February 19, 2002

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

SYLLABUS: 2002-003

For purposes of R.C. 2729.13, the term "county road" does not include township roads.

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OPINION NO. 2002-003

The Honorable Kevin J. Baxter
Erie County Prosecuting Attorney
247 Columbus Avenue, Suite 319
Sandusky, Ohio 44870-2636

Dear Prosecutor Baxter:

You have requested an opinion concerning the meaning of the term "county road," as used in R.C. 2729.13. Your specific concern is whether the term "county road," as used in R.C. 2729.13, includes township roads.

Let us begin by examining the precise language of R.C. 2729.13, which states:

> As to every *county road* the records of which have been lost or destroyed, and which records are not reproduced under [R.C. 2729.09-.12], the center of the road as fenced on April 12, 1884, is prima facie the true center, and the width of such road is *prima facie* sixty feet. (Emphasis added.)

Thus, if the records of a "county road" have been lost or destroyed and have not been reproduced through the judicial proceedings governed by R.C. 2729.09-.12,[1] R.C. 2729.13 creates the

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[1] R.C. 2729.09 authorizes a board of county commissioners to apply to the court of common pleas for the reproduction of lost road records. By statute, this process requires, among other things, notice to all persons owning property or residing on the subject road, and a hearing in which the court may hear evidence from interested parties and ultimately determine whether any of the papers produced by the county commissioners regarding the subject road are true and accurate depictions. R.C. 2729.09-.10. Pursuant to R.C. 2729.10:

> As often as the court finds any of such papers to be accurate or substantial copies of such records, the court shall enter such finding upon its journal and direct transcripts of such copies to be made by such persons as it selects. As often as any of such transcripts are completed to the satisfaction of the court, an entry of that fact must be made upon its journal. Thereupon the clerk of the court of common pleas shall certify on such transcript that it has been approved by the court, and

rebuttable presumption, *inter alia*, that the width of such road is sixty feet. *See generally State ex rel. Herbert v. Whims*, 68 Ohio App. 39, 44, 38 N.E.2d 596, 599 (Franklin County 1941) ("[t]he words '*prima facie*' as used in statutes merely mean a fact presumed to be true unless disproved by some evidence to the contrary, but they always imply that the proper party shall have the opportunity of offering proof in rebuttal of the *prima facie* facts"); *Black's Law Dictionary* 1209 (7th ed. 1999) (defining the adverb "prima facie" as meaning, "[a]t first sight; on first appearance but subject to further evidence or information").[2]

In order to answer your question, we must begin by noting that, pursuant to R.C. 5535.01:

> 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],[3] which shall

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> deliver it to the board. Transcripts so certified prima facie have the same effect as the original from which the copies were made.

[2] As explained in *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St. 125, 133, 77 N.E. 752, 754 (1906):

> The general rule would seem to be well established by an almost unbroken line of authority, — that to rebut and destroy a mere *prima facie* case, the party upon whom rests the burden of repelling its effect, need only produce such amount or degree of proof as will countervail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose, *counterbalance* the evidence by which the *prima facie* case is made out or established, it need not *overbalance* or outweigh it.

[3] R.C. 5541.01-.03 require each county to establish a system of county highways. In the establishment of such system, each township must provide the county commissioners a report setting forth, among other things, "the relative value of each road in the township in consecutive order as a used highway," R.C. 5541.01. From these reports, the county commissioners must determine "the relative importance and value for traffic of the various public highways of the entire county," R.C. 5541.02, and "select and designate a connected system of county highways, … connecting with the intercounty and state highways of such county all of the villages and centers of rural population within the county," *id.* In accordance with R.C. 5541.02, no part of a state or intercounty highway may be included in the system, and "all of the roads composing such system shall be known and designated as county roads." Upon approval of this system by the Director of Transportation, the system designated by the county commissioners becomes "the system of county roads of the county. R.C. 5541.02. Thereafter, "[t]he board of county

> be known as the county highway system. Such roads shall be maintained by the board of county commissioners.
>
> (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. (Footnote added.)

