

**OPINION NO. 90-024****Syllabus:**

The county engineer has no authority, simply upon request of a private corporation which is developing its property in an attempt to attract private industry, to furnish equipment, labor, and materials in the form of engineering and design support, actual excavation, and materials to construct a road on property owned by the private corporation, whether such corporation is for profit or non-profit, where such work is not part of the engineer's statutory duties with respect to public roads.

**To: Charles F. Kennedy, III, Van Wert County Prosecuting Attorney, Van Wert, Ohio**

**By: Anthony J. Celebrezze, Jr., Attorney General, April 11, 1990**

I have before me your opinion request concerning the authority of the county engineer to assist a private corporation in the development of a tract of land owned by the corporation. By way of background, your opinion request states:

[T]he [Van Wert County] Industrial Development Commission is a private for profit corporation with individual stockholders....[A]t the present time the Commission is the owner of a 200 acre tract north of the City of Van Wert proper, located in Pleasant Township. It is hoped that private industry can be attracted to this site and present plans call for a three (3) stage development over the next several years. If industry can indeed be attracted to this site the benefits to both the City and County of Van Wert would be many. With this in mind the County Engineer has been approached by the Commission for help. The Engineer has been requested to provide certain technical assistance, manpower and equipment which would be employed to make the site more attractive to any business which might decide to locate here.

Based upon these facts, you specifically ask: "May a county, through its County Engineer's office, furnish equipment, labor and material in the form of engineering and design support, actual excavation and material for an access road to a proposed industrial park owned by a private for profit corporation or by a non-profit corporation?" Further, you have informed a member of my staff that the planned access road will be constructed on private property, which I will assume for purposes of this opinion is owned by the same corporation, and that the county commissioners are not involved in any aspect of this project.

I begin the analysis of your question by noting that: "The office of the county engineer is a creature of statute. The holder of such office has only such powers and duties as are expressly given to him by statute, or as are naturally and necessarily implied from the language of the statute." *AFSCME, Local 1045 v. Polta*, 59 Ohio App. 2d 283, 284, 394 N.E.2d 310, 311 (Erie County 1977). Thus, whether the county engineer may participate in the contemplated project as described in your request depends upon whether he is so authorized by statute. For the reasons that follow, however, I believe that the county engineer is without authority to act independently to assist the Van Wert County Industrial Development Commission in the manner you describe.

The powers and duties of the county engineer are set forth in R.C. Chapter 315 and throughout R.C. Title 55. It is not possible to address the inapplicability of each statute to the situation you describe. I will, however, attempt to address those statutes under which it might be suggested that the engineer is empowered to act in the manner described in your opinion request.

The general duties of the county engineer are set forth in R.C. 315.08, which states in part:

The county engineer shall perform for the county all duties authorized or declared by law to be done by a registered professional engineer or registered surveyor. He shall prepare all plans, specifications, details, estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of all bridges, culverts, roads, drains, ditches, roads on county fairgrounds, and other public improvements, except buildings, constructed under the authority of any board within and for the county.

The engineer's authority to act under R.C. 315.08 was analyzed in 1966 Op. Att'y Gen. No. 66-084, which considered whether the county engineer is required to make a survey of a township cemetery upon request of the township trustees. Op. No. 66-084 at 2-148 reasons as follows:

Beginning with the general proposition that a county and a township are separate political entities, it must be noted that [R.C. 315.08] devolves upon the county engineer, a county officer, duties concerning *county* matters. Therefore, pursuant to the terms of [R.C. 315.08], the county engineer has no duty to make a survey at the behest of the township trustees. (Emphasis in original.)

