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SYLLABUS:

(1) The Director of Highways has authority to arrange with planning commissions, county engineers, or boards of county commissioners to employ consulting engineers, subject to State approval and supervision, and reimburse such agency for costs incurred or agreed parts thereof.

(2) The Director of Highways is authorized to contract with a planning commission to perform part of the work of preparing comprehensive transportation and land use studies and include the arrangements of such planning commission with another authorized planning commission or commissions to perform part of the work aforesaid and to reimburse such multiple planning commissions in their respective phases of said work.

(3) A properly enacted resolution of cooperation by a board of county commissioners proposing cooperation by said board of county commissioners with the Director of Highways in the preparation of comprehensive transportation and land use studies and major thoroughfare reports in urban areas, which resolution sets forth the proportion of the costs and expenses to be contributed by such county, a copy of which is filed with the Director of Highways of the State of Ohio, constitutes a legal, valid, and enforceable contract under Section 5521.02, Revised Code.

Columbus, Ohio, October 28, 1963

Hon. P. E. Masheter
Director of Highways
State of Ohio
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“As a result of the passage of the Federal Aid Highway Act of 1962, the Ohio Highway Department has the responsibility of developing comprehensive transportation studies in urbanized areas over 50,000 population, of which there are 15 such areas in Ohio. To implement such responsibility the legislature enacted Senate Bill No. 226 and House Bill No. 719, the former applying to the highway department.

“Senate Bill No. 226, Section 5501.10 authorizes the Director of Highways to employ consulting engineers for preparation of all or any part of comprehensive transportation and land use studies for urban areas and surrounding areas.

“It also authorized the director to contract with regional, county or municipal planning commissions, or county engineers having *adequate staffs* for preparation of such studies or parts thereof and pay such commissioners for their work.

“Under such conditions, is the Director of Highways authorized to arrange with a planning commission, county engineer or Board of County Commissioners to employ consulting engineers, subject to State approval and supervision and reimburse such agency for costs incurred or agreed parts thereof?

“Also in connection with contracting with say a regional planning commission to do part of the work can such contract also cover such regional planning commission arranging with another planning commission to do some of the work, subject to reimbursement by the Ohio Department of Highways?

“Section 5521.02 of Senate Bill No. 226 authorizes boards of county commissioners to cooperate with the director of highways in the preparation of comprehensive transportation and land use studies by resolution proposing such cooperation.

“Please advise me if such resolution offering cooperation, when formally accepted by the Director of Highways, by endorsement on a certified copy thereof, constitutes a legal, valid, and enforceable contract, or whether a more usual type of agreement must follow its acceptance, setting forth or repeating terms covered in the accepted resolution.

“In view of the urgency in organizing and progressing these comprehensive transportation studies to meet the July 1, 1965 date set forth in the Federal Aid Highway Act, your early action on this request will be helpful and appreciated.”

Your request contains three basic questions. The first two of which involve the application of Section 5501.10, Revised Code, and the third relates to Section 5521.02, Revised Code, (Both Sections having been amended by Amended Senate Bill 226, effective June 17, 1963).

I shall discuss the three questions in the order in which you relate them. However, before proceeding to answer the questions a brief historical background of Section 5501.10, Revised Code, appears in order for a clearer understanding of the intent of the General Assembly. Prior to the Revised Code of Ohio, Section 5501.10, was denominated as Section 1178-17 General Code. General Code, Section 1178-17 contained only the first two paragraphs of what became later Section 5501.10, Revised Code, and the Supreme Court of Ohio in ruling on the authority of the Director of Highways to enter into contracts with a firm of consulting professional engineers held that statute did not authorize the Director of Highways to do so. *The State ex rel., A. E. Stilson & Associates, Ltd., A Partnership vs. Ferguson, Aud., 154 O.S. 139, 42 O.O. 214, 93 N.E. (2d) 688, decided July 19, 1950.* The syllabus of that case reads as follows:

“1. The provision of Section 1178-17, General Code, authorizing the state director of highways to ‘employ such assistants as are necessary to prepare plans and surveys’ for the improvement or construction of highways must be construed by giving the words employed therein their ordinarily accepted meaning and significance.

“2. The phrase, ‘employ such assistant,’ as used in Section 1178-17, General Code, does not authorize the director of highways to enter into a contract with a firm of professional engineers, delegating authority to such firm to make surveys, plans and contract specifications for the improvement of a state highway, for which service compensation is to be a fee based upon a specified percentage of the cost of the proposed highway improvement.”

The 1953 codification carried the same language into the new Revised Code with the exception of one word which is for our purposes unimportant historically. Thereafter the Ohio General Assembly has seen fit to amend Section 5501.10, Revised Code, five times: in 1953, 1955, 1957, 1961, and 1963.

The first amendment to Section 5501.10, effective October 16, 1953, added paragraph three (employment of consulting professional engineers), paragraphs four, five and six (restrictions on use of consulting engineers (A), (B),) and paragraph seven (compensation for services under (A), (B),).

