

## OPINION NO. 75-030

## Syllabus:

1. A board of township trustees may, under R.C. 5571.01 and 5573.01, proceed with the improvement of a township road without requesting the approval of the board of county commissioners.

2. Under R.C. 163.04, 5549.04 and 5579.01 a board of township trustees may enter into an agreement with landowners for a temporary easement necessary for improvement of a township road.

3. The agreement between a board of township trustees and landowners for an easement necessary for improvement of a township road may not include a provision holding the landowners harmless from liabilities caused by injuries to persons using the improved road.

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To: Anthony R. Auten, Ashland County Pros. Atty., Ashland, Ohio  
By: William J. Brown, Attorney General, May 15, 1975

I have before me your request for an opinion as to the authority of a board of township trustees to improve a township road by a change in the direction of a part of it. Your letter reads in part as follows:

"\* \* \*The specific problem is as follows:  
The township had entered into an agreement termed as easement duly executed and recorded with certain property owners adjacent to an existing township road. Due to the poor visibility and traffic hazard created by the existing township road the land owners had agreed to relocate the end of the roadway curving it to avoid the visibility problem at the intersection of State Route 603 and this township road. The new curved

portion of the township road is entirely on an individual landowner's property and the agreement provided that this was to be maintained by the township for a period of five years with the hopes that the State Highway Department would eliminate the hazard from the original township road and State Route intersection. Along with this agreement, the township agreed to indemnify and hold harmless these landowners from any liabilities which may arise from the public using this new portion of the roadway.

"In Section 5553.02, O.R.C. the county commissioners are given the sole power to establish roads and it would seem that through a reading of an additional section, Section 5571.01, O.R.C. the trustees are given power to construct, reconstruct, resurface or improve any public road or part thereof under their jurisdiction. This section, however, seems to give them power only where there are previously established roads and highways.

"Therefore, I am inquiring whether or not 1) a township, through its trustees would have authority to change the course of an existing township road without going through dedication or without having approval of the county commissioners bearing in mind that the change is in the nature of a temporary change and one which would be necessary for public safety and convenience, and 2) if the trustees would have such authority, would they be allowed to also have the authority to hold harmless and indemnify landowners on whose property the temporary road is located from any liabilities which may be caused from injuries or damages to persons using this new and temporary road.

"The temporary roadway will eventually be discontinued either by mutual agreement of the trustees and the landowners and/or if the State Route 603 is reconstructed so as to eliminate the traffic hazard."

In a telephone conversation subsequent to your letter, you stated that the agreement with the landowners is that the alteration of the road will be carried out by the board of township trustees and the county engineer pursuant to the provisions of Chapters 5571 and 5573 of the Revised Code.

As I understand the first section of your question, you ask (1) whether the proposed change in the existing road is simply an improvement, or the establishment of a new road; (2) whether the approval of the board of county commissioners is required; and (3) whether it is necessary for the landowners concerned to dedicate the land necessary for road purposes.

The power to establish all roads in a county, exclusive of state highways, rests, as your letter notes, with the board of county commissioners. The board of township trustees, however, has authority to construct, maintain and improve the township roads within its jurisdiction. R.C. 5571.01, 5573.01, 5575.01.

The first of these sections, R.C. 5571.01, reads in part as follows:

"(A) The board of township trustees may construct, reconstruct, resurface or improve any public road or part thereof under its jurisdiction \* \* \*. The board of township trustees may widen, straighten or change the direction of any part of a road in connection with the proceedings for its improvement."  
(Emphasis added.)

Substantially similar language is used in R.C. 5553.01 to define the authority of a board of county commissioners to "improve" the roads under its jurisdiction:

" '[I]mprovement' means any location, establishment, alteration, widening, straightening, vacation, or change in the direction of a public road, or part thereof, \* \* \*." (Emphasis added.)

