

Note from the Attorney General's Office:

1974 Op. Att'y Gen. No. 74-007 was modified by
1981 Op. Att'y Gen. No. 81-007.

OPINION NO. 74-007**Syllabus:**

1. Where, pursuant to 5521.01, a village has requested and thereby obligated the director of transportation to make repairs on a section of highway, the obligation does not continue in effect after the village becomes a city.

2. A municipal corporation has a statutory duty to maintain and repair state highways within its limits, including bridge structures which are a part of such highways. The director of transportation has discretionary power to perform maintenance and repairs with the consent of the legislative authority of the municipal corporation.

3. While a county has an obligation to maintain and repair certain bridges in accordance with R.C. 5591.02, a municipal corporation, within which the bridge is located, has no authority to recover from the county costs it incurs in performing the repairs itself.

4. A village which is required by R.C. 723.01 to keep certain bridges in repair, may pursuant to R.C. 5521.01 request the director of transportation to perform such repairs. In such case both the state and the county are under an obligation to repair the bridge.

To: J. Phillip Richley, Director, Department of Transportation, Columbus, Ohio
By: William J. Brown, Attorney General, February 1, 1974

The request for an opinion as to the responsibility for the repair and maintenance of highways within the confines of a city reads in part:

"Your legal opinion is requested concerning responsibility for repair and maintenance of U.S. Route 23 within the City of Sylvania and the overpass bridge structure carrying State Route 223 (Monroe Street) above U. S. Route 23.

* * * * *

"Consent by the Village of Sylvania was given to the Director of Highways to construct, operate and maintain U.S. Route 23, a non interstate, limited access state highway by 1958 and 1960 Village ordinances. The Director of Highways accepted the Village ordinances, in view of the provisions of the first sentence of O.R.C. 5521.01 which are applicable only to villages. The governmental status of Sylvania later changed to that of a city, at which time the responsibility for maintenance and repair of the subject highway because a statutory responsibility of the City and the department so notified the City. The State is required by statute to inspect all bridges on state routes and such inspections revealed that the backwalls of the Monroe Street overpass bridge above Route 23 have deteriorated to the point that repairs should be made. The position taken by the City of Sylvania toward responsibility for these repairs, as stated in their letter, is that the Director assumed, by acceptance of said 1958 and 1960 Village ordinances, a contractual duty of permanent maintenance of said Route 23 within Sylvania to the end of time and regardless of its change in governmental status from that of a village to that of a city.

"The agreement by the Director to maintenance of U.S. Route 23 and to the bridge structures above it as part of that highway was given with an intention to conform to the statutory provisions of O.R.C. 5521.01 which made repairs and maintenance of state highway within villages the mandatory duty of the state upon request by the village. It is further expressed in this statute and in O.R.C. 5501.11 and 5511.01 that such maintenance and repair of state highways within cities is to be discretionary with the director. * * *"

Given the above facts, the questions may briefly be stated as follows:

1. Is the Director's acceptance of the village ordinance still binding on the Department after the village has become a city?
2. Does a city have a statutory duty to maintain and repair state highways within the city and bridge structures over such highways, and does the Director have a discretionary power to perform such maintenance and repair?
3. What is the county's duty with respect to the repair of a bridge structure over a state highway within the limits of a city?
4. What is the responsibility of a village for the maintenance and repair of bridges, within the village limits, which form a part of a state highway or are overpasses of such state highway?

R.C. 5521.01 discusses the responsibility for maintenance and repair of state highways within a municipal corporation:

"The director of transportation, upon the request by and the approval of the legislative authority of a village, shall maintain, repair, and center line paint, or may establish, construct, reconstruct, improve, or widen any section of a state highway within the limits of a village. The director may establish, construct, reconstruct, improve, widen, maintain, or repair any section of state highway within the limits of a city, including the elimination of railway grade crossings, and pay the entire or any part of the cost and expense thereof from state funds, but in all cases he shall first obtain the consent of the legislative authority of such municipal corporation, except that he need not obtain the consent of the municipal corporation if the existing highway being changed or the location of an additional highway being established was not within the corporate limits of the municipal corporation at the time such establishment or change was journalized by the director."
(Emphasis added.)

