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1. ROAD—EXISTING PRIVATE DRIVE ESTABLISHED AS PUBLIC ROAD—UPON ITS ESTABLISHMENT, BY OPERATION OF LAW, BECOMES TOWNSHIP ROAD—SECTION 5553.04 ET SEQ., RC.
2. CONSENT OF TOWNSHIP TRUSTEES—NOT REQUIRED FOR COUNTY COMMISSIONERS TO ESTABLISH TOWNSHIP ROADS.
3. COSTS AND EXPENSES—STATUTORY PROCEEDINGS, INCLUDING COST OF NOTICE BY PUBLICATION, FOR ESTABLISHMENT OF PUBLIC ROAD IS SOLE LIABILITY OF COUNTY INVOLVED.
4. COUNTY COMMISSIONERS—UNDER NO MANDATORY DUTY TO VIEW PREMISES OF PROPOSED IMPROVEMENT BY PROPERTY OWNERS—PROVISO, PETITION SHALL CONTAIN AT LEAST TWELVE SIGNATURES OF FREEHOLDERS WHO RESIDE IN VICINITY OF PROPOSED IMPROVEMENT.

SYLLABUS:

1. An existing private drive duly established as a public road in conformity with the provisions of Section 5553.04 et seq., Revised Code, becomes, by operation of law, upon its establishment, a township road.
2. Consent of township trustees is not required in order for county commissioners to establish township roads under authority of Section 5553.04 et seq., Revised Code.
3. Costs and expenses of the statutory proceedings specified in Section 5553.04 et seq., Revised Code, including the cost of notice by publication therein specified, for the establishment of a public road is the liability solely of the county involved.
4. County Commissioners are under no mandatory duty to view premises of an improvement proposed by property owners unless the petition specified by Section 5553.04, Revised Code, contains at least twelve signatures of freeholders residing in the vicinity of such proposed improvement.

Columbus, Ohio, May 9, 1956

Hon. Fred F. Fox, Prosecuting Attorney
Noble County, Caldwell, Ohio

Dear Sir:

I have before me your request for my opinion which reads as follows:

“A land owner who is also petitioner, petitions the County Commissioners to add a certain road to the Township system. This road had previously been a private drive. Assuming that all the provisions of Revised Code 5553.01 et seq. had been complied with, is it permissible for the County Commissioners to add this private drive to the Township system without the consent of the Trustees of that Township?

“Would you also please advise me who must bear the cost of this proceedings including the cost of advertising?

“Are twelve signatures required on all such petitions?”

Answer to the questions propounded will be made in the order submitted.

In accordance with your letter and for the purposes of this opinion, I shall assume that the county commissioners of Noble County have proceeded in conformity with Chapter 5553., Revised Code, to establish as a public road the existing private drive to which your letter refers. Several sections only of that chapter are material to the present inquiry.

Section 5553.02, Revised Code, empowers the several boards of county commissioners throughout the state to locate, establish, alter,

widen, straighten, vacate, or change the direction of roads * * *.” This power extends to all roads within the county, except that as to roads on the state highway system, the approval of the director of highways shall be had.

Section 5553.04, Revised Code, specifies two separate and distinct procedures for initiating action under Section 5553.02, supra, and to which more detailed reference will be made in considering the second question presented by your request.

Section 5553.05, Revised Code, and Section 5553.06, Revised Code, provide for a view of the proposed improvement by the commissioners, notice by publication of the time and place thereof, and submission of engineering data relative thereto.

Section 5553.07, Revised Code, sets forth the procedure to be followed in final hearing upon the merits of the proposed improvement, and concludes with provision for final order or resolution of establishment of such improvement or rejection thereof, as follows:

“* * * If the board finds such improvement will serve the public convenience and welfare, it shall by resolution enter such finding on its journal and determine to proceed with the improvement. If it finds such improvement will not serve the public convenience and welfare, it shall refuse to proceed with the improvement.”

