

**OPINION NO. 80-039****Syllabus:**

1. A board of county commissioners may grant a license or permit to use the county's easement for road purposes to a private firm for geophysical exploration only if such exploration is incidental to road purposes and is for a public purpose, or if such firm has, by lease or otherwise, the consent of the abutting landowners and such use will not interfere with the county's road easement. R.C. 5547.05.
2. A board of township trustees is without authority to subordinate its easements for road purposes to a private firm for geophysical exploration, but the abutting landowners may, by lease or otherwise, permit such use. In the event such use is permitted, the township trustees may, by resolution, require such firm to obtain a permit for its excavations pursuant to R.C. 5571.16.

3. Prior to erecting any obstruction within the bounds of a highway, other than a state highway, the firm must also obtain the approval of the county commissioners pursuant to R.C. 5547.04.

**To: Thomas E. Ray, Morrow County Pros. Atty., Mount Gilead, Ohio**  
**By: William J. Brown, Attorney General, July 21, 1980**

I have before me your request for my opinion in which you inquire whether a board of county commissioners or a board of township trustees has the authority to grant an easement or license to a private corporation to conduct geophysical exploration along a county or township road right-of-way in either of the following situations:

1. The private firm has the right to conduct the exploration from abutting landowners by lease; or
2. The private firm does not have such right from abutting landowners.

I am assuming, for the purposes of this opinion, that by county or township road right-of-way, you refer to the easement for road purposes granted to the county or township, the fee to such lands to the middle of the road remaining in the abutting landowners.

It is, of course, fundamental that a county or township cannot convey an interest that it does not have or permit a use that it may not make itself. Hence, if the county's or township's easement is limited to road purposes, the county or township is without authority to permit a use that is not included in its easement for road purposes. Although you have not described the nature of the geophysical exploration or the purpose thereof, the geophysical exploration would appear not to be a use included in an easement for road purposes. In addition and as discussed later, even if the exploration is a use included in the easement for road purposes, the county or township may not permit the exploration unless it is also for a public purpose.

With this fundamental limitation in mind, I will begin by reviewing the authority of counties to dispose of their roadway easements. Pursuant to R.C. 5547.05, a board of county commissioners is expressly empowered to convey the use of highway lands not owned in fee by the county. That section provides, in part, as follows:

With respect to any portion of any highway in any county, or bridges or culverts thereon, which is not owned in fee simple by the county, the board of county commissioners of such county may grant the right to use any portion thereof in perpetuity or for such period of time as it shall specify, including areas or space on, above, or beneath the surface, together with rights for the support of buildings or structures constructed or to be constructed thereon or therein, provided that it shall determine and enter its determination on its journal, that the property made subject to a permit to use is not needed by the county for highway purposes.

. . . .

In any case where any county has acquired or acquires easements or permits to use areas or space on, above, or below the surface for any purpose, the board of county commissioners of such county may extinguish them in whole or in part or subordinate them to uses by others, provided that it shall determine and enter its determination on its journal, that the easements so extinguished or subordinated are not needed for county purposes.

No conveyance, easement, lease, permit, or other instrument executed pursuant to the authorization given by this section shall prejudice any right, title, or interest in any lands affected thereby which at the date thereof existed in any person, firm, or corporation, other than the county and other than members of the general public having no specific rights in said lands, unless such right, title, or interest was expressly subject to the right of the county to make such conveyance, grant such right, or execute such instrument and unless the county by such instrument expressly exercises such right. . . .  
(Emphasis added.)

R.C. 5547.05 further requires that all conveyances, grants, or permits to use "shall be made with competitive bidding" as required by R.C. 307.10, with certain exceptions not applicable here.

Although R.C. 5547.05 clearly gives a board of county commissioners the authority to grant to any person or firm the right to use the county's road easement, certain restrictions are placed upon this power. It must be determined that the land is "not needed for county purposes," and no instrument executed pursuant to R.C. 5547.05 may prejudice any title in lands affected thereby, unless such title was expressly subject to the right of the county to grant the use. Thus, unless the county's easement was for more than highway purposes or unless the instrument which created the county's easement expressly reserved in the county the power to grant a license or easement for purposes other than highway purposes, R.C. 5547.05 would appear to preclude the conveyance which you propose as the conveyance you propose does not appear to be for road purposes. Should, however, the private corporation have, by lease or otherwise, the authorization of the landowners to undertake geophysical exploration within the county's easement for road purposes, the county has the right to grant a license or use for geophysical exploration in accordance with the procedure set forth in R.C. 5547.05.

