March 13, 2002

The Honorable Gregory A. Perry
Morrow County Prosecuting Attorney
60 East High Street
Mt. Gilead, Ohio 43338

SYLLABUS: 2002-009

1. A board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require a person to obtain a permit from the township before installing a driveway culvert in an existing ditch that provides drainage for a county or township road.

2. A board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require township employees to install culverts that are needed by persons to construct driveways over existing ditches that provide drainage for county or township roads.

3. Pursuant to R.C. 5543.16, an abutting property owner who installs a culvert as part of his driveway from a county or township road must comply with any specifications, directions, or requirements set forth by the county engineer for the installation of the culvert. In order to ensure compliance with these specifications, directions, or requirements, a board of county commissioners may require the property owner to obtain a permit before installing the culvert.

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OPINION NO. 2002-009

The Honorable Gregory A. Perry
Morrow County Prosecuting Attorney
60 East High Street
Mt. Gilead, Ohio 43338

Dear Prosecutor Perry:

You have requested an opinion concerning the installation of culverts in drainage ditches along county and township roads. You have informed us that several townships that have not adopted a limited home rule government pursuant to R.C. Chapter 504 would like to pass resolutions governing the installation of culverts in existing drainage ditches along county and township roads by abutting property owners to permit construction of driveways over the ditches.[1] Consequently, you wish to know:

1. May a board of township trustees pass a resolution requiring township residents to obtain a permit from the township before installing a culvert in a ditch adjacent to a township or county road?

2. In such a resolution, may a board of township trustees establish specifications for culverts and deny permits unless the resident installs a culvert according to the township's specifications?

3. May the township pass a resolution requiring all culverts in township or county ditches to be installed by township personnel according to the

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[1] R.C. 504.01 authorizes a township to adopt a limited home rule government under which the township exercises limited powers of self-government and limited police powers as authorized by R.C. Chapter 504. Pursuant to R.C. 504.04(A), a limited home rule government township may "[e]xercise all powers of local self-government within the unincorporated area of the township, other than powers that are in conflict with general laws," and may "[a]dopt and enforce within the unincorporated area of the township local police, sanitary, and other similar regulations that are not in conflict with general laws or otherwise prohibited by [R.C. 504.04(B)]."

> township's specifications, and then bill the resident for the costs of the installation?

As a creature of statute, a board of township trustees has only such authority as is expressly conferred upon it by statute, or as may be implied in order to effect the exercise of an express power. *New London Township v. Miner*, 26 Ohio St. 452, 456 (1875); *Schultz v. Erie County Metro. Park Dist. Bd.,* 26 Ohio Misc. 68, 69, 269 N.E.2d 72, 73 (C.P. Erie County 1971). No statute expressly authorizes a board of township trustees to require a person to obtain a permit from the township before installing a culvert in an existing ditch that provides drainage for a county or township road. We must, therefore, review the powers granted to a board of township trustees with respect to county and township roads and ditches to determine whether such authority may be implied in order to carry out another express power of the board of township trustees.

In Ohio, all roads are classified as state, county, or township roads pursuant to R.C. 5535.01, which provides as follows:

> The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.
>
> (A) State roads include the roads and highways on the state highway system.
>
> (B) County roads include all roads which are or may be established as a part of the county system of roads as provided in [R.C. 5541.01-.03], which shall be known as the county highway system. Such roads shall be maintained by the board of county commissioners.
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> (C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of county commissioners may assist the board of township trustees in maintaining all such roads. This section does not prevent the board of township trustees from improving any road within its township.

R.C. 5535.08 states that, "[t]he state, county, and township shall each maintain its roads, as designated in [R.C. 5535.01]." Thus, "the general statutory scheme is that the state, county, and township, each as to its respective jurisdiction, bears the responsibility for maintenance and repair of its respective road or highway system." 1981 Op. Att'y Gen. No. 81-039 at 2-155.