Thereafter follow certain condemnation, compensation and assessment provisions of the chapter not pertinent here.

Classification of the public highways of the State of Ohio is prescribed by Section 5535.01, Revised Code, in the following manner:

“The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.

“(A) State roads include the roads and highways on the state highway system.

“(B) County roads include all roads which are or may be established as a part of the county system of roads as provided in sections 5541.01 to 5541.03, inclusive, of the Revised Code, which shall be known as the county highway system. Such roads shall be maintained by the board of county commissioners.

“(C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of

county commissioners may assist the board of township trustees in maintaining all such roads. This section does not prevent the board of township trustees from improving any road within its township."

Chapter 5541., Revised Code, to which reference is made in paragraph (B) of Section 5535.01, *supra*, sets forth in detail the procedure by which there is created within each county a "system of county highways." Section 5541.01, Revised Code, directs township trustees, upon request by the county commissioners, to report to that body the value of each road in that township, as a "used highway," its length and condition, and the nature of its dominant traffic burden. Section 5541.02, Revised Code, specifies that the county commissioners shall, from the information thus provided, make a determination of the relative importance and value for traffic of the various roads of the entire county, and shall select and designate therefrom a connected system of county highways; that such system shall become "the system of county roads," of such county; that a map of the same shall be forwarded to the director of highways, and, upon approval by him, the same shall become a part of the records of the county commissioners. This section concludes as follows:

"* * * The system of roads designated upon such map shall then become the system of county roads of the county * * *. *The board of county commissioners may make changes in or additions to the county system as in the manner provided by this section.* * * *"
(Emphasis added.)

Your inquiry as to the propriety of the county commissioners *adding* the newly established road to the township system is founded, it would seem, upon the presumption that such road, as established, is presently a county road. However, as your letter contains no indication that the Board of County Commissioners of Noble County has proceeded under Section 5541.01 et seq., Revised Code, above abstracted, to integrate this road into the county system, I will assume, for the purpose of this opinion, that it has not. Determination therefore becomes pertinent as to whether or not "county roads" may include roads other than, and in addition to "* * * all roads which are or may be established as a part of the county system of roads *as provided in Sections 5541.01 to 5541.03, inclusive, of the Revised Code* * * *." Section 5535.01, Revised Code.

Confusion perhaps arises because of the designation of Chapter 5553., of the Revised Code, as "COUNTY ROADS—Establishment; Altera-

tion; Vacation," giving rise to the inference that roads and public ways established under favor of its provisions are per se "county roads." Reference, however, to the legislative content of the component code sections themselves reveals that it was merely the purpose of the Legislature to clothe county commissioners with power and authority, in the particulars therein specified, subject to certain limitations therein contained, over all roads within the county generally, regardless of political subdivision classification or denomination. At no point within the entire chapter is reference expressly made to "county roads," "roads of the county system," or any other similarly distinguishing term in conjunction with the powers therein delegated. Reference to public easements, established or to be established, is confined exclusively to the terms "road(s)," "improvement," or "public road(s)." In this regard, Section 5553.01, Revised Code, provides as follows:

"As used in sections 5553.02 to 5553.17, inclusive, of the Revised Code, 'improvement' means any location, establishment, alteration, widening, straightening, vacation, or change in the direction of a *public road*, or part thereof, as determined upon by a board of county commissioners or joint board of county commissioners by resolution." (Emphasis added.)

Section 5553.02, Revised Code, specifically extends certain powers therein granted, to locate, establish, alter, widen, etc., "*to all roads within the county*, except as to roads on the state highway system, the approval of the director of highways shall be had." It is noted also that, while the section heading of Section 5553.03, Revised, is "*Width of County Roads*," the code content makes mention not of "county roads" but rather "*all public roads * * **" Similar example might be made of Sections 5553.04, 5553.06, 5553.10, 5553.18, and 5553.21, Revised Code.

