

OPINION NO. 77-028

Syllabus:

(1) R.C. 5553.042 does not provide a method whereby a board of township trustees may initiate action to divest itself of the duties of road maintenance imposed upon it by R.C. Chapter 5571. (1976 Op. Att'y Gen. No. 76-043 overruled);

(2) The duties of road maintenance imposed upon a board of township trustees by R.C. Chapter 5571 are mandatory upon such board in the absence of formal vacation proceedings pursuant to R.C. 5553.04 to 5553.011 or in the absence of a successful action initiated by an abutting landowner to acquire title to a road abandoned or adversely possessed.

To: Gary F. McKinley, Union County Pros. Atty., Marysville, Ohio
By: William J. Brown, Attorney General, May 25, 1977

You have requested clarification of the conclusions relative to abandoned township roads reached in 1976 Op. Atty. Gen. No. 76-043 in light of amendments to R.C. 5553.042 not considered in that opinion.

As discussed in the prior opinion, your question concerned an unimproved lane which you indicate was part of a township road system a number of years ago. You had indicated that a portion of this lane was formally vacated many years ago. Another portion of the lane was not formally vacated, but you indicate that this section has neither been maintained by the township nor used or traveled by the public in general for the past 45 years. Your question was as to the duty and authority of the township trustees to maintain or improve this section of the lane.

Historically, there were three methods by which the public right to public roads, streets and ways could be extinguished: first, through statutory procedures for vacation; second, through adverse possession; third, through non-use and abandonment.

A number of Ohio decisions indicate that a vacation by operation of law may occur where abandonment has existed over a period of twenty-one years. See Nail & Iron Co. v. Furnace Co., 46 Ohio St. 544, (1899); Morehouse v. Burgot et al., 22 Ohio C.C. 174, (1901); Howell v. Eirick, et al., 14 Ohio C.C. (n.s.) 577, (1911); Fondriest v. Dennison, 8 Ohio Misc. 75, (1966). A review

of these decisions, however, indicates that the extinguishment of public right to a public road on the basis of adverse possession or abandonment occurred at the initiation of a private party. These common law doctrines do not appear to have been applied in Ohio in situations where a public body sought to divest itself of its duty of road maintenance.

In 1961, the 104th General Assembly enacted R.C. 5553.042, which contained the following provisions applicable to township roads:

"Sec. 5553.042. A township shall lose all rights in and to any public road which has been abandoned and not used for a period of twenty-one years, formal proceedings for vacation as provided in section 5553.04 of the Revised Code not having been taken; and upon petition for vacation of such road filed with the board of county commissioners by any abutting landowner, if the board finds that said public road has been abandoned and not used for a period of twenty-one years as alleged in such petition, the board of county commissioners shall, by resolution, order the road vacated and such road shall pass, in fee, to the abutting landowners thereof, as provided by law, subject to the preservation of any existing right of way in, over, or under such roadway by any public utility or rural electric co-operative service facilities, including any conduit, cable, wires, towers, poles, or other equipment or appliances of any public utility or rural electric co-operative located on, over, or under such roadway and for such period of time as such public utility or rural electric co-operative service facilities continue to be used to render service to the public and also subject to the right of ingress and egress for the purpose of servicing and maintaining the same."

The 105th General Assembly amended this provision by Am. H.B. No. 93, effective August 19, 1963, to include not only public roads, but public highways, streets and alleys as well. As discussed by one of my predecessors in 1964 Op. Atty. Gen. No. 1517 and 1965 Op. Atty. Gen. No. 66-065, this statutory procedure requires a determination by the board of county commissioners as to whether or not a township has abandoned a particular road, highway, street or alley. The necessity for a determination by the Commissioners under the provisions of R.C. 5553.42 occurs as the result of a petition filed by an abutting land owner. As originally enacted, R.C. 5553.042 specified that where the Commissioners found that such a road, highway, street, or alley had been abandoned and not used for a period of twenty-one years, the board was required to order such road, street, highway or alley vacated, at which time the title thereto passed to the abutting landowners.

