

February 15, 2000

OPINION NO. 2000-012

The Honorable Jetta Mencer  
Coshocton County Prosecuting Attorney  
239 N. Fourth Street  
Coshocton, Ohio 43812-1116

Dear Prosecutor Mencer:

You have requested an opinion concerning the repair and maintenance of a bridge that carries a road over a railroad line. You indicate that the bridge connects a county road with a township road. It was originally constructed by the railroad as the result of an agreement with the landowners in that area. By a deed filed for record on November 21, 1900, certain landowners released the railroad company from its obligation to maintain a grade crossing over the railroad line. Instead, they agreed to use an overhead crossing to be erected by the railroad company. Accordingly, the railroad company constructed this bridge, which has been in continuous use since that time. The bridge is located outside of a municipal corporation and connects a county road with a township road that runs parallel to the county road.

In addition, there does not appear to be a contract or agreement between any railroad company and the county or township concerning the repair and maintenance of the bridge. There is, however, a 1992 agreement whereby the Conrail Corporation, which owned at one time the railroad line the bridge traverses, conveyed all of its interests in portions of the railroad line, including the portion the bridge crosses, to the State of Ohio acting through Caprail I, Inc., a private corporation. In accepting this conveyance the State of Ohio agreed to be responsible for repairing and maintaining all bridges and grade crossings located on the portion of the railroad line conveyed to it. Subsequent to this conveyance, the State of Ohio leased its portion of the railroad line to the Columbus and Ohio River Railroad or the Ohio Central Railroad.

You have indicated that the bridge is in need of repair and that the township believes that the railroad company that leases the railroad lines beneath the bridge is responsible for the bridge's repair and maintenance.<sup>1</sup> You also state that both the Ohio Rail Development Commission<sup>2</sup> and the Columbus

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<sup>1</sup> Your letter states that the bridge was repaired and maintained by the Conrail Corporation during the time that it owned the railroad lines beneath the bridge.

<sup>2</sup> The Ohio Rail Development Commission (Commission) is an independent agency of the State of Ohio within the Department of Transportation. R.C. 4981.02(A). In regard to rail service, the

and Ohio River Railroad deny any responsibility for the repair and maintenance of the bridge. Accordingly, you wish to know whether the county or the township is responsible for the repair and maintenance of this bridge.

A bridge is considered to be a part of the road that passes over it, and, absent a statute to the contrary, the duty to repair and maintain the road carries with it the duty to repair and maintain the bridge. 1981 Op. Att’y Gen. No. 81-083 at 2-326 and 2-327; *see* R.C. 5501.01(C); R.C. 5535.08; *see also* 1994 Op. Att’y Gen. No. 94-025 at 2-112 (“a board of township trustees bears the responsibility of maintaining the bridges on township roads within its township”); 1925 Op. Att’y Gen. No. 2557, p. 389 (syllabus) (“[i]n performing the mandatory duty of keeping township roads in good repair, ... township trustees may appropriate and use township road funds in the construction and maintenance of bridges and culverts on township roads within their respective jurisdictions”). However, “[a] road must be properly dedicated and accepted for public use, and thus established as a public road, before any public entity becomes responsible for its maintenance.” 1994 Op. Att’y Gen. No. 94-036 at 2-186; *accord* 1949 Op. Att’y Gen. No. 1209, p. 835, at 837; *see also* *Adamson v. Wetz*, 69 Ohio Law Abs. 281, 124 N.E.2d 832 (Ct. App. Montgomery County 1952); 1951 Op. Att’y Gen. No. 599, p. 365. A county’s or township’s duty to repair a road thus extends only to public roads under its jurisdiction. *See, e.g., State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961) (syllabus, paragraph one) (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”); 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”).