Prior to a 1915 revision of the highway laws, 106 Ohio Laws, 574, township trustees had authority to establish roads within their townships—such roads, upon their establishment, becoming "township roads". Sections 6957 to 6967 Pages & Adams Annotated General Code, 1912. Thereafter, and until the present day, power to establish roads within the county has been vested exclusively in the county commissioners. See Opinion No. 2121, Opinions of the Attorney General for 1930; also *State, ex rel. Kerr v. Neitz et al, Board of Trustees of Monclova Township*, 58 Ohio App., 135. Township trustees, though they are empowered to construct, improve and maintain roads under their jurisdiction, Section

5571.01 et seq., Revised Code, have no authority to establish or create a road where none before existed. Their power in this regard was, however, concluded by the 1915 revision aforementioned.

While Section 7464, General Code, 106 Ohio Laws, 648, provided for classification of county roads upon the basis of construction by the county, that section was amended in 1927, 112 Ohio Laws, 430, and Section 5535.01, Revised Code, above set out, providing for the present classification enacted. Thus, the 1927 amendment terminated classification of public roads by means of identifying the constructing or improving authority, i.e., state or county and, in the case of "county roads," that task was explicitly assigned by Section 6965, General Code, present Section 5541.01, Revised Code, enacted four years earlier, 110 Ohio Laws, 267, setting forth the formal procedure for establishment of the "county highway system."

In view of the fact that specific classification sufficiently broad to encompass all public ways, presently existing and to be created, is provided for within the code, Section 5535.01, Revised Code, there is no legitimate basis upon which to imply that bare establishment of a public way by a given authority is, in itself, classificatory.

Moreover, force is added to this conclusion when it is observed that a road does not become part of the "county system of roads" under Chapter 5541., Revised Code, until it has received the approval of the director of highways for such designation. In light of the positive language of Section 5541.02, Revised Code, providing that "* * * the board of county commissioners may make *changes in* or *additions to* the county system as in the manner provided by this section * * *", the conclusion must be rejected that there exists in legislative contemplation two separate and distinct types of "county roads"; one, approved by the director of highways and a part of "the system of county roads," and another, neither approved by him nor a part of that system. Section 5535.01, Revised Code, provides no such classification. The language is direct and ingenuous. "The public highways (presumably *ALL* public highways) *shall* be divided into three classes: state roads, county roads and township roads * * *." Here likewise, no proper inference may be indulged that there exists a "class" of roads, standing outside this section, yet, under the "jurisdiction" of the county, but not "county roads" as therein provided. Creation and establishment might well, in the absence of classification to the contrary,

bestow "jurisdiction," but never in its presence. That portion of paragraph (C) of Section 5535.01, Revised Code, providing that "*Township roads include all public highways other than state or county roads * * **" is therefore governing in this instance and the newly created road in question became, by operation of law, upon its establishment, a township road.

As to who must properly bear the costs and expense of the proceedings when action is initiated under Section 5553.02, et seq., Revised Code, for establishment of a public road by landowners' petition, the statute is silent. However, former Section 6863, General Code, 106 Ohio Laws, 574, analogous to present Section 5553.04, Revised Code, made such costs, in certain instances, petitioners' responsibility, as follows:

"* * * The county commissioners shall require the petitioner or some one or more of them to enter into bond with sufficient sureties in favor of the state of Ohio, for the use and benefit of the county, and conditioned that the petitioners asking for such improvement will pay into the treasury of the county, the costs and expense incurred in the proceedings for such improvement, *in case the prayer of the petition be not granted.*"

(Emphasis added.)

