

February 23, 2015

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

SYLLABUS:

2015-006

Upon receiving a petition that satisfies the requirements of R.C. 517.02, a board of township trustees shall provide a public road to a township cemetery over which the board of township trustees has control. A board of township trustees shall establish the public road in the same way the board is authorized to establish a township cemetery under R.C. 517.01, and, if necessary, construct, resurface, reconstruct, or improve the public road as authorized by R.C. 5571.01 and R.C. 5573.01.



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OPINION NO. 2015-006

The Honorable D. Vincent Faris
Clermont County Prosecuting Attorney
101 East Main Street
Batavia, Ohio 45103

Dear Prosecutor Faris:

You have requested an opinion concerning the authority of a board of township trustees to provide a public road to a cemetery pursuant to R.C. 517.02. R.C. 517.02 states: “When twenty-five interested persons petition for it, the board of township trustees shall provide a public road to any township cemetery over which it has control, in the same manner as provided by [R.C. 517.01] for establishing cemeteries and obtaining the land therefor.” You explain that the cemetery at issue, Mt. Olive Cemetery, is an abandoned public cemetery located in Franklin Township. The cemetery is surrounded by privately-owned parcels of land. There is no road providing public access to the cemetery. You surmise that Franklin Township has title to the cemetery pursuant to R.C. 517.10, which provides:

The title to, right of possession, and control of all public cemeteries located outside any municipal corporation, which have been set apart and dedicated as public cemeteries, and any grounds which have been used as such by the public, but not expressly dedicated as a cemetery, except such as are owned or under the care of a religious or benevolent society, or an incorporated company or association, or under the control of the authorities of any municipal corporation, shall, severally be vested in the board of township trustees.

You wish to know what R.C. 517.02 requires of the Franklin Township Board of Trustees if it receives a petition under the statute. To answer your inquiry, we will analyze the statutory provisions governing Ohio’s highways and explain how R.C. 517.02 fits into this statutory scheme.

The Classification of Ohio’s Highways

Statutes pertaining to the state’s highways are voluminous and span several of the Revised Code’s titles and chapters. *See, e.g.*, R.C. Chapter 5501 (creating the Department of Transportation); R.C. Chapter 5511 (governing the state highway system); R.C. 5519.01 (empowering the Director of Transportation to appropriate property for highway purposes); R.C. Chapter 5521 (containing statutes that regulate how municipal corporations and counties cooperate in the establishment and construction

of roads); R.C. Chapter 5541 (governing the county highway system); R.C. Chapter 5543 (setting forth the various duties of the county engineer); R.C. Chapter 5553 (providing for the establishment and vacation of county roads); R.C. Chapter 5555 (governing county road improvement); R.C. Chapter 5557 (providing for the ways in which streets are improved); R.C. Chapter 5571 (delegating to boards of township trustees duties with respect to the improvement and maintenance of roads); R.C. Chapter 5573 (governing township road improvement). *See also* R.C. 517.02 (requiring a board of township trustees to provide a road when twenty-five persons petition for it); R.C. 719.01(A) (authorizing a municipal corporation to appropriate property for street purposes); R.C. Chapter 723 (setting forth provisions related to streets and other public grounds); *Sparrow v. City of Columbus*, 40 Ohio App. 2d 453, 460, 320 N.E.2d 297 (Franklin County 1974) (“the General Assembly has spoken frequently and voluminously with respect to highways, roads, and streets”). These statutes comprehensively provide for, among other things, the ways in which highways are established, constructed, maintained, and classified. While this statutory scheme is extensive and multi-faceted, understanding the law’s basic nomenclature is the first step in understanding the advice offered in this opinion. *See generally* 1988 Op. Att’y Gen. No. 88-036, at 2-175 (“[t]he statutory scheme governing the construction, improvement, and repair of streets and roads within Ohio is complex and confusing”).

