

OPINION NO. 2011-028

Syllabus:

2011-028

A board of township trustees may not require a property owner who

constructs a new driveway or replaces an existing driveway that enters a township road to use a township road crew to complete a culvert installation. (2002 Op. Att’y Gen. No. 2002-009, followed.)

To: Judy C. Wolford, Pickaway County Prosecuting Attorney, Circleville, Ohio

By: Michael DeWine, Ohio Attorney General, July 28, 2011

You have requested a formal opinion whether a township may “mandate all homeowners either constructing new driveways or replacing existing driveways that enter onto a township road to use the township road crew to actually complete the culvert installation.”¹ You have explained that “[a] township . . . wants to make all homeowners abutting the township road use the township to install the driveways to ensure that all driveways are done according to the township’s standards.” You also have explained that “[t]he township would not charge for the actual installation so long as the homeowner pays for the material needed to install the culvert,” and “[c]urrently, the township does install driveway culverts for private individuals when requested.”

We are aware of two statutes within R.C. Title 55 that are material to your inquiry: R.C. 5543.16 and R.C. 5571.16. We first consider R.C. 5543.16, which requires an owner of land to construct and keep in repair all approaches or driveways from a public road. We shall then consider R.C. 5571.16, which permits a board of township trustees to require a person to obtain a permit before installing a driveway culvert.

Pursuant to R.C. 5543.16, “[t]he owners of land shall construct and keep in repair all approaches or driveways from the public roads, under the direction of the county engineer.” R.C. 5543.16 further provides that in the construction of a road improvement where approaches of abutting property are unsuitable to a projected improvement or constructed in a manner that does not afford proper drainage after a road improvement is completed, the director of transportation or county engineer

¹ Your letter does not specify whether the township to which you refer has adopted a limited home rule government pursuant to R.C. Chapter 504. Our research discloses that at present no township in Pickaway County has adopted a limited home rule government. We shall therefore limit our remarks to the authority of a statutory township to require an owner of property abutting a township road to use a township crew to install a driveway culvert. *See* 2002 Op. Att’y Gen. No. 2002-032, at 2-210 n.2 (“[a] limited home rule township is a township that has adopted the limited home rule form of township government pursuant to R.C. Chapter 504. It contrasts with a statutory township, which is a township that has not adopted this limited home rule form of township government. As a practical matter, R.C. Chapter 504 grants a limited home rule township authority to exercise a greater measure of authority, in a greater number of matters, than the authority granted to townships generally by the other provisions of R.C. Title 5. *See, e.g.,* R.C. 504.04”).

may include plans for proper approaches and assess “against the lands along which they are constructed” the entire cost of constructing proper approaches.² Thus, under R.C. 5543.16 an owner of land abutting a township road, *see generally* 1990 Op. Att’y Gen. No. 90-029, at 2-109 to 2-110,³ is responsible to construct and keep in repair approaches and driveways to a township road under the direction of a county engineer. And, if an approach of property abutting a township road is unsuitable to a projected improvement or constructed in a manner that does not afford proper drainage after a road improvement is completed, then an assessment may be made against the property owner’s land abutting the township road for the entire cost of constructing proper approaches.

In 2002 Op. Att’y Gen. No. 2002-009, the Attorney General examined R.C. 5543.16 when she considered whether a board of township trustees may adopt a resolution requiring all culverts in township or county ditches to be installed by township personnel according to the township’s specifications and whether the township may bill a resident for the cost of installation. In that opinion the Attorney General noted the common law principle that an abutting property owner has title to the land to the center of a public road, subject to an easement of the public to use the public road for travel and matters incident thereto. 2002 Op. Att’y Gen. No. 2002-009, at 2-51; *see* 1917 Op. Att’y Gen. No. 203, vol. I, p. 524, at 526. The Attorney General further noted that R.C. 5543.16 was enacted in view of this common law principle. 2002 Op. Att’y Gen. No. 2002-009, at 2-51. The Attorney General therefore reasoned that R.C. 5543.16 “represents an exception to the general rule placing the responsibility for highway maintenance and repair on the various governmental entities (an approach is part of the highway pursuant to R.C. 5501.01(C)).” *Id.* (quoting 1981 Op. Att’y Gen. No. 81-039, at 2-158). *See generally* R.C. 5535.08(A).

