

**OPINION 65-15****Syllabus:**

1. Roads may become public roads entitled to be put upon a county engineer's map, by virtue of continued public use for more than 21 years and maintenance of the surfaces and bridges during such period by township and county officials, which results in a conclusive presumption of common law dedication and acceptance as public roads.

2. Once a road has become a public road by common law dedication and acceptance there is no necessity for such road to be thereafter officially dedicated as a public road.

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**To: Harlan R. Spies, Tuscarawas County Pros. Atty., New Philadelphia, Ohio**  
**By: William B. Saxbe, Attorney General, January 28, 1965**

Your request for my opinion reads in pertinent part as follows:

"Request is hereby made for an opinion upon the following problem concerning township roads.

"In Tuscarawas County, Ohio, we have 22 townships. In several of these townships, there are roads which the township trustees have considered to be public roads, and have spent public funds upon them to gravel and maintain them, and on occasion in the past, the Tuscarawas County Engineer has made repairs upon bridges located on said roads.

"Recently the township trustees have made request upon the Board of County Commissioners for repairs on these bridges located within and on these roads. Up to this point, there does not seem to be too much of a problem. However, in regard to the several roads which we speak of, we cannot find any official record, either at the township or county level, where the same have been duly dedicated for public roads. However, we do have residents who live in the vicinity and adjacent to said roads, as well as township officials, who will swear by affidavit, that said roads have been in existence in excess of 40 years, and been used by the public and have been maintained by the township trustees, and in some instances by the county. Presently, however, the County Engineer has refused, upon request of the Board of County Commissioners, and the township trustees, to make any repairs upon any bridges upon any roads which cannot be shown to him that have been duly dedicated public roads.

'Question: Does the continued use by the public over a period of 40 years, amount to an implied dedication, so that these particular roads can be considered to be public roads, and therefore entitled to have public funds expended upon them?

"Question: Does the fact that we can be supplied with affidavits, setting forth the existence and continuous use of the roads for at least 40 years last past, and the fact that the county has on previous occasions repaired and maintained said road and bridges, lend any credence to the fact that such roads should be considered public roads, although presently we do not have any official records to show that the same have been duly dedicated?

"Question: Are these roads in question public roads, or will it be, in your opinion, necessary to begin proceedings to officially dedicate said roads before public funds can be legally expended thereon?

" \* \* \*

\* \* \*

\* \* \* "

Section 5543.04, Revised Code, provides in pertinent part as follows:

"The county engineer, \* \* \* shall name and number all the public roads of his county, other than intercounty and state highways \* \* \*. A map of such roads shall be made by the engineer, which shall show and identify by number, location, and length each such road and section thereof and all bridges and culverts. \* \* \*

"As rapidly as the roads, bridges, and culverts of each township are located and numbered, the engineer shall enter in a book in his office, to be kept for that purpose, a description or identification thereof. \* \* \* When a new road is established it shall be assigned a name and number by the engineer \* \* \* and the engineer shall note such new road, \* \* \* on the copy of the map on file in his office and report it to the director and board of county commissioners."

Under this section it is the responsibility of the county engineer to make a map showing and identifying every public road within the county. Presumably the roads in question are not shown on the engineer's map, and you have stated that there are no official records of the several roads having been dedicated. I assume, therefore, that there was no attempt to comply with the requirements for statutory dedication at the time the roads in question were first built. The initial question, then, is can there be a dedication other than by statute.

It has long been held that dedication of a road to public purposes may be accomplished under the common law as well as by statute. The earliest case on the subject, Village of Fulton v. Mehrenfeld, 8 Ohio St. 440 (1856), held in the first branch of the syllabus:

"1. A dedication of ground for public uses may be made, in Ohio, either under the statute or according to the rules of the common law."

To have a common law dedication of land to public use, there must be an intent to dedicate by the owner and an acceptance of the dedication by the proper public authority. However, neither the intent to dedicate nor the acceptance need be expressed, but may be presumed or implied, as the following cases illustrate.