This responsibility includes the duty to clean and maintain ditches that provide drainage for state, county, or township roads. As explained in 1981 Op. Att'y Gen. No. 81-039 at 2-156:

> [I]t is apparent that when a political subdivision undertakes to establish a road or highway, it must also provide for the drainage of that highway. Roadside ditches which handle the road drainage must be deemed to be part of the highway system. Thus, the political subdivision with the responsibility for the repair and maintenance of a particular road must, as a part of that responsibility, clean and maintain the ditches which run along the side of the road.

Accordingly, a board of township trustees is required to maintain and repair township roads within its jurisdiction and the ditches that provide drainage for such roads. *Id.* at 2-155 and 2-156. A review of the rights and obligations of private property owners in the use of county and township roads that abut their property discloses, however, that such owners, rather than a board of township trustees, are responsible for installing any culverts in existing drainage ditches along county and township roads that are necessary to permit the owners to construct their driveways over the ditches. *See* 1982 Op. Att'y Gen. No. 82-025.

It is well settled in Ohio that "[a]butting landowners own the fee of the land to the middle of the road, and may use such land in any way not inconsistent with the public easement." 1980 Op. Att'y Gen. No. 80-071 at 2-279; *accord Ohio Bell Tel. Co. v. Watson*, 112 Ohio St. 385, 147 N.E. 907 (1925); *see also Taylor v. Carpenter*, 45 Ohio St. 2d 137, 341 N.E.2d 843 (1976). As explained in 1917 Op. Att'y Gen. No. 203, vol. I, p. 524, at 526:

> It must be remembered that the abutting property owner has title to the land to the center of the public road, subject, however, to the easement of the public to use the same for travel and matters incident thereto. He has a right to plant trees and use the sides of the public road so long as he does nothing to interfere with the easement which the public has in the public highway. *He has the right to use and maintain driveways and approaches from the public road to his premises or any part of his premises, so long as he does nothing to interfere with the rights of the public in and to said public road. All these rights he enjoys as a property owner.* (Emphasis added.)

Accord 1921 Op. Att'y Gen. No. 2480, vol. II, p. 908, at 909; *see Ohio Edison Co. v. Carroll*, 14 Ohio App. 3d 421, 425, 471 N.E.2d 825, 829 (Medina County 1984) ("Ohio law has long recognized that an adjoining property owner in either a rural or an urban setting has an easement of ingress and egress, light, air and view in the adjacent street").

In light of this common law principle, the General Assembly has enacted R.C. 5543.16, which provides, in pertinent part, that "[t]he owners of land shall construct and keep in repair all approaches or driveways from the public roads, under the direction of the county engineer." R.C. 5543.16 thus "represents an exception to the general rule placing the responsibility for highway maintenance and repair on the various governmental entities (an approach is part of the highway pursuant to R.C. 5501.01(C))." 1981 Op. Att'y Gen. No. 81-039 at 2-158. Therefore, under R.C. 5543.16, the responsibility for the construction of a driveway from a county or township road is vested in an abutting property owner, rather than a board of township trustees.

When an abutting property owner constructs a driveway across an existing ditch that provides drainage for a county or township road, he is prohibited from obstructing the ditch. In this regard, R.C. 3767.17 states that "[n]o person shall willfully obstruct a ditch, drain, or watercourse constructed by order of a board of county commissioners or by a board of township trustees, or divert the water therefrom." R.C. 5589.06 similarly provides that "[n]o person shall wrongfully obstruct any ditch, drain, or watercourse along, upon or across a public highway, or

divert any water from adjacent lands to or upon a public highway." *See* 1982 Op. Att'y Gen. No. 82-025 at 2-74 ("R.C. 5589.06 imposes a duty on a property owner who builds an approach to his land to do so in a manner which does not obstruct an existing ditch 'along, upon, or across a public highway'"); *see also* R.C. 5547.04 ("[t]he owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent"). *See generally* 1980 Op. Att'y Gen. No. 80-071 at 2-280 ("an abutting landowner may not impair the function of a public road by causing it to be flooded").

