

2368.

GUARD RAILS AT COUNTY BRIDGES AND APPROACHES—  
COUNTY COMMISSIONERS REQUIRED TO ERECT AND  
MAINTAIN SAME — SECTION 7563 G. C. — ALSO REQUIRED  
AT ALL PERPENDICULAR WASHBANKS, EXCEEDING EIGHT  
FEET IN HEIGHT, IN IMMEDIATE CONNECTION WITH OR  
ADJACENT TO PUBLIC HIGHWAY OTHER THAN STATE  
HIGHWAY — “PUBLIC HIGHWAY” INCLUDES TOWNSHIP  
ROADS.

SYLLABUS:

1. *The duty of a board of county commissioners to erect and maintain guard rails at bridges and bridge approaches is limited to county bridges and approaches thereto and then only under the conditions set forth in Section 7563, General Code, as follows: (a) at each end of a county bridge, viaduct or culvert more than five feet high; and (b) on each side of every ap-*

*proach to the county bridge, viaduct or culvert if the approach or embankment is more than six feet high.*

2. *By the express provisions of Section 7563, General Code, a board of county commissioners is required to protect by suitable guard rails all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, other than state highways, or are adjacent thereto, in an unprotected condition. The term "public highway" by definition (Section 7464, General Code) includes township roads.*

Columbus, Ohio, June 7, 1940.

Hon. J. Ewing Smith, Prosecuting Attorney,  
Bellefontaine, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion which reads as follows:

"Is the Board of County Commissioners, under O. G. C. 7563, required to construct guard rails at bridges, approaches and along banks where improving a Township road under petition by the Board of Township Trustees?"

Section 7563, General Code, with which your inquiry is concerned, provides as follows:

"The board of county commissioners shall erect or cause to be erected and maintained where not already done, one or more guard rails on each end of a county bridge, viaduct or culvert more than five feet high. They shall also erect or cause to be erected, where not already done (,) one or more guard rails, on each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high. They shall also protect, by suitable guard rails, all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, other than state highways, or are adjacent thereto, in an unprotected condition, but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality, and on state highways such guard rails shall be erected and maintained by the department of state highways."

By virtue of that section the board of county commissioners is charged with the mandatory duty of erecting and maintaining guard rails at the

following places: (1) at each end of a county bridge, viaduct or a culvert more than five feet high; (2) at each side of every approach to a county bridge, viaduct or culvert if the approach or embankment is more than six feet high; and (3) at perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, other than state highways, or are adjacent thereto, in an unprotected condition.

It will be observed that I failed to limit the duty of the board of county commissioners as set forth in the statute as follows:

“ \* \* \* but in such cities and villages as by law receive part of the bridge fund levied therein, such guard rails shall be erected by the municipality, \* \* \* ”

Such omission is prompted by the observation of Marshall, C. J., in the case of *The City of Youngstown vs. Sturgess*, 102 O. S., 480, wherein speaking for the court he said at page 484 as follows:

“Neither of these two sections (Section 2421, General Code and Section 7557, General Code) can have any controlling force, because they only provide for the construction and repair of bridges without any mention being made of approaches or embankments, *and for the further reason that there is no longer any provision whereby cities or villages may demand or receive any portion of the bridge fund created by county levy.*”

(Parenthetical matter and underscoring mine.)

It would appear, therefore, that the limitation in the statute above quoted, with respect to cities and villages receiving part of the bridge fund levied therein, is obsolete and of no force or effect.

The duties of boards of county commissioners are statutory and unless some specific authority by way of legislative enactment can be found imposing a particular duty upon such boards, no such duty exists in law. The sole duty imposed upon boards of county commissioners to construct and maintain guard rails is contained in Section 7563, *supra*. Such boards owe no duty to erect guard rails in places other than those specified in said Section. (See Opinion No. 461, Opinions of the Attorney General, 1927, Vol. I, p. 765).

In support of the position taken in the instant opinion, your attention is directed to the case of *The Board of County Commissioners of Franklin*

County vs. Darst, 96 O. S., 163, the first branch of the syllabus of which reads as follows:

“Section 7563, General Code, imposes an absolute duty upon the board of county commissioners, requiring the erection of guard rails at the heights designated therein. When this duty has been performed there is no liability imposed upon the county under said section for negligence or for failure to use ordinary care in the erection of guard rails on other parts of an approach or embankment.”

At page 169 of the opinion in the Darst case, supra, Jones, J., said as follows:

“It is evident from the whole scope of the statute (Section 7563, General Code) that the legislature intended to protect only those places designated by it peculiarly as points of danger. It required the erection of guard rails on county bridges, viaducts and culverts where the same were more than five feet high. It required suitable guard rails at all perpendicular wash-banks more than eight feet in height. And so when the statute imposed the duty upon the county commissioners to place guard rails on approaches or embankments more than six feet high, the legislature evidently had the intention to protect these fixed points of danger.”

(Parenthetical matter mine.)

See also the case of The Board of County Commissioners of Wyandot County vs. Boucher, 98 O. S., 263, wherein at page 264 of the per curiam opinion the court said as follows:

“Section 7563, being in derogation of the common law, is not to be extended beyond the plain meaning of its terms.”

In addition to the mandatory duties imposed on boards of county commissioners by Section 7563, supra, said boards are also required to construct and keep in repair approaches and ways to those bridges enumerated in Section 2421, General Code. The latter duty exists by force of Section 2422, General Code, which provides as follows:

“Except as therein provided, the commissioners shall construct and keep in repair, approaches or ways to all bridges named in the preceding section. But when the cost of construction or repair of the approaches or ways to any such bridge does not exceed fifty dollars, such construction or repair shall be performed by the township trustees.”

There is no need to examine the types of bridges set forth in Section 2421, General Code, for the reason that Section 2422, supra, does not re-

quire the erection of guard rails. Suffice it to say, the provisions of Section 2422, supra, do not alter the conclusion reached in the instant opinion.

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

1. The duty of a board of county commissioners to erect and maintain guard rails at bridges and bridge approaches is limited to county bridges and approaches thereto and then only under the conditions set forth in Section 7563, supra, as follows: (a) at each end of a county bridge, viaduct or culvert more than five feet high; and (b) on each side of every approach to the county bridge, viaduct or culvert if the approach or embankment is more than six feet high.

2. By the express provisions of Section 7563, supra, a board of county commissioners is required to protect by suitable guard rails all perpendicular wash banks more than eight feet in height, where such banks have an immediate connection with a public highway, other than state highways, or are adjacent thereto, in an unprotected condition. The term "public highway" by definition (Section 7464, General Code) includes township roads.

Respectfully,

THOMAS J. HERBERT,  
Attorney General.