

OPINION NO. 90-029**Syllabus:**

1. A board of township trustees, pursuant to the duty of R.C. 5571.02 to control township roads and keep them in good repair, has the authority to temporarily close a township road when the road is impassable or dangerous to the travelling public or when continued use of the road would cause excessive damage to the road resulting in the road being closed to the public for extensive repair.
2. A board of township trustees must not temporarily close a township road during construction of a road improvement unless such closing is found to be necessary by the county engineer pursuant to R.C. 5543.17.
3. The provisions of R.C. 5543.17 do not restrict a board of township trustees from temporarily closing a township road, unless such closing occurs during a road improvement project.

To: Peter R. Seibel, Defiance County Prosecuting Attorney, Defiance, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, April 11, 1990

I have before me your request for my opinion concerning the authority of a board of township trustees to close a township road. You have asked whether a board of township trustees may close a township road for any reason without first securing the approval of the county engineer in accordance with R.C. 5543.17. Your letter makes it apparent that your question concerns a temporary closing of a township road to traffic rather than a permanent road closing. Also, your question does not contemplate a situation involving the formal vacating of a road under R.C. Chapter 5553. As additional background, you have shared with me an article circulated widely among township trustees, wherein township officials were advised that a board of township trustees may close a township road if the board considers it necessary to prevent excessive damage to the road.

The Ohio Constitution, at art. I, § 19, requires that "roads...shall be open to the public." Pursuant to this clear mandate, a board of township trustees has the control of, and must maintain, all township roads within its township. R.C. 5535.01(C); R.C. 5535.08; R.C. 5571.02. 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. R.C. 5535.01. Municipal streets, however, are excluded from the definition of township roads. 1988 Op. Att'y Gen. No. 88-036 (syllabus, paragraph 2) ("[a] road that has been established as part of the township road system is considered a city street, rather than a township road, whenever it exists within a city").

Since your question presumes that the approval of the county engineer under R.C. 5543.17 is a prerequisite to closing a township road, an examination of that statute as it applies to your question is helpful. R.C. 5543.17 states, in relevant part, that "[n]o person shall close a...township highway, bridge, or culvert, unless such action has first been determined to be necessary by the [county] engineer." Reading R.C. 5543.17 in its entirety, however, it is apparent that the county engineer's power is limited by the language of R.C. 5543.17, which states that the "county engineer shall, at the time he makes surveys, plans, profiles, cross sections, estimates, and specifications for any...township...road improvement,...determine whether the making of such improvement will require the *closing to traffic of such improvement.*" (Emphasis added.) Since a county engineer may exercise only such powers as are expressly granted by statute or necessarily implied therefrom to carry out such express powers, *A.F.S.C.M.E. v. Polta*, 59 Ohio App. 2d 283, 394 N.E.2d 310 (Erie County 1977), the express grant of power to the county engineer in R.C. 5543.17 to authorize the closing of township roads is limited to road improvement projects. The closing of a township road at any other time is not dependent upon the restrictions in R.C. 5543.17. In an earlier opinion I concluded that if the General Assembly had intended a greater power to vest in the county engineer to close a township road beyond the limited circumstance enumerated in R.C. 5543.17, "it would have specifically so provided." 1986 Op. Att'y Gen. No. 86-023, at 2-123. A county engineer, therefore, has authority under R.C. 5543.17 to determine the necessity for the closing of a township road during road improvement projects.

Despite the mandate of the Ohio Constitution to keep township roads open, R.C. 5543.17 implicitly recognizes that a township road may be closed. R.C. 5543.17, however, fails to designate the board of township trustees as authorized to order the closing of a township road. In fact, no statute explicitly grants such authorization to a board of township trustees. It must be recognized that a board of township trustees, being a creature of statute, *see* R.C. 505.01, has only such powers as are expressly granted or necessarily implied from the statutory grant. *Yorkavitz v. Bd. of Township Trustees*, 166 Ohio St. 349, 142 N.E.2d 655 (1957); *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875). It is therefore necessary to examine the powers of township trustees regarding township roads to ascertain the existence of such an implied power.

Whether the authority of a board of township trustees to control township roads includes the authority to close a township road requires an examination of R.C. 5571.02 which provides, in relevant part, that, "[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair." While the cases construing the language in R.C. 5571.02 requiring the township trustees to keep township roads in good repair are numerous, *see, e.g., State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961); *State ex rel. Kreis v. English*, 168 Ohio St. 566, 156 N.E.2d 734 (1959); *State ex rel. Rogers v. Taylor*, 152 Ohio St. 241, 89 N.E.2d 136 (1949); *see also* Op. No. 88-036, I have been unable to find any discussion by any Ohio court construing the duty to control township roads, other than in the context of maintenance and repair of such roads.

