

OPINION NO. 99-005**Syllabus:**

1. Where a property owner indicates on a plat the dedication of a road to public use, the county engineer's failure to inspect the road in accordance with R.C. 711.091 does not preclude the board of county commissioners from accepting dedication of that road. If the board of county commissioners has accepted the dedication of a road under common law principles or as required by R.C. 5553.31, and if the other elements governing common law or statutory dedication are present, the road has been established as a public road, whether or not the county engineer has inspected the road in accordance with R.C. 711.091.
2. A township road may be vacated by action of the board of county commissioners under R.C. 5553.04 or R.C. 5553.042.
3. Upon vacation of a township road, the fee passes to the abutting property owners, *i.e.*, those whose properties share a common border with the vacated road, subject to any easements that may be provided by statute.

To: Scott W. Nusbaum, Ross County Prosecuting Attorney, Chillicothe, Ohio
By: Betty D. Montgomery, Attorney General, February 1, 1999

You have requested an opinion concerning the dedication and vacation of a public road. Based upon additional information you have provided, we have restated your questions as follows:

1. Does R.C. 711.091 require the county engineer to inspect a road before the county commissioners may accept the proposed dedication of the road as indicated on a plat?
2. If a road has become a public road, specifically a township road, may the township vacate it?

3. Upon vacation of a road by the township, who owns the fee to the property under the road?

By way of background, you have provided the following information. The road about which you ask lies outside of a municipality. The plat on which the road is represented may have been recorded as many as thirty years ago, and the road has been considered a township road since that time. The plat contains the dedication of the road for public use and also shows approval and acceptance by the board of county commissioners. The road, however, has never been approved or certified by the county engineer in accordance with R.C. 711.091. The road remains unimproved and the township would like to vacate the road if it is indeed a township road. The township also would like to know who will own the fee to the road upon its vacation.

In order to answer your questions, it is first necessary briefly to explain the meaning of the terms "dedication" and "acceptance" with respect to the establishment of a public road. *See generally* 1956 Op. Att'y Gen. No. 7136, p. 690 at 695 ("establishment" and "dedication" of public roads are distinguishable in that "establishment," unlike "dedication," "implies acceptance by the public authorities of responsibility for the proper maintenance of a road, rendering it safe for public use"). Public roads may be established from private lands in a variety of ways, including dedication. *See generally* 1988 Op. Att'y Gen. No. 88-080 (in addition to statutory dedication and common law dedication, statutory appropriation and prescription also are means of establishing a public road). As stated in 1987 Op. Att'y Gen. No. 87-046 at 2-304 to 2-305, "[d]edication occurs when a landowner, having determined that certain lands should be used for road purposes, makes a gift of the land to the state or one of its political subdivisions for such purposes." "Dedication" includes both statutory dedication¹ and common law dedication.² *Lessee of Fulton v. Mehrenfeld*, 8 Ohio St. 440 (1858) (syllabus, paragraph one); *Oberhelman v. Allen*, 7 Ohio App. 251, 29 Ohio Cir. Dec. 596 (Hamilton County 1915). Essential to the establishment of a road by either statutory dedication or common law dedication is the acceptance of such dedication by the

¹ Statutory dedication is governed by R.C. 5553.31, pursuant to which private land may become a public road through placement on the county's road records of a "definite description of the lands to be dedicated with a plat of such lands thereto attached and signed by the party dedicating such lands, with the approval and acceptance of the board [of county commissioners] indorsed thereon." *See generally* 1986 Op. Att'y Gen. No. 86-094 at 2-533 (approval of a plat by a board of county commissioners does not, in itself, constitute acceptance of a public road dedicated on the plat; "[u]nder R.C. 5553.31, the board of county commissioners must indorse its approval *and acceptance* of the dedication on the plat showing the lands to be dedicated" (emphasis added)).

² The elements of common law dedication of land are set forth in *Neeley v. Green*, 73 Ohio App. 3d 167, 170, 596 N.E.2d 1052, 1054 (Clermont County 1991), as follows:

A common-law dedication can be proven upon the showing of the following three elements: (1) the existence of an intention on the part of the owner to make such dedication; (2) an actual offer on the part of the owner, evidenced by some unequivocal act, to make such dedication; and (3) the acceptance of such offer by or on behalf of the public. *Mastera v. Alliance* (1987), 43 Ohio App.3d 120, 539 N.E.2d 1130; [*Becker v. Cox*, No. CA84-04-044 (Ct. App. Butler County June 10, 1985) (unreported)]; *Vermilion v. Dickason* (1976), 53 Ohio App.2d 138, 7 O.O.3d 98, 372 N.E.2d 608.

proper public authorities. See R.C. 5553.31 (statutory dedication); *Neeley v. Green*, 73 Ohio App. 3d 167, 170, 596 N.E.2d 1052, 1054 (Clermont County 1991) (common law dedication).

