

Note from the Attorney General's Office:

1992 Op. Att'y Gen. No. 92-064 was approved and followed by 2016 Op. Att'y Gen. No. 2016-039.

OPINION NO. 92-064**Syllabus:**

1. When a board of county commissioners, acting pursuant to R.C. 5553.04, vacates a public road, such road passes, in fee, to those landowners whose properties abut the road.
2. When a board of county commissioners, acting pursuant to R.C. 5553.042, orders vacated a public road that has been abandoned and not used for a period of twenty-one years, such road passes, in fee, to those landowners whose properties abut the road, subject

to the easements for public utility and nonmotorized vehicular recreational uses described in that section.

To: Kevin J. Baxter, Erie County Prosecuting Attorney, Sandusky, Ohio
By: Lee Fisher, Attorney General, December 29, 1992

You have requested an opinion regarding the fee interest in a public road that is vacated by a board of county commissioners pursuant to R.C. 5553.04 or R.C. 5553.042. Specifically, you wish to know whether the fee interest in a public road that is thus vacated passes to (1) those landowners whose property abuts the road; (2) the landowner who filed with the board of county commissioners a petition to vacate the road; or (3) the landowner (or his heirs) who originally platted the subdivision in which the vacated road is located. You state that your question is prompted by the syllabus to 1970 Op. Att'y Gen. No. 70-151, which reads as follows:

The rights in and to any township road are lost to the township if the road has been abandoned and not in use for a period of twenty-one years, and appropriate action may be taken by any abutting landowner under Section 5553.042, Revised Code, to effect passage in fee of the township road to *that abutting landowner*. (Emphasis added.)

You question whether the emphasized portion of the foregoing statement means that the entire fee interest in a township road that is vacated by a board of county commissioners pursuant to R.C. 5553.042 passes to the single abutting landowner who petitioned the board to vacate the township road, rather than to all of the landowners whose properties abut that road.

Authority of a Board of County Commissioners to Vacate a Public Road

R.C. 5553.02 states, in pertinent part, that a board of county commissioners "may locate, establish, alter, widen, straighten, vacate, or change the direction of roads as provided in [R.C. 5553.03-.16]." Further, such power on the part of a board of county commissioners "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." *Id.* See also *Sparrow v. City of Columbus*, 40 Ohio App. 2d 453, 320 N.E.2d 297 (Franklin County 1974) (holding that county commissioners have no authority under R.C. 5553.02 to vacate a street or a part thereof that is within the corporate limits of a municipality and is a part of its street system; such authority rests exclusively with the municipal corporation's legislative authority, pursuant to the municipal corporation's powers of local self-government bestowed by Ohio Const. art. XVIII, §3).

R.C. 5553.04 sets forth the procedures by which a board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of a public road. Pursuant to R.C. 5553.04 a board of county commissioners may, *inter alia*, declare by resolution to vacate a public road when the board is of the opinion that such vacation is for the public convenience or welfare. Such action may be taken by the board either on its own initiative, see 1950 Op. Att'y Gen. No. 2279, p. 616, or following the presentation to the board of a petition requesting such action that is signed by at least twelve freeholders of the county residing in the vicinity of the public road, or signed by the owner of the right to mine coal lying under or adjacent to the road. *Id.*

R.C. 5553.042 describes the procedure that governs whenever a board of county commissioners is requested to vacate a public road, highway, street, or alley that has been abandoned by a township and not used for twenty-one years. R.C. 5553.042 provides, in pertinent part, as follows:

A township shall lose all rights in and to any public road, highway, street, or alley which has been abandoned and not used for a period of twenty-one years, after formal proceedings for vacation as provided in sections 5553.04 to 5553.11 of the Revised Code have been taken; and upon petition for vacation of such road, highway, street, or alley filed with the board of county commissioners by any abutting landowner, if the board finds that said public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years as alleged in such petition, the board of county commissioners may, by resolution, order the road, highway, street, or alley vacated and such road, highway, street, or alley shall pass, in fee, to the abutting landowners thereof, as provided by law....

R.C. 5553.042 further states that the fee that passes to the abutting landowners remains subject to certain easements for public utility and nonmotorized vehicular recreational uses. Pursuant to R.C. 5553.042, therefore, any landowner whose property abuts a public road that has been abandoned by a township and not used for a period of twenty-one years may petition the board of county commissioners to vacate that road.