Op. No. 66-084 thus found that the engineer's duties under R.C. 315.08 extend only to county matters and do not require the engineer to perform duties at the request of a board of township trustees, unless specifically required by statute. See generally 1954 Op. Att'y Gen. No. 3698, p. 177, 180 (R.C. 315.08 imposes upon county engineer only limited duties with respect to roads on county fairgrounds; other statutes governing engineer's duties concerning county roads generally found not applicable to such roads since the owner of fairgrounds, a county agricultural society, "although for limited purposes deemed to be a 'public institution designed for public instruction' is essentially a corporate entity separate and distinct from the county in which it is located and is in no sense a branch of the county government" (citation omitted)). Similarly, in the situation about which you ask, R.C. 315.08 imposes no duty or authority upon the county engineer with regard to the proposed access road to be built on property owned by a corporation, an entity separate from the county.

By statute, the county engineer is directed to take certain actions with regard to various public roads.<sup>1</sup> See generally 1981 Op. Att'y Gen. No. 81-039 at 2-155 (concerning R.C. 5535.08, states: "the general statutory scheme is that the state, county, and township, each as to its respective jurisdiction, bears the responsibility for maintenance and repair of its respective road or highway system, although the various subdivisions may cooperate in the maintenance and repair of the

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<sup>1</sup> Pursuant to R.C. 5535.01, the public highways of the state are divided into three categories: state roads, county roads, and township roads. R.C. 5535.01 further states:

(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 [R.C. 5541.01-.03], 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.

others' roads"). For example, R.C. 5543.01 sets forth certain powers and duties of the county engineer with regard to public roads as follows:

The county engineer shall have general charge of the following:

(A) Construction, reconstruction, improvement, maintenance, and repair of all bridges and highways within his county, under the jurisdiction of the board of county commissioners;

(B) Construction, reconstruction, resurfacing, or improvement of roads by boards of township trustees under [specified sections of the Revised Code];

(C) Construction, reconstruction, resurfacing, or improvement of the roads of a road district under [R.C. 5573.21].

The engineer may not perform any duties in connection with the repair, maintenance, or dragging of roads by boards of township trustees, except that upon the request of any board of township trustees he shall inspect any road designated by it and advise as to the best methods of repairing, maintaining, or dragging such road.

Concerning construction of a road, as contemplated in your request, under R.C. 5543.01 the county engineer is given general charge of construction of only certain public roads, those under the jurisdiction of the board of county commissioners, certain township roads and roads of a road district created under R.C. 5573.21. It is, therefore, necessary to determine whether the road about which you ask may be considered a public road.

There are several methods by which land may be established as a public road or highway. *See generally* 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"). One method is statutory appropriation, set forth in portions of R.C. Chapter 5553. This method, however, requires an initial decision by the board of county commissioners to proceed in such manner. R.C. 5553.07. *See generally* 1961 Op. Att'y Gen. No. 2409, p. 397 (syllabus) ("[w]hether a board of county commissioners should establish a public road pursuant to [R.C. 5553.04] is at the discretion of the board after said board has considered whether such establishment will be for the public convenience or welfare"); 1956 Op. Att'y Gen. No. 6576, p. 373 (discussing appropriation proceedings under R.C. Chapter 5553 and the system of county highways, under the direction of the county commissioners, as governed by R.C. Chapter 5541).

Another method of creating a public road is by statutory dedication. Pursuant to R.C. 5553.31, "[a]ny person may, *with the approval of the board of county commissioners*, dedicate lands for road purposes." (Emphasis added.) As I concluded in 1986 Op. Att'y Gen. No. 86-094 (syllabus, paragraph one): "R.C. 5553.31 sets forth the statutory method by which land may be dedicated for road purposes, and requires, *inter alia*, that a person must propose to dedicate land for road purposes *and the proposal must be approved and accepted by the board of county commissioners*." (Emphasis added.)

Creation of a public road by statutory appropriation or by statutory dedication requires, in part, action by the board of county commissioners. The plans you outline contemplate no involvement by the county commissioners, and, thus, neither of these two methods can operate to create a public road in the circumstances you describe.