Accordingly, absent a statute to the contrary, a county or township is responsible for the repair and maintenance of a bridge if the road that passes over the bridge is a public road under its jurisdiction. Conversely, if a road has not been properly dedicated and accepted for public use, and thus established

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Commission is the successor to the Ohio High Speed Rail Authority and the Division of Rail Transportation of the Department of Transportation. R.C. 4981.03(B). The Commission has assumed all functions, assets, liabilities, and obligations and constitutes the continuation of the Ohio High Speed Rail Authority and the Division of Rail Transportation of the Department of Transportation. 1993-1994 Ohio Laws, Part III, 5185, 5231 (Sub. H.B. 250, eff. Oct. 20, 1994) (section four, uncodified).

As part of its statutory duties, the Commission is required to “[d]evelop, promote, and support safe, adequate, and efficient rail service throughout the state.” R.C. 4981.03(A)(1). In order to discharge this duty, the Commission may purchase or lease any portion of the rail property of a railroad corporation, *see* R.C. 4981.06, R.C. 4981.10, and “may restore, repair, relocate, or upgrade any rail property purchased, leased, or maintained by the commission.” R.C. 4981.07(A).

as a public road, neither a county nor a township is required to repair and maintain a bridge on that road.

In Ohio, public roads may be established from private tracts of land in several different ways. 1987 Op. Att’y Gen. No. 87-046 summarizes those various methods at 2-304 to 2-306:

There 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) common law dedication; or, (4) prescription. 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 highway. A tract of land may also be established as a public road or highway by way of dedication. Dedication occurs when a landowner, having determined that certain lands should be used for road purposes, makes a gift of the land to the state or one of its political subdivisions for such purposes. R.C. 5553.31, which sets forth the procedure by which land may be statutorily dedicated for use as a public road, provides that, “[a]ny person may, with the approval of the board of county commissioners, dedicate land for road purposes.” R.C. 5553.31 further provides that, in order to accomplish such dedication, a definite description of the lands to be dedicated with a plat of the lands attached and signed by the landowner, and with the approval and acceptance of the board endorsed thereon, shall be placed upon the proper road records of the county in which the prospective road is situated. Thereafter, “the proposal to dedicate lands for road purposes, together with the acceptance of the grant by the board, constitutes the lands so dedicated a public road.”

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.” 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. Further, the dedication of land by the owner may also be express or implied. As the court stated in [*State ex rel. Litterst v. Smith*, 87 Ohio App. 513, 517, 94 N.E.2d 802, 804-05 (Pike County (1950))], the dedication “is express when the *animus dedicandi* is expressly declared; it is implied when it arises by operation of law from the acts of the owner....Anything which fully demonstrates the intention of the donor, or the acceptance by the public, is effectual.”

Finally, a tract of land may be established as a public road or highway by way of prescription. As a general matter, 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. (Citations omitted.)

Whether 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; 1988 Op. Att’y Gen. No. 88-080 at 2-397. In your letter you state that the bridge in question was constructed by a railroad company to carry a road over a railroad line. Daniel and Julia Miller executed a deed in favor of the railroad company that conveyed to the railroad company the tract of land upon which the bridge was to be located. It is unclear from the information you have provided us, however, whether the road that passes over the bridge was ever established by the appropriate governmental authorities as a public road. Accordingly, you will first have to determine whether the road that traverses this bridge was at one time established as a public road by either statutory appropriation, statutory dedication, common law dedication, or prescription, as described in 1987 Op. Att’y Gen. No. 87-046.

In the case of statutory appropriation, you will have to determine whether the board of county commissioners acted under R.C. 5553.03-.16, or their statutory predecessors, to appropriate the land in question for use as a public road. Specifically, you will have to determine whether the resolutions or other written records of the board of county commissioners indicate that the board acted at some point in the past to acquire this tract of land for road purposes and took the steps necessary to accomplish its establishment as a public road. In such a circumstance the board of county commissioners would also have paid compensation to the landowner for such acquisition. 1984 Op. Att’y Gen. No. 84-016 at 2-52.