You have also inquired whether a board of township trustees may grant such a license or easement along township road right-of-ways.

I am aware of no provision analogous to R.C. 5547.05 dealing with township roads. Although R.C. 1723.02 gives a board of township trustees, as well as a board of county commissioners, the power to grant to the companies enumerated in R.C. 1723.01 the right to lay tubing, pipes, conduits, and wires in township roads or county roads, respectively, a firm or person engaged in geophysical exploration would not fall within the purview of R.C. 1723.01.

I recently opined that a board of township trustees has the implied power to alienate real property owned by the township and not needed for current public use. 1980 Op. Att'y Gen. No. 80-028. I am not inclined, however, to extend this implied authority to the alienation of the property not owned in fee by the township,<sup>2</sup> even

<sup>1</sup> As discussed later in this opinion, where there is authority therefor, the owner of a highway easement may subject such easement to uses incidental to the purpose of the easement, *i.e.*, public travel. In such a case, there is no additional burden placed upon the landowner's interest in the property, and, therefore, no necessity that there be payment of additional compensation. The result is *contra* where, as here, an attempt is made to subject the easement to a use that is apparently unrelated to highway purposes.

<sup>2</sup> In Ohio, an abutting property owner outside a municipality holds the title of the land in fee to the middle of the road subject to an easement (or right-of-way) for highway or street purposes. *Taylor v. Carpenter*, 45 Ohio St. 2d 137, 341 N.E. 2d 843 (1976); *DiBella v. Village of Ontario*, 4 Ohio Misc. 120, 212 N.E. 2d 679 (C.P. Richland County 1965).

assuming that the right-of-way for road purposes under consideration here is in the name of the township.<sup>3</sup> The result reached in Op. No. 80-028 was based primarily upon the Ohio Supreme Court case of Reynolds v. Commissioners of Stark County, 5 Ohio 204 (1831), which held that where real estate is "vested absolutely" in county commissioners, they may dispose of it in the same manner as could individuals. Certainly, the holder of an easement does not hold real estate which is "absolutely vested." Admittedly the holding of the Reynolds case could arguably control the instant situation. However, because of the well-settled countervailing principle that governmental bodies, such as township trustees, have only such powers as are expressly provided by or necessarily implied from statute, I am constrained to apply the holding of the Reynolds case only to situations where the real estate is held in fee by the governmental body and where there is no statute prohibiting or regulating such disposition. I conclude, therefore, that Op. No. 80-028 is inapplicable to an easement or right-of-way for road purposes.

However, even assuming, arguendo, that a township would have the implied power to alienate or subordinate an easement for road purposes, such easement probably cannot be subordinated to the use contemplated here since the contemplated use does not appear to be included in the township's easement or meet the other tests that are required before the township may subordinate the easement.

Several cases have dealt specifically with the transfer of easements for highway purposes, and for many years the courts in this state made a distinction between the uses to which roads within a municipality and without a municipality could be put. See Ohio Bell Telephone Co. v. Watson Co., 112 Ohio St. 385, 147 N.E. 907 (1925). See also Heck v. General Telephone Co., 72 Ohio Op. 2d 146 (C.P. Montgomery County 1975) (discussion of distinction between easements on rural and urban roads). But in Ziegler v. Ohio Water Service Co., 18 Ohio St. 2d 101, 247 N.E. 2d 728 (1969), the court rejected, for purposes of determining whether an unlawful additional burden had been placed upon abutting landowners, any theoretical distinction between municipal and non-municipal roads. The question presented in Ziegler was whether the grant of the use of a state easement for highway purposes to a private firm for the installation of water lines was an added burden on the landowner's property for which compensation must be made. The court, in upholding the grant, reasoned as follows:

Obviously, highways are primarily for the use of the public, in traveling from place to place. Although modern day travel on our highways is predominantly by motor vehicle, highways are certainly not limited to such use. The effect of the use of a highway upon abutting land has always been variable and subject to change. . . .

. . . A denial of the use of a highway for the purpose of transporting water to areas where it is needed, as in the instant case, would be a rejection of evolutionary change. [Citation omitted.] We therefore hold that the construction of water pipes in real property, for which an easement for highway purposes has been given, is not an added burden on such land, for which the owner must be compensated.

