

May 31, 1994

OPINION NO. 94-032

The Honorable Mark A. Ochsenein
Jackson County Prosecuting Attorney
295 Pearl Street
Jackson, Ohio 45640

Dear Prosecutor Ochsenein:

You have requested an opinion on the following questions:

1. What establishes the right of way for a road for public use?
2. What is the minimum right of way for a township road?

From information provided with your request, it appears that your concern is determining the width of a particular road located within a township.

Establishment of Public Roads

In order to answer your questions, it is first necessary to examine the various ways in which a public road may be established. 1987 Op. Att'y Gen. No. 87-046 described the four methods by which this may occur. The first method, statutory appropriation, occurs where a board of county commissioners, in accordance with the procedures set forth in R.C. 5553.02-.16, appropriates land for road purposes and formally establishes such land as a public road or highway. R.C. 5553.04 states in pertinent part:

When the board of county commissioners is of the opinion that it will be for the public convenience or welfare to locate, establish, alter, widen, straighten, vacate, or change the direction of a public road, it shall so declare by resolution, which resolution shall set forth the general route and termini of the road, or part thereof, to be located, established, or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed.

Further, pursuant to R.C. 5553.06, if the board of county commissioners determines that the proposed improvement is of sufficient public importance, it "shall instruct the county engineer to make an accurate survey and plat of such improvement and furnish an accurate and detailed

description describing therein the center line and right of way lines." *See also* R.C. 5553.10 (record of proceedings to locate, establish, vacate or change of a road).

A public road may also be established by dedication, either under statutory law or under common law. Under either of these methods, a landowner gives land to the state or to a political subdivision to be used for road purposes. In order to establish a public road by either dedication procedure, there must be an acceptance of such grant on behalf of the public. Op. No. 87-046 at 2-305. As part of the statutory dedication procedure, R.C. 5553.31 requires the landowner to provide "[a] definite description of the lands to be dedicated with a plat of such lands thereto attached and signed by the party dedicating such lands, with the approval and acceptance of the board [of county commissioners] indorsed thereon." In contrast, as described in Op. No. 87-046 at 2-305:

A common law dedication of land to public use results in the establishment of a public road or highway when there is a demonstrated "intention to dedicate, and an actual dedication on the part of the owner, and an acceptance [of such dedication] on the part of the public, which may be proved by the circumstances of the case." *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440, 446 (1858)... The acceptance of the dedication by a public authority may be express or implied, but in order to imply acceptance by the public, a public authority must take some positive action to indicate that it has taken control of the property, such as improving the street or road that has been dedicated. (Various citations omitted.)

The final method by which a public road may be established is by prescription, which occurs "where it is shown that the general public has used a tract of land in a way adverse to the claim thereto of the title holder of record under some claim of right for an uninterrupted period of at least twenty-one years." *Id.* at 2-306 (citation omitted).

Right of Way of Public Roads

Your first question asks what establishes the right-of-way of a public road. As discussed in 1988 Op. Att'y Gen. No. 88-080 at 2-398:

[T]he term ["right-of-way"] is generally understood as referring to the easement acquired by the public in that portion of the land of the owner thereof over which a road or highway passes, with all the powers and privileges that are necessarily incident to such easement. *See, e.g., Ohio Bell Telephone Co. v. The Watson Co.*, 112 Ohio St. 385, 389, 147 N.E. 907, 908 (1925) ("outside the limits of a municipality, the fee to the land in the rural highway rests in the abutting landowner, subject only to such rights as are incident to and necessary for public passage, in other words, the right of the public to improvement, maintenance and uninterrupted travel"); *Dibella v. Village of Ontario*, 4 Ohio Misc. 120, 122, 212 N.E.2d 679, 681 (C.P. Richland County 1965) ("[i]n Ohio an abutting property owner in the country holds fee title to the middle of the highway or street subject to an easement for highway or street uses and purposes"); 1980 Op. Att'y Gen. No. 80-039 at 2-164 ("I am assuming, for the

purposes of this opinion, that by county or township road right-of-way, you refer to the easement for road purposes granted to the county or township, the fee to such lands to the middle of the road remaining in the abutting landowners").

If there is a question as to what constitutes the right-of-way of a road that was established by appropriation or by statutory dedication, the descriptions of the property incident to the road's establishment should resolve that question. *See, e.g.*, R.C. 5553.10 (record of proceedings to locate, establish, vacate, or change a road); R.C. 5553.31 (record of statutory dedication). If, however, the question concerns a road that was established by common law dedication or by prescription, there may be no documentation available to indicate what constitutes the right-of-way of the road. In such a case:

The right-of-way of a public road or highway established by common law dedication or by prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel.