With respect to statutory dedication, we must examine the statutory law in force in 1900 when this particular tract of land was conveyed to the railroad company. Such an examination should disclose what was required of a landowner at that time in order to effect a statutory dedication of land for road purposes. In 1900, R.S. 4908b (Bates 1900), the statutory predecessor of R.C. 5553.31 (dedication of land for road purposes), set forth the procedure by which private land could be dedicated for road purposes:

That any person or persons may dedicate any tract or strips of ground to the public use as a highway, either by plat or deed of gift to the county or township, filed with the commissioners or trustees, and by them recorded as road surveys and other plats; and the county commissioners, or in a proper case the township trustees, may, if they deem such road of sufficient public utility, accept the same, by entry to that effect on their record, and recording as aforesaid. Upon such acceptance, said tract or strip shall become and be a legally established highway.

Thus, you will have to search the county land records to determine whether any owner of the tract of land on which the bridge is situated ever executed a deed of gift to the county or the township, or made

a dedication of the land to the county or township by an entry on the plat that corresponds to this land, for use as a public road. The same records should also disclose whether or not the county commissioners or the township trustees expressly acknowledged and accepted such a dedication from the landowner and recorded their acceptance in the same manner as they would have recorded a road survey or other plat.

A search of the county land records will also be necessary to determine whether this tract of land was established as a public road by common law dedication. You will wish to determine whether any landowner filed or recorded a deed or a plat in which he declared his intention that this tract of land should be open to use as a public road. Examination of the same records should also indicate whether the public authorities accepted that dedication, thereby establishing the tract as a public road. *See, e.g., In re Application of Loose*, 107 Ohio App. 47, 49, 153 N.E.2d 146, 148 (Franklin County 1958) (holding that the following notation upon a recorded plat, signed by the county commissioners, was sufficient to establish a common law dedication: “Approved this 1st day of March, A.D. 1906, and the roads, streets and alleys therein dedicated to public use, are hereby accepted as such for the county of Franklin, State of Ohio”). Acceptance of the dedication by the county or the township may also be shown to have occurred by implication. Acceptance may be deemed to have occurred if there is evidence that county or township officials have acted in a way that is consistent with an acceptance of this land for use as a public road (*e.g.*, by performing routine maintenance of the bridge over which this road passes, ensuring that the bridge remains free of debris and open to public traffic, or clearing the bridge of snow and ice during the winter season).

Finally, you will wish to consider whether the facts demonstrate that this tract of land was previously established as a public road by prescription. What must be shown in that regard is continuous use of the land as a means of access by the general public for at least twenty-one years in a way that has been adverse to the rights of the title holder of the land.

Once a road has been established as a public road, either the state, a county, or a township is responsible for its maintenance and repair. In this regard, R.C. 5535.01 states that the public highways of the State of Ohio are divided into the following three classes: state roads, county roads, and township roads. State roads are the “roads and highways on the state highway system.” R.C. 5535.01(A). County roads are “established as a part of the county system of roads as provided in [R.C. 5541.01-.03].” R.C. 5535.01(B). Township roads “include all public highways other than state or county roads.” R.C. 5535.01(C). Pursuant to R.C. 5535.08, “[t]he state, county, and township shall each maintain its roads, as designated in [R.C. 5535.01].” *See also* R.C. 5501.11(A) (the Department of Transportation is required to maintain and repair the roads on the state highway system); R.C. 5535.01 (the board of county commissioners shall maintain county roads and the board of township trustees shall maintain township roads); R.C. 5571.02 (a board of township trustees shall keep township roads in good repair). Accordingly, absent a statute to the contrary, the state and each county and township are required to maintain and repair their own roads, and the bridges situated on those roads.

Certain statutory exceptions to the general rule that the state and each county and township are required to maintain and repair the bridges on their own public roads apply in the case of bridges that carry public roads over railroad lines. Pursuant to R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, railroad companies operating a railroad in this state are required to keep and maintain safe and sufficient crossings at all points where a public road and railroad line cross or intersect.<sup>3</sup> See *Brady v. Consolidated Rail Corp.*, 35 Ohio St. 3d 161, 164, 519 N.E.2d 387, 389-90 (1988); *Lent v. New York, Chicago & St. Louis Ry. Co.*, 69 Ohio App. 514, 44 N.E.2d 295 (Lucas County 1942); *McNulta v. Ralston*, 3 Ohio Cir. Dec. 163, 164, 5 Ohio C.C. 330, 333 (Defiance County 1891). See generally R.C. 4961.19 (“[w]hen it is necessary in the construction, reconstruction, alteration, or improvement of its railroad, or in making additions to or relocating such railroad, to cross a road or a stream of water, a railroad company may divert it from its location or bed, but without unnecessary delay it shall place such road or stream in such condition as not to impair its former usefulness”).