In the 1927 revision of the highway statutes, the provision for the cost bond was deleted, and it is in that form that the statute stands today. Prior to the 1927 revision, it was the apparent purpose of the legislature that the county itself bear the cost of the proceedings if the petitioners *were* successful. Likewise, it was the apparent intent of that body by the 1927 deletion of the provision for security of cost payment to relieve future petitioners entirely of the burden of cost payment, the ultimate success or failure of the petition notwithstanding. Moreover, observation of the provisions of Section 5553.26, Revised Code, setting forth the procedure a landowner may pursue in having relocated a public road which crosses his lands, strengthens this conclusion. That section makes mandatory the giving of a cost bond by such a landowner-petitioner. By thus specifically providing for payment of costs and expenses by petitioners acting under Section 5553.26, supra, and by omitting similar provision in Section 5553.04, Revised Code, the burden of costs and expenses in the latter section has been placed, it should seem, unequivocally upon the county involved. The views above stated are equally applicable to any expense incurred in publication of the required notice.

In regard to the signature requirement of petitions filed under Section 5553.04, Revised Code, it is to be observed that, under that section, county commissioners are empowered to proceed upon their own motion and resolution and, in the absence of petition, to establish improvements as provided for by Sections 5553.04 to 5553.17, inclusive, Revised Code. Paragraph two of Section 5553.04, Revised Code, provides a landowner's method for initiating action upon the part of the county commissioners under Chapter 5553., Revised Code, in the following language:

“When a petition signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement is presented to the board requesting the board to locate, establish, alter, widen, straighten, vacate, or change the direction of a public road, such board shall view the location of the proposed improvement, and, if it is of the opinion that it will be for the public convenience or welfare to make such improvement, it may proceed to make such improvement as provided in this section and sections 5553.04 to 5553.17, inclusive, of the Revised Code. Such petition shall set forth the general route and termini of the road, or part thereof, to be located, established or vacated, or the general manner in which such road is to be altered, widened, or the direction thereof changed.”

Prior to the 1927 amendment to Section 6862, General Code, now Section 5553.04, Revised Code, a properly executed petition was jurisdictional to the establishment by the county commissioners of a public road, the then existing statute providing no other method for the commencement of proceedings. In that year, however, present Section 5553.04, Revised Code, was enacted. 112 Ohio Laws, 430.

Section 5553.05, Revised Code, is explicit to the effect that, regardless of the manner in which action is initiated under Section 5553.04, Revised Code, a resolution of convenience by the county commissioners is a condition precedent to any road establishment proceedings under this Chapter. The first paragraph of that section is as follows:

“In the resolution required by section 5553.04 of the Revised Code, the board of county commissioners shall fix a date when it will view the proposed improvement, and also a date for a final hearing thereon.”

It appears, therefore, that the 1927 amendment aforementioned has relegated the petition of landowners to an instrument of request which

places upon the county commissioners the mandatory duty of viewing the premises of the improvement proposed therein and, if that group is then of the opinion that the public convenience and welfare will be thus served, it shall proceed "as provided *in this section* and sections 5553.04 to 5553.17, inclusive, Revised Code, * * *." Section 5553.04, Revised Code. For this reason, it is my feeling, although the question is not directly presented in your request, that a landowner's petition, properly executed, is no longer jurisdictional to proceedings under Chapter 5553., Revised Code; however, such a petition, for whatever office or purpose it may properly serve under Section 5553.04, Revised Code, must contain the full complement of twelve (12) signatures of the nature therein specified.

Therefore, in specific answer to your inquiry, it is my opinion that:

1. An existing private drive duly established as a public road in conformity with the provisions of Section 5553.04 et seq., Revised Code, becomes by operation of law, upon its establishment, a township road.

2. Consent of township trustees is not required in order for county commissioners to establish township roads under authority of Section 5553.04 et seq., Revised Code.

3. Costs and expenses of the statutory proceedings specified in Section 5553.04 et seq., Revised Code, including the cost of notice by publication therein specified, for the establishment of a public road is the liability solely of the county involved.

4. County Commissioners are under no mandatory duty to view premises of an improvement proposed by property owners unless the petition specified by Section 5553.04, Revised Code, contains at least twelve signatures of freeholders residing in the vicinity of such proposed improvement.

Respectfully,

C. WILLIAM O'NEILL

Attorney General