It may be fairly assumed that the General Assembly amended and broadened this statute to meet the prohibitions of the *Stilson* case cited above since it expressly conferred upon the Director of Highways the authority to employ consulting engineers, and, subject to the Director of Highways obtaining the consent of the Controlling Board, authorizing the Director to "enter into contracts for consulting engineering services . . ." for the purposes contained in restrictive paragraphs (A), (B). The second, third and fourth amendments of 1955, 1957, and 1961 relate to the addition of paragraphs (C) and (D) of the restrictions, revising the money limitations of paragraph (A) of said restrictions. The net effect of all amendments since 1953 is the enlargement of the powers of the Director of Highways to employ and contract with consulting professional engineers on a fee or other negotiated contract basis where said engineers are neither employes nor assistants of the Director of Highways as construed and delineated in the *Stilson* case. The latest amendment, effective June 17, 1963, added new paragraph (E), amended the paragraph relating to compensation to be paid for services to include the services under (E) and added a new paragraph at the end of the Section around which ending paragraph your questions chiefly revolve. The new paragraph at the end of Section 5501.10, Revised Code, reads as follows:

"The director may contract with regional, county, or municipal planning commissions or county engineers having adequate staffs, and with planning agencies of adjacent states for the preparation of comprehensive transportation and land use studies and major thoroughfare reports, or parts thereof, and pay such commissions, county engineers or planning agencies of adjacent states for such

work from funds available to the state highway department.”

Public law 87-866, 76 Statutes At Large 1148, Federal Aid Highway Act of 1962, was enacted by the Congress of the United States and became law on October 23, 1962. Chapter 1, Title 23, U. S. Code, was enlarged by the addition thereto of Section 134.

Section 134 of Title 23 U.S. Code reads as follows:

Section 134, Transportation planning in certain urban areas

“It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. Added Pub. L. 87-866, 9 (a), Oct. 23, 1962, 76 Stat. 1148.”

The Section is self-explanatory and in order to implement this program and to meet the deadline date of July 1, 1965, as provided therein, the General Assembly of Ohio enacted the aforementioned Amended Senate Bill 226, as an emergency measure and it became effective on June 17, 1963.

It is clear that the Director of Highways has the authority to employ consulting professional engineers directly for “(E) . . . preparation of all or any part of comprehensive transportation and land use studies and major thoroughfare reports for urban areas and surrounding areas affected by such urban areas” and with the consent of the Controlling Board may contract for such consulting engineer services with a waiver of Section 5525.01, Revised Code, being expressly granted.

Thus, in this new program policy laid down by the Congress of the United States authorizing the U.S. Secretary of Commerce to cooperate with the various States in the development of long range highway plans and programs, coordinated with plans for improvements in other affected forms of transportation, which are formulated with consideration given to the effect on the future development of urban areas of more than 50,000 population, the Director of Highways may proceed at once to employ consulting professional engineers directly under sub-paragraph (E).

The General Assembly of Ohio having given the Director of Highways the power directly to employ consulting engineers then proceeded to authorize the Director to make contracts with five major planning groups to carry forward the avowed policy of the Federal Aid Highway Act of 1962 and to pay said commissions or groups directly for their work under the contracts so made. Thus, steps one and two are clear. The Director of Highways can employ his own consulting engineers or pay the various planning commissions etc., to do this urban comprehensive transportation planning process work if their staffs are adequate.

The nub of the first question raised by you is whether or not the Director of Highways may contract with said enumerated commissions for the latter to employ their own professional consulting engineers, to parcel out parts of the work to other commissions, to divide up the work among several commissions and the Director of Highways then to reimburse said commission or commissions. This is, in effect, asking the question of whether the Director of Highways may take one additional step with these other commissions, beyond that which the Director may clearly do directly under sub-paragraph (E) of Section 5501.10.

As stated by one of my predecessors in construing the former analagous Section 5521.02, Revised Code, (General Code, Section 1191 and Section 1193), there is no question but that it is necessary to have preliminary surveys made prior to the undertaking of a highway improvement. Such preliminary engineering as may be necessary to the drafting of plans is a necessary incident to all road improvements projects. *Opinions of the Attorney General of Ohio, 1927, Volume IV, No. 1423, page 2600 at page 2603.* While the issue