In accordance with R.C. 5535.01, all public highways within the state are divided into three distinct categories as described therein. Pursuant to R.C. 5535.01(B), a county road is a road that has been included in the county system of highways established under R.C. 5541.01-.03. *See* note three *supra*. A township road is, by definition, a public highway other than a state or county road. R.C. 5535.01(C). *See generally, e.g.,* 1982 Op. Att'y Gen. No. 82-012 (syllabus) ("[c]ounty commissioners may remove a road from the county highway system pursuant to the statutory requirements of R.C. 5541.02 and in compliance with the provisions of R.C. 5553.02, and through such statutory procedure establish a township road from an already existing county road regardless of objections by township trustees").

We are not aware of a rule of statutory construction that would enable one to read the term "county road" as including township roads. Rather, it is well settled that, "[w]here the words of a statute are free of ambiguity and express plainly and distinctly the sense of the lawmaking body, the courts should look no further in their efforts to interpret the intent of the General Assembly." *State v. Smorgala*, 50 Ohio St. 3d 222, 223, 553 N.E.2d 672, 674 (1990).

The General Assembly has long used the term "county road" to identify a type of public road different from a "township road." *See, e.g.*, 1823 Ohio Laws 305 (Act of February 26, 1824) (section one stated, in part, "all county and township roads, shall hereafter be laid out and established agreeably to the provisions of this act, and all *county roads* shall be sixty feet wide, and *township roads* not exceeding forty feet wide" (emphasis added)); *State ex rel. Duncan v. Chippewa Twp. Trustees*, 73 Ohio St. 3d 728, 654 N.E.2d 1254 (1995) (in resolving question whether road had been established as township road in 1851, court examined statute in effect in 1851 concerning establishment of township roads); *Shaver v. Starrett*, 4 Ohio St. 494 (1855) (syllabus) (stating in part, "[t]he statutory provisions authorizing the establishment of township roads, do not contravene the constitutional provision, that 'private property shall ever be held inviolate, but subservient to the public welfare.' A township road is as subject to public travel, and as free and open to every individual, as any other road in the state"). Because the General Assembly has recognized a difference between a county road and a township road since at least 1824, it is readily apparent that the General Assembly did not intend the term "county road," as

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commissioners may make changes in or additions to the county system as in the manner provided by [R.C. 5541.02]." *Id*.

used in R.C. 2729.13, to include township roads.[4] *See generally Wilson v. Porterfield*, 28 Ohio St. 2d 176, 178, 277 N.E.2d 207, 209 (1971) ("the General Assembly is aware of the meaning of the words it employs in its enactments").

Had the General Assembly intended the presumptions created by R.C. 2729.13 to apply to township roads, as well as to county roads, it could easily have included the term "township road" in R.C. 2729.13 to indicate that intention. *See State v. Waddell*, 71 Ohio St. 3d 630, 631, 646 N.E.2d 821, 822 (1995) ("[c]ourts must give effect to the words of a statute and may not modify an unambiguous statute by deleting words used or inserting words not used"); *Metropolitan Securities Co. v. Warren State Bank*, 117 Ohio St. 69, 76, 158 N.E. 81, 83 (1927) ("[h]aving used certain language in the one instance and wholly different language in the other, it will rather be presumed that different results were intended").

Based on the foregoing, it is my opinion, and you are hereby advised that, for purposes of R.C. 2729.13, the term "county road" does not include township roads.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

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[4] When enacted in 1884 Ohio Laws 159, 165 (S.B. 251, passed April 12, 1884), R.S. 4935c (now at R.C. 2729.13) stated:

> As to all county roads whose records have been lost or destroyed as aforesaid, and are not reproduced under the foregoing sections, *prima facie* the center of the road as now fenced shall be taken as the true center, and *prima facie* the width of the said road shall be sixty feet.