

2916

TURNPIKE PROJECT — GRADE SEPARATION — INTERSECTION, TURNPIKE AND PUBLIC ROAD—OVERPASS—STRUCTURE—PAVED SURFACE—PART OF SUCH PROJECT—MAINTENANCE AND REPAIR RESPONSIBILITY OF TURNPIKE COMMISSION.

SYLLABUS:

Where, in the construction of a turnpike project, it becomes necessary to effect a grade separation at the intersection of such turnpike and a public road, whereby such public road is carried over the turnpike by means of an overpass, the paved surface on such overpass does not become such a part of the turnpike project as defined in Section 1204, General Code, as to require such paved surface to be kept in maintenance and repair under the provisions of Section 1218, General Code; but the structure by which such paved surface is supported is a part of such project and its maintenance and repair is the responsibility of the turnpike commission.

Columbus, Ohio, July 31, 1953

Hon. Thomas F. Dewey, Prosecuting Attorney
Sandusky County, Fremont, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“Mr. L. R., Engineer of Sandusky County, Ohio, has requested me to obtain an opinion from your office concerning the following question:

“Mr. R., as Sandusky County Engineer, has a duty to maintain and clean county roads, about thirty of which will go over the new turnpike which will be constructed through Sandusky County. According to present plans the approaches to the overpasses will be constructed at a 5 degree grade, which will necessitate cleaning and ice removal during icy and snowy weather.

“Section 5537.17 (1218) of the General Code of Ohio states as follows: ‘Each turnpike project when constructed and open to traffic shall be maintained and kept in good condition and repair by the Commission.’

“Section 5537.0 (1204) Paragraph B says ‘Turnpike project means any express highway, super highway, or motor way constructed under Sections 5537.01 to 5537.23 inclusive, of the Revised Code, at such location as is approved by the Governor, including all bridges, tunnels, *overpasses*, underpasses, interchanges, entrance plazas, approaches, etc.’

“Under the statutes, who has the duty to clean, maintain and keep in repair the approaches and the overpass bridges on the county roads going over the turnpike? Does the county engineer have the duty to maintain the approaches and bridges over the county roads, or are the approaches and bridges on the county roads going over the turnpike included in the definition of the turnpike project, which under Section 5537.17 shall be maintained and kept in good condition and repair by the Turnpike Commission?”

Paragraph (b) of Section 1204, General Code, to which you refer in your inquiry, reads as follows:

“(b) The word ‘project’ or the words ‘turnpike project’ shall mean any express highway, super-highway or motor way constructed under the provisions of this act, at such location as shall be approved by the governor, including all bridges, tunnels, overpasses, underpasses, interchanges, entrance plazas, approaches, toll houses, service stations, and administration, storage and other buildings and facilities *which the commission may deem necessary for the operation of the project*, together with all property, rights, easements and interests which may be acquired by the commission for the construction or the operation of the project. Each project or turnpike project shall be separately designated by name or number and may be constructed or extended in such sections as the commission may from time to time determine.”
(Emphasis added.)

It would be technically possible, of course, to construct and operate a limited access toll turnpike without a grade separation at numerous points of intersection of such turnpike with roads open to the public use without charge, but this could not be done without destroying the use of such public roads at such intersection. It is quite clear, of course, that the Legislature did not intend to permit such destruction, and thus it may be said that it would be impossible lawfully to construct and operate a toll turnpike without such grade separation. In this sense it could be

said that any overpass which carries a public road over such turnpike is "necessary for the operation of the project." Such being the case it follows that such overpass is a part of a turnpike project which, under the provisions of Section 1218, General Code, is required to "be maintained and kept in good condition and repair by the commission." In this situation the next question to be examined is whether the paved, or traveled, surface of a public road carried over a turnpike project by means of an overpass is itself a part of the overpass.