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<sup>3</sup> It is my understanding that, because of the nature of the statutes which have governed roads in Ohio, the easement for a township road is frequently owned by the county, rather than the township, and the ownership of a particular easement may be difficult to trace. Prior to the adoption of the Cass law in 1915, both counties and townships could established roads. See Chapter 1224, Vol. III Statutes of Ohio 2105 (Curwen 1854). Roads were then classified as either county roads or township roads depending upon which entity established the road. Since 1915, roads have been classified in accordance with the scheme set forth in R.C. Chapter 5535, and what is now a township road may have originally been a state road or a county road. See generally 1918 Op. Att'y Gen. No. 1300, p. 865.

We are aware that the defendant is a private corporation for profit. However, the project sought to be enjoined was undertaken pursuant to an agreement with the board of county commissioners, and is, therefore, presumed to be for the public purpose.

18 Ohio St. 2d at 105-06, 247 N.E. 2d at 731.

The rights of an assignee of an easement for highway purposes can be no greater than the rights of the original grantee, but in addition to the primary purpose of such easement for the convenience of public travel there are secondary purposes (e.g., sewers, drainage, and water mains) with which the abutting landowner has no right to interfere. Friedman Transfer & Construction Co. v. City of Youngstown, 176 Ohio St. 209, 198 N.E. 2d 661 (1964) (city, as assignee of state's easement, can install water pipes in plaintiff's property).

The import of these cases is that an easement for highway purposes may be assigned or aliened for purposes incidental to public travel. Thus, the construction of an elevated walkway over an existing walk, and the construction of buildings that are a source of some comfort, pleasure, or convenience to passers-by, have been held to be valid grants without the necessity of the payment of additional compensation to the landowner. State ex rel. Cincinnati Garage Co. v. Bird, 25 Ohio Misc. 69, 263 N.E. 2d 330 (C.P. Hamilton County 1970); Bramson v. City of Berea, 33 Ohio Misc. 186, 293 N.E. 2d 577 (C.P. Cuyahoga County 1971).

Implicit in all of the cases, however, is the grant of a use which is for the public's benefit. See, e.g., Zeigler, *supra* (must presume county's agreement with private firm is for a public purpose); Bramson, *supra* (city has the right to use street for all public purposes consistent with terms of dedication). The grant of a license to a private corporation to use a township's easement for road purposes for geophysical exploration would not appear to be incidental to public travel, nor have you indicated that a determination has been made that the exploration is for a public purpose. Thus, even if a township did have the power to alienate an easement for a township road, a grant for geophysical exploration would appear to be impermissible.

This does not mean, however, that the landowners themselves may not agree with the private firm to permit such exploration. As noted earlier, the abutting landowners own the fee to the middle of the road, and may use such land in any way not inconsistent with the public easement. Ohio Bell Telephone, *supra*; State v. Williams, 3 Ohio Op. 2d 429, 145 N.E. 2d 373 (C.P. Montgomery County 1957). The landowners may not, therefore, permit exploration which would actually interfere with the public way or the township's duty to keep the same in repair. Moreover, since excavations and drilling would likely be made during geophysical exploration, the board of township trustees may, by resolution, require that a permit be obtained by the firm in accordance with R.C. 5571.16 for any such excavations.

Finally, it should be noted that R.C. 5547.04 provides that no person, partnership or corporation shall erect any obstruction within the bounds of any highway, other than a state highway, without having first obtained the approval of the board of county commissioners. Hence, regardless of which of the above proves applicable, the private corporation is required to seek the approval of the county commissioners before placing any obstruction in the bounds of the highway.

Accordingly, it is my opinion, and you are advised, that:

1. A board of county commissioners may grant a license or permit to use the county's easement for road purposes to a private firm for geophysical exploration only if such exploration is incidental to road purposes and is for a public purpose, or if such firm has, by lease or otherwise, the consent of the abutting landowners and such use will not interfere with the county's road easement. R.C. 5547.05.

2. A board of township trustees is without authority to subordinate its easements for road purposes to a private firm for geophysical exploration, but the abutting landowners may, by lease or otherwise, permit such use. In the event such use is permitted, the township trustees may, by resolution, require such firm to obtain a permit for its excavations pursuant to R.C. 5571.16.
3. Prior to erecting any obstruction within the bounds of a highway, other than a state highway, the firm must also obtain the approval of the county commissioners pursuant to R.C. 5547.04.