Op. No. 88-080 (syllabus, paragraph three). In order to determine the actual width of such right-of-way, there are a number of options available to the county. As explained in Op. No. 88-080 at 2-399:

Depending upon the circumstances of the particular situation, the board of county commissioners, acting in concert with the county engineer, may determine the actual width of such right-of-way by following the appropriate procedures set forth in either R.C. Chapter 5553 (county roads; establishment; alteration; vacation), *see* R.C. 5553.18 (determining true line of road); R.C. 5553.20 (civil action to establish true line of road); R.C. 5553.21 (establishing true line of road by agreement) or R.C. Chapter 5555 (county road improvement), *see* R.C. 5555.02 (road improvements by board of county commissioners); R.C. 5555.06 (resolution by board; survey and plans to be prepared by county engineer). *See generally* 1964 Op. Att'y Gen. No. 1198, p. 2-253.

Minimum Right-of-Way

Your second question asks: "What is the minimum right of way for a township road?" The width of public roads, including township roads, *see* R.C. 5535.01 (dividing the public highways of the state into three categories: state roads, county roads, and township roads), is provided for in R.C. 5553.03, which states:

(A) Except as provided in division (B) of this section, all public roads located and established by the board of county commissioners subsequent to September 6, 1915, shall be of such width, not less than thirty feet, as is determined by the board. If a public road is established upon a county or state line, the board may determine the width of the strip of land in the county to be used for such purposes, but such width

shall not be less than fifteen feet.

(B) The board of county commissioners may locate and establish public roads that are less than thirty but not less than twenty feet in width, when all of the following conditions are met:

(1) The roads have been in continuous existence and use as private roads since at least 1952, and are located in land platted as a subdivision outside of the limits of a municipal corporation;

(2) It is proved to the satisfaction of the board that the acquisition of additional land necessary to meet the width otherwise applying under division (A) of this section will involve or result in damage to structures or dwellings adjacent to the roads;

(3) The county engineer submits to the board a detailed report on the kinds and amount of traffic using the roads, and showing that the lesser width is adequate to serve anticipated traffic volumes without endangering persons using the roads.

Thus, pursuant to R.C. 5553.03(A), any road established by a board of county commissioners after September 6, 1915, is required to be at least thirty feet wide, except that the width of a public road established on a county or state line "shall not be less than fifteen feet." *See generally* 1949 Op. Att'y Gen. No. 1285, p. 913, 914-15 ("the thirty feet minimum width required of county roads does not refer exclusively to the paved portion of such roads, but refers to the entire right-of-way, which may also include certain unimproved portions or ditches or any other facilities which may be necessary in the care and maintenance of the traveled portion of the road"). R.C. 5553.03(B) establishes an exception to the requirements of division (A) by prescribing the circumstances in which a board of county commissioners may establish a road "not less than twenty feet in width."¹

In the event that the road with which you are concerned is not subject to R.C. 5553.03, the general rule set forth in Op. No. 88-080, syllabus, paragraph three, as to the width of the right-of-way of a road determines what the width of that road shall be, *i.e.*, the road must be wide enough to accommodate not only the improved road surface used for travel, but also as much of the land immediately adjacent thereto as is necessarily incident to the safe and efficient use of such road surface for actual travel.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. The "right-of-way" of a public road refers to the easement acquired by the public in that portion of the land of the owner thereof over which a road or highway passes, with all the powers and privileges that are necessarily incident to such easement.

¹ *See generally* 1982 Op. Att'y Gen. No. 82-012 (authority of county commissioners to establish township roads under R.C. 5553.02 is not subject to approval by board of township trustees).

2. Pursuant to R.C. 5553.03, a public road established by a board of county commissioners after September 6, 1915, must, with certain exceptions described therein, be at least thirty feet wide.

3. The right-of-way of a township road established by common law dedication or by prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel. (1988 Op. Att'y Gen. No. 88-080 (syllabus, paragraph three), approved and followed.)

Respectfully,

LEE FISHER
Attorney General

May 31, 1994

The Honorable Mark A. Ochsenein
Jackson County Prosecuting Attorney
295 Pearl Street
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SYLLABUS:

94-032

1. The "right-of-way" of a public road refers to the easement acquired by the public in that portion of the land of the owner thereof over which a road or highway passes, with all the powers and privileges that are necessarily incident to such easement.
2. Pursuant to R.C. 5553.03, a public road established by a board of county commissioners after September 6, 1915, must, with certain exceptions described therein, be at least thirty feet wide.
3. The right-of-way of a township road established by common law dedication or by prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel. (1988 Op. Att'y Gen. No. 88-080 (syllabus, paragraph three), approved and followed.)