While the Director of Transportation is required by statute to repair, at the request of the legislative authority of a village, any section of highway lying within the village, no such duty arises in the case of a city. See also R.C. 5501.11 and R.C. 5511.01 which state that no duty of repairing state highways within municipal corporations shall attach to the Director, except within villages, as provided in R.C. 5521.01. Therefore, the director has no statutory duty to make the repairs in question.

Furthermore, I find nothing in the facts set out above to establish any contractual obligation on the part of the director to make these repairs. It is well established that public officials may not bind the state of Ohio by a perpetual contract. State of Ohio v. Arnold Medbery et al., 7 Ohio St. 522 (1857). Article II, Section 22, Ohio Constitution, reads as follows:

"No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law, and no appropriation shall be made for a longer period than two years."

And R.C. 131.17 provides that:

"No officer, board, or commission of the state shall enter into any contract, agreement, or obligation involving the expenditure of money, or pass any resolution or order for the expenditure of money, unless the director of finance first certifies that there is a balance in the appropriation, not otherwise obligated to pay precedent obligations, pursuant to which such obligation is required to be paid."

The village ordinances in question were enacted in 1958 and 1960 and were accepted by the director of highways pursuant to R.C. 5521.01. At a later date the village became a city. On this point R.C. 703.07 reads as follows:

"Officers of a village advanced to a city, or of a city reduced to a village, shall continue in office until succeeded by the proper officers of the new municipal corporation at the regular municipal election, and the ordinances thereof not inconsistent with the laws relating to the new municipal corporation shall continue in force until changed or repealed."

(Emphasis added.)

It appears clear, therefore, that an obligation, created by the enactment of a village ordinance, pursuant to R.C. 5521.01, does not continue in effect after the village becomes a city, since it would conflict with the director's discretion under that Section. Nor may these ordinances and their acceptance by the director be treated as a perpetual contract obligating the state of Ohio to make such expenditures more than two years thereafter, or after the village has become a city.

The second question concerns a city's responsibility to maintain state highways within the city, as well as bridges over such highways. R.C. 723.01 reads:

"Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of such municipal corporation shall have the care, supervision, and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and shall cause them to be kept, open, in repair, and free from nuisance."

(Emphasis added.)

This Section has been repeatedly treated by courts as imposing a mandatory duty on municipal corporations to maintain highways and bridges within the city limits. Robert Neff and Sons, Inc. v. Lancaster, 21 Ohio St. 2d 31 (1970); Fankhauser v. Mansfield, 19 Ohio St. 2d 102 (1969); State, ex rel City of Cleveland v. Masheter, 8 Ohio St. 2d 11 (1966). In addition, R.C. 723.01 has been applied in these cases as an exception to the rule of sovereign immunity which normally protects municipal corporations in the exercise of governmental functions.

The director of transportation may, of course, maintain and repair any section of state highway within a city, after having first obtained the consent of the legislative authority of the municipal corporation in accordance with R.C. 5521.01. However, such a course of action is purely discretionary on the part of the director.

The third question is whether the county has a statutory duty to repair bridges, such as the one described above. R.C. 5591.02 provides:

"The board of county commissioners shall construct and keep in repair all necessary bridges in municipal corporations on all state and county roads and improved roads which are of general and public utility, running into or through such municipal corporations."
(Emphasis added.)

It is clear from the above that the county also has a statutory duty to maintain and repair the bridge in question, since it is part of a state route. See State ex rel. City of Cleveland v. Masheter, 8 Ohio St. 2d 11 (1966); Lengyel v. Brandmiller et al., Commrs., 139 Ohio St. 487 (1942); Youngstown v. Sturgess, 102 Ohio St. 480 (1921); City v. Dumford, 22 Ohio App. 2d 75, 76 (1969). Cf. Opinion No. 71-030, Opinions of the Attorney General for 1971.

There is, then, a statutory responsibility imposed on both the city and the county, and both may be sued for damages resulting from their failure to maintain and keep the bridge in repair. R.C. 723.01, R.C. 305.12. Lengyel v. Brandmiller et al., supra. Furthermore, it has been held that the county has the primary obligation to repair a bridge on a county or state road. Youngstown v. Sturgess, supra; The Interurban Railway and Terminal Company v. The City of Cincinnati, 94 Ohio St., 269 (1916); The City of Piqua v. Geist, 59 Ohio St. 163 (1899). See also, Opinion No. 1107, Opinions of the Attorney General for 1960, page 35; Opinion No. 790, Opinions of the Attorney General for 1957, page 309; Opinion No. 471, Opinions of the Attorney General for 1951, page 211.

