January 17, 2014

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS: 2014-001

1. Neither a county nor township is required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

2. Neither a county nor township is required to clear obstructions from an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

3. Neither county nor township officials are required to prevent encroachments that adversely affect travel on an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

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OPINION NO. 2014-001

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
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18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Adkins:

You have requested an opinion about the maintenance of, and removal of obstructions from, an alley in a residential subdivision located in the unincorporated territory of a county. While the alley appears on the plat of the residential subdivision recorded in the county recorder's office,[1] the alley has not been designated as a county road[2] or established as a public road by statutory appropriation.[3]

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[1] The platting of residential subdivisions located in the unincorporated territory of a county is governed by R.C. Chapter 711. *See generally* R.C. 711.001 (defining the terms "plat" and "subdivision" for purposes of R.C. Chapter 711); R.C. 711.01 ("[a]ny person may lay out a … subdivision or addition to a municipal corporation, by causing the territory to be surveyed, and by having a plat of it made by a competent surveyor. The plat shall particularly describe the streets, alleys, commons, or public grounds, and all in-lots, out-lots, fractional-lots, within or adjacent to such village. The description shall include the courses, boundaries, and extent"); R.C. 711.04 (after a plat of a subdivision is completed, certified by the surveyor, and acknowledged by the owner of the subdivision or his agent, the plat shall "be recorded in the office of the county recorder").

[2] R.C. 5541.02 states that "[t]he system of highways, when selected and designated by the board of county commissioners, shall be known as the system of county highways of the county, and all of the roads composing the system shall be known and designated as county roads."

[3] A county or township may establish an alley as a public road through statutory appropriation. *See* R.C. 511.11 (a board of township trustees may acquire by appropriation any private or public lands it deems necessary for its use); R.C. 5553.11 (a board of county commissioners may acquire by appropriation the land it needs to construct a public road); R.C. 5555.02 ("[t]he board of county commissioners may construct a public road by laying out and building a new road"); R.C. 5571.01(A) (a board of township trustees "may construct … any public road or part thereof under its jurisdiction"). *See generally* 1987 Op. Att'y Gen. No. 87-046 at 2-304 ("[a] board of county commissioners may, pursuant to R.C. 5553.03-.16, appropriate land for road purposes, and, by following the procedures enumerated therein, formally establish such land as a public road or

Nor does language in the plat or other county records state or suggest that the alley has been dedicated and accepted for use as a public road.[4] Further, there is no evidence that the alley has been maintained or repaired by the county or township or that the alley has been established as a public way of travel by prescription.[5] In light of these facts, you ask:

1. Is a county or township required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription?

2. Is a county or township required to clear obstructions from an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription?

3. Are county or township officials required to prevent encroachments that adversely affect travel on an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the

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highway"); 1956 Op. Att'y Gen. No. 6576, p. 373 (discussing statutory appropriation proceedings under R.C. Chapter 5553).

[4] A tract of land may be established as a public road by statutory dedication. 1987 Op. Att'y Gen. No. 87-046 at 2-304 and 2-305. R.C. 5553.31 declares that "[a]ny person may, with the approval of the board of county commissioners, dedicate lands for road purposes." R.C. 5553.31 requires, among other things, that "a person must propose to dedicate land for road purposes and the proposal must be approved and accepted by the board of county commissioners." 1986 Op. Att'y Gen. No. 86-094 (syllabus, paragraph 1). Thus, under R.C. 5553.31, a "board of county commissioners must indorse its approval and acceptance of the dedication on the plat showing the lands to be dedicated" before the dedication will be effective to establish the land in question as a public road. *Id*. at 2-533.

[5] As explained in 1987 Op. Att'y Gen. No. 87-046 at 2-306, "a public road may be established by prescription 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." *See generally* 1982 Op. Att'y Gen. No. 82-028 at 2-83 (setting forth the factors to be considered in determining whether a road may have been established as a public way of travel by prescription).

> subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription?

Maintenance of Public Roads in the Unincorporated Territory of the County

Ohio's public highway system is divided into state roads, county roads, and township roads.[6] R.C. 5535.01; 2001 Op. Att'y Gen. No. 2001-003 at 2-19. Under this system, a county or township is responsible for maintaining and repairing its respective road or highway system. R.C. 5535.01; R.C. 5535.08; R.C. 5571.02; 2001 Op. Att'y Gen. No. 2001-003 at 2-19. Neither a county nor township, however, has a duty to maintain and repair a private road that is not part of its road system. *See generally* 2000 Op. Att'y Gen. No. 2000-012 at 2-65 ("[a] county's or township's duty to repair a road thus extends only to public roads under its jurisdiction"); 1982 Op. Att'y Gen. No. 82-028 (syllabus) ("[a] board of township trustees lacks the authority to maintain a lane which has not been established as a township road"). Thus, if an alley is not part of its road system, a county or township is not required to maintain or repair the alley, as the county or township has no duty to do so.

