

Note from the Attorney General's Office:

1976 Op. Att'y Gen. No. 76-043 was overruled by
1977 Op. Att'y Gen. No. 77-028.

OPINION NO. 76-043**Syllabus:**

1. Where an unmaintained, unimproved township road has been used solely by abutting land owners, their guests, their service suppliers, etc., for a period in excess of twenty-one years, such road has been "not in use", as this term is employed in R.C. 5553.042.

2. Under the terms of R.C. 5553.042, in the absence of formal vacation a township loses all interest in and right to township roads, streets, highways and alleys abandoned and not in use for a period in excess of twenty-one years. Where township rights to and in such roads have been lost