In this regard, R.C. 4955.20 provides in relevant part:

Companies operating a railroad in this state *shall build and keep in repair good and sufficient crossings over or approaches to such railroad, its tracks, sidetracks, and switches, at all points where any public highway, street, lane, avenue, alley, road, or pike is intersected by such railroad, its tracks, sidetracks, or switches....* The board of township trustees shall have power to fix and determine the kind and extent, and the time and manner of constructing, crossings and approaches outside of municipal corporations.

... Such crossings, approaches, and sidewalks shall be constructed, repaired, and maintained by the railroad companies as so ordered. (Emphasis added.)

Similarly, R.C. 4959.03 states in part:

Before operating a railroad, the company or person having control or management of such railroad *shall maintain at every point where a public road, street, lane, or highway used by the public crosses such railroad, safe and sufficient crossings....* (Emphasis added.)

Finally, the last paragraph of R.C. 5523.19 reads as follows:

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<sup>3</sup> R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19 are a codification of the common law principle that a railroad company has a duty to afford the public a safe, easy, and convenient way to cross a railroad line when the railroad company constructs a railroad line across a public road. See *Railroad Co. v. Defiance*, 52 Ohio St. 262, 313-14, 40 N.E. 89, 102 (1895), *aff'd*, 167 U.S. 88 (1897); 1914 Op. Att’y Gen. No. 751, vol. I, p. 174, at 175-76; 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1570, at 375 (3rd ed. 1921).

Every person or company owning, controlling, managing, or operating a railroad in this state *shall maintain and keep in good repair good, safe, adequate, and sufficient crossings and approaches thereto, whether at grade or otherwise, across its tracks, at all points* other than crossings separated in accordance with sections 4957.01 to 4957.26 and 5561.01 to 5561.15 of the Revised Code, or in accordance with sections 5523.01 to 5523.20 of the Revised Code, and other than separated crossings relocated and reconstructed, widened, reconstructed, or realigned in accordance with this section, *where such tracks intersect a road or highway on the state highway system or an extension thereof.* (Emphasis added.)

These statutes together thus impose a duty upon a railroad company to repair and maintain a safe and sufficient crossing at each point where a public road crosses or intersects the company's railroad lines.

In general use, the term "crossing" may be interpreted narrowly to mean crossings at grade,<sup>4</sup> or it may be read more broadly to include overpasses, underpasses, bridges, viaducts, or other means by which the public crosses from one side of a railroad line to the other. *See, e.g., Black's Law Dictionary* 376 (6th ed. 1990) (defining "crossing"); *Webster's Third New International Dictionary* 542 (unabridged ed. 1993) (defining "crossing"); *see also Illinois Cent. R.R. Co. v. Farris*, 259 F.2d 445, 447 n.2 (5th Cir. 1958). Reading the statutes governing the crossing of public roads and railroad lines together, it is evident that the General Assembly intended the term "crossing," as used in R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, to be read broadly to include any place on a public road that the public uses to cross from one side of a railroad line to the other. *See generally State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph two) ("[s]tatutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent").

Statutory provisions pertaining to railroad and highway crossings are set forth in R.C. 4959.03 (cattle guards and crossings) and R.C. Chapters 4955 (tracks; crossings); 4957 (elimination of crossings); 5523 (grade crossings) and 5561 (county road grade crossings). A review of these provisions indicates that where the General Assembly intended to refer to crossings at grade it used language such as "grade crossing," or "crossings at grade" to convey that intention. *See, e.g.,* R.C. 4907.471-472; R.C. 4907.50; R.C. 4907.52; R.C. 4955.15; R.C. 4955.17; R.C. 4955.33; R.C.

