

## OPINION NO. 86-080

## Syllabus:

1. Where a sidewalk is located outside of a municipality, the governmental entity which is currently responsible for the repair and maintenance of a particular highway is responsible for the repair and maintenance of sidewalks appurtenant to the highway.
2. A county or township which, pursuant to R.C. 5543.10, orders the repair or maintenance of sidewalks located along a highway not within the highway system of the county or township does not assume a continuing responsibility to maintain and repair those sidewalks.

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To: Gary L. Van Brocklin, Mahoning County Prosecuting Attorney, Youngstown, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, November 13, 1986

I have before me your request for my opinion regarding the maintenance of certain sidewalks located in Mahoning County. Specifically, your questions are:

1. Is the State, county or township responsible for the maintenance and repair of sidewalks located in unincorporated areas?
2. If the county or township is not responsible for the maintenance of the sidewalks, will the county or township assume a continuing responsibility to maintain the sidewalks if it proceeds to order their maintenance and repair pursuant to R.C. 5543.10?

With regard to these questions, you have related the following facts: The sidewalks at issue are located in Mahoning County at the intersection of Route 45 and Mahoning Avenue. The intersection is located in an unincorporated area of Jackson Township. The sidewalks extend approximately one thousand feet along both highways. Route 45 is a state highway; Mahoning Avenue is currently classified as a county highway. Originally, however, it was classified as a state highway. You also note that both sidewalks were constructed under the federal War Projects Administration during the Second World War, and are in need of repair. In a subsequent conversation, your staff confirmed that the sidewalks are located within the horizontal limitations of the highways.

As your first question suggests, in order to determine which governmental entity bears the responsibility for the maintenance of a sidewalk, a distinction must first be drawn between sidewalks located within a municipal corporation and those located outside of incorporated areas. A municipality is responsible for the maintenance and repair of sidewalks located within the municipal corporation. R.C. 723.01. See also R.C. 723.011. There is, however, no analogous section specifically delegating the responsibility to maintain and repair sidewalks located outside of the corporation limit. Since your correspondence specifies that the sidewalks in question are located in an unincorporated area, R.C. 723.01 is not applicable.

In 1942 Op. Att'y Gen. No. 4712, p. 11, one of my predecessors concluded that township trustees are required to maintain sidewalks constructed by property owners along township highways located outside of a municipality. The roads in question had been dedicated to the public use.<sup>1</sup> The opinion adopted the rule that sidewalks which are within the horizontal limitations of a public highway are a part of the road. As such, the governmental entity currently responsible for the maintenance of the highway is also responsible for the maintenance of any appurtenant sidewalks. 1942 Op. No. 4712, at 14, 16-17.

This rule is consistent with the conclusion reached in 1955 Op. Att'y Gen. No. 5564, p. 362. In that opinion, a township board of trustees questioned whether they were required to maintain and repair a sidewalk constructed by the State along a state road located within the township. The opinion advises that: "where a particular public agency has the duty to maintain a highway a portion of which consists of a sidewalk, there is a duty to maintain such sidewalk as well as that portion of the highway designated for vehicular traffic." 1955 Op. No. 5664, at 363.

Thus, 1942 Op. No. 4712 and 1955 Op. No. 5564 stand for the proposition that the governmental entity which has the duty to maintain and repair a particular highway also has the duty to maintain and repair the sidewalks located within the horizontal limitations of that highway. The fact that the sidewalks in question were constructed by the federal government does not alter the responsibility of the public agency currently charged with the maintenance of a highway to also maintain the appurtenant sidewalks. See 1942 Op. No. 4712 (a township must repair sidewalks which are part of the township roads even though the sidewalks were originally built by property owners).<sup>2</sup> In accordance with the foregoing, the authority

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<sup>1</sup> Cf. Johnson v. Grukeneyer, 11 Ohio Dec. 412 (C.P. Hamilton County 1901)(where a private property owner constructs a sidewalk and does not dedicate it to the public use, the property owner is responsible for the maintenance and repair of the sidewalk).

<sup>2</sup> I note that R.C. 5543.10, which is discussed in greater detail with regard to your second question, empowers a board of county commissioners or a board of township trustees to order the county engineer to construct sidewalks along or connecting the public highways outside of a municipal corporation. In 1928 Op. Att'y Gen. No. 2209, vol. II, p. 1420, it was stated that if a board of county commissioners or township trustees orders the construction of a sidewalk pursuant to R.C. 5543.10, then the commissioners have the implied authority to maintain or repair that sidewalk. The opinion thus concludes that a sidewalk originally constructed by order of the county commissioners and township trustees along a state road may be maintained and repaired by the commissioners and trustees. There is nothing in 1928 Op. No. 2209 or otherwise, however, to indicate whether a public authority which has the responsibility to maintain and repair a highway is relieved of its duty to maintain and repair the appurtenant sidewalk where the sidewalk is constructed by a county or township pursuant to R.C. 5543.10. It is unnecessary for me to finally resolve this issue since in the instant situation, the sidewalks were not constructed by a county or township pursuant to R.C. 5543.10.

responsible for the repair and maintenance of a particular highway is also charged with the responsibility to maintain and repair appurtenant sidewalks.

