

December 23, 2016

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
Gallia County Courthouse
18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

SYLLABUS:

2016-039

1. A public road vacated by a board of county commissioners passes in fee to those landowners whose properties abut the road pursuant to the principle of accretion. (1992 Op. Att’y Gen. No. 92-064, approved and followed.)
2. Upon vacation of a public road, the fee that accretes to abutting landowners remains subject to easements for public utilities and railroads and the rights of landowners to access their property.



MIKE DEWINE

★ OHIO ATTORNEY GENERAL ★

Opinions Section
Office 614-752-6417
Fax 614-466-0013

30 East Broad Street, 15th Floor
Columbus, Ohio 43215
www.OhioAttorneyGeneral.gov

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OPINION NO. 2016-039

The Honorable Jeff Adkins
Gallia County Prosecuting Attorney
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18 Locust Street, Room 1267
Gallipolis, Ohio 45631-1267

Dear Prosecutor Adkins:

You have requested an opinion in response to the following questions:

1. Upon vacation of a public road by a board of county commissioners, to which persons or entities does the fee to the public road pass?
2. Upon vacation, does the fee to a public road pass to the original grantor or to the abutting landowners pursuant to a reversionary interest or does it pass by a different principle of law?

In speaking with the county engineer, we have learned that the subject road is within a platted¹ subdivision outside of a municipal corporation. As platted, the road borders the outskirts of that subdivision, but the roadway has never been built. One person owns all the lots within the subdivision along one side of the undeveloped, platted road. A second person owns a parcel of property on the other side of the road outside of the subdivision. There is no conclusive evidence that the road was statutorily dedicated and, thus, established as a public road.² Insofar as you

¹ Pursuant to R.C. 711.001(A), a “plat” is defined as “a map of a tract or parcel of land.” The plat is a drawing of the survey. *See* 11B Ohio Admin. Code 4733-37-05.

² Whether a particular tract of land has been established as a public road will depend, in part, upon the law in effect at the time the establishment was attempted, and, in part, upon the factual circumstances of the particular case. 1999 Op. Att’y Gen. No. 99-005, at 2-31; 1988 Op. Att’y Gen. No. 88-080, at 2-397. A roadway must first be “established” as a public highway before it is designated as a street, state road, county road, or township road for public travel. 1984 Op. Att’y Gen. No. 84-016, at 2-51 to 2-52. Public roads may be established on a tract of land in a variety of ways, including statutory dedication. *See generally* 2015 Op. Att’y Gen. No. 2015-006, at 2-62 (“Ohio law recognizes four principal ways in which a highway can be established: (1) statutory dedication, (2)

have asked about vacation of a public road, we presume that your inquiry concerns a road established for use by the general public for travel and transportation.³

R.C. 5553.01-.16 confer upon a board of county commissioner powers and responsibilities with respect to the establishment, location, alternation, and vacation of all roads and highways within the county. R.C. 5553.02 expressly grants a board of county commissioners the power to vacate public roads, declaring, in part:

The board of county commissioners may locate, establish, alter, widen, straighten, *vacate* or change the direction of roads as provided in [R.C. 5553.03-.06]. 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 transportation shall be had. (Emphasis added).

See also R.C. 5553.04; 1982 Op. Att’y Gen. No 82-012; 1928 Op. Att’y Gen. No. 1627, vol. I, p. 198, at 205. *Cf.* R.C. 723.05 (conferring power upon a municipal legislative authority to vacate a public road within a municipal corporation); *Sparrow v. City of Columbus*, 40 Ohio App. 2d 453, 320 N.E.2d 297 (Franklin County 1974) (a board of county commissioners has no authority under R.C. 5553.02 to vacate a street within the corporate limits of a municipality; such authority rests exclusively with the municipal corporation’s legislative authority, pursuant to the municipal corporation’s powers of local self-government provided in Ohio Const. art. XVIII, § 3). R.C. 5553.04 sets forth the procedure for a board of county commissions to vacate a public road that is outside the boundaries of a municipal corporation. R.C. 5553.04 declares, in pertinent part, as follows:

When the board of county commissioners is of the opinion that it will be for the public convenience or welfare to ... vacate, or change the direction of a public road, it shall so declare by resolution[.]

common law dedication, (3) prescription, and (4) statutory appropriation”); 1988 Op. Att’y Gen. No. 88-080, at 2-396 (statutory dedication is one of four methods in Ohio to establish a public road; the other methods are common law dedication, prescription, and statutory appropriation).