However, it does not follow that a municipal corporation may require the county to participate in the cost of repairing a bridge within the limits of the municipal corporation, which is part of a state road. The functions of the county and the city differ somewhat as to bridges within the limits of the municipality. The county's duty is to construct and maintain. The city's duty is to keep the bridge from becoming a nuisance. Youngstown v. Sturgess, supra; 8 O. Jur. 2d, Bridges, Secs. 62-63.

In Opinion No. 1453, Opinions of the Attorney General for 1920, page 793, my predecessor had occasion to consider a similar problem. In that situation a city undertook to pave a bridge within the city, which the county had a duty to repair. The city sought to recover from the county the cost of paving the bridge, by assessing the county under G.C. 3812 [R.C. 727.01]. My predecessor, noting that the county was not the owner of any land abutting on or adjacent to the bridge, concluded that there was no basis for an assessment against the county. While recognizing that county commissioners are under the duty of keeping in repair certain bridges within municipalities, he stated that:

"* * * such duty on the part of the commissioners as to a given bridge does not supply the lack of authority in the municipality to assess for improving the bridge."

See, also, the recently enacted H.B. No. 1, effective March 22, 1973, which eliminated language in R.C. 5591.02 relieving the county commissioners of the duty to repair, where a municipal corporation had a right to demand and receive a portion of the bridge fund levied upon property within such corporation. The language was considered obsolete as there has been no such fund in actual existence for years.

It appears clear, therefore, that while a county has the primary obligation to maintain and repair bridges such as the one in question, a municipal corporation, within which the bridge is located, has no authority to recover from the county costs it incurs in performing the repairs itself.

The final question concerns the responsibility of villages to maintain and repair bridges within the village limits, which form a part of a state highway or are overpasses of state highways. The duty of a village under R.C. 723.01 to keep public highways and bridges in repair is secondary to the county's primary obligation under R.C. 5591.02. M.J. Mooney, Admr. v. St. Marys (Village), 8 Ohio C.Dec. 341 (1897). However, a village, as discussed in my answer to your first question, may pursuant to R.C. 5521.01 request the director of transportation to maintain and repair any section of a state highway, within the limits of the village. Therefore, although the county has the primary obligation to repair bridges on state roads within a municipal corporation, a village may, in performing its statutory obligation, impose on the director of transportation a duty under R.C. 5521.01 to maintain the bridge in question. In such a case both the state and the county would be under a statutory obligation to repair the bridge. I find nothing to indicate that the county would be relieved of its duty under R.C. 5591.02. On this point, Opinion No. 1841, Opinions of the Attorney General for 1960, must be questioned. At any rate, it is distinguishable here, since my predecessor was apparently concerned with bridges outside municipalities and made no mention of the provisions of R.S. 5591.02 which concerns bridges within such municipal corporations. In response to the final question, a village, which is required by R.C. 723.01 to keep certain bridges in repair, may pursuant to R.C. 5521.01 request the director of transportation to perform such repairs. In such case both the state and the county would be under an obligation to repair the bridge.

In answer to the questions posed, it is my opinion, and you are hereby advised that:

1. Where, pursuant to 5521.01, a village has requested and thereby obligated the director of transportation to make repairs on a section of highway, the obligation does not continue in effect after the village becomes a city.
2. A municipal corporation has a statutory duty to maintain and repair state highways within its limits, including bridge structures which are a part of such highways. The director of transportation has discretionary power to perform maintenance and repairs with the consent of the legislative authority of the municipal corporation.
3. While a county has an obligation to maintain and repair certain bridges in accordance with R.C. 5591.02, a municipal corporation, within which the bridge is located, has no authority to recover from the county costs it incurs in performing the repairs itself.
4. A village which is required by R.C. 723.01 to keep certain bridges in repair, may pursuant to R.C. 5521.01 request the director of transportation to perform such repairs. In such case both the state and the county are under an obligation to repair the bridge.