The final step, then, is to determine who is responsible for the maintenance of the appurtenant highways. Under R.C. 5535.01, the public highways within the State are divided into three classes: state, county, and township roads. State highways are defined as roads belonging to the state highway system. R.C. 5535.01(A). County roads include those roads provided for in R.C. 5541.01-.03, and are to be maintained by the board of county commissioners. R.C. 5535.01(B). Township roads include all other public highways which do not belong to the state or county systems, and are to be maintained by the board of township trustees. R.C. 5535.01(C). Pursuant to R.C. 5535.08, the State, counties and townships are each required to maintain their own highways as designated in R.C. 5535.01. See also R.C. 5571.02. Although various statutory provisions authorize the State, counties and townships to cooperate in the repair and maintenance of the others' roads, see, e.g., R.C. 5535.01, R.C. 5535.08, R.C. 5571.01, and R.C. 5571.02, the State and each county and township has the duty to maintain and repair its respective highway system. See generally 1981 Op. Att'y Gen. No. 81-039.

Therefore, based on your description of the highways, it is my opinion that the responsibility for maintaining the sidewalks in question must fall upon the State with respect to the sidewalks bordering the state highway, and upon the county with respect to the sidewalks adjacent to the county highway.

Your second inquiry presents the issue whether a county or township will incur a continuing responsibility to maintain a sidewalk if it orders repairs pursuant to R.C. 5543.10. R.C. 5543.10 authorizes a board of county commissioners or a board of township trustees to order the county engineer to construct, repair, or maintain sidewalks along, or connecting, the public highways outside of a municipal corporation.<sup>3</sup> Although no single statute specifically governs the result, the statutory language of two statutes suggests the result intended by the General Assembly.

In answer to your first inquiry, I concluded that under R.C. 5535.08 the State, counties and townships are each required to maintain their own roads and any adjoining sidewalks. The statute provides in pertinent part: "The state, county and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code." (Emphasis added.) Where the General Assembly employs the word "shall," the statutory language is generally interpreted as an assignment of a mandatory duty. See State ex rel. City of

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<sup>3</sup> Under R.C. 5543.10, county commissioners and township trustees are empowered to order the construction, maintenance, or repair of sidewalks along "public highways." The term "public highways" is broadly defined in R.C. 5535.01 as including all state, county, and township highways. Thus, a county or township may order the construction, maintenance, or repair of sidewalks located along highways not within its respective highway system. See 1928 Op. No. 2209 (where a sidewalk was originally constructed by a county or township along a state highway pursuant to R.C. 5543.10, the county and township may also maintain the sidewalk).

Niles v. Bernard, 53 Ohio St. 2d 31, 372 N.E.2d 339 (1978);  
Mallory v. City of Westlake, 52 Ohio St 2d 103, 370 N.E.2d 457  
(1977); 1979 Op. Att'y Gen. No. 79-081. In contrast, R.C.  
5543.10 employs permissive language: "The board of county  
commissioners or board of township trustees may, by unanimous  
vote, order the construction, repair or maintenance of  
sidewalks along or connecting the public highways, outside of a  
municipal corporation." (Emphasis added.) The statutory use  
of the word "may," absent any indicia of an intent to the  
contrary, is interpreted as a grant of a permissive power.  
Dennison v. Dennison, 165 Ohio St. 146, 134 N.E.2d 574 (1956);  
State ex rel. Post v. Klinger, 114 Ohio St. 212, 151 N.E. 47  
(1926).

The statutory language employed suggests the scheme intended by the General Assembly. The mandatory language used in R.C. 5535.08 indicates that the given authority has a continuing mandatory duty to repair its highways, and by extension, the appurtenant sidewalks. The permissive language employed in R.C. 5543.10 suggests that the legislature did not intend to shift this responsibility where the county or township chooses to repair and maintain a sidewalk adjoining a public highway outside of a municipal corporation. Rather, the use of the word "may" demonstrates that the General Assembly intended to permit counties and townships to voluntarily assume sidewalk maintenance where the county or township deems it prudent. Ultimately, because the primary duty to repair is not shifted by R.C. 5543.10, any sidewalk repair and maintenance made pursuant to that statute would not impose a continuing responsibility upon the county or township.

In conclusion it is my opinion, and you are hereby advised that:

1. Where a sidewalk is located outside of a municipality, the governmental entity which is currently responsible for the repair and maintenance of a particular highway is responsible for the repair and maintenance of sidewalks appurtenant to the highway.
2. A county or township which, pursuant to R.C. 5543.10, orders the repair or maintenance of sidewalks located along a highway not within the highway system of the county or township does not assume a continuing responsibility to maintain and repair those sidewalks.