In 1971, however, R.C. 5553.042 was amended by H.B. No. 714, effective December 3, 1971, to increase the discretion vested in the county commissioners. Thus where the board found that a public road, highway, road or alley had been

abandoned and not used for a period of twenty-one years it could, but was no longer required to, order vacation. Since the first clause of R.C. 5553.042 remained as originally enacted, this statutory provision was somewhat anomalous, in that the first clause specified that a township would lose all rights to a road or way abandoned for twenty-one years. The statute, however, vested in the commissioners the discretion as to whether or not to order vacation where it found twenty-one year abandonment.

In 1972, R.C. 5553.042, was amended by Am. Sub. S.B. No. 247, effective October 20, 1972, which made a number of provisions for a state system of recreational trails. R.C. 5553.042 was amended to provide 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, subject to the preservation of any existing right of way in, over, or under such roadway by any public utility or rural co-operative service facilities, including any conduit, cable, wires, towers, poles, or other equipment or appliances of any public utility or rural electric co-operative located on, over, or under such roadway and for such period of time as such public utility or rural electric co-operative service facilities continue to be used to render service to the public and also subject to the right of ingress and egress for the purpose of servicing and maintaining the same, and subject to the preservation of a right of way for public nonmotorized vehicular recreational use as provided under section 5553.044 [5553.04.4] of the Revised Code.

(Emphasis added.)

Under the terms of this section as amended in 1972, therefore, the board of county commissioners, when petitioned by an abutting landowner, is charged with making a determination as to whether the public road, highway, street or alley has been abandoned for a period of twenty-one years. If the board finds such a period of abandonment, it may, but is not required to, proceed with an order of vacation, subject to a public hearing and the enumerated reserved rights.

If the board, after following this procedure, goes forward with formal proceedings for vacation, under the terms of the

underlined language above, a township shall lose any rights in and to the road, highway, street or alley involved. If the board exercises its discretion in deciding that the road in question should not be vacated, the underlined language above does not operate to extinguish the township rights in and to such road.

It appears, therefore, that the General Assembly, through this last amendment to R.C. 5553.042, intended to limit the methods whereby the public right to a road can be extinguished and title passed to a private party claiming abandonment. The provisions of this section go to such a situation and it is my opinion that these provisions do not, as amended, provide a method whereby a township may extinguish its duty to maintain township roads.

A board of township trustees is, of course, free to request that the board of county commissioners, pursuant to R.C. 5553.04, vacate any road. I am, however, unaware of any other mechanism, available either at common law or through statutory provision, whereby a board of township trustees may initiate action to divest itself of the duty of road maintenance imposed by R.C. Chapter 5571.

R.C. 5571.02, in pertinent part, specifies as follows:

"The board of township trustees shall have control of the township roads of its township and shall keep them in good repair."

The requirements of G.C. 3370, the predecessor of R.C. 5571.02 and of what is now R.C. 5571.12 were discussed by the Ohio Supreme Court in State, ex rel. Rogers v. Taylor, 152 Ohio St. 241 (1949), in a situation where a township road had been overgrown, unmaintained and impassable for a period of more than fifteen years. In granting a writ of mandamus compelling maintenance of the road involved, the Court concluded that the provisions of what is now R.C. Chapter 5571 leave nothing to conjecture and that the duties imposed thereby are mandatory. While the common law doctrines of adverse possession and abandonment and the statutory provisions of R.C. 5553.042 may apply to extinguish these duties where a private party initiates action to obtain title to an abandoned township road, I am unaware of any method other than action by the county commissioners under R.C. 5553.04 whereby the board of township trustees may divest itself of these responsibilities.

In summary, therefore, it is my opinion, and you are so advised that: (1) R.C. 5553.042 does not provide a method whereby a board of township trustees may initiate action to divest itself of the duties of road maintenance imposed upon it by R.C. Chapter 5571. (1976 Op. Att'y. Gen. No. 76-043 overruled); (2) the duties of road maintenance imposed upon a board of township trustees by R.C. Chapter 5571 are mandatory upon such board in the absence of formal vacation proceedings pursuant to R.C. 5553.04 to 5553.011 or in the absence of a successful action initiated by an abutting landowner to acquire title to a road abandoned or adversely possessed.