In order not to obstruct a ditch that provides drainage for a county or township road, the abutting property owner must install in the ditch a culvert upon which his driveway can be constructed. 1982 Op. Att'y Gen. No. 82-025 at 2-74. In such a situation, the culvert is necessary to prevent the property owner from obstructing the ditch in violation of R.C. 5589.06 and R.C. 3767.17, and thus is part of the property owner's driveway, rather than part of the township's system of roads. *See* 1982 Op. Att'y Gen. No. 82-025 (a culvert installed in a ditch by a property owner in order to permit the construction of an approach to the owner's property is part of the owner's approach). R.C. 5543.16 thus requires the abutting property owner, rather than a board of township trustees, to install the culvert when he constructs his driveway. The statute further requires the abutting property owner to repair and maintain the culvert. 1982 Op. Att'y Gen. No. 82-025.

Because culverts installed as part of an abutting property owner's driveway are not part of the township's system of roads, a board of township trustees has no duties with respect to the installation, maintenance, or repair of such culverts. *Compare* 1982 Op. Att'y Gen. No. 82-025 (a culvert installed in a preexisting ditch that is part of a public highway by a property owner in order to provide an approach to his property is part of the owner's approach and the owner is responsible for the maintenance of the culvert) *with* 1981 Op. Att'y Gen. No. 81-039 (a culvert installed by a political subdivision as part of the overall road drainage system of a political subdivision is part of the subdivision's system of roads, even though the culvert passes beneath the driveway of an abutting landowner, and the political subdivision is responsible for the maintenance of the culvert). A board of township trustees, therefore, has no implied authority to regulate the installation of such culverts in existing ditches that provide drainage for county or township roads.[2] Absent such authority, a board of township trustees of a township that has not

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[2] Although a board of township trustees does not have the authority to regulate the installation of a culvert by an abutting property owner to permit construction of a driveway across an existing ditch that provides drainage for a county or township road, the board may remove the culvert if it obstructs the flow of water in the ditch. As advised in 1982 Op. Att'y Gen. No. 82-025 at 2-74:

> Should a culvert installed by a property owner become an obstruction, it would be the property owner's duty to remedy the situation. Failure to do so would constitute a violation of R.C. 5589.06. Where the property owner fails to

adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require a person to obtain a permit from the township before installing a driveway culvert in an existing ditch that provides drainage for a county or township road.

The manner in which an abutting property owner may install a driveway culvert in an existing ditch that provides drainage for a county or township road is not unlimited, however. In fact, R.C. 5543.16 states that an abutting property owner is required to construct his driveway from a county or township road "*under the direction of the county engineer*." (Emphasis added.) R.C. 5543.16 thus unequivocally requires an abutting property owner who installs a culvert as part of his driveway from a county or township road to comply with any specifications, directions, or requirements set forth by the county engineer for the installation of the culvert. 1917 Op. Att'y Gen. No. 203, vol. I, p. 524, at 526 (all "approaches or driveways constructed by occupants or owners since the taking effect of the provisions of [G.C.] 7212 [now R.C. 5543.16] must be constructed under the direction of the county highway superintendent").[3]

In addition, R.C. 5547.04 provides, in part, that "[n]o person … shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon." Because it appears that culverts placed in ditches by abutting property owners are obstructions for purposes of R.C. 5547.04, *see* 1980 Op. Att'y Gen. No. 80-043 at 2-181, a board of county

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act, the township is required to remove the obstruction, from either a township or a county road, collecting the cost from the property owner. R.C. 5589.06; *see* 1949 Op. Att'y Gen. No. 869, p. 519 (township trustees are responsible for removing obstructions from the ditches of both township and county roads).