The term “highway” has long been used to refer to all types of public roadways. *See Miller v. Berryhill Nursery Co.*, 7 Ohio App. 2d 30, 32, 218 N.E.2d 467 (Clark County 1966) (“[t]he term ‘highway’ is the generic term for all kinds of public ways”); *Sullivan v. Columbus*, 12 Ohio Dec. 650, 652 (C.P. Franklin County 1902) (“[t]he term ‘highway’ is the generic term for all kinds of public ways, streets, alleys, etc.”). As explained in *Sullivan v. Columbus*: “Ways are either public or private. A way open to all the people is a highway. The term ‘highway’ is the generic term for all kinds of public ways, streets, alleys, etc.” 12 Ohio Dec. at 652. Therefore, when the term “highway” is used in Ohio law, it encompasses all of the state’s public roadways, unless otherwise defined.

The state’s highways comprise two main categories: “roads” and “streets.”¹ *See Sparrow*, 40 Ohio App. 2d at 459 (“the word ‘road,’ as ordinarily used in Ohio statutes, relates to public ways and rural sections while the word ‘street’ is used as to roadways in a municipal corporation”). “Streets” include all highways located within a municipal corporation, while “roads” encompass all highways located outside any municipal corporation. *See id.*; 2006 Op. Att’y Gen. No. 2006-051, at 2-490 (“public highways located within municipal corporations are generally classified as streets”); 1919 Op. Att’y Gen. No. 397, vol. I, p. 661, at 662 (“while the word ‘road’ as a generic term is no doubt broad enough to include ‘street,’ yet our legislature has for many years past made use of the word ‘road’ in dealing with improvements outside of municipalities and the word ‘street’ in dealing with improvements within municipalities. In fact, as a matter of common usage, the word ‘street’ is

¹ The Revised Code classifies certain roadways as “limited access highways” or “freeways.” R.C. 5535.02. “A ‘limited access highway’ or ‘freeway’ is a road, highway, or street, especially designed for through traffic, over which abutters have no easement or right of access by reason of the fact that their property abuts upon such highway.” *Id.*

understood as referring particularly to public ways within municipalities and the word ‘road’ to like ways outside of municipalities”). “Roads” are divided into “state roads, county roads, and township roads.” R.C. 5535.01; *see also* 2006 Op. Att’y Gen. No. 2006-051, at 2-490; 1981 Op. Att’y Gen. No. 81-039, at 2-155 (“all roads in Ohio are classified as state, county, or township roads”); 1979 Op. Att’y Gen. No. 79-045, at 2-145 (recognizing the three classes of roads set forth in R.C. 5535.01). “State roads include the roads and highways on the state highway system,”² R.C. 5535.01(A), “[c]ounty roads include all roads which are or may be established as a part of ... the county highway system,”³ R.C. 5535.01(B), and “[t]ownship roads include all public highways other than state or county roads,” R.C. 5535.01(C).

The Establishment of Ohio’s Highways

Before a highway may be opened and designated as a street, state road, county road, or township road, providing a way for public travel, it must first be “established” as a public highway.⁴ *See generally* 1984 Op. Att’y Gen. No. 84-016, at 2-51 to 2-52 (discussing the ways in which roads may be established). Establishment is an essential first step in providing the public with a highway, as it is only after a highway is established that the state or a political subdivision becomes responsible for the highway’s maintenance.⁵ *See State ex rel. Duncan v. Chippewa Twp. Trs.*, 73 Ohio St. 3d 728,

² State highways are established as part of the state highway system by the Director of Transportation. *See* R.C. 5501.31 (empowering the Director of Transportation to establish state roads); R.C. 5511.01 (requiring the Director of Transportation to notify the community before establishing state highways).

³ Roads are designated as “county roads” pursuant to the procedures set forth in R.C. Chapter 5541. *See* R.C. 5535.01(B).

⁴ A highway may be established on an existing private road or on a tract of land on which no road exists. *See, e.g.*, R.C. 5501.11(A)(1) (authorizing the Department of Transportation to establish state highways on existing roads or new locations).