Disposition of the Fee Interest in a Public Road that is Vacated by a Board of County Commissioners

R.C. 5553.042 expressly provides that whenever a board of county commissioners orders the vacation of a public road in the foregoing instance, such road, subject to the specific easements therein described, "shall pass, in fee, to the abutting landowners thereof, as provided by law." Thus, the fee interest in the road that is vacated passes to those landowners whose properties abut the road, regardless of whether a single abutting landowner files the petition for such vacation. This result under the statute reflects the longstanding common law rule regarding the disposition of roads or streets that are vacated. In *Stevens v. Shannon*, 6 Ohio C.C. 142, 145-146, 3 Ohio Cir. Dec. 386, 388 (Franklin County 1892), for example, the circuit court set forth that rule, and the reasoning in support of it, as follows:

Vacation of the streets and alleys does not affect the rights of the adjacent proprietor, nor rehabilitate the original owner with the title to the lands included therein. If it did it would follow that upon the vacation of a street the original proprietor would have the right to take possession thereof, fence it in, cultivate crops thereon, or make any other use of it which an owner in fee simple may lawfully make of real estate, and the abutting owners would have no remedy except to incur the expense and trouble of procuring the establishment of new streets; and this, notwithstanding they had purchased their lots upon the faith of their right to have the streets kept open for their benefit. Such is certainly not the law. Convenience and necessity, if no other consideration, require that where highways are vacated the title thereto shall vest in the abutters. Vacation is an abandonment of the rights of the *public* to have and use the streets and alleys as public highways, but not a relinquishment of the rights of abutting owners therein. Section two thousand six hundred fifty-four of the Revised Statutes

provides that the order of vacation of a street or alley shall "operate as a revocation of the acceptance thereof by the council; but the right of way and easement therein of any lot owner shall not be impaired thereby." This indicates an intention that vacation shall not deprive abutters of rights incident to their ownership. (Emphasis in original.)

The decision in *Stevens v. Shannon* was subsequently cited with approval by the Ohio Supreme Court in *Kinnear Manufacturing Co. v. Beaty*, 65 Ohio St. 264, 62 N.E. 341 (1901) (syllabus, paragraph one), in support of the following proposition of law: "Where a street or alley is vacated by a city, the vacated portion reverts to the abutting lot owners, subject, however, to such rights as other property owners on the street or alley may have therein, as a necessary means of access to their property." More recent decisions have continued to endorse the foregoing rule. See, e.g., *Taylor v. Carpenter*, 45 Ohio St. 2d 137, 341 N.E.2d 843 (1976) (syllabus) ("[u]pon vacation of an alley by a city, abutting lot owners, as to that portion of the alley abutting their properties, are vested with a fee simple interest in one-half of the width of the strip of land which formerly comprised the alley"); *Greenberg v. L.I. Snodgrass Co.*, 161 Ohio St. 351, 357, 119 N.E.2d 292, 295 (1954) ("[t]he rule is well established in Ohio that upon the vacation of a street the fee thereto does not revert to the original dedicator but accretes to the abutting-lot owners, subject only to such rights as other such owners may have in the street as a necessary means of access to their property"); *Babin v. City of Ashland*, 160 Ohio St. 328, 340, 116 N.E.2d 580, 587 (1953); *Tanner v. Shirkey*, 5 Ohio App. 3d 225, 226, 451 N.E.2d 255, 257 (Fulton County 1982) ("[i]n none of the cases cited by appellees did the court hold that the entire portion of a vacated highway vested in fee simple to only one of the abutting lot owners").

Accordingly, when a board of county commissioners, acting pursuant to R.C. 5553.042, orders vacated a public road that has been abandoned and not used for a period of twenty-one years, such road passes, in fee, to those landowners whose properties abut the road. See *Eastland Woods v. City of Tallmadge*, 2 Ohio St. 3d 185, 187, 443 N.E.2d 972, 974 (1983) (in order for property to abut a street, the property must share a common border with the street); accord, *In Re Vacation of a Public Road*, 18 Ohio St. 3d 397, 400, 482 N.E.2d 570, 573 (1985). Such road would pass, in fee, to a single landowner only if that landowner, having filed a petition for vacation with the board of county commissioners, were the only landowner whose property abutted the road so vacated.

A similar conclusion follows when a board of county commissioners, acting pursuant to R.C. 5553.04, resolves to vacate a public road in situations not otherwise governed by R.C. 5553.042. Unlike R.C. 5553.042, R.C. 5553.04 does not, by its express terms, address the disposition of the fee interest in a public road thus vacated by a board of county commissioners. Nonetheless, the established common law rule discussed previously controls in such situations, which means that any such road so vacated passes, in fee, to those landowners whose properties abut the road.

Conclusion

Based upon the foregoing, therefore, it is my opinion, and you are advised that:

1. When a board of county commissioners, acting pursuant to R.C. 5553.04, vacates a public road, such road passes, in fee, to those landowners whose properties abut the road.

2. When a board of county commissioners, acting pursuant to R.C. 5553.042, orders vacated a public road that has been abandoned and not used for a period of twenty-one years, such road passes, in fee, to those landowners whose properties abut the road, subject to the easements for public utility and nonmotorized vehicular recreational uses described in that section.