In addition, the property owner could be subject to a civil suit brought by the board of township trustees for the purpose of recovering damages and having the culvert removed. *See generally* R.C. 5571.09 ("[t]he board of township trustees may bring and maintain all suits involving an injury to any township road, ditch, drain, or watercourse under the jurisdiction of such board and for the prevention of injury thereto"). Finally, failure to remove the culvert from the ditch could result in the property owner being prosecuted criminally under R.C. 3767.17 (prohibition against obstructing township or county ditch) or R.C. 5589.06 (prohibiting a property owner from wrongfully diverting water from adjacent lands to or upon a public road). *See* 1994 Op. Att'y Gen. No. 94-061 (syllabus, paragraph two); 1982 Op. Att'y Gen. No. 82-025 at 2-74. A violation of R.C. 3767.17 or R.C. 5589.06 constitutes a minor misdemeanor under R.C. 3767.99(D) or R.C. 5589.99(B), respectively.

[3] The duties imposed upon a county highway superintendent by G.C. 7212 (now R.C. 5543.16) are now performed by the county engineer. *See* 1953-1954 Ohio Laws 7 (Am. H.B. 1, eff. Oct. 1, 1953) (recodifying G.C. 7212 as R.C. 5543.16 and transferring the duties imposed upon a county highway superintendent under G.C. 7212 to the county engineer).

commissioners has the authority under R.C. 5547.04 to require abutting property owners to receive approval from the board prior to placing culverts within the bounds of township and county roads. *See* 1982 Op. Att'y Gen. No. 82-025 at 2-75.

In light of the provisions of R.C. 5543.16 and R.C. 5547.04 it is clear that a county is permitted to regulate the installation of a culvert by an abutting property owner to permit construction of a driveway across an existing ditch that provides drainage for a county or township road. Therefore, pursuant to R.C. 5543.16, an abutting property owner who installs a culvert as part of his driveway from a county or township road must comply with any specifications, directions, or requirements set forth by the county engineer for the installation of the culvert. In order to ensure compliance with these specifications, directions, or requirements, a board of county commissioners may require the property owner to obtain a permit before installing the culvert. *See generally* 1986 Op. Att'y Gen. No. 86-081 at 2-455 and 2-456 (a county is authorized to establish a permit system for the installation of driveways or other approaches to county roads).

Your second question asks whether a board of township trustees may establish specifications for culverts and deny permits unless the resident installs a culvert according to the township's specifications. In light of our answer to your first question, it is unnecessary for us to address your second question.

Your final question asks whether a board of township trustees may pass a resolution requiring all culverts in township or county ditches to be installed by township personnel according to the township's specifications, and then bill the resident for the costs of the installation. As explained previously, a board of township trustees has no authority to regulate the installation of culverts in existing drainage ditches along county and township roads by abutting property owners to permit construction of driveways over the ditches.

Moreover, R.C. 5543.16 provides, in part, "[t]he *owners of land shall construct* … all approaches or driveways from the public roads." (Emphasis added.) Where the language of a statute is clear and unequivocal, it is to be applied not interpreted. *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944) (syllabus, paragraph five). Thus, a property owner, rather than the township, is responsible for the installation of any culvert that is needed by the property owner to construct a driveway over an existing ditch that provides drainage for a county or township road. Accordingly, a board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require township employees to install culverts that are needed by persons to construct driveways over existing ditches that provide drainage for county or township roads.

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. A board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require a person to obtain a permit from the township before installing a

driveway culvert in an existing ditch that provides drainage for a county or township road.

2. A board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require township employees to install culverts that are needed by persons to construct driveways over existing ditches that provide drainage for county or township roads.

3. Pursuant to R.C. 5543.16, an abutting property owner who installs a culvert as part of his driveway from a county or township road must comply with any specifications, directions, or requirements set forth by the county engineer for the installation of the culvert. In order to ensure compliance with these specifications, directions, or requirements, a board of county commissioners may require the property owner to obtain a permit before installing the culvert.

Respectfully,

BETTY D. MONTGOMERY
Attorney General