

OPINION NO. 82-025

Syllabus:

A property owner who, in order to provide an approach to his property, places a culvert in a preexisting ditch which is part of a public highway is responsible for the maintenance of that culvert. (1981 Op. Atty Gen. No. 81-039, clarified.)

To: Gregory W. Happ, Medina County Prosecuting Attorney, Medina, Ohio
By: William J. Brown, Attorney General, April 26, 1982

I have before me your request for a clarification of 1981 Op. Att'y Gen. No. 81-039. Your concern goes to the third paragraph of the opinion's syllabus which states that "[t]he political subdivision which is responsible for the repair and maintenance of a road is also responsible for the cleaning, repair, and replacement of a culvert on the road, even though the culvert may pass beneath the driveway of an abutting property owner." You question whether the fact that a culvert is not necessary for proper drainage, but is necessary only to allow a property owner to construct an approach to his property, makes it the property owner's responsibility to maintain and repair the culvert.

Op. No. 81-039 addresses a question which is fundamentally different from the one described in your request. Op. No. 81-039 contemplates the problem which arises where a ditch is dug along a state, county, or township road, destroying existing approaches of abutting property owners. In such a case, R.C. 5543.16 requires that construction of a culvert over which the approach may be rebuilt must be made part of the improvement plans. R.C. 5543.16 states, in part:

In the construction of a road improvement the director of transportation or engineer may, in all cases where the approaches of the owners of abutting real estate are unsuitable to a projected improvement or so constructed as not to afford proper drainage after its completion, include in the plans for such improvement plans for proper approaches. The entire cost of constructing such approaches may be assessed against the lands along which they are constructed. (Emphasis added.)

A culvert constructed pursuant to this provision is part of the overall drainage system constructed by the political subdivision. Op. No. 81-039 states that in this limited situation, where the culvert was constructed by a political subdivision as part of the overall improvement plan, as required by R.C. 5543.16, it is the duty of that political subdivision to maintain the culvert. The key facts are that the approach to the abutting property preexisted the improvements, and that the ditch dug as part of the improvements would destroy that approach. Culverts built under driveways in such limited circumstances are part of the political subdivision's system of roads. While R.C. 5543.16 provides that the cost of construction can be assessed against the landowner, in accordance with the general rule that each subdivision is responsible for the repair and maintenance of its roads, the maintenance of these culverts is the responsibility of the political subdivision.

It is my understanding, pursuant to telephone conversations between members of my staff and your office, that your question is concerned with drainage ditches along county and township roads which preexisted the approaches of abutting property owners. In essence, your question asks who is responsible for maintaining a culvert placed in a preexisting ditch by an abutting property owner.

The first point which must be noted is that the culverts to which your question pertains would not have been constructed by a political body as part of a road improvement pursuant to R.C. 5543.16. Rather, they would have been constructed by abutting property owners to permit construction of an approach over an existing ditch. Thus, the construction provisions set forth in R.C. 5543.16 do not apply to the situation about which you inquire.

With respect to a property owner who builds an approach to his land from the public highway, across an existing ditch, R.C. 5589.06 is the pertinent statute. R.C. 5589.06 states:

No person shall wrongfully obstruct any ditch, drain, or watercourse along, upon, or across a public highway, or divert any water from adjacent lands to or upon a public highway. Whenever the township highway superintendent learns of any obstruction of any ditch, drain, or watercourse along, upon, or across a public highway, or diversion of any water from adjacent lands to or upon a public highway, he shall notify the board of township trustees, which shall cause written notice thereof to be personally served upon the person,

firm, or corporation, or upon any agent in charge of the property of the person, firm, or corporation causing such obstruction or diversion. Notice may be served by a constable of the proper township or any person authorized and deputed therefor by the board of township trustees, and shall describe and locate said obstruction or diversion and direct its immediate removal. If the person, company, or corporation does not within five days from the receipt of written notice proceed to remove such obstruction and complete the removal within a reasonable time, the township highway superintendent, upon the order of the board of township trustees, shall remove the obstruction. The expense incurred shall be paid in the first instance out of any money levied, collected, and available for highway purposes and shall then be collected from the person, company, or corporation by civil action by the board of township trustees, and paid into the highway fund of the township. (Emphasis added.)

R.C. 5589.99(B) provides that "[w]hoever violates section . . . 5589.06 . . . of the Revised Code, is guilty of a minor misdemeanor."

R.C. 5589.06 imposes a duty on a property owner who builds an approach to his land to do so in a manner which does not obstruct an existing ditch "along, upon, or across a public highway." In order to carry out that duty, the property owner must install in the ditch a culvert upon which his approach can be constructed. Therefore, strictly speaking, the culvert is not necessary for proper drainage, but rather is necessary to prevent the property owner from obstructing the ditch in violation of R.C. 5589.06.

Should a culvert installed by a property owner become an obstruction, it would be the property owner's duty to remedy the situation. Failure to do so would constitute a violation of R.C. 5589.06. Where the property owner fails to act, the township is required to remove the obstruction, from either a township or a county road, collecting the cost from the property owner. R.C. 5589.06; see 1949 Op. Att'y Gen. No. 869, p. 519 (township trustees are responsible for removing obstructions from the ditches of both township and county roads).