Neither a County Nor Township Is Required to Maintain an Alley that Is Not a Public Road

Your first question asks whether a county or township is required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription. As explained above, a county or township is required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when the alley is part of the county's or township's road system.

To become a part of a county or township road system, it is essential that the alley be established as a public road. *See* 2000 Op. Att'y Gen. No. 2000-012 at 2-65 and 2-66; 1994 Op. Att'y Gen. No. 94-098 at 2-496 and 2-497; 1958 Op. Att'y Gen. No. 1646, p. 46, at 47. *See generally* 1956 Op. Att'y Gen. No. 6576, p. 373 (syllabus, paragraph 1) ("[a]n existing private drive duly established as a public road in conformity with the provisions of [R.C. 5553.04] becomes, by operation of law, upon its establishment, a township road"). As described in a number of earlier Attorney General opinions, there are various methods by which a private tract of land that serves as a road or alley may become a public road: "[t]here are several methods by which a tract of land may be established as a public road or highway. These include: (1) statutory appropriation; (2) statutory dedication; (3)

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[6] Public roads in a municipal corporation may exist separate and apart from the public highway system established under R.C. 5535.01. *See* R.C. 723.01; R.C. 723.02-.03; 2001 Op. Att'y Gen. No. 2001-003 at 2-21 n.6; 1982 Op. Att'y Gen. No. 82-012 at 2-40 n.1. The provisions of law governing the maintenance of, and removal of obstructions from, such public roads are not relevant to your questions, as your questions concern an alley located in the unincorporated territory of a county.

common law dedication; or, (4) prescription." 1987 Op. Att'y Gen. No. 87-046 at 2-304 (citations omitted); *accord* 2000 Op. Att'y Gen. No. 2000-012 at 2-66.

Whether a particular private tract of land that serves as a road or alley is a public road requires a determination whether the elements of any of the methods for establishment of a public road—statutory appropriation; statutory dedication; common law dedication; or prescription—have been met. *See, e.g., State ex rel. Duncan v. Chippewa Twp. Trs.*, 73 Ohio St. 3d 728, 654 N.E.2d 1254 (1995) (examining statutory requirements in effect in 1851 to determine whether a public road had been properly established by statutory dedication, but finding no evidence of acceptance by public authorities); 1999 Op. Att'y Gen. No. 99-005 at 2-31 and 2-32 ("examination of the facts and circumstances of the attempted dedication of the road you describe will be necessary in order to determine whether the road was in fact dedicated and established as a public road"); 1988 Op. Att'y Gen. No. 88-080 (syllabus, paragraph 1) ("[a]bsent a statutory appropriation by a board of county commissioners under R.C. 5553.03-.16, or a formal statutory dedication under R.C. 5553.31, a tract of land within a township may, depending upon the facts and circumstances of the particular case, be established as a public road or highway by common law dedication or by prescription"). Generally, this is a factual determination which cannot be made by means of an opinion of the Attorney General. *See Vill. of Hicksville v. Lantz*, 153 Ohio St. 421, 92 N.E.2d 270 (1950) (syllabus, paragraphs 1 and 2) ("[o]ne of the essential elements of a common-law dedication of property to a public use is the intention of the owner of the property to so dedicate it. That intention may be expressed or implied from circumstances"); *Doud v. City of Cincinnati*, 152 Ohio St. 132, 87 N.E.2d 243 (1949) (syllabus, paragraph 1) ("[a] dedication and acceptance of private property for a public use may result from the use of such property by the public, with the silent acquiescence of the owner, for a period of time sufficient to warrant an inference of an intention to make such dedication and to constitute such acceptance"); *In re Application of Loose for Vacation of Alley*, 107 Ohio App. 47, 153 N.E.2d 146 (Franklin County 1958) (circumstances surrounding failure of statutory dedication may, nonetheless, result in a common law dedication of a road); 2000 Op. Att'y Gen. No. 2000-012 at 2-67 ("[w]hether a particular tract of land has been established as a public road will depend, in part, upon the law in effect at the time the establishment was attempted, and, in part, upon the factual circumstances of the particular case"); 1999 Op. Att'y Gen. No. 99-005 at 2-31 and 2-32 (same as the previous parenthetical); 1982 Op. Att'y Gen. No. 82-028 at 2-83 and 2-84 ("[w]hether there has been sufficient adverse public use to create a prescriptive public right in the present case is ultimately a question of fact which only a court can decide"). *See generally* 2001 Op. Att'y Gen. No. 2001-026 at 2-144 ("a formal opinion of the Attorney General can only address questions of law, such as the meaning to be accorded particular language within a statute or the interpretation that has been placed upon such language by our courts. We are unable by means of a formal opinion to consider and decide questions of fact"); 1986 Op. Att'y Gen. No. 86-076 at 2-422 (it is inappropriate for the Attorney General "to use the opinion-rendering function to make findings of fact").