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<sup>4</sup> The phrase "at grade" commonly denotes "on the same level or degree of rise." *Webster's New World Dictionary* 606 (2nd college ed. 1986); *see also F. W. Caldwell v. City of Cleveland*, 12 Ohio N.P. (n.s.) 483, 495, 22 Ohio Dec. 306, 318 (C.P. Cuyahoga County 1911) ("[i]t is true that a grade crossing means a place where a highway or common road crosses a railroad on the same level"). *See generally* R.C. 1.42 (phrases are to be accorded their common meaning).

4957.01; R.C. 4957.09; R.C. 4957.28-.30; R.C. 5523.01-.03; R.C. 5523.10; R.C. 5523.15; R.C. 5523.18-.19; R.C. 5561.02-.03; R.C. 5561.06-.09; R.C. 5561.11; R.C. 5561.15-.16. Because there is no such language in R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, it reasonably follows that the term “crossing,” as used therein, is to be accorded its broader meaning.

Various contexts in which the General Assembly uses the term “crossing” also support this proposition. R.C. 4957.27 states that, except as provided in R.C. 4957.30-32, “all *crossings* constructed after May 3, 1904, whether of highways by railroads, or of railroads by highways, shall be *above or below the grade thereof*.” (Emphasis added.) In addition, statutes pertaining to the allocation of costs of maintenance and repair of crossings indicate that a bridge carrying a public road over a railroad line or a railroad line over a public road constitutes a “crossing.” See, e.g., R.C. 4957.06; R.C. 4957.24; R.C. 5523.08; R.C. 5561.12. These statutory provisions thus further support the proposition that where the General Assembly has not used language such as “grade crossing,” or “crossings at grade” in a statute, the term “crossing” is not limited to crossings at grade, but rather includes crossings made at grade, above grade, and below grade.

In addition, it is a cardinal principle of statutory interpretation that a well-established rule of the common law will not be abrogated unless the General Assembly clearly conveys such an intention. In this regard, *State ex rel. Morris v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146 (1909) (syllabus, paragraph three), held:

Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law unless the language employed by it clearly expresses or imports such intention.

It is a well-established rule of the common law that railroad companies have a legal duty to ensure the safety of the travelling public at highway crossings. As stated in 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1575, at 389-91 (3rd ed. 1921):

At every crossing<sup>5</sup> something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway reasonably safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety.... Where the railway crosses the highway

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<sup>5</sup> 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1565, at 367-69 (3rd ed. 1921) states that “[c]rossings are constructed for the purpose of enabling persons, horses and vehicles, or the like, to cross the railway tracks, and all the structures, and the like, reasonably necessary to enable that object to be safely accomplished are included in the crossing.”

through a deep cut, the company may be required to make the highway safe by building a bridge over the railway track.... Each particular crossing presents different conditions, but the general rule governing all is the same, and that rule is that the company must erect whatever structures are reasonably necessary to the safety and convenience of the travelers using the crossing. (Footnote added and footnotes omitted.)

Accordingly, under the common law, a railroad company that erects a bridge to carry a public way over a railroad line is responsible for the repair and maintenance of the bridge. See *The Hocking Valley Ry. Co. v. Helber*, 91 Ohio St. 231, 110 N.E. 481 (1915) (syllabus, paragraph two) (where a railroad company constructs a bridge to carry a public highway over its tracks, “it [is] the duty of the company to make every reasonable provision for the safety of the public in the construction and maintenance of the bridge”); 1922 Op. Att’y Gen. No. 3814, vol. II, p. 1020 (syllabus, paragraph one) (“[w]here a railroad company, prior to the enactment of the grade crossing elimination statutes (Secs. 8863 *et seq.*) [now R.C. Chapter 4957] has erected bridges along a public road so as to constitute an overhead crossing for the public road, it is the duty of the railroad company and not of the county to keep up all repairs of such bridges”); 1914 Op. Att’y Gen. No. 751, vol. I, p. 174 (syllabus) (“[w]here a railroad crosses a public highway below grade, which necessitates the building of wagon bridges across the railroad track, and no agreement was made between the county commissioners and the railroad company as to the construction and repair of these bridges, it is the primary duty as between the county commissioners and the railroad company for the railroad company to construct and keep the bridges in repair”).