⁵ The state is required to maintain state roads, boards of county commissioners are required to maintain county roads, boards of township trustees are required to maintain township roads, and municipal corporations are required to maintain streets. *See* R.C. 5535.01(C) (“[t]he board of township trustees shall maintain all [township] roads within its township”); R.C. 5535.08(A) (“[t]he state, county, and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code”). The state, municipal corporations, counties, and townships, through agreement, may contribute to the repair and maintenance of each other’s highways. *See, e.g.*, R.C. 5521.01 (permitting the Director of Transportation to establish or improve a state highway within the limits of a village upon the approval of the legislative authority of the village); R.C. 5535.01(C) (“[t]he board of county commissioners may assist the board of township trustees in maintaining [township] roads”); R.C. 5535.08(A) (“the county or township, by agreement ... may contribute to the repair and maintenance of the roads under the control of the other”); R.C. 5571.02 (a board of township trustees may maintain

729-32, 654 N.E.2d 1254 (1995) (affirming the holding below that a board of township trustees had no duty to maintain a road when it had never been properly established as a township road); 2000 Op. Att’y Gen. No. 2000-012, at 2-65 (recognizing that a road must first be established “‘before any public entity becomes responsible for its maintenance’” (quoting 1994 Op. Att’y Gen. No. 94-036, at 2-186)). Furthermore, it is only after a highway is established that the state or a political subdivision has authority to construct a road or improve an existing one to make it available for public use. *See generally* 1993 Op. Att’y Gen. No. 93-016, at 2-89 (recognizing that a board of township trustees and the legislative authority of a city have authority to construct public highways within their territories). Ohio law recognizes four principal ways in which a highway can be established: (1) statutory dedication, (2) common law dedication, (3) prescription, and (4) statutory appropriation. *See* 2014 Op. Att’y Gen. No. 2014-001, at 2-4 (“[w]hether a particular private tract of land that serves as a road ... 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”); 1994 Op. Att’y Gen. No. 94-032, at 2-146 to 2-147 (describing the ways in which a public road may be established); 1987 Op. Att’y Gen. No. 87-046, at 2-304 (listing the four methods by which a tract of land may be established as a public highway); 1984 Op. Att’y Gen. No. 84-016, at 2-51 (“the statutory and common law methods of accepting lands dedicated for road purposes have been referred to as methods of ‘establishing’ roads. However, roads can also be ‘established’ by proceedings undertaken by a board of county commissioners to appropriate land for road purposes, R.C. 5553.03 to R.C. 5553.16, and also by prescription”) (citations omitted).

Generally, under either statutory or common law dedication, a highway is established when a landowner dedicates the land for highway purposes, and a public entity accepts the dedication. *See* R.C. 711.091 (providing that when a city, village, or county engineer, in each of his or her respective jurisdictions, endorses that a road has been constructed according to the specifications of a plat and that the street or road is in good repair, the street or road is considered accepted for public use by the city, village, or county, “provided such street has been theretofore duly dedicated”); R.C. 723.03 (providing the way in which land is dedicated for street purposes); R.C. 5501.33 (permitting a landowner to donate property to the state for state highway purposes); R.C. 5553.31 (setting forth the way in which a board of county commissioners accepts property dedicated for road purposes); *Ickes v. Lawrence Twp.*, 161 Ohio App. 3d 711, 2005-Ohio-3195, 831 N.E.2d 1068, at ¶7 (listing the elements of common law dedication); *Mastera v. City of Alliance*, 43 Ohio App. 3d 120, 122, 539 N.E.2d 1130 (Stark County 1987) (recognizing R.C. 723.03 as a form of statutory dedication); 1987 Op. Att’y Gen. No. 87-046, at 2-304 to 2-305 (explaining how highways are established under the statutory and common law methods of dedication); 1984 Op. Att’y Gen. No. 84-016, at 2-52 (“a ‘dedication’ under R.C. 5553.31 involves an initial determination by a landowner that certain lands should be used for

county and state roads with the approval of the board of county commissioners and Director of Transportation, respectively); *see also* 1981 Op. Att’y Gen. No. 81-039, at 2-155 (“the general statutory scheme is that the state, county, and township, each as to its respective jurisdiction, bears the responsibility for maintenance and repair of its respective road or highway system, although the various subdivisions may cooperate in the maintenance and repair of the others’ roads”).