³ Only a properly established public road may be vacated. *See Augustus v. Brumbaugh*, 28 Ohio Op. 360, 14 Ohio Supp. 31 (C.P. Montgomery County 1944) (explaining that if the road was established and properly dedicated as a public road, the road may be vacated by the board of county commissioners). If a road is not established as a public road, it remains a private road. A board of county commissioners has no authority to vacate a private road. *See* R.C. 5553.02 (authority of a board of county commissioners to vacate a public road). Hence, without proper authority or jurisdiction, an order of a board of county commissioners to vacate a road is invalid. *See Tobin v. Bates*, 90 Ohio St. 397, 397-398, 108 N.E. 1133 (1914).

When a petition, signed by at least twelve freeholders of the county residing in the vicinity of the proposed improvement, or signed by the owner of the right to mine coal lying under or adjacent to the proposed improvement, is presented to the board requesting the board to ... vacate, or change the direction of a public road, the 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 the improvement, it may proceed to make the improvement as provided in [R.C. 5553.04-.16][.]

In vacating a public road, a board of county commissioners may act upon its own resolution when it is of the opinion that the change will be for the convenience or welfare of the public, or it may act upon a petition signed by the adjoining landowners. *See also* 1950 Op. Att’y Gen. No. 2279, p. 616 (syllabus).

As part of the process of vacation, if a board of county commissioners finds that such improvement⁴ is of sufficient public importance, the county engineer will be instructed to “make an accurate survey and plat of such improvement and furnish an accurate and detailed description describing therein the center line and right of way lines.” R.C. 5553.06. Thereafter, the engineer shall make a report in writing to the board, which will “set forth the opinion of the engineer for or against such improvement.” *Id.*; *see also* R.C. 5553.24 (when a petition for relocation of a road and vacation of unimproved public roads pursuant to R.C. 5553.23 is filed, the board of county commissioners shall order the county engineer to make a survey of the ground where the road is to be relocated, prepare a plat, and submit his written report of the proposed change and his opinion of the advantages or disadvantages of the proposed change). The report of the county engineer is read at the final hearing for the proposed vacation in addition to any testimony by any interested persons bearing upon the necessity of the improvement for the public convenience or welfare. R.C. 5553.07. Upon a finding by the board of county commissioners that the vacation serves the public convenience and welfare, the board shall by resolution proceed with the improvement. *Id.* If the improvement does not serve the public convenience and welfare, the board shall refuse to proceed with the improvement. *Id.* Additionally, the board of county commissioners may determine to proceed with the proposed improvement subject to modifications required by the public convenience and welfare in the judgment of the board. R.C. 5553.08. Should the board of county commissioners determine that the proposed improvement is of sufficient importance to the public, the board may order the payment of compensation and damages to the persons entitled thereto or by the landowners who will be benefitted by the improvement. R.C. 5553.09.

⁴ “Improvement” means “any location, establishment, alteration, widening, straightening, vacation, or change in direction of a public road, or part thereof, as determined upon by a board of county commissioners[.]” R.C. 5553.01.

R.C. 5553.04 does not specifically address the disposition of the fee interest⁵ in a public road vacated by a board of county commissioners. Cf. R.C. 5553.042 (in the case of an abandoned township road, highway, street, or alley, “the board, by resolution, may order the road, highway, street, or alley vacated, and the road, highway, street, or alley shall pass, in fee, to the abutting landowners, as provided by law”). “Nonetheless, the established common law rule ... controls in such situations, which means that any such road so vacated passes, in fee, to those landowners whose properties abut⁶ the road.” 1992 Op. Att’y Gen. No. 92-064, at 2-266 (footnote added). “It is well settled in Ohio that ‘[a]butting landowners own the fee of the land to the middle of the road, and may use land in any way not inconsistent with the public easement.’” 2002 Op. Att’y Gen. No. 2002-009, at 2-50 (quoting 1980 Op. Att’y Gen. No. 80-071, at 2-279). Thus, when a board of county commissioners vacates a properly established public road, the road so vacated passes in fee to those landowners whose properties abut the road.