Since the term "control" in R.C. 5571.02 is neither statutorily defined nor judicially interpreted, the rules of statutory construction may be used to interpret the term. *See Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926). Inasmuch as the use of the term "control" in R.C. 5571.02 is ambiguous, especially in the context raised by your question, other statutory provisions on related subjects may be read *in pari materia*, or together and harmoniously, to give full effect to the statutory language. *Bobb v. Marchant*, 14 Ohio St. 3d 1, 469 N.E.2d 847 (1984). R.C. 5571.02 lacks any provision that expressly limits or gives guidance on the extent and methods of control. Other statutory provisions, however, grant specific authority to perform acts which appear to be included within the power to control

township roads. For example, see R.C. 505.26 (township may construct bridges and viaducts over streets, railroads and other places where necessary); R.C. Chapter 515 (township may light roads); R.C. 4511.07(I) (township may regulate use of streets); R.C. 4511.21(K) (township may set speed limits for unimproved highways); R.C. 5571.01 (trustees have sole discretion whether to construct and improve township roads); 1944 Op. Att'y Gen. No. 6960, p. 326; 1929 Op. Att'y Gen. No. 520, p. 788; 1929 Op. Att'y Gen. No. 476, p. 702.

While the examples of permitted control in Revised Code sections other than R.C. 5571.02 are numerous, they are not necessarily exclusive. Where statutory provisions coexist on the same subject, one containing a general grant of power, and another containing a narrower grant of power that enumerates specific permitted acts, the enumeration in the second statute is not exclusive and does not limit the first, absent a contrary indication by statute. See *Springer v. Philippine Islands*, 277 U.S. 189 (1928). Since the examples of control in Revised Code sections other than R.C. 5571.02 are not exclusive and R.C. 5571.02 does not contain prescribed methods by which "control" is to be exercised, the legislative intent is that it be exercised in a reasonable manner. See generally, *Jewett v. Valley Railway Co.*, 34 Ohio St. 601 (1878).

Reasonableness is best determined on the local level and is dependent on the surrounding circumstances. 1988 Op. Att'y Gen. No. 88-087. To be reasonable, the means adopted must be suitable to the ends in view, must be impartial in operation, must have a real and substantial relation to the purpose and must not unduly interfere with private rights. *Froelich v. City of Cleveland*, 99 Ohio St. 376, 124 N.E. 212 (1919); see also *Cincinnati Motor Transportation Ass'n v. City of Lincoln Heights*, 25 Ohio St. 2d 203, 267 N.E.2d 797 (1971); 1981 Op. Att'y Gen. No. 81-008.

The purpose of the "control" of township roads by a board of township trustees is to keep the roads open to the public. 1955 Op. Att'y Gen. No. 5587, p. 343. One of the facets of the duty to control township roads is the protection of the public. See generally, R.C. 5571.02, R.C. 5571.08; R.C. 5579.08; 1939 Op. Att'y Gen. No. 893, p. 1208, at 1210 ("the legislature...has charged [township trustees] with the positive duty of maintaining, repairing and keeping [township roads] safe for public travel"); 1961 Op. Att'y Gen. No. 2210, p. 253; 1941 Op. Att'y Gen. No. 3430, p. 62.

Because the objective of the "control" required by R.C. 5571.02 is the keeping open of township roads for the safe travel of the public, any exercise of control by the township trustees must be examined in light of this goal. Township trustees are not prohibited, however, from closing a township road, if necessary, to protect the public. 1939 Op. No. 893, at 1210-11 ("it is within the authority of the township trustees to close any township road whenever the impassable condition of such road warrants such action as a proper means of protecting the travelling public") (emphasis added); see also 1973 Op. Att'y Gen. No. 73-004 (syllabus) ("[n]either a board of township trustee nor a board of county commissioners has the power to barricade a passable township public road").

A township board of trustees, thus, has the power to close a township road. Since the constitutional mandate requires township roads to be open, a closing may be ordered in circumstances in which the road is impassable or dangerous to the travelling public. A determination as to the proper action to take in a particular situation "depends upon the condition of each road and cannot, therefore, be answered categorically by me. Such course must be determined by the township trustees in the exercise of their sound discretion." 1939 Op. No. 893, at 1210.

In the article attached to your letter reference is made to closing a township road because the board of township trustees considers it "necessary to prevent excessive damage to the road" due to heavy rains. Any decision to close a road under such circumstances must be guided by the constitutional dictate to keep roads "open to the public." If the possibility of damage to a road is such that continued use of the road would cause excessive damage to the road resulting in the road being closed to the public for extensive repair, a temporary closing to prevent such damage may be a proper exercise of the duty under R.C. 5571.02 to control and maintain township roads and keep them safe for public travel.

It is, therefore, my opinion, and you are so advised that:

1. A board of township trustees, pursuant to the duty of R.C. 5571.02 to control township roads and keep them in good repair, has the authority to temporarily close a township road only when the road is impassable or dangerous to the travelling public or when continued use of the road would cause excessive damage to the road resulting in the road being closed to the public for extensive repair.
2. A board of township trustees must not temporarily close a township road during construction of a road improvement unless such closing is found to be necessary by the county engineer pursuant to R.C. 5543.17.
3. The provisions of R.C. 5543.17 do not restrict a board of township trustees from temporarily closing a township road, unless such closing occurs during a road improvement project.