road purposes, and then an offer of the land to the government”). A highway is established by prescription when the general public uses “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.” 1987 Op. Att’y Gen. No. 87-046, at 2-306; *see also Smith v. Krites*, 90 Ohio App. 38, 42, 102 N.E.2d 903 (Allen County 1950) (explaining how roads are established by prescription); 1982 Op. Att’y Gen. No. 82-028, at 2-83 (same). When the state or a political subdivision uses its statutory authority to acquire property for highway purposes, a highway is said to be established through statutory appropriation. *See, e.g.*, R.C. 715.01 (stating that municipal corporations may appropriate property “for any authorized municipal purpose”); R.C. 715.19 (authorizing municipal corporations to establish streets); R.C. 719.01(A) (authorizing a municipal corporation to appropriate property for street purposes); R.C. 5519.01 (permitting the Director of Transportation to appropriate property for any purpose related to highways); R.C. 5333.02-.16 (setting forth the procedures by which a board of county commissioners appropriates property for the establishment of a road); *see also* 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 highway”).⁶

The Director of Transportation, legislative authorities of municipal corporations,⁷ and boards of county commissioners have broad authority to establish state roads, streets, and county and township roads, respectively, through statutory appropriation. *See* R.C. 715.01 (a municipal corporation may appropriate property “for any authorized municipal purpose”); R.C. 715.19 (authorizing a municipal corporation to establish streets); R.C. 719.01(A) (authorizing a municipal

⁶ The cases and opinions that discuss the establishment of a highway through statutory appropriation generally have addressed a board of county commissioners’ authority to appropriate property for the establishment of roads under R.C. 5553.02-.16. *See, e.g.*, 1987 Op. Att’y Gen. No. 87-046, at 2-304. However, municipal corporations and the Director of Transportation also have the authority to establish streets and state roads and, if necessary, appropriate land therefor. *See* R.C. 715.01 (stating that municipal corporations may appropriate property “for any authorized municipal purpose”); R.C. 715.19 (authorizing municipal corporations to establish streets); R.C. 719.01(A) (authorizing a municipal corporation to appropriate property for street purposes); R.C. 5501.31 (authorizing the Director of Transportation to establish state highways); R.C. 5519.01 (permitting the Director of Transportation to appropriate property for any purpose related to highways authorized by, among other chapters, R.C. Chapter 5501).

⁷ A municipal corporation’s authority to establish and maintain its streets “has been long established and recognized as a ‘power of local self-government’” under Ohio Const. art. XVIII, § 3, a power exercised in conjunction with the authority conveyed to the municipal corporation under R.C. Chapter 723. 1982 Op. Att’y Gen. No. 82-012, at 2-40 n.1; *see also* Ohio Const. art. XVIII, § 3 (“[m]unicipalities shall have authority to exercise all powers of local self-government”); 1988 Op. Att’y Gen. No. 88-036, at 2-171 (“[t]he authority of a municipal corporation to establish and regulate roadways within its boundaries has been recognized as a power of local self-government”).

corporation to appropriate property for street purposes); R.C. 5501.31 (authorizing the Director of Transportation to establish state highways); R.C. 5519.01 (permitting the Director of Transportation to appropriate property for any purpose related to highways authorized by, among other chapters, R.C. Chapter 5501); R.C. 5553.01-16 (authorizing a board of county commissioners to establish county and township roads and appropriate property for such purposes).⁸ A board of township trustees does not possess similar authority to establish township roads.⁹ Instead, R.C. 5553.02 grants this power to a board of county commissioners:

The board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of roads as provided in sections 5553.03 to 5553.16 of the Revised Code. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the director of transportation shall be had. However, no public road shall be located or established, by the board of county commissioners, unless the location or establishment begins on a public road and terminates on a public road, or begins on a public road and services a public park, a state supported educational institution, public school, public aviation area, or a public recreation area, or begins on a public road and services at least three private residences or businesses in the first five hundred feet and one private residence or business in each two hundred feet thereafter.

