, and obligations conferred upon it by law.

Statutes which confer authority upon county commissioners are delegations of power by the state, which reserves to itself all power not thus delegated, and are, therefore, to be strictly construed in favor of the state and against the board."

Having these basic principles in mind, I have carefully perused the sections of the General Code relating to the powers of county commissioners. I find in them no authorization, either express or implied, general or specific, which would empower county commissioners to contribute money to your commission for the purpose of purchasing markers for the Revolutionary Trail.

Whether county commissioners have the power to furnish such markers otherwise than through the instrumentality of your commission requires a more extended consideration. It is certain that there are no laws granting to county commissioners power to appropriate money for historical, memorial or educational purposes from which one might reasonably imply the power to furnish markers for the Revolutionary Trail. If authority exists for this power, it must be found in the laws defining the powers of county commissions relative to public highways; these I shall proceed to discuss.

Before considering Section 7196, General Code, which provides specifically for signposts, I should like first to scrutinize the sections which deal with the more general powers of county commissioners relative to public highways, in order to ascertain whether, from them, may be implied the power to furnish markers for the Revolutionary Trail.

I am aware of the case of *Sears vs. Hopley*, 103 O. S. 46, which might reasonably be interpreted to hold that the erection of markers along a public highway may constitute an *improvement* thereof. But that case did not involve, as our problem does,

the question of the power of county commissioners to make improvements or to erect markers on the state highway system. It is one thing to say that the erection of markers may be a road improvement, but it is an entirely different thing to say that county commissioners have the power to make such improvements. Too, it is arguable that the placement of Revolutionary Trail markers might be classed as an item under *maintenance* of highways (Bouvier defining maintenance as "Aid; support; assistance."). But again, the vital question is the power of county commissions relative thereto. Keeping in mind that the route traversed by the Ohio Revolutionary Memorial Trail follows throughout its entire course, except for a small portion which is negligible, thoroughfares belonging to the state highway system, I find no authority empowering county commissioners to appropriate money for their general maintenance and improvement from which might be implied the right to provide road markers. In fact, changes effected by the 87th General Assembly now seem to negative such power if it did once exist.

Thus, Section 1203, General Code, formerly provided: (107 O. L. 125)

"Nothing in this chapter shall be construed as prohibiting the county commissioners or township trustees from *constructing, improving, maintaining or repairing* any part of the intercounty highways within such county or township; provided, however, that the plans and specifications for the proposed improvement shall first be submitted to the state highway commissioner and shall receive his approval." (*Italics the writer's*).

But in 1927, the Legislature repealed (112 O. L. 500) existing Section 1203, just quoted, and reenacted it more narrowly to read: (112 O. L. 444)

"Nothing in this act shall be construed as prohibiting the county commissioners, at the expense of the county, or in cooperation with township trustees, from constructing any part of the state highway system, or the bridges and culverts thereon, within such county or township; provided, however, that the plans and specifications covering any such proposed construction by county commissioners or township trustees shall be first submitted to the director and shall first receive his approval; provided, further, that any such construction shall be under the supervision and inspection of the director, or his agents or employes. * * * "

From a comparison of the former and existing Section 1203, it is obvious that, in so far as they are delegated by said section, the powers of county commissioners in reference to state highways have been greatly curtailed, that the general powers to improve, maintain and repair have been eliminated, and that only the general power of construction remains.

Further evidence of a legislative intent to diminish the scope within which county commissioners can act in reference to state highways is found in the amendment of Section 1224, General Code. This section is the one which places upon the Director of Highways the duty of maintaining and repairing state highways. Formerly, (110 O. L. 361) this section contained the further provision:

"Nothing in this chapter shall be construed so as to prohibit a *county, township or municipality* or the federal government, or any individual or corporation from contributing a portion of the cost of the construction, maintenance and repair of said state highways." (*Italics the writer's*).

But said provision was amended both in 1927 (112 O. L. 453) and in 1929 (113 O. L. 600), and it now reads:

“Nothing in this act shall be construed so as to prohibit the federal government, or any individual or corporation, from contributing a portion of the cost of the construction, reconstruction, widening, resurfacing, maintenance and repair of said highways.”

Thus, by the amendment, the *general* power of counties to contribute money to state highways for the purposes enumerated, was definitely taken away.

I do not believe that it would be reasonable to say that the erection of road markers constitutes a *construction* of a part of the state highway system within the meaning of existing Section 1203, *supra*. This conclusion is strengthened by the provisions of Section 6906, General Code, (enacted simultaneously with existing Section 1203); said section, entitled “General powers of commissioners relating to public roads”, reads: (112 O. L. 487)

“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, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives, or *by* otherwise improving the same. The board of county commissioners shall also have authority to purchase, erect and maintain automatic traffic signals at such intersections of public highways outside of municipalities, as they deem necessary for the protection of the public traveling upon such highways; provided, however, such power and authority shall not extend to intersections of public highways on the state highway system unless the board of county commissioners first obtain the consent and approval of the director. The county commissioners shall have power to alter, widen, straighten, vacate or change the direction of any part of such road in connection with the proceedings for such improvement. 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.” (Italics the writer’s.)

From the foregoing quotation, it is seen that Section 6906, General Code, undertakes to define the meaning of the word “construct”. Three things are included in the definition:

1. Laying out and building a new public road.
2. Improving, reconstructing or repairing any existing public road or part thereof by grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives.
3. Otherwise improving the same.