However, you have indicated that you are concerned with a situation in which an alley in a residential subdivision located in the unincorporated territory of the county has not been established as a public road by statutory appropriation and no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription. In such a situation, the alley has not become a public road

through one of the methods used to establish a private tract of land as a public road, and thus neither the county nor the township has a duty to maintain the alley. *See generally State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961) (syllabus, paragraph 1) (absent an acceptance by a board of county commissioners or the showing of facts from which such acceptance can be implied, the use by the public of roads dedicated by a developer does not impose responsibility on a board of township trustees to maintain those roads); 1994 Op. Att'y Gen. No. 94-036 at 2-186 ("a street shown on an approved plat remains under the care and control of the developer until such street is accepted for use as a public way by the appropriate public authority"). Accordingly, in response to your first question, neither a county nor township is required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

Neither a County Nor Township Is Required to Remove Obstructions from an Alley that Is Not a Public Road

Your second question asks whether a county or township is required to clear obstructions from an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription. In the situation you have presented, neither the county nor township owns the land on which the alley is located. Instead, the alley is located on privately-owned property. Also, as discussed previously, the alley is not a public road that the county or township has a duty to maintain and keep open as a public way of travel. *See* Ohio Const. art. I, § 19 (county and township roads must be kept open to the public); 1973 Op. Att'y Gen. No. 73-004 (syllabus) ("[n]either a board of township trustees nor a board of county commissioners has the power to barricade a passable township public road").

Because neither the county nor township has control over, or ownership of, the alley, there is no concomitant duty for either to clear obstructions from the alley so as to keep the alley open as a public way of travel. *See* 1990 Op. Att'y Gen. No. 90-029 at 2-111 ("[t]he purpose of the 'control' of township roads by a board of township trustees is to keep the roads open to the public"). Moreover, the statutory duty of a county or township to remove obstructions from roads extends only to public roads under its control. *See* R.C. 5547.04; R.C. 5571.14; 1980 Op. Att'y Gen. No. 80-071; *see also* 1928 Op. Att'y Gen. No. 1751, vol. I, p. 474 (syllabus) (under G.C. 7204-1a (now R.C. 5547.04), the power to remove obstructions from county roads "was transferred from the Director of Highways to county commissioners"). Thus, when an alley is not a public road, a county or township is not responsible for removing obstructions from the alley. Therefore, neither a county nor township is required to clear obstructions from an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

Duty of County and Township Officials to Prevent Encroachments on Private Property

Your final question asks whether county or township officials are required to prevent encroachments that adversely affect travel on an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.[7] The answer to this question follows directly from the discussion of your second question.

Again, the alley in question is not controlled or owned by the county or township. For this reason, county and township officials have no duty to keep the alley open and free from encroachments that prevent the public, including a person who owns a portion of the land on which the alley is situated, from using the alley. Instead, any dispute as to the right of a person to close, barricade, or obstruct the alley or use the private land on which the alley is situated for other purposes must be resolved by the judicial branch of government. *See generally* 2001 Op. Att'y Gen. No. 2001-026 at 2-144 ("[t]he Attorney General cannot adjudicate the legal rights or responsibilities of particular persons. Rather, such authority rests exclusively with the courts" (citations omitted)); 1986 Op. Att'y Gen. No. 86-076 at 2-422 (the Attorney General may not make "determinations as to the rights of particular individuals"). Hence, neither county nor township officials are required to prevent encroachments that adversely affect travel on an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

Conclusions

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

1. Neither a county nor township is required to maintain an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

2. Neither a county nor township is required to clear obstructions from an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory

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[7] An "encroachment" is "[a]n infringement of another's rights" or "[a]n interference with or intrusion onto another's property." *Black's Law Dictionary* 607 (9th ed. 2009).

appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

3. Neither county nor township officials are required to prevent encroachments that adversely affect travel on an alley in a residential subdivision located in the unincorporated territory of the county when (1) the alley was not established as a public road by statutory appropriation and (2) no language in the subdivision's plat or other evidence indicates that the alley has been dedicated and accepted for use as a public road or established as a public way of travel by prescription.

Very respectfully yours,

MICHAEL DEWINE
Ohio Attorney General