“The rule is well established in Ohio that upon the vacation of a street the fee thereto does not revert to the original dedicator but accretes to the abutting-lot owners, subject only to such rights as other such owners may have in the street as a necessary means of access to their property.” *Greenberg v. L.I. Snodgrass Co.*, 161 Ohio St. 351, 357, 119 N.E.2d 292 (1954); see also *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 275, 62 N.E. 341 (1901). The Ohio Supreme Court in *Hamilton, G. & C. Traction Co. v. Parish*, 67 Ohio St. 181, 190–91, 65 N.E. 1011 (1902), provided the reasoning for the rule of accretion:

The reason that a street when vacated, becomes a part of the abutting lots, is not because the owner of the lot owned the fee of the street, but because it must go there

⁵ A fee simple (or commonly known as a “fee”) is the highest right, title, and interest that one can have in land; it is the full and absolute estate in all that can be granted. *Masheter v. Diver*, 20 Ohio St. 2d 74, 253 N.E.2d 780 (1969) (syllabus, paragraph 1); see also *Black’s Law Dictionary* 615 (6th ed. 1991) (“[f]ee-simple signifies a pure fee; an absolute estate ... clear of any condition or restriction to particular heirs[.] It is the largest estate and most extensive interest that can be enjoyed in land”). Conversely, an easement is an “interest in the land of another which entitles the owner of the easement to a limited use of the land in which the interest exists.” *Szaraz v. Consol. R.R. Corp.*, 10 Ohio App. 3d 89, 91, 460 N.E.2d 1133 (Summit County 1983) (quoting 36 Ohio Jurisprudence 3d 386, Easements and Licenses §1); see also 2016 Op. Att’y Gen. No. 2016-006, at 2-63 (defining easement).

⁶ In defining the term “abutting,” the Ohio Supreme Court recognized the principle that “before properties may abut each other there must be some common boundary line and not merely a minute pin-point touching occasioned by the existence of a common vertex.” *Eastland Woods v. City of Tallmadge*, 2 Ohio St. 3d 185, 187, 443 N.E.2d 972 (1983) (quoting *Lincoln v. Cather & Sons Constr., Inc.*, 206 Neb. 10, 290 N.W.2d 798 (1980)).

by necessity, to preserve his easement of ingress and egress, which in many cases is a valuable property right, and without which the lots might be of little value. The street being vacated and abandoned, the public no longer owns it, and it must either revert to the original owner, or adhere to the abutting lots as by accretion. As the original owner is presumed to have received full value for the street when he sold the lots, there is no just reason why he should have the street, when vacated, restored to him. And as the lot owners and those in the line of title have paid an increased price for lots by reason of the easement in the street, it is only just that when the street becomes vacated, the easement should be preserved to them by adding the vacated street to the lots, and therefore this doctrine of accretion in such cases has been adopted in this state, and generally elsewhere.

Thus, a public road vacated by a board of county commissioners does not pass in fee to abutting landowners due to reversionary interests, but rather, upon the common law rule of accretion, which preserves the abutting landowner's access to his property. In the absence of the rule of accretion, the vacated street might revert to the original dedicator. If the original dedicator of the public street retained a reversionary interest, the rights of abutting landowners would be adversely affected. For example, a diminution in the value of the property would result should the original dedicator take possession of the vacated street and no longer permit the abutting landowners a right of way to access their properties. Access by means of the vacated road, which is a right of way the landowners presumably acted in reliance upon when purchasing the property, maintains the value of the landowner's property. Hence, the rule of accretion preserves the abutting landowner's access to his property. *Cf. Taylor v. Carpenter*, 45 Ohio St. 2d 137, 341 N.E.2d 843 (1976) (syllabus) (“[u]pon vacation of an alley by a city, abutting lot owners, as to that portion of the alley abutting their properties, are vested with a fee simple interest in one-half of the width of the strip of land which formerly comprised the alley, irrespective of the fact that the original owner and dedicator of the land was not the predecessor in title to all such abutting lot owners; subject, however, to those rights which other owners might have in the alley as a necessary means of access to their properties”); *Greenberg v. L.I. Snodgrass Co.*, 161 Ohio St. 351, 119 N.E.2d 292 (1954) (syllabus, paragraph 3) (“[w]here the owner of a lot abutting on a street, which street is vacated during his ownership, conveys such lot by number and without reservation of any rights in the street, such conveyance transfers, in addition to the lot, all rights which the grantor may have acquired by reason of such vacation, even though the metes and bounds description in the conveyance extends only to the side of the street”); *City of Dayton v. Woodgeard*, 116 Ohio App. 248, 255, 187 N.E.2d 921 (Montgomery County 1962) (upon vacation of a street, the fee thereto does not revert to the original dedicator but accretes to abutting lot owners, subject only to such rights as such other owners may have in the street as a necessary means of access to their property).