See also Bd. of Cnty. Comm'rs of Athens Cnty., Ohio v. Goldsberry, Athens App. No. 05CA18, 2005-Ohio-4705, at ¶8 (recognizing that the power afforded to boards of county commissioners under R.C.

⁸ In addition to establishing the roads over which they have primary control, the state, boards of county commissioners, and legislative authorities of municipal corporations may establish, through cooperation or permission, another entity's roads or streets. *See, e.g.*, R.C. 5521.01 (empowering the Director of Transportation with the authority, upon approval by a village's legislative authority, to establish any section of a state highway within the limits of a village); R.C. 5521.02 (allowing a board of county commissioners to cooperate with the Director of Transportation in the establishment of state highways, both within and without municipal corporations, subject to the municipality's consent); R.C. 5521.06 (giving a board of county commissioners and the legislative authority of a municipal corporation the power to appropriate property for state roads that are established with the cooperation of the Department of Transportation pursuant to R.C. 5521.02 and R.C. 5521.03); R.C. 5553.02 (authorizing a board of county commissioners to establish state roads with the Director of Transportation's permission).

⁹ At an earlier time, a board of township trustees had the authority to establish township roads. *See* 1982 Op. Att'y Gen. No. 82-012, at 2-42 ("[p]rior to a 1915 revision of the highway laws of Ohio, 1914-1915 Ohio Laws 574, township trustees had the power to create township roads"). However, since revisions were made to the state's highway statutes in 1915, the power to establish township roads "has been exclusively vested in the county commissioners." *Id.*

5553.02 is not limited to county roads, but instead applies to all the public roads within the county, except state roads and streets).

Responsibility of a Board of Township Trustees under R.C. 517.02 to Provide a Public Road to a Township Cemetery

Your question relates to R.C. 517.02, which states: “When twenty-five interested persons petition for it, the board of township trustees *shall provide a public road* to any township cemetery over which it has control, in the same manner as provided by [R.C. 517.01] for establishing cemeteries and obtaining the land therefor.” (Emphasis added.) You wish to know exactly what the statute demands in requiring a board of township trustees to “provide a public road.” In researching R.C. 517.02 and its predecessor, G.C. 3443, we located no court decision or Attorney General opinion addressing the character or scope of the power thus granted to a board of township trustees under the statute. Therefore, your inquiry presents us a matter of first impression.

The word “provide” is not defined for purposes of R.C. 517.02. Thus, we derive the word’s meaning from its common, everyday usage. *See* R.C. 1.42 (“[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage”); *State v. Dorso*, 4 Ohio St. 3d 60, 62, 446 N.E.2d 449 (1983) (“any term left undefined by statute is to be accorded its common, everyday meaning”); 2014 Op. Att’y Gen. No. 2014-013, at 2-109 (recognizing that when a term is not statutorily defined, it is appropriate to use the term’s ordinary dictionary definition). In common usage, the word, “provide” means “to supply or make available.” *Merriam-Webster’s Collegiate Dictionary* 1001 (11th ed. 2005); *see also* 2014 Op. Att’y Gen. No. 2014-013, at 2-109 (using the same definition to define the term “providing” as it is used in R.C. 5705.19(U)). Accordingly, when R.C. 517.02 requires a board of township trustees to “provide a public road,” a board of township trustees shall do whatever is necessary to supply or make a public road available.¹⁰ The legislature’s use of the word “shall” in R.C. 517.02 means that the board’s duty in this regard is mandatory. *See Dep’t of Liquor Control v. Sons of Italy Lodge 0917*, 65 Ohio St. 3d 532, 534, 605 N.E.2d 368 (1992) (“[i]t is axiomatic that when it is used in a statute, the word ‘shall’ denotes that compliance with the commands of that statute is *mandatory*”) (emphasis in original).