As suggested by 1994 Op. Att'y Gen. No. 94-036 at 2-187 n. 4, another means of dedicating a road to public use is through the platting procedure prescribed by R.C. Chapter 711.³ R.C. 711.01, in part, authorizes any person to "lay out a village, or subdivision or addition to a municipal corporation, by causing the territory to be surveyed, and by having a plat of it made by a competent surveyor."⁴ R.C. Chapter 711 requires that a plat be approved by the appropriate entity before it is recorded. The entity required to approve the plat varies, depending upon the circumstances.⁵ *Eggert v. Puleo*, 67 Ohio St. 3d 78, 616 N.E.2d 195 (1993). The approval and recording of a plat allows for, among other things, the transfer of property within the subdivision. See R.C. 711.13 (prohibition against transfer of property prior to recording of plat).

Concerning the element of acceptance in the establishment of a public road through the platting process, 1994 Op. Att'y Gen. No. 94-036 states at 2-187: "When a street is dedicated as part of the platting process, acceptance of the street as a public way is governed by R.C. 711.091."⁶ Specifically, pursuant to R.C. 711.091, if privately owned land outside of a municipality is dedicated to public use by the owner through the platting process, should the county engineer find through his inspection, conducted upon written request of the

³ In reaching this conclusion, 1994 Op. Att'y Gen. No. 94-036 relied upon the court's statement in *Eggert v. Puleo*, 67 Ohio St. 3d 78, 84, 616 N.E.2d 195, 200 (1993), that "R.C. Chapter 711 contemplates creation of a street through the platting process, a separate type of 'dedication' from that provided in R.C. 723.03 [statutory dedication of streets within a municipality]." Based upon this statement by the *Eggert* court, 1994 Op. Att'y Gen. No. 94-036 at 2-187 n. 4 concluded that, "[a]lthough the court in *Eggert* considered only the relationship between R.C. 723.03 [governing statutory dedication of a street] and R.C. 711.091, the reasoning used by the court is equally applicable to the relationship between R.C. 5553.31 [governing statutory dedication of a road] and R.C. 711.091."

⁴ For purposes of R.C. 711.01-.38, a "plat" is "a map of a tract or parcel of land." R.C. 711.001(A). See also R.C. 711.001(B) (defining "subdivision," as used in R.C. 711.01-.38).

⁵ See, e.g., R.C. 711.041 (providing in part that, except for plats that must be approved by a planning commission under R.C. 711.09 or R.C. 711.10, "[n]o plat certifying lands outside a municipal corporation may be recorded without the approval thereon of the board of county commissioners of the county wherein such lands are situated"); R.C. 711.09 (approval by city planning commission, when necessary); R.C. 711.10 (approval by county or regional planning commission, when necessary).

⁶ R.C. 711.091 states:

The city or village engineer in the case of lands within a city or village, and the county engineer in the case of lands outside of a city or village, shall, upon written request by the owner of the land upon which the street has been constructed check the construction and if the engineer finds that such street has been constructed in accordance with the specifications set forth on the approved plat, and that such street is in good repair, then such finding, endorsed on the approved plat, shall constitute an acceptance of the street for public use by the city, village or county as the case may be, provided such street has been theretofore duly dedicated. (Emphasis added.)

owner, that the street was properly constructed and is in good repair, "then such finding, endorsed on the approved plat, shall constitute an acceptance of the street for public use by the ... county ..., provided such street has been theretofore duly dedicated."⁷ R.C. 711.091.

It is the necessity of the county engineer's inspection of the road and endorsement of the plat under R.C. 711.091 to which your first question is addressed. You ask whether performance of the county engineer's duties described in R.C. 711.091 with respect to a road located outside of a municipality is a prerequisite to the county's acceptance of the dedication of that road.

Examination of the platting scheme of R.C. Chapter 711 suggests that the General Assembly intended that the actions of the engineer described in R.C. 711.091 be the only manner in which "acceptance" of public roads dedicated thereunder may occur. Although there are a number of methods by which a road may be "approved" under R.C. Chapter 711, depending on the circumstances, *see* note five, *supra*, the General Assembly has also expressly stated that such approval does not constitute acceptance of such a proposed dedication. *See, e.g.*, R.C. 711.041 (stating in part, "[t]he approval of a plat by the board of county commissioners shall not be deemed to be an acceptance of the dedication of any public street, road, or highway dedicated on such plat"); R.C. 711.09(C) (stating in part, "[a]pproval of a plat shall not be an acceptance by the public of the dedication of any street, highway, or other way or open space shown upon the plat"); R.C. 711.10 (same).