Further, when a board of county commissioners vacates a public road, the fee that passes to the abutting landowners is subject to easements and the rights of landowners to access their property. *See* R.C. 5553.042; R.C. 5553.043; *see also* R.C. 723.08 (“the right of way and easement therein of any lot owner shall not be impaired” when a municipality vacates a dedicated street or alley). “Dedication of land ... creates an easement for public use, if the dedication is at common law, or a determinable or qualified fee in a municipality or other public agency, in the case of a statutory

dedication.” *Trotwood Congregation of Jehovah’s Witnesses, Dayton v. Measel*, App. No. 13471, 1993 WL 26776 (Montgomery County Feb. 4, 1993). Upon vacation of a street, the Ohio Supreme Court recognizes that the accretion to abutting lot owners of the fee is subject to those rights which other owners might have in the alley as necessary means of access to their properties. *Taylor v. Carpenter*, 45 Ohio St. 2d 137, 142-43, 341 N.E.2d 843 (1976); *Babin v. Ashland*, 160 Ohio St. 328, 340, 116 N.E.2d 587 (1953) (“there is no reverter to the dedicator or those claiming under him when such streets are vacated, but that the land occupied by the vacated portion of the street passes to the owners of land adjacent to and abutting thereon because of their private rights therein, as for access, ingress and egress”). Cf. *Krzewinski v. Eaton Homes, Inc.*, 108 Ohio App. 175, 179-80, 161 N.E.2d 88 (Lorain County 1958) (even if a street is not a public street, when potential purchasers of a subdivision lot are provided a plat of the subdivision reflecting a through highway within the plat referred to in the conveyance the completion of such a roadway is implied and becomes part of the purchase transaction; thus, the purchaser acquires from the seller the right to have the street upon which his land abuts kept open for travel throughout the length of the street as reflected within that plat or map, or easement by estoppel); *Finlaw v. Hunter*, 87 Ohio App. 543, 96 N.E.2d 319 (Hamilton County 1949) (syllabus, paragraph 3) (“[w]here a deed describes the lot conveyed by number and reference to an undedicated plat upon which the lot is shown to front upon a street, the grantor is estopped to deny the right of the grantee to use the land for street purposes, and the easement which the grantee acquires is not limited to that part of the described street in front of his lot but it extends to the whole street shown so far as it was owned by the grantor when the deed was executed”).

Additionally, public utility companies and railroads “have a permanent easement in the vacated portion of the street, highway, or road for the purpose of accessing, maintaining, operating, renewing, reconstructing, and removing [the] utility facilities” when a road is vacated. R.C. 5553.043. This permanent easement also “confers a right of ingress and egress to service and maintain [the] utility facilities and a right to trim or remove any trees, shrubs, brush, or other obstacles growing in or encroaching onto the permanent easement that may affect the operation, use, or access to those utility facilities.” *Id.*; see also R.C. 5553.045 (E)(1)-(3) (addressing a petition by township trustees to vacate a township road, rights of abutting landowners, and easements for service utilities). Vacation of a street or road also does not affect any rights to mine coal that an owner may have. See R.C. 5553.043. Thus, upon vacation of a public road, the fee that accretes to abutting landowners remains subject to easements for public utilities and railroads and the rights of landowners to access their property.

Conclusions

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

1. A public road vacated by a board of county commissioners passes in fee to those landowners whose properties abut the road pursuant to the principle of accretion. (1992 Op. Att'y Gen. No. 92-064, approved and followed.)
2. Upon vacation of a public road, the fee that accretes to abutting landowners remains subject to easements for public utilities and railroads and the rights of landowners to access their property.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive, flowing style.

MICHAEL DEWINE
Ohio Attorney General