When such an overpass is considered solely as a physical structure and when it is considered solely from the engineering viewpoint, it is difficult to conceive it to be other than a single physical entity. In seeking to ascertain the legislative intent on the question of responsibility of maintenance, however, it may well be borne in mind that the sole purpose of the structure is to make possible the relocation, in point of elevation, of a separate and complete structure previously existing, i. e., the paved portion of the public road concerned. By means of such overpass such paved portion has been removed from direct contact with the supporting soil and now is borne by an artificial structure with only indirect contact with the earth. Such paved portion is, however, so reconstructed as again to become an integrated part of the traveled surface of a public road, and the operation may thus be regarded, in a very real and definite sense, as the reconstruction of a previously existing physical entity which is separate and distinct from the newly created structure which supports it.

In the matter of the structure upon which the paved portion of public road is supported, we can easily recognize a new creation which quite clearly is necessary, by requirement of statute, to the construction and operation of the toll road. Such being the case the responsibility for the maintenance of such supporting structure is clearly that of the commission under the provisions of Section 1218, General Code.

In the case of the paved portion of the public road, however, it will be observed that although its *relocation*, and its continued support in the plane where relocated, is necessary to the operation of the turnpike, its maintenance in good repair is not so necessary, such maintenance being necessary only to the continued operation of the public way.

Moreover, it should be recalled that the maintenance of the paved surface of the public road, prior to such relocation, was the responsibility

of the public authorities concerned, and that this, in the case of public roads, represented the established policy of the state. In the provisions in the turnpike act defining turnpike projects and fixing the responsibility for their maintenance, I perceive no clear legislative intent to require the commission to assume an expense which had theretofore been met by the expenditure of public funds. Even if the statute could be conceded to be ambiguous in this respect, it would be necessary to resolve such ambiguity in harmony with the established policy of the state. 37 Ohio Jurisprudence, 677, Section 372. I must conclude, therefore, that although the commission has the responsibility to maintain the supporting structures by which a public road is carried over a turnpike project, it has no such continuing duty as to the paved portion of such road which has thus been relocated and reconstructed by the commission.

This conclusion does not, however, entirely dispose of the whole question here presented. In Section 1206, General Code, we find the following provision :

“The commission shall have authority to construct grade separations at intersections of any turnpike project with public roads, state highways and railroads and to change and adjust the lines and grades of such public roads, state highways, railroads and public utility facilities, which change and adjustment of lines and grades of public roads and highways shall be subject to the approval of the director of highways so as to accommodate the same to the design of such grade separation. The cost of such grade separation and any damage incurred in changing and adjusting the lines and grades of such roads, highways, railroads and public utility facilities, shall be ascertained and paid by the commission as a part of the cost of such turnpike project.”

Moreover, in Section 1218, General Code, it is provided :

“All public or private property damaged or destroyed in carrying out the powers granted by this act shall be restored or repaired and placed in its original condition as nearly as practicable or adequate compensation made therefor out of funds provided under the authority of this act.”

It can scarcely be doubted that where it has been found necessary to carry a public road over a turnpike project by means of an overpass so as to create a substantial grade, which grade did not previously exist, it is not practicable to restore such public road absolutely to its original condition. It is clear, too, that if it be asserted that the creation of such grade on the public road is such as to cause “damage incurred in changing

and adjusting the lines and grades of such roads," the question of fact thereby raised must be determined by the parties in particular cases. The pecuniary amount of such damage, if any, should "be ascertained and paid by the commission as a part of the cost of such turnpike project" as provided in Section 1206, General Code.

Accordingly, in specific answer to your inquiry, it is my opinion that where, in the construction of a turnpike project, it becomes necessary to effect a grade separation at the intersection of such turnpike and a public road, whereby such public road is carried over the turnpike by means of an overpass, the paved surface on such overpass does not become such a part of the turnpike project as defined in Section 1204, General Code, as to require such paved surface to be kept in maintenance and repair under the provisions of Section 1218, General Code; but the structure by which such paved surface is supported is a part of such project and its maintenance and repair is the responsibility of the turnpike commission.

Respectfully,

C. WILLIAM O'NEILL
Attorney General