

421.

CANAL BRIDGES—ELIMINATION—COUNTY COMMISSIONERS—MAY NOT PROPERLY MAKE CONTRIBUTION TO CITY WHERE PROJECT LOCATED WITHIN MUNICIPALITY ON STATE OR COUNTY HIGHWAYS — WHEN COUNTY COMMISSIONERS MAKE SUCH IMPROVEMENT AND CITY CONTRIBUTES — COUNTY HAS SUPERVISION — SECTION 5541-8 G. C. — GASOLINE TAXES — DISTRIBUTED TO COUNTY—MAY BE USED FOR ELIMINATION CANAL BRIDGES — IN CONNECTION WITH CONSTRUCTION, RECONSTRUCTION OR WIDENING COUNTY ROADS—WPA—MIAMI AND ERIE CANAL.

SYLLABUS:

1. *The county commissioners may not properly make a contribution to a city in connection with a project the purpose of which is to eliminate canal bridges which are located within such municipality on state or county highways.*
2. *The county commissioners may institute such an improvement and the city may make a contribution to the county, but the same must be constructed under the supervision of the county.*
3. *Gasoline taxes distributed to a county, under the provisions of*

section 5541-8, General Code, may be used for the elimination of canal bridges in connection with the constructing, widening or reconstructing of county roads.

COLUMBUS, OHIO, April 13 1939.

HON. PAUL T. LANDIS, *Prosecuting Attorney, Lima, Ohio.*

DEAR SIR: Acknowledgment is made of a communication from your office requesting my opinion as follows:

"The council of the city of Delphos, Ohio, is sponsoring a WPA project involving a closing up of the Miami and Erie canal through said city. In so doing there will be eliminated two, or possibly three, bridges over the canal which are on state highways or inter-county highways.

The city of Delphos has requested the county commissioners of Allen county, Ohio, to assist financially on this project, suggesting that the county's gasoline tax fund might be used for this purpose.

Will you kindly give us your opinion as to whether the county commissioners of Allen county may use gasoline tax funds of the county for the purpose of assisting in this project."

Sections 6860, 6906, and other related sections of the General Code, pertain to the duties of the county commissioners in connection with roads. These sections generally grant the commissioners authority to construct, improve and maintain public roads.

Section 7464 of the General Code classifies state, county and township roads.

Section 7467 of the General Code provides that the state, county and township shall each maintain their respective roads as designated in the classification set forth in Section 7464, supra. Said section further provides that the state, county or township, or any two or more of them, may by agreement expend any funds available for road construction, etc., inside of a village, or a village may expend funds available for street improvement upon roads outside of the village and leading thereto.

Section 2421 of the General Code requires the county commissioners to construct and keep in repair all bridges in cities and villages.

Section 7555 of the General Code provides:

"The commissioners of a county through which a canal or feeder thereof passes, except such as are built by incorporated companies, shall keep in good repair all bridges, where a state or county road crosses such canals."

Section 7557 also requires the county commissioners to construct and

keep in repair all necessary bridges in villages and cities not having the right to demand and receive a portion of the bridge fund, etc.

It has frequently been held that a bridge is a part of a road and unquestionably such funds are available for the purpose of constructing bridges.

From the foregoing, it will be seen that the county commissioners are authorized and have a duty enjoined upon them to maintain and construct such bridges as are referred to in the communication. However, the real question presented, in view of the facts, is whether there is authority for the commissioners to cooperate.

Section 6949 of the General Code, which is material to consider in connection with this inquiry, reads:

“The board of county commissioners may construct a proposed road improvement into, within or through a municipality, when the consent of the council of said municipality has first been obtained, and such consent shall be evidenced by the proper legislation of the council of said municipality entered upon its records, and said council may assume and pay such proportion of the cost and expense of that part of the proposed improvement within said municipality as may be agreed upon between said board of county commissioners and said council. If no part of the cost and expense of the proposed improvement is assumed by the municipality, no action on the part of the municipality, other than the giving of the consent above referred to, shall be necessary; and in such event all other proceedings in connection with said improvement shall be conducted in the same manner as though the improvement were situated wholly without a municipality.”