In view of these statutory provisions I conclude that a mere temporary change in the course of a portion of a township road, rendered necessary by considerations of public safety and convenience, constitutes the improvement of an existing road. See 1930 Op. Att'y Gen. No. 2127, and R.C. 5543.17. Since it does not amount to the establishment of a new road, the township trustees are authorized under R.C. 5571.01 to proceed with the project.

The omitted passages in the quotation above from R.C. 5571.01 require the township trustees to obtain the approval of the board of county commissioners before improving any county road, intercounty highway, or state highway within the boundaries of the township. No such approval is, however, required under the section for the improvement of a township road.

Finally, you ask whether the land necessary to accomplish the change must be dedicated for road purposes by the owners. Such a procedure is permissible, under R.C. 5553.31, with the approval of the board of county commissioners. It is, however, optional. There is also statutory authority for the procedure described in your letter, i.e., the grant of a temporary easement to the township pending elimination of the traffic hazard at the junction of the township road and State Route 603. Under R.C. 163.04, R.C. 5549.04 and R.C. 5579.01 a board of township trustees has authority to appropriate a necessary easement if the landowner refuses to enter into an agreement. R.C. 5579.01 provides in part:

"The \* \* \*board of township trustees, may, in connection with any road improvement, appropriate \* \* \*any easement \* \* \*in any property desired for any proposed improvement. In case such \* \* \* [board desires] to appropriate the \* \* \*easements \* \* \*, the same may be done in the manner provided by [section] 5549.04 \* \* \*of the Revised Code. \* \* \*"

The Section referred to, R.C. 5549.04, provides in part:

"If the \* \* \*board of township trustees, and the owner of such \* \* \*land, cannot agree on the price therefore, the \* \* \*board of town-

ship trustees may proceed in accordance with sections 163.01 to 163.22, inclusive, of the Revised Code."

The appropriation of property is covered generally, of course, in R.C. Chapter 163, and R.C. 163.04 provides in part as follows:

"Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner \* \* \*."

When read together these Sections clearly require the board of township trustees to enter into an agreement for the desired easement with the landowner if at all possible.

In answer to the first portion of your question it was, therefore, unnecessary for the township trustees to obtain the approval of the board of county commissioners, or to require the adjacent owners to dedicate the land necessary for the improvement of the end of the township road.

You also ask whether the board of township trustees have authority to hold the landowners harmless from liability for injuries to persons using the temporary section of the road. You stated in a telephone conversation subsequent to your written request that the purpose of the hold harmless provision of the agreement was not to address any particular defect in the property, but was instead designed to address liability for damages which might arise due to negligence or carelessness. I can see no justification for this provision of the agreement. The board possesses only such powers as are conferred or necessarily implied by statute (1972 Op. Att'y Gen. No. 72-031) and I can find no statutory authority for this provision. The township trustees and the county engineer are responsible for the construction of the improvement and for its maintenance and repair as long as their agreement with the landowners remains in effect. R.C. 5571.01, 5571.02, 5571.05. Furthermore, liability is specifically imposed upon the board of township trustees under R.C. 5571.10 which provides:

"Each board of township trustees shall be liable, in its official capacity, for damages received by any person, firm, or corporation, by reason of the negligence or carelessness of such board in the discharge of its official duties."

Consequently, there is no authority for this provision of the agreement and it is difficult to see what purpose it would serve since the township trustees are already liable for any injury caused by their own negligence.

In specific answer to your question it is my opinion, and you are so advised that:

1. A board of township trustees may, under R.C. 5571.01 and 5573.01, proceed with the improvement of a township road without requesting the approval of the board of county commissioners.

2. Under R.C. 163.04, 5549.04 and 5579.01 a board of township trustees may enter into an agreement with land-

owners for a temporary easement necessary for improvement of a township road.

3. The agreement between a board of township trustees and landowners for an easement necessary for improvement of a township road may not include a provision holding the landowners harmless from liabilities caused by injuries to persons using the improved road.