A property owner who does not remove an obstruction caused by his failure to maintain his culvert would also be violating R.C. 3767.17. R.C. 3767.17 provides that "[n]o person shall willfully obstruct a ditch, drain, or watercourse constructed by order of a board of county commissioners or by a board of township trustees, or divert the water therefrom." Violation of R.C. 3767.17 is a minor misdemeanor. R.C. 3767.99. Therefore, failure to remove an obstruction from the ditch could result in the property owner being prosecuted under R.C. 3767.17 or R.C. 5589.06.

In addition to the two sections of the Revised Code mentioned above, the placement of a culvert in a ditch along a county or township road is also subject to R.C. 5547.03 which states:

All persons . . . using or occupying any part of a highway . . . with . . . any object or structure, other than by virtue of a franchise legally granted, shall remove from the bounds of such highway . . . [the] objects or structures when, in the opinion of the board of county commissioners, they constitute obstructions in any highway, other than the state highway system. . . .

It goes on to state:

If, in the opinion of the engineer, such persons . . . have obstructed any such highway . . . or if any of their properties are, in his opinion, so located that they do or may interfere with the proposed improvement, maintenance, or repair the board shall notify such person . . . directing the removal or relocation of the obstruction or property, and, if they do not within five days proceed to so remove or relocate and complete the removal or relocation within a reasonable time, the board may do so by employing the necessary

labor. The expense incurred shall be paid in the first instance out of any moneys available for highway purposes, and not encumbered for any other purpose, and the amount shall be certified to the proper officials to be placed on the tax duplicate against the property of such person. . .to be collected as other taxes and in one payment, and the proper fund shall be reimbursed out of the money so collected, or the account thereof may be collected from such person. . .by civil action by the state on the relation of the board.

As I had occasion to note in Op. No. 81-039, "it is apparent that when a political subdivision undertakes to establish a road or highway, it must also provide for the drainage of that highway. Roadside ditches which handle the road drainage must be deemed to be part of the highway system." Op. No. 81-039, at 2-156. Thus, R.C. 5547.03 applies to the obstruction of roadside ditches, as they are part of the highway. Further, as I noted in 1980 Op. Att'y Gen. No. 80-043, at 2-180, as used in R.C. Chapter 5547, the term "highway" is meant to encompass all types of roads--state, county, and township. . .except for those [roads] specifically excepted." Thus R.C. 5547.03 applies to county and township roads, but not state roads as they have been specifically excepted by R.C. 5547.03.

R.C. 5547.03 empowers the county engineer to order the obstruction removed, and authorizes the board of county commissioners to remove the obstruction where the property owner fails to do so, collecting the cost of removal from the property owner. Thus, both the board of county commissioners, acting pursuant to R.C. 5547.03, and the board of township trustees, acting pursuant to R.C. 5589.06, can order the removal of an obstruction either from a county or township road. Where the person obstructing the highway fails to remove the obstruction either board can proceed to remove it, and can hold the obstructing party ultimately responsible for the cost of removal.

It must also be noted that R.C. 5547.04 requires abutting property owners to receive approval from the board of county commissioners prior to placing an obstruction within the bounds of a township or county road. As I noted in 1980 Op. Att'y Gen. No. 80-043, at 2-181, for the purpose of R.C. 5547.04, "it appears that 'obstruction' must be defined so as to include virtually any object within the bounds of a highway that has been 'placed' or 'erected' there." Thus it appears that a culvert placed in a ditch by an abutting property owner is an obstruction for the purpose of R.C. 5547.04. This section of the Revised Code also requires these property owners to remove any obstruction erected without permission.

There exists yet another remedy that may be used against a property owner whose culvert obstructs proper drainage of a county road. Such property owner is subject to civil suit brought by the board of county commissioners for the purpose of recovering damages and having the obstruction removed. R.C. 305.12; R.C. 5591.26; 1980 Op. Att'y Gen. No. 80-071.

Finally, R.C. 5543.16 states as a general rule that "[t]he owners of the land shall construct and keep in repair all approaches or driveways from the public roads. . . ." (Emphasis added.) Op. No. 81-039 addresses the limited exception under R.C. 5543.16 of a political body making improvements requiring the construction of a culvert in order to preserve a property owner's preexisting approach.

For all the reasons noted above, I conclude that in the situation where a property owner places a culvert into a preexisting ditch, which is part of the highway system, for the purpose of constructing an approach, it is the property owner's duty to maintain that culvert.

While the preceding analysis has focused upon county and township roads, I note that the same conclusion is reached with regard to state highways. The Ohio Department of Transportation, pursuant to R.C. 5515.01, issues permits to landowners to place culverts in ditches along the right of way of state highways for the purpose of constructing approaches to their land. R.C. 5515.01(E) specifically requires that:

Such individual, firm, or corporation shall maintain all objects and things in a proper manner, promptly repair all damages resulting to such road or highway on account thereof, and in event of failure to so repair such road or highway to pay to the state all costs and expenses which may be expended by the director in repairing any damage. (Emphasis added.)

A property owner is, therefore, clearly required to maintain a culvert placed along the right of way of a state highway. Further, the prohibition found in R.C. 5589.06 against obstructing a "public highway" also applies to this situation.

In conclusion, it is my opinion, and you are hereby advised, that a property owner who, in order to provide an approach to his property, places a culvert in a preexisting ditch which is part of a public highway is responsible for the maintenance of that culvert. (1981 Op. Att'y Gen. No. 81-039, clarified.)