For this reason, the Attorney General concluded that “under R.C. 5543.16, the responsibility for the construction of a driveway from a county or township road is vested in an abutting property owner, rather than a board of township trustees.” 2002 Op. Att’y Gen. No. 2002-009, at 2-51. And, in a circumstance requiring the

² Pursuant to R.C. 5543.16, if an approach or driveway abutting a public road is destroyed during the construction, improvement, maintenance, or repair of any road, then the authorities constructing, improving, maintaining, or repairing the road “shall compensate the property owner for the destruction of his approach or driveway, or in lieu thereof authorize the [county] engineer to reconstruct it at public expense.”

³ “Township roads are broadly defined to include all public roads in a township other than state roads on the state highway system and county roads that are a part of the county highway systems Municipal streets, however, are excluded from the definition of township roads.” 1990 Op. Att’y Gen. No. 90-029, at 2-109 to 2-110.

installation of a culvert to prevent an obstruction of a ditch,⁴ the Attorney General concluded “R.C. 5543.16 . . . requires the abutting property owner, rather than a board of township trustees, to install the culvert when he constructs his driveway. The statute further requires the abutting property owner to repair and maintain the culvert.” *Id.* at 2-51 to 2-52. The Attorney General reiterated these conclusions later in 2002 Op. Att’y Gen. No. 2002-009. *See id.* at 2-53 to 2-54 (“a property owner, rather than the township, is responsible for the installation of any culvert that is needed by the property owner to construct a driveway over an existing ditch that provides drainage for a county or township road” and “a board of township trustees of a township that has not adopted a limited home rule government pursuant to R.C. Chapter 504 has no authority to require township employees to install culverts that are needed by persons to construct driveways over existing ditches that provide drainage for county or township roads”). *Accord* 1982 Op. Att’y Gen. 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”) (clarifying 1981 Op. Att’y Gen. No. 81-039); 1937 Op. Att’y Gen. No. 601, vol. II, p. 1051 (syllabus).

We find 2002 Op. Att’y Gen. No. 2002-009’s reasoning to be sound regarding the meaning of R.C. 5543.16. And, we find no basis to depart from that reasoning here. We also concur with 2002 Op. Att’y Gen. No. 2002-009’s conclusion that a board of township trustees may not require township personnel to install driveway culverts. Applying 2002 Op. Att’y Gen. No. 2002-009’s reasoning here, we conclude that a board of township trustees may not require a property owner who constructs a new driveway or replaces an existing driveway that enters a township road to use a township road crew to complete a culvert installation.

R.C. 5571.16 lends additional support to the conclusion that a board of township trustees may not require an owner of property abutting a township road to use township resources to complete a culvert installation. Pursuant to R.C. 5571.16, a board of township trustees, by resolution, “may require any person to obtain a permit before installing a driveway culvert or making any excavation in a township highway or highway right-of-way within its jurisdiction, except an excavation to repair, rehabilitate, or replace a pole already installed for the purpose of providing electric or telecommunications service.”⁵

⁴ In 2002 Op. Att’y Gen. No. 2002-009, at 2-51, the Attorney General discussed various statutes prohibiting the obstruction of a ditch that provides drainage for a township road. *See, e.g.*, R.C. 3767.17; R.C. 5589.06; *see also* R.C. 5547.04.

⁵ R.C. 5571.16 also provides, in part, that, as used in R.C. 5571.16, the term “person” has the same meaning as in R.C. 1.59, and the term “right-of-way” has the same meaning as in R.C. 4511.01(UU)(2). Pursuant to R.C. 1.59(C), the term “person” “includes an individual, corporation, business trust, estate, trust, partnership, and association.” According to R.C. 4511.01(UU)(2), the term “[r]ight-of-way” means “[a] general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to transportation

R.C. 5571.16 also sets forth terms that a board of township trustees may impose as a condition to granting a permit. R.C. 5571.16 provides, in part:

The board [of township trustees], as a condition to the granting of the permit, may do any of the following:

- (A) Require the applicant to submit plans indicating the location, size, type, and duration of the culvert or excavation contemplated;
- (B) Specify methods of excavation, refilling, and resurfacing to be followed;
- (C) Require the use of warning devices it considers necessary to protect travelers on the highway;
- (D) Require the applicant to indemnify the township against liability or damage as the result of the installation of the culvert or as a result of the excavation;
- (E) Require the applicant to post a deposit or bond, with sureties to the satisfaction of the board, conditioned upon the performance of all conditions in the permit.⁶ (Footnote added.)