As explained above, the first step in making a road available for public travel is establishing the road. Within R.C. Title 55 the General Assembly has confined the power to establish or assent to the establishment of roads, including those that traverse a township, to the Director of Transportation, the board of county commissioners, and the legislative authority of a municipal corporation. Yet nothing inhibits the General Assembly from determining that unique local circumstances may be presented in which a board of township trustees, acting independently, ought to be able to establish a public road. We are persuaded that the General Assembly has made that kind of determination in the

¹⁰ A public road created pursuant to R.C. 517.02 would be classified as a township road under R.C. 5535.01(C), thus making the board of township trustees responsible for the road’s maintenance. *See* R.C. 5535.08(A) (“[t]he state, county, and township shall each maintain its roads”).

case of R.C. 517.02. The language of R.C. 517.02 empowers a board of township trustees to establish a public road that enables persons to make their way to a township cemetery. This power is a logical adjunct to the responsibility imposed upon a board of township trustees under R.C. Chapter 517 to superintend the management, repair, and upkeep of a township cemetery. Even as the General Assembly has entrusted to township trustees the care and upkeep of a township cemetery, it follows that the General Assembly has given the trustees the authority to act expeditiously in providing convenient and safe access to that cemetery. This authority includes the power to establish a public road for that purpose.

R.C. 517.02 grants a board of township trustees the power to establish a public road to a township cemetery in the same way a board of township trustees establishes cemeteries under R.C. 517.01.¹¹ R.C. 517.01 provides:

The board of township trustees may accept a conveyance of, or purchase, and enclose, improve, and protect lands in one or more places within the township as it deems necessary and proper for cemetery purposes. If suitable lands cannot be procured by contract on reasonable terms, such board may appropriate lands therefor, not to exceed ten acres, by proceedings in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.

No lands shall be so appropriated within one hundred yards of a dwelling house, or other building.

R.C. 517.01 lists three ways in which a board of township trustees may acquire lands for cemetery purposes: (1) “accept a conveyance of” such lands,¹² (2) “purchase” the lands, or, (3) “[i]f suitable lands cannot be procured by contract on reasonable terms, ... appropriate lands therefor ... in

¹¹ A board of township trustees is a creature of statute and therefore possesses only those powers expressly conferred by statute or necessarily inferred therefrom. *In re Petition for Incorporation of the Vill. of Holiday City*, 70 Ohio St. 3d 365, 370, 639 N.E.2d 42 (1994) (recognizing that “absent a specific directive from the General Assembly, township trustees are powerless to” act); *Trs. of New London Twp. v. Miner*, 26 Ohio St. 452, 456 (1875) (“[township] trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted”); 1982 Op. Att’y Gen. No. 82-012, at 2-42 (“[s]ince townships are creatures of statute, township trustees may exercise only those powers conferred by statute or such others as are necessarily to be implied from those granted, in order to enable them to perform their duties”).

¹² Although purchasing land will result in the conveyance of the land by the seller, the two options, “conveyance” and “purchase,” are listed in the alternative in R.C. 517.01. *See generally Inglis v. Pontius*, 102 Ohio St. 140, 149, 131 N.E. 509 (1921) (“[i]t will be presumed that the General Assembly had some purpose in mind in using both words instead of only one, and unless the words are inconsistent or contradictory it is the duty of the courts to give effect to both words”). Therefore, as used in R.C. 517.01, to “accept a conveyance of” land means to receive title to the land without providing compensation to the transferor.

accordance with sections 163.01 to 163.22, inclusive, of the Revised Code.” It is through these three methods, therefore, that a board of township trustees may establish a public road providing access to a township cemetery.