Another method of creating a public road or highway is by common law dedication. *See generally* 1987 Op. Att'y Gen. No. 87-046. Concerning common law dedication, I stated in Op. No. 86-094 (syllabus, paragraph three): "In order to constitute a common law dedication of land for road purposes, the landowner must intend to dedicate such land, *and the public authority must accept the dedication*." (Emphasis added.) In the situation you describe, the only involvement with the county is through the office of the county engineer. No statute of which I

am aware, however, authorizes the county engineer to accept the dedication of a road. Thus, the project you propose cannot constitute a common law dedication of land for road purposes.

The final method by which a public road may be established is by prescription. I described this method in Op. No. 87-046 at 2-306, as follows: "a public road may be established by prescription where it is shown that the general public has used a tract of land in a way adverse to the claim thereto of the title holder of record under some claim of right for an uninterrupted period of at least twenty-one years." (Citation omitted.) Nothing in the facts described in your letter indicates that establishment of a road by prescription has occurred. I will, therefore, assume for purposes of this opinion that such establishment has not occurred.

It is clear, therefore, that the county engineer's authority with regard to various public roads, as set forth in R.C. 5543.01, does not empower the engineer to participate in the project which you describe, since the contemplated construction does not involve a public road. Similarly, other statutes empowering the engineer to act with respect to various public roads, *see, e.g.*, R.C. 5543.09, 5543.11, 5543.17, have no application to the situation you describe.

I note, however, that R.C. 5543.16 may be relevant to the situation you describe, depending upon the location of the proposed construction. R.C. 5543.16 states in part:

The owners of land shall construct and keep in repair all approaches or driveways from the public roads, under the direction of the county engineer. If in the construction, improvement, maintenance, and repair of any road, the approach or driveway of an abutting property owner is destroyed, the authorities constructing, improving, maintaining, or repairing such road shall compensate the property owner for the destruction of his approach or driveway, or in lieu thereof authorize the engineer to reconstruct it at public expense.

As stated in Op. No. 81-039 at 2-158, "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))...." Thus, R.C. 5543.16 places liability for the initial construction of an approach to a public road upon the abutting property owners. 1940 Op. Att'y Gen. No. 2148, vol. I, p. 334 (construing G.C. 7212 (predecessor of R.C. 5543.16)). *See generally* 1982 Op. Att'y Gen. No. 82-025; Op. No. 81-039 (discussing the difference between maintenance and repair as opposed to initial construction).

R.C. 5543.16 also provides for compensation to an abutting property owner, or reconstruction at public expense, where an already existing approach is destroyed in the construction, improvement, maintenance, or repair of a public road. This portion of R.C. 5543.16 contemplates, however, that an approach already exists at the time the work is done on the adjacent public road, and, therefore, does not appear to apply to the situation you describe. *See* 1939 Op. Att'y Gen. No. 959, vol. II, p. 1359.

The final paragraph of R.C. 5543.16 states:

In the construction of a road improvement the...[county] engineer may, in all cases where the approaches of the owners of abutting real estate are unsuitable to a projected improvement or so constructed as not to afford proper drainage after its completion, include in the plans for such improvement plans for proper approaches. The entire cost of constructing such approaches may be assessed against the lands along which they are constructed.

This portion of R.C. 5543.16 provides that in the construction of a road improvement, the county engineer may include in the plans for such improvement plans for proper approaches where abutting property owners' approaches will not be

suitable to the improvement. In such a situation, however, the cost of constructing such approaches "may be assessed against the lands along which they are constructed." R.C. 5543.16. This portion of R.C. 5543.16 does not empower the engineer to undertake the plan you describe, since the county does not appear to be constructing any public road improvement which would necessitate a change in the approach of abutting property owners.

Another provision which may be relevant to your inquiry is R.C. 5543.19, which states in pertinent part:

(A) The county engineer may, when authorized by the board of county commissioners and not required by this section or other law to use competitive bidding, employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of roads by force account.