In contrast, R.C. 711.091 contains the only mention of acts that constitute acceptance of a public road dedicated through the platting process. Specifically, R.C. 711.091 requires the city, village, or county engineer, as appropriate, upon written request of the owner, to inspect a road dedicated on a plat, and if he finds that the road has been properly constructed and is in good repair, to endorse such finding on the plat. Pursuant to R.C. 711.091, such endorsement constitutes an acceptance of the dedication on behalf of the public. It appears, therefore, that, absent the county engineer's endorsement of his finding that a road which is located outside of a municipality and dedicated on a plat to public use has been properly constructed and is in good repair, the road has not been established through the platting process of R.C. Chapter 711 as a public road. *See* 1994 Op. Att'y Gen. No. 94-098 at 2-499 ("a county engineer is statutorily required to review and approve the plat of a residential subdivision before the streets in that subdivision may be accepted for public use, R.C. 711.091").

Although you have indicated that you are concerned with the establishment of a public road only through the platting process of R.C. Chapter 711, we must also consider whether the circumstances you describe may have resulted in the dedication and establishment of the road as a public road by some other means. It is well settled that, even though the elements necessary to accomplish a statutory dedication of a road under R.C. 5553.31 may be lacking, the circumstances may result in the common law dedication of that road, so long as the three elements described in *Neeley v. Green* have been satisfied. *See, e.g., In re Loose*, 107 Ohio App. 47, 153 N.E.2d 146 (Franklin County 1958) (syllabus, paragraph two) (circumstances surrounding failure of statutory dedication may, nonetheless, result in a common law dedication of a road).

Similarly, it would appear that, even though a road proposed for dedication on a plat has not been inspected by the county engineer and has not, therefore, been established as a

⁷ *See* 1994 Op. Att'y Gen. No. 94-036 at 2-187 n. 5 ("[t]he dedication to public use must be expressly indicated on the plat").

public road through the platting process prescribed by R.C. Chapter 711, the road may, nonetheless, have been dedicated and thereby established as a public road if the elements necessary to effect either statutory or common law dedication are present. *See generally* notes one and two, *supra*. The necessity of inspection by the county engineer of a road dedicated under R.C. 5553.31, statutory dedication, was rejected in 1960 Op. Att'y Gen. No. 1789, p. 655, which concluded in syllabus, paragraph one:

Where under [R.C. 5553.31] lands are dedicated for road purposes under the procedure specified by the section and the dedication is accepted by the board of county commissioners, the lands so dedicated constitute a public road without any further proceeding thereon; and the fact that the county engineer has endorsed or not endorsed the construction of the road under [R.C. 711.091] does not affect such acceptance and dedication.

See also In re Loose (syllabus, paragraph one) (R.C. 5553.31, "providing the method for the dedication of land for county road purposes, requires no acknowledgment, but only that the plat be signed by the party dedicating such land, and that it be approved and accepted by the board of county commissioners and filed for record; and when such requirements have been complied with there is a valid statutory dedication of such land for public road purposes"); *Oberhelman v. Allen*. Similarly, inspection and endorsement by the county engineer are not elements of common law dedication. *See* note two, *supra*.

In answer to your first question, we conclude that, dedication of a public road may be accomplished other than through the platting process of R.C. Chapter 711 and, therefore, where a property owner indicates on a plat the dedication of a road to public use, the county engineer's failure to inspect the road in accordance with R.C. 711.091 does not prevent the board of county commissioners from accepting the proposed dedication and thereby establishing the road as a public road through common law dedication or statutory dedication under R.C. 5553.31.

In applying the foregoing analysis to a determination of whether a particular road has been established as a public road, we caution that whether a particular road has been properly dedicated and thereby established as a public road depends, in part, upon the law in effect at the time the establishment was attempted, *see, e.g., Lessee of Fulton v. Mehrenfeld*,⁸ and, in part, upon the circumstances of the dedication, *see, e.g., State ex rel. Fitzhum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961).⁹ Thus, examination of the

⁸ An example of the changes in the law of platting is discussed in 1956 Op. Att'y Gen. No. 7136, p. 690 (syllabus, paragraphs three and four). Prior to October 19, 1953, the effective date of 1953-1954 Ohio Laws 448 (Am. Sub. H.B. 629, eff. Oct. 19, 1953), which, in part, amended R.C. 711.04, the county commissioners' approval of a plat containing the dedication of a public road constituted an acceptance and establishment of such dedicated road. Subsequent to the amendment of R.C. 711.04 by Am. Sub. H.B. 629 and the enactment of R.C. 711.041 in 1955-1956 Ohio Laws 929 (Am. Sub. H.B. 607, eff. Oct. 6, 1955), however, the county commissioners' approval of a plat containing the dedication of a public road no longer constitutes either an acceptance or establishment of the road as a public road.