Once a board of township trustees has established the road, R.C. 517.02 requires that the board determine whether additional steps are necessary to make the road available for public use. If a board of township trustees establishes the road on land that does not contain an existing roadway, the board shall construct the road to fulfill its obligation of “provid[ing]” it under R.C. 517.02. If the land on which the road is established contains a roadway, the board shall take those actions necessary to make the road safe and convenient for public use. This may include resurfacing, reconstructing, or widening the road.

A board of township trustees is authorized to construct, repair, or otherwise improve public roads. *See, e.g.*, R.C. 5571.01; R.C. 5573.01; *see also* 1987 Op. Att’y Gen. No. 87-046, at 2-302 (“authority to construct, repair, maintain, and improve roads and highways within a township is conferred upon a board of township trustees by R.C. Chapters 5571 and 5573”). R.C. 5571.01(A) empowers a board of township trustees to “construct, reconstruct, resurface ... improve ... widen, straighten, or change the direction of” any public roads within the board’s jurisdiction.¹³ *See also* 1993 Op. Att’y Gen. No. 93-016, at 2-89 (“[p]ursuant to R.C. 5571.01, a board of township trustees is authorized to ‘construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township’”); 1987 Op. Att’y Gen. No. 87-046, at 2-302 (“R.C. 5571.01 ... authorizes a board of township trustees to construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction”). A board of township trustees that determines a road shall be improved is to follow the procedures set forth in R.C. 5573.01. *See also* R.C. 5575.01(B) (requiring the board of township trustees to, among other things, “cause to be made by the county engineer an estimate of the cost of the work” before constructing or reconstructing a township road). The powers granted to a board of township trustees under R.C. 5571.01 and R.C. 5573.01 apply to “any public road ... under its jurisdiction.” R.C. 5571.01(A); *see also* R.C. 5573.01 (setting forth procedures that a board of township trustees shall follow when it determines “that any road shall be ... improved”). Therefore, a board of township trustees may use its powers under these statutes to construct, resurface, reconstruct, or improve a public road that has been established pursuant to R.C. 517.02.

Accordingly, we conclude that upon receiving a petition under R.C. 517.02, a board of township trustees shall establish a public road to a township cemetery in one of the three ways set

¹³ R.C. 5571.01 also authorizes boards of township trustees to erect traffic control signals and road signs. *See* R.C. 5571.01(C)-(G).

forth in R.C. 517.01, and, if necessary, construct or improve the road in accordance with the board's powers in R.C. 5571.01 and R.C. 5573.01.¹⁴

In your letter, you question whether the appellate court decision in *State ex rel. Kerr v. Neitz*, 58 Ohio App. 135, 16 N.E.2d 236 (Lucas County 1937) prevents a board of township trustees from establishing a road under R.C. 517.02. The ruling in *Neitz* does not conflict with the authority R.C. 517.02 grants to a board of township trustees.

In *Neitz*, the relator, John Kerr, submitted a petition to the board of county commissioners requesting that the board open a road within the county. 58 Ohio App. at 135-36. Mr. Kerr filed his petition in accordance with G.C. 6862, predecessor to R.C. 5333.04, which stated, in relevant part:

When a petition signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement is presented to the board of county commissioners of any county requesting said board to locate, establish, alter, widen, straighten, vacate or change the direction of a public road, such board of county commissioners shall view the location of the proposed improvement, and if they are of the opinion that it will be for the public convenience or welfare to make such improvement, they may take the action prescribed by this and the succeeding sections and proceed to make such improvement.