In Penquite v. Lawrence, 11 Ohio St. 274, 276 (1860), it was stated:

" \* \* \* \* \* \* \* \* "

" \* \* \* It is not pretended that there was any statutory dedication, either by the defendant or the public, and, therefore, the dedication, if any, was a common law dedication, which depends for its validity, upon the real or presumed intention of the owner, and where there is no express grant, operates by way of an estoppel

in pais of the owner. There must be an intention to dedicate, and the general rule is, that without some clear manifestation of such intention on the part of the owner, a dedication will not be conclusively presumed, until the lapse of a period sufficient to create a bar to an action to recover possession of real estate;

\* \* \*

" \* \* \*

\* \* \*

\* \* \* "

It may be pointed out that under Section 2305.04, Revised Code, the period of limitation referred to above is presently 21 years; hence 40 years of use for the roads in question is ample to satisfy the statute.

A case similar on its facts to the one you have propounded to me is Doud v. Cincinnati, 152 Ohio St. 132 (1949). The first branch of the syllabus states:

"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 your request you make no mention of any complaints or objections by abutting landowners during the 40-year period. I therefore assume that there have been none. On the question of acceptance, I note that you state that in the past both the township and county authorities have maintained the roads and bridges in question. On Pages 135-136 of the Doud case, supra, the following is found which is relevant in this regard:

" \* \* \*

\* \* \*

\* \* \*

"It is conceded that there was no statutory appropriation of a private sewer originally constructed through the property of the plaintiff. However, the defendant tapped into the sewer, connected its own public sewers with the private sewer and thereafter used it as a public sewer.

\* \* \*

" \* \* \* the affirmative act of the defendant \* \* \* in connecting its public sewer with the sewer in question \* \* \* estops defendant from denying that the sewer became a public sewer devoted to a public use.

" \* \* \*

\* \* \*

\* \* \* "

In my opinion, the past maintenance of the roads and bridges in question by the township and county authorities constituted an acceptance by them within the meaning of the above cases, sufficient to estop them from now denying that such roads were established as public roads by common law dedication.

Further authority for the above propositions may be

found in Pennsylvania Railroad Co. v. City of Girard,  
210 F. 2d, 437, 441 (1954):

" \* \* \* \* \* \* \* \* "

" \* \* \* the uncontradicted testimony with reference to the use by the general public of the crossing over the railroad tracks from 1907 to the present time, being for a period of more than 21 years, under Ohio law raises a conclusive presumption of common-law dedication and acceptance by the city. \* \* \*

" \* \* \* \* \* \* \* \* "

I am not unaware of a prior opinion of mine on a question somewhat similar to the present one. See Opinion No. 1646, Opinions of the Attorney General for 1958. However, my statements contained therein were all in reference to statutory dedication, and the question of whether dedication by common law is acceptable was not before me at that time. Thus the requirements set forth in the first part of the syllabus of that opinion, that public highways must be "duly dedicated and accepted as such by the county Commissioners," did not and was not intended to exclude the possibility of common law dedication, which, when the requirements for it are met, is fully as effective as statutory dedication. See Opinion No. 7113, Opinions of the Attorney General for 1956.

With regard to the second question of your inquiry, in my opinion affidavits by residents and township officials swearing to the existence of the roads in question for 40 years would lend credence to the conclusion that such roads are public roads. Of course, the necessity of obtaining such affidavits, or of producing such persons as witnesses, would depend upon the length to which any person disputing the fact that the roads are public might choose to go.

As to the last part of your inquiry, since the roads in question are already public roads, there is no necessity to rededicate them as public roads.

In conclusion, it is my opinion and you are hereby advised that:

(1) Roads may become public roads entitled to be put upon a county engineer's map, by virtue of continued public use for more than 21 years and maintenance of the surfaces and bridges during such period by township and county officials, which results in a conclusive presumption of common law dedication and acceptance as public roads.

(2) Once a road has become a public road by common law dedication and acceptance there is no necessity for such road to be thereafter officially dedicated as a public road.