R.C. 5571.16 thus grants a board of township trustees the authority to adopt purposes. When used in this context, right-of-way includes the roadway, shoulders or berm, ditch, and slopes extending to the right-of-way limits under the control of the state or local authority.”

Following the issuance of 2002 Op. Att’y Gen. No. 2002-009, the General Assembly amended R.C. 5571.16 to authorize a board of township trustees, by resolution, to require a person to obtain a permit before installing a driveway culvert in a township highway or highway right-of-way within a township’s jurisdiction. *See* 2001-2002 Ohio Laws, Part V, 9340, 9363 (Am. Sub. H.B. 513, eff. Mar. 31, 2003). *Cf.* 2001-2002 Ohio Laws, Part II, 2398, 2406 (Am. Sub. S.B. 255, eff. Sept. 30, 2002); 1955-1956 Ohio Laws 910 (Am. H.B. 576, eff. Aug. 16, 1955). *See generally* 2002 Op. Att’y Gen. No. 2002-009, at 2-53 (“a board of county commissioners may require the property owner to obtain a permit before installing [a] culvert”); 1986 Op. Att’y Gen. No. 86-081, at 2-456 (county has authority to establish a permit system for the installation of driveways or other approaches to county roads).

⁶ R.C. 5571.16 also provides, in part:

No person shall install a driveway culvert or make an excavation in any township highway or highway right-of-way in violation of any resolution adopted pursuant to this section, except that, in the case of an emergency requiring immediate action to protect the public health, safety, and welfare, an excavation may be made without first obtaining a permit, if an application is made at the earliest possible opportunity.

See R.C. 5571.99 (“[w]hoever violates [R.C. 5571.16] shall be fined not more than two hundred dollars or imprisoned not more than thirty days, or both”).

and implement a permit system with respect to the installation of driveway culverts by property owners. R.C. 5571.16 sets forth terms and requirements that a board of township trustees may adopt as part of the permit scheme. These terms and requirements include requiring an applicant to (1) submit plans concerning the location, size, type, and duration of a contemplated culvert or excavation; (2) specify the methods of excavation, refilling, and resurfacing; (3) arrange the use of warning devices to protect the public who may travel on a township road while a driveway culvert is being installed or an excavation is made; (4) indemnify the township against liability or damage as a result of a culvert installation or excavation; and (5) post a deposit or bond, with sureties to the satisfaction of a board of township trustees, conditioned upon the performance of all conditions in the permit. R.C. 5571.16.

Nowhere in R.C. 5571.16 has the General Assembly empowered a board of township trustees to require a property owner to use township personnel or other township resources to install or complete the installation of a driveway culvert. If the General Assembly had intended to grant a board of township trustees such authority, the General Assembly could have included express language to that effect in R.C. 5571.16. Because R.C. 5571.16 lacks such express language and because R.C. 5571.16 expressly limits the terms and requirements that a board of township trustees may impose as a condition to granting a permit, we may reasonably infer that the General Assembly did not intend to empower a board of township trustees, as a creature of statute, *see* R.C. 505.01, to require the use of township resources for driveway culvert installations. *See Hall v. Lakeview Local School Dist. Bd. of Educ.*, 63 Ohio St. 3d 380, 383, 588 N.E.2d 785 (1992) (“[b]oards of education, as creatures of statute, have no more authority than that conferred upon them by statute, or what is clearly implied therefrom . . . R.C. 3319.081 applies to contracts with respect to nonteaching employees. The statute does not contain a provision authorizing a board of education to enter into supplemental contracts with nonteaching employees . . . Clearly, if the General Assembly had intended to empower a board of education to enter into supplemental contracts with nonteaching employees, the General Assembly could have specifically so stated as it did with regard to teachers in R.C. 3319.08”).

In sum, it is my opinion, and you are hereby advised that a board of township trustees may not require a property owner who constructs a new driveway or replaces an existing driveway that enters a township road to use a township road crew to complete a culvert installation. (2002 Op. Att’y Gen. No. 2002-009, followed.)