⁹ In *State ex rel. Fitzhum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961), the court examined the question whether a township was under a duty to maintain and repair a road that was alleged to have become a township road through common law dedication. *See generally* R.C. 5535.01(C) (stating in part: "Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such

facts and circumstances of the attempted dedication of the road you describe will be necessary in order to determine whether the road was in fact dedicated and established as a public road.¹⁰ See, e.g., 1988 Op. Att'y Gen. No. 88-080 (syllabus, paragraph one) (“[a]bsent a statutory appropriation by a board of county commissioners under R.C. 5553.03-.16, or a formal statutory dedication under R.C. 5553.31, a tract of land within a township may, depending upon the facts and circumstances of the particular case, be established as a public road or highway by common law dedication or by prescription”); 1987 Op. Att'y Gen. No. 87-046 at 2-306 (“[a]lthough it is essentially a question of fact that only a court may ultimately decide, it also does not appear that the tracts of land described in your letter were ever established as public roads by common law dedication or by prescription” (various citations omitted)).

Your second question asks, assuming that a road has been established as a township road, whether the township may vacate such road. Pursuant to R.C. 5553.02, the power to vacate public roads within a county, except for roads that are part of the state highway system, has been vested in the board of county commissioners. See 1982 Op. Att'y Gen. No. 82-012; 1930 Op. Att'y Gen. No. 2121, vol. II, p. 1170 (syllabus, paragraph two). The board of township trustees, therefore, has no authority to vacate a township road. See 1977 Op. Att'y Gen. No. 77-028 at 2-106 (“[a] board of township trustees is ... free to request that the

roads within its township”); 1994 Op. Att'y Gen. No. 94-036 at 2-186 (“[a] road must be properly dedicated and accepted for public use, and thus established as a public road, before any public authority becomes responsible for its maintenance”). In answering this question, the *Turinsky* court stated:

It can not be denied ... that user of a street or road by the public following an intention to dedicate to the public may well constitute such acceptance of the dedication as to estop the owners of the fee from interfering with its continued use by the abutting-property owners and the public. Nor do we intend to say that an acceptance can not be implied as a result of the authorities taking some positive action such as the actual improvement of a street or road. But in the absence of a formal acceptance by the county commissioners or actions from which such acceptance can be implied, such a user by the public in general is not such an acceptance as will impose responsibility on a Board of Township Trustees for the maintenance of roads within their township.

172 Ohio St. at 153, 174 N.E.2d at 243. The *Turinsky* court thus suggests that the requirements for establishment of a road as a public road may be more stringent when considering whether a public entity has a duty to maintain and repair that road than those required “to estop the owners of the fee from interfering with its continued use by the abutting-property owners and the public.” *Id.* See generally 1994 Op. Att'y Gen. No. 94-098 at 2-498 (“[p]ursuant to R.C. 5535.01, roads in a platted residential subdivision located outside a municipal corporation are township roads unless the board of county commissioners takes affirmative action to incorporate them into the county highway system pursuant to R.C. 5541.01-.03 or the state incorporates them into the state highway system”).

¹⁰ See generally 1991 Op. Att'y Gen. No. 91-016 at 2-82 n. 2 (“[t]he opinion-rendering function of the Attorney General is not an appropriate forum for making findings of fact”); 1983 Op. Att'y Gen. No. 83-057 at 2-232 (“[t]his office is not equipped to serve as a fact-finding body; that function may be served by [the office of the county prosecuting attorney] or, ultimately, by the judiciary”).

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").

The method for vacating public roads, other than state roads, is set forth, in part, in R.C. 5553.04, which authorizes the board of county commissioners, upon finding that "it will be for the public convenience or welfare" to vacate a road, to declare so by resolution.¹¹ See *In re Vacation of a Public Road*, 18 Ohio St. 3d 397, 399, 482 N.E.2d 570, 572 (1985) n. 2 ("R.C. 5553.04 requires only that the board of county commissioners be 'of the opinion that [a vacation] * * * will be for the public convenience or welfare * * *'. This clearly is a very broad requirement that gives great discretion to the county commissioners to 'opine' whether a vacation will serve the 'public convenience or welfare'"). As stated in 1977 Op. Att'y Gen. No. 77-028, although a board of township trustees may ask the board of county commissioners to vacate a road in accordance with R.C. 5553.04, it has no authority unilaterally to vacate a township road.