Clearly, county commissioners receive no power to provide road markers for existing roads from the first meaning of the word “construct”. Likewise the second meaning confines the word “improving” to certain things to which the erection of markers is extrinsic. Any authorization for the erection of the markers in question

under said section would have to be found under the third meaning—i. e.—“otherwise improving the same”. To the average layman who may be unfamiliar with the rules of legal statutory construction, the phrase “otherwise improving” may seem amply broad to include the erection of the contemplated markers. However, those who are habituated to the application of such rules, see at once that such an interpretation is precluded by the principle which is commonly known as the rule of *ejusdem generis*, aptly stated in 25 Ruling Case Law 996, thus:

“ * * * where in a statute, general words follow a designation of particular subjects * * * , the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things * * * of the same kind, class or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.”

Hence, the meaning of the phrase “otherwise improving” must be confined to the class of improvements specifically enumerated under the second meaning of the word “construct”, or to improvements of a similar nature. Being unable to class the erection of road markers under “grading, paving, widening, draining, dragging, graveling, macadamizing, resurfacing or applying dust preventatives”, I can find no authorization in Sections 1203 and 6909 for the erection of road markers.

The application of the rule of *ejusdem generis* may, upon mere cursory reflection, seem to frustrate rather than to give effect to the Legislature’s intent. However, it is based upon the sound reasoning that had the Legislature by the use of the general terms intended to include everything that might come within the meaning of “otherwise improving”, it would not first so carefully have enumerated certain specific improvements since the specific ones would receive sanction under the general terms. To disregard this principle of statutory construction would be to stifle the legislative intent. Thus, as is stated in 25 R. C. L. 956:

“Knowledge of the settled maxims and principles of statutory interpretation is imputed to the Legislature. To the end that there may be certainty and uniformity in legal administration, it must be assumed that statutes are enacted with a view to their interpretation according to such maxims and principles. When they are regarded, the legislative intent is ascertained. When they are ignored, interpretation becomes legislation in disguise. It is to be presumed that the lawmaking body is conversant with the established rules of statutory construction, and that it knows and contemplates the legal effect that accompanies the language it employs to make effective the legislative will.”

This construction placed upon Section 6906 is further strengthened by the fact that after using the general term “otherwise improving”, the Legislature in the very next sentence specifically authorized county commissioners to erect automatic traffic signals. Had the Legislature intended the phrase “otherwise improving” to include improvements other than the type already specified, it would have been unnecessary to interpolate express authority to erect such traffic signals. If the Legislature felt that express authority was needed to erect such traffic signals, it would seem that express authority would be necessary for the erection of road markers, for traffic signals certainly could come under the head of “otherwise improving” if road markers could.

Section 1191, General Code, (113 O. L. 604) empowers county commissioners to cooperate with the Department of Highways in certain specific improvements of the state highway system, but the erection of road markers is not included.

Finding in the laws relating to the general powers of county commissioners over state highways, no authorization for county commissioners to furnish road markers, I shall proceed to consider Section 7196, General Code, the specific provision relative to sign posts. The section reads: (107 O. L. 115)

“When authorized by the county commissioners the county surveyor shall erect and maintain at intersecting roads on the inter-county highways and main market roads suitable sign posts, the design of which shall be approved by the state highway commissioner, showing the names and numbers of the roads and the direction and distance to nearby villages and cities.”

The type of guideposts here authorized, the manner of their establishment and provision as to their location are specific. If such guideposts can be used along the Revolutionary Trail they may be furnished, erected and located in the manner stated. But this section cannot be relied upon as granting general authority to erect any type of guidepost. It must be confined to the kind specified. “A statute that directs a thing to be done in a particular manner ordinarily implies that it shall not be done otherwise.” (25 R. C. L. 982).

In construing the phrase “showing the names and numbers of the roads and the direction and distance to nearby villages and cities”, I do not believe that the Legislature intended to command that each guidepost erected under Section 7196 should bear all of the four things mentioned by the statute—i. e.—name, number, direction and distance. It is to be noted that the signposts to be erected are to be “suitable”. At some intersections it may be expedient to erect signs designating a highway even though there may not be a village or city nearby. Some roads may have official numbers but no official names. In keeping with the well known rule that “and” may be construed to mean “or” when necessary to effect the obvious intention of the Legislature, I believe that Section 7196 provides authority for the erection of guideposts which merely bear the name of the Revolutionary Trail, as I understand some of the guideposts which your commission intends to erect do. There is nothing to prevent the design of such guideposts from being the same as the design adopted by your commission if the state highway director approves it. I do not find, however, in Section 7196, any authority for the erection of markers merely designating historical sites.

In specific reply to your inquiry, I am of the opinion:

1. County commissioners have no authority to contribute money to the Ohio Revolutionary Memorial Commission to be expended in furnishing markers for the Ohio Revolutionary Memorial Trail.

2. County commissioners have no authority to provide money for or to erect, even otherwise than through the instrumentality of the Ohio Revolutionary Memorial Commission, markers designating historical sites along said Revolutionary Trail.

3. Under authority of Section 7196, General Code, the county commissioners may authorize the county surveyor to erect and maintain at intersecting roads on the Ohio Revolutionary Memorial Trail, signposts the design of which shall be approved by the state highway director, and bearing merely the name of said trail; whereupon it shall be the duty of the county surveyor to erect and maintain such signposts.

Respectfully,

GILBERT BETTMAN,
Attorney General.