Id. at 138 (quoting G.C. 6862). The board of county commissioners reviewed Mr. Kerr's petition and passed a resolution ordering the board of township trustees to proceed with the road's opening. *Id.* at 136. When the road was not opened, the state, on the relation of Mr. Kerr, filed a petition for a writ of mandamus to compel the board of county commissioners and board of township trustees to open the road. *Id.* at 137. The court of common pleas entered judgment in favor of the relator, Mr. Kerr, and issued an order compelling both boards to proceed with the road's opening. *Id.* In reversing the lower court's judgment, the appellate court found, among other things, that the board of township trustees had no duty, or even permissive authority, to open the road. *Id.* The court noted that the power to establish roads within the county rested exclusively with the board of county commissioners under G.C. 6860, the predecessor to R.C. 5553.02, and that this power could not be assigned to a board of township trustees. *Id.* (“[G.C. 6860 et seq.] disclose that the power and authority of the board of

¹⁴ A board of township trustees may also fulfill its duty to provide a public road under R.C. 517.02 by entering into a contract with a board of county commissioners pursuant to R.C. 307.15, whereby the board of county commissioners agrees to provide the road. *See* R.C. 307.15; 1993 Op. Att’y Gen. No. 93-016, at 2-89 to 2-90 (recognizing that R.C. 307.15 permits a board of township trustees to enter into a contract with a board of county commissioners, “whereby the board of county commissioners is authorized ‘to exercise any power, perform any function, or render any service, in behalf of the [township],’” including the authority to construct township roads).

county commissioners thus invoked is exclusive and can not be shifted by that board to the township board of trustees upon which no power or authority is thereby conferred and no duty imposed”).

The court in *Neitz* did not consider the application of G.C. 3443, R.C. 517.02’s predecessor, in concluding that the board of township trustees had “no power or authority” to establish and open the road for which Mr. Kerr had petitioned. *Id.* Mr. Kerr had submitted his petition to the board of county commissioners pursuant to G.C. 6862, predecessor to R.C. 5553.04, not to the board of township trustees under G.C. 3443. *Id.* at 140. In stating that boards of township trustees were without authority to establish roads pursuant to G.C. 6860 the *Neitz* court made no intimation about the authority granted to a board of township trustees under G.C. 3443, now R.C. 517.02. R.C. 517.02 addresses a power different from that conferred upon a board of county commissioners under R.C. 5553.02. R.C. 517.02 would not have applied to the facts and circumstances in the *Neitz* case. *See generally* 1984 Op. Att’y Gen. No. 84-016, at 2-51 (“[t]he opening sentence of R.C. 5553.02 does not use the terms ‘locate’ and ‘establish’ in a broad, unrestricted sense, but instead specifically refers to the location and establishment of roads ‘as provided in sections 5553.03 to 5553.16 of the Revised Code’”).

You raise a similar concern about 1930 Op. Att’y Gen. No. 2121, vol. II, p. 1170, which addressed the authority of a board of township trustees under G.C. 3298-1, the predecessor to R.C. 5573.01, to establish township roads. The opinion advised that G.C. 3298-1 did not give a board of township trustees the power to establish township roads and that the power to establish a township road was vested exclusively in a board of county commissioners by G.C. 6860, now R.C. 5553.02. 1930 Op. Att’y Gen. No. 2121, vol. II, p. 1170 (syllabus, paragraph 2).

For the same reasons as apply to the court’s decision in *Neitz*, the conclusion in 1930 Op. Att’y Gen. No. 2121, vol. II, p. 1170, does not control here. We agree that a board of township trustees does not have authority under R.C. 5573.01 to establish a township road and that only a board of county commissioners may establish such roads pursuant to R.C. 5553.02. Here, however, the power of a board of township trustees to establish a public road to a township cemetery is drawn from R.C. 517.02 and R.C. 517.01, not R.C. 5573.01 or R.C. 5553.02.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that upon receiving a petition that satisfies the requirements of R.C. 517.02, a board of township trustees shall provide a public road to a township cemetery over which the board of township trustees has control. A board of township trustees shall establish the public road in the same way the board is authorized to establish a

township cemetery under R.C. 517.01, and, if necessary, construct, resurface, reconstruct, or improve the public road, as authorized by R.C. 5571.01 and R.C. 5573.01.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a prominent initial "M" and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General