Nothing in R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19 indicates a legislative intent to abrogate a railroad company’s common law duty to repair and maintain a bridge that carries a public road over a railroad line. These statutes thus must be construed in accordance with this common law duty. See generally *Brady v. Consolidated Rail Corp.*, 35 Ohio St. 3d at 164, 519 N.E.2d at 389-90 (“R.C. 4955.20 imposes general requirements on railroads to keep *all rights-of-way* safe and in good repair for the benefit of the general public using such crossings” (emphasis added)).

Finally, this interpretation of the term “crossing” is buttressed by the fact that courts in other states that have examined a railroad company’s duty to maintain safe and sufficient crossings have concluded that the term “crossing” includes all points at which a public road and railroad line cross, regardless of whether the public road crosses the railroad line at grade, above grade, or below grade. See, e.g., *Kutsenkow v. Chicago & N. W. Ry. Co.*, 99 Ill. App. 2d 265, 269, 240 N.E.2d 805, 807 (Ill. App. 1968); *McCarty v. Illinois Cent. R.R. Co.*, 194 So. 96, 99 (La. App. 1939); *State ex rel. Alton R.R. Co. v. Public Serv. Comm.*, 334 Mo. 985, 70 S.W.2d 52 (1934); *Pierce v. Boston & Maine R.R.*, 83 N.H. 466, 467, 143 A. 903, 903 (N.H. 1928); *Hays v. Texarkana & Ft. Smith Ry. Co.*, 87 S.W.2d 1106, 1108 (Tex. Civ. App. 1935). But see generally *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Halbert*, 179 Ill. 196, 53 N.E. 623 (1899) (the statute requiring a locomotive bell or whistle to be sounded on approaching a highway crossing, refers only to grade

crossings, and not to overhead bridges or subways). Thus, in order to ensure the public's safety, courts have construed the term "crossing" broadly, rather than narrowly.

In light of the foregoing, it is reasonable to conclude that the General Assembly intended for the term "crossing," as used in R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, to include overpasses, underpasses, bridges, viaducts, or other means by which the public crosses from one side of a railroad line to the other. Because a bridge carrying a public road over a railroad line is a "crossing" for purposes of R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, a railroad company, rather than a public entity, is required to repair and maintain bridges that carry public roads over its railroad lines.<sup>6</sup>

A railroad company's duty to repair and maintain bridges that carry public roads over railroad lines is not absolute, however. R.C. Chapters 4957 and 5561 authorize a county to alter or eliminate the crossing of a public road and railroad line at grade. *See* R.C. 4957.01; R.C. 5561.01. Additionally, R.C. Chapter 5523 authorizes the state to eliminate existing grade crossings on any road of the state highway system or any extension thereof. R.C. 5523.01. By eliminating or altering such crossings, the state and the counties may ensure the public's safety and convenience at crossings.

The repair and maintenance of bridges constructed pursuant to R.C. Chapter 4957, 5523, or 5561 is governed by R.C. 4957.06, R.C. 5523.17, or R.C. 5561.12, respectively. Pursuant to these statutes, when such a bridge has been constructed, either the state or the county is required by R.C.

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<sup>6</sup> Although a railroad company is required to repair and maintain a bridge that carries a public road over its railroad line, prior opinions of the Attorneys General have determined that a public entity's duty to keep public roads and bridges in repair requires a public entity to either bring an action to compel a railroad company to make necessary repairs to a bridge, or make the repairs itself and bring an action against the railroad company to recover the cost of the repairs. *See, e.g.*, 1922 Op. Att'y Gen. No. 3814, vol. II, p. 1020; 1914 Op. Att'y Gen. No. 751, vol. I, p. 174; *see also* R.C. 305.12; R.C. 505.26; 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1574, at 388-89 (3rd ed. 1921).