there was whether a board of county commissioners could enter into an agreement with the Director of Highways to pay some part or all of the costs of surveys incident to the improvement of a state highway and the Attorney General of Ohio ruled it could, there is no question here as to the authority of the Director of Highways to contract with these various planning boards and commissions, and the board of county commissioners to carry out a "continuing comprehensive transportation planning process . . ." as stated in Title 23, Section 134 United States Code. Can the Director of Highways let the planning commissions hire their own consulting engineers and then pay the commissions? I feel the intent of the statute is to permit and authorize the Director of Highways to do all of the things requisite and necessary to effectuate the policies set forth. Thus, if he may contract directly with consulting engineers and if he may contract directly with the named commissions, a natural corollary is that he may provide in his contracts with these commissions for employment by them, or private consulting engineers on a fee basis, subject to state approval, and pay these commissions from funds available to the Ohio Department of Highways. This would encompass the Director of Highways being able to contract with these commissions on a sound and reasonable basis to carry forward the intent of the General Assembly of Ohio expressed in its statutory amendments for the urban comprehensive planning which is deemed to be vital in the national interest by the Federal Aid Highway Act of 1962. Once having set the policy of cooperation in urban planning, the General Assembly of Ohio enlarged the authority of the Director of Highways to implement his authority and extend it to the cooperation with lawful planning commissions contemplated by the Congress of the United States and further authorizing him to pay for such work. It must be borne in mind that there appears to be one restrictive clause standing athwart this path, in relation to contracts with local commissions and county engineers, viz: they must have adequate staffs. These questions immediately arise:

- (1) What is an adequate staff?
- (2) What kind of staff is needed for these commissions and county engineers?
- (3) Who determines the adequacy of the staff?

(4) If the Director of Highways determines the adequacy of the staff, then does that imply that, for the purposes of planning comprehensive transportation and land use studies and major thoroughfare reports in connection with the urban areas, the Director of Highways will have no real need to employ outside private consulting professional engineers for such purposes, or, conversely, that, if the local Ohio commissions and county engineers employ outside private consulting professional engineers, are they to be considered as staff members and their adequacy as part of the staff be passed upon?

Once again we must look to the intent of the Congress of the United States and the Ohio General Assembly. The Section under review is one of delegation of powers. It must be read in the light of the words being given their ordinarily accepted meaning and significance. See syllabus one of the *Stilson* case. What did the Ohio General Assembly mean when it amended Section 5501.10, Revised Code, to add (e) amending the compensation for payment of consulting engineers employed under (E) and giving the Director of Highways authority to contract with the board of county commissioners and to pay them for the preparation of these studies? It is manifest that the Ohio General Assembly wants these things performed either by the Director of Highways in employing consulting engineers on his own or by contracting with local planning commissions and county engineers to do what he otherwise could do on his own. Thus, the axiom that the greater contains the lesser is readily apparent and the overall intent of the Federal Aid Highway Act of 1962 can be carried forward in this manner expeditiously and on a realistic basis to meet the deadline date of July 1, 1965, directly at state level, cooperating between state and local authorized commissions having staffs equipped to do such work or employing consulting engineers to perform these urban transportation studies. The penalty to be imposed under the Federal Aid Highway Act of 1962 if continuing comprehensive urban area transportation surveys and land use studies are not in effect between the state and local authorized commissions on July 1, 1965, is that the U.S. Secretary of Commerce may refuse to grant further Federal Aid to highway projects in these affected urban areas.

In relation to your third question it appears that Section

5521.02, Revised Code has been amended to authorize cooperation between the boards of county commissioners and the Director of Highways in the preparation of comprehensive transportation and land use studies and major thoroughfare reports in line with the policy and intent of the Federal Aid Highway Act of 1962. Section 5521.02, Revised Code, is clear when a board of county commissioners desires to cooperate in such matters. The procedure is simple. The board passes the required resolution proposing cooperation setting forth all the terms and conditions relating to "the proportion of the costs and expenses to be contributed by such county" and files said resolution of cooperation with the Director of Highways.

However, in view of the importance of this program and injunction contained in the Federal Aid Highway Act of 1962, concerning State and Local cooperation and the penalties that may be invoked by the U.S. Secretary of Commerce after July 1, 1965, the Department of Highways of the State of Ohio, no doubt, contemplates taking the initiative rather than awaiting an offer of cooperation by resolution from the board of county commissioners and, if so, then a more formal type of contract or agreement should be entered into between the Director of Highways and the board of county commissioners, or, at least the terms of any negotiated agreement should be embodied clearly and unambiguously into any resolution of cooperation of the board of county commissioners.

In view of the foregoing and answering your questions specifically, it is my opinion that:

(1) The Director of Highways has authority to arrange with planning commissions, county engineers, or boards of county commissioners to employ consulting engineers, subject to State approval and supervision, and reimburse such agency for costs incurred or agreed parts thereof.

(2) The Director of Highways is authorized to contract with a planning commission to perform part of the work of preparing comprehensive transportation and land use studies and include the arrangements of such planning commission with another authorized planning commission or commissions to perform part of the work aforesaid and to reimburse such multiple planning commissions in their respective phases of said work.

(3) A properly enacted resolution of cooperation by a board of county commissioners proposing cooperation by said board of county commissioners with the Director of Highways in the preparation of comprehensive transportation and land use studies and major thoroughfare reports in urban areas, which resolution sets forth the proportion of the costs and expenses to be contributed by such county, a copy of which is filed with the Director of Highways of the State of Ohio, constitutes a legal, valid, and enforceable contract.

Respectfully,
WILLIAM B. SAXBE
Attorney General