In determining whether he may undertake construction or reconstruction, including widening and resurfacing, of roads by force account, the county engineer shall first cause to be made an estimate of the cost of such work, which estimate shall include labor, material, freight, fuel, hauling, use of machinery and equipment, and all other items of cost. When the total estimated cost of the work exceeds ten thousand dollars per mile, the county commissioners shall invite and receive competitive bids for furnishing all labor, materials and equipment necessary to complete the work in accordance with sections 307.86 to 307.92, inclusive, of the Revised Code.

I note, however, that the engineer's authority under R.C. 5543.19(A) is limited to using such labor and equipment on public roads, not on private property, as in the situation you describe. Further, the engineer's authority to proceed under R.C. 5543.19(A) requires, among other things, authorization by the board of county commissioners to so proceed. *See generally* 1917 Op. Att'y Gen. No. 855, vol. III, p. 2310 (construing G.C. 7198, predecessor of R.C. 5543.19).

Since your question contemplates not only the county engineer's participation in the proposed project, but also the use of county road equipment, it is necessary to discuss R.C. 5549.01 which states in part:

The board of county commissioners may purchase such machinery, tools, or other equipment, including special wearing apparel, for the construction, improvement, maintenance, or repair of the highways, bridges, and culverts under its jurisdiction as it deems necessary. The board may also purchase, hire, or lease automobiles, motorcycles, or other conveyances and maintain them for the use of the county engineer and his assistants when on official business. All such machinery, tools, and equipment, including special wearing apparel, and conveyances belonging to the county shall be under the care and custody of the engineer, and shall be plainly and conspicuously marked as the property of the county.

This portion of R.C. 5549.01 authorizes the board of county commissioners to purchase necessary tools and equipment for the construction, improvement, maintenance, and repair of highways, bridges, and culverts under the board's jurisdiction. Although such items are under the care and custody of the county engineer, they remain county property.

The use of machinery and equipment so purchased by the county commissioners was addressed in 1944 Op. Att'y Gen. No. 6660, p. 44, in which one of my predecessors considered whether the county could lend to private persons the equipment purchased under authority of G.C. 7200 (predecessor of R.C. 5549.01). Finding no language in the statute itself authorizing the county to lease such equipment to private persons, the opinion concluded that no such authority, either

express or implied, exists. As more fully explained in 1949 Op. Att'y Gen. No. 1313, p. 954, 959-61:

[G.C. 7200 (predecessor of R.C. 5549.01)], which authorizes the purchase by the county commissioners of machinery, tools and other equipment for construction, improvement, maintenance or repair of highways, bridges and culverts under their jurisdiction, and also the purchase, hire or lease of automobiles or other conveyances for the use of the county engineer, does not authorize the lease or rental of such equipment.

Other sections of the statutes grant specific authority to the county commissioners to lease certain property belonging to the county...but I find no authority given to county commissioners to lease tools and equipment purchased for highway construction and repair. If such authority exists it must be implied.

*While the question which you have presented concerns the loan of county property for use other than county purposes, it is only logical that if no power to lease such equipment exists, then the county commissioners would have no implied power to loan such equipment.*

....

...It therefore appears reasonably clear that in the absence of statutory provisions granting authority to the county commissioners to cooperate with or loan equipment belonging to the county to other governmental or public agencies, the county commissioners are without authority to loan or lease such equipment. (Emphasis added.)

Reading 1944 Op. No. 6660 and 1949 Op. No. 1313 together, I find no authority for the county, either through the board of county commissioners or the county engineer, to loan county equipment purchased under R.C. 5549.01 to a private corporation.

Based on the foregoing, it is my opinion, and you are hereby advised, that the county engineer has no authority, simply upon request of a private corporation which is developing its property in an attempt to attract private industry, to furnish equipment, labor, and materials in the form of engineering and design support, actual excavation, and materials to construct a road on property owned by the private corporation, whether such corporation is for profit or non-profit, where such work is not part of the engineer's statutory duties with respect to public roads.