Contractual provisions between a public entity and a railroad company also may have a bearing upon the responsibilities of a railroad company to repair and maintain a bridge that carries a public road over the company's railroad line. In this instance provisions of leases and contracts between agencies of the State of Ohio and the owners of the railroad line may be relevant in that regard. Pursuant to these contractual provisions, the State of Ohio may have assumed the railroad company's duty to repair and maintain the bridge in question. However, while parties to a contract may agree how they will allocate among themselves specific duties and responsibilities, each party will still remain primarily liable for the performance of duties imposed upon that party by statute. Thus, although the State of Ohio may have agreed to repair and maintain this bridge, the railroad company remains responsible for such repair and maintenance under the statutory schemes discussed in this opinion should the State of Ohio default on that responsibility.

4957.06, R.C. 5523.17, or R.C. 5561.12, respectively, to repair and maintain the bridge. Accordingly, pursuant to R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, a bridge carrying a public road over a railroad line must be repaired and maintained by the railroad company that owns or operates the railroad line, unless the bridge was constructed pursuant to R.C. Chapter 4957, 5523, or 5561. *See generally Warner v. Ohio Edison Co.*, 152 Ohio St. 303, 89 N.E.2d 463 (1949) (syllabus, paragraph one) (“[s]tatutes relating to the same subject matter should be construed *in pari materia*, although they were enacted at different sessions of the General Assembly”). If the bridge carrying the road over the railroad line was constructed pursuant to R.C. Chapter 4957, 5523, or 5561, then the state or the county, as may be provided by law, is responsible for the repair and maintenance of the bridge.<sup>7</sup> *See* R.C. 4957.06; R.C. 5523.17; R.C. 5561.12.

Therefore, to the extent that it is possible to provide general guidance on the subject, it is my opinion, and you are hereby advised as follows:

1. Unless a road has been properly established as a public road, neither a county nor a township is required to repair or maintain a bridge that carries the road over a railroad line.
2. Pursuant to R.C. 4955.20, R.C. 4959.03, and R.C. 5523.19, a bridge carrying a public road over a railroad line must be repaired and maintained by the railroad company that owns or operates the railroad line, unless the bridge was constructed pursuant to R.C. Chapter 4957, 5523, or 5561. If the bridge carrying the road over the railroad line was constructed pursuant to R.C. Chapter 4957, 5523, or 5561, then the state or the county, as may be provided by law, is responsible for the repair and maintenance of the bridge.

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<sup>7</sup> According to your letter the bridge was constructed by a railroad company at the turn of the century for use by Daniel and Julia Miller. A deed conveying the tract of land to the railroad company stated that the Millers agreed to release the railroad company from its obligation to maintain a grade crossing that, until that time, had been used by the Millers and other residents of that area. Instead, it was stipulated that the bridge constructed by the railroad company would be used in lieu of the former grade crossing.

Based on this information, it appears that the bridge was not constructed pursuant to R.C. Chapter 4957, 5523, or 5561. Neither the state nor the county authorized the construction of the bridge to eliminate the grade crossing. *See* R.C. 4957.01; R.C. 5523.01; R.C. 5561.01. In addition, the statutory predecessors of R.C. Chapters 5523 and 5561 were not enacted by the General Assembly until 1945 and 1923, respectively. *See generally* 1923 Ohio Laws, 231 (H.B. 35, approved Apr. 21, 1923) (enacting G.C. 6956-22 through G.C. 6956-39 (now R.C. Chapter 5561)); 1945-1946 Ohio Laws, 455 (Am. S.B. 204, approved July 10, 1945) (enacting G.C. 1182 through 1182-21 (now R.C. 5523.01-20)).

The Honorable Jetta Mencer

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Respectfully,

BETTY D. MONTGOMERY  
Attorney General

February 15, 2000

The Honorable Jetta Mencer  
Coshocton County Prosecuting Attorney  
239 N. Fourth Street  
Coshocton, Ohio 43812-1116

SYLLABUS:

2000-012

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