The above section was under consideration in an opinion found in *Opinions of the Attorney General for 1928*, p. 2038, in which it was held in the second branch of the syllabus:

“Where a city street is a continuation of a state road or highway, the same may be improved by the county commissioners of the county in which such city is located, with the consent of such city evidenced by proper legislation of its council. In such case the city may participate in the payment of the cost and expense of such improvement by paying to the county treasurer such amount of the cost and expense of the improvement as may be agreed upon between the county commissioners and the council of the city. The city may pay its proportion of the cost and expense of the improvement from the proceeds of taxes levied upon the taxable property of the city or from the proceeds of

assessments therefor levied against abutting property owners, or both."

In the body of the opinion, the following is found:

"In an opinion of this department under date of March 21, 1917, Opinions of the Attorney General, 1917, Vol. 1, page 313, construing the then provisions of section 6949, General Code, above quoted, it was held that the county commissioners and the council of a municipality were not authorized to cooperate in the improvement of a part of an intercounty highway of the state, where the part to be improved was entirely within the limits of a municipality. However, in 1917, section 6946, General Code, was amended in the enactment of the White-Mulcahey road law, so as to read as first above quoted herein; and as the section now reads the county commissioners of a county are authorized to cooperate with the council of a city or village in the improvement of that part of a state or county road which lies wholly within the municipality. In such case the improvement shall of course be conducted by the county, and not by the municipality; and in the case here presented, inasmuch as the street here in question is a part of a state road, the improvement will have to be made under plans and specifications approved by the Director of Highways and under his supervision and inspection. Sections 1203 and 6906, General Code."

From the above opinion it will be noted that such an improvement must be conducted by the county and not by the municipality. In other words, Section 6949, supra, expressly authorizes the county to construct a road in or through a municipality and authorizes the municipality to contribute to the cost of such improvement.

In an opinion found in Opinions of the Attorney General for 1929, p. 1823, there was under consideration the power of the county commissioners to construct a storm sewer lying wholly within the limits of the municipality, and it was contended, as in this case that such construction would eliminate the necessity of maintaining a number of bridges and that it would be a distinct advantage to the county to construct said sewer. In such opinion it was held as disclosed by the syllabus:

"In the absence of authority so to do, a county may not contribute a part of the cost of the construction of a storm sewer lying wholly within the limits of a municipality, notwithstanding the fact that such sewer construction may result in a saving to the county in connection with the construction or repair of bridges within the limits of such municipality."

It would therefore seem that no matter how expedient such a pro-

cedure would be, in the absence of express authority the county is without authority to make such a contribution. Undoubtedly, in the case presented, the county commissioners may undertake the improvement referred to and receive a contribution from the municipality, which perhaps would accomplish the same purpose.

I come now to your question relative to the use of gasoline tax funds of the county for the purpose of assisting in such project. In connection therewith, your attention is directed to section 5541-8 of the General Code, which reads in part as follows:

“When appropriated by the General Assembly such highway construction fund shall be appropriated and expended in the following manner and subject to the following conditions:

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Seven and one-half per cent of said highway construction fund shall be paid on vouchers and warrants drawn by the auditor of state in equal proportions to the county treasurer of each county for the sole purpose of maintaining, constructing, widening and reconstructing the county system of public roads and highways within such county.”

From the above, it will be noted that the proceeds of the gasoline tax distributed to the county, for use by the counties, may be used only for the purpose of constructing, widening and reconstructing the county system of highways within such county. In view of this limitation upon the expenditure of county gasoline tax funds, it would appear that such funds may be used only in assisting a project such as the one in question, when the same is in connection with the county system of highways within such county.

Based upon the foregoing, and in specific answer to your inquiry, you are advised that:

1. The county commissioners may not properly make a contribution to a city in connection with a project the purpose of which is to eliminate canal bridges which are located within such municipality on state or county highways.

2. The county commissioners may institute such an improvement and the city may make a contribution to the county, but the same must be constructed under the supervision of the county.

3. Gasoline taxes distributed to a county, under the provisions of section 5541-8, General Code, may be used for the elimination of canal bridges in connection with the constructing, widening or reconstructing of county roads.

Respectfully,

THOMAS J. HERBERT,
Attorney General.