Specifically concerning the vacation of abandoned township roads, R.C. 5553.042 states in pertinent part:

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 [R.C. 5553.04-.11] 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 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, and subject to the preservation of a right of way for public nonmotorized vehicular recreational use as provided under [R.C. 5553.044].* (Emphasis added.)

See generally *Bigler v. Township of York*, 66 Ohio St. 3d 98, 609 N.E.2d 529 (1993) (syllabus, paragraph one) ("R.C. 5553.042 provides the exclusive remedy for abutting landowners who desire a township road to be vacated").¹²

¹¹ Vacation of public roads may also be initiated upon petition by certain property owners under R.C. 5553.04 or by the Director of Transportation under R.C. 5553.041.

¹² See also R.C. 5553.10 (stating in part: "A road, or part thereof, which remains unopened for seven years after the order establishing it was made or authority granted for opening it shall be vacated, and the right to build it pursuant to the establishment in the original proceedings therefor shall be barred"). See generally 1987 Op. Att'y Gen. No. 87-046

Under either R.C. 5553.04 or R.C. 5553.042, the vacation of a township road must, therefore, be accomplished by action of the board of county commissioners rather than by the board of township trustees. See 1987 Op. Att'y Gen. No. 87-046 (vacation of a township road by the board of county commissioners under R.C. 5553.04 or R.C. 5553.042). In answer to your second question, we conclude that a township road may be vacated by action of the board of county commissioners under R.C. 5553.04 or R.C. 5553.042.

Your final question asks in whom the fee vests upon vacation of a township road. This question was answered in 1992 Op. Att'y Gen. No. 92-064, which concludes in the 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.

See also R.C. 5553.043 (public utility's permanent easement in vacated road). Thus, upon vacation of a township road, whether pursuant to R.C. 5553.04 or R.C. 5543.042, the fee to the vacated road passes to the abutting property owners. If vacation is accomplished under R.C. 5553.042, however, the ownership of the road by the abutting landowners is subject to the easements described in R.C. 5553.042.

The issue of who are abutting property owners for purposes of passing title to a vacated township road was considered by the court in *In re Vacation of a Public Road*. The question arose because the county commissioners' resolution to vacate the road recited the language of R.C. 5553.042 that the fee to the vacated road was to pass to the abutting property owners, but did not specify the persons who were the abutting owners. The Ohio Supreme Court stated: "Although R.C. 5553.042 does not expressly direct that the commissioners make a determination as to the identity of abutting landowners, such a determination realistically must be made prior to the enactment of any resolution that serves to pass a piece of property to 'the abutting landowners thereof.'" 18 Ohio St. 3d at 400, 482 N.E.2d at 573. The court then adopted the following test, established in *Eastland Woods v. City of Tallmadge*, 2 Ohio St. 3d 185, 187, 443 N.E.2d 972, 974 (1983), for determining whether property abuts a road and, accordingly, who constitute the abutting owners: in order for property to abut a street, the property must share a common border with the street. Thus, those owners of properties that share a common border with the vacated road are abutting owners for purposes of ownership of the road.

In answer to your third question, you are advised that, upon vacation of a township road, the fee passes to the abutting property owners, *i.e.*, those whose properties share a common border with the vacated road, subject to any easements that may be provided by statute.

at 2-303 to 2-304 ("[i]t is only logical that a road or highway may not properly be deemed abandoned and unused for purposes of R.C. 5553.042 or R.C. 5553.10, such that a county or township surrenders its rights thereto, if the purported road or highway has not, in fact, been established and intended for use as a public way").

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Where a property owner indicates on a plat the dedication of a road to public use, the county engineer's failure to inspect the road in accordance with R.C. 711.091 does not preclude the board of county commissioners from accepting dedication of that road. If the board of county commissioners has accepted the dedication of a road under common law principles or as required by R.C. 5553.31, and if the other elements governing common law or statutory dedication are present, the road has been established as a public road, whether or not the county engineer has inspected the road in accordance with R.C. 711.091.
2. A township road may be vacated by action of the board of county commissioners under R.C. 5553.04 or R.C. 5553.042.
3. Upon vacation of a township road, the fee passes to the abutting property owners, *i.e.*, those whose properties share a common border with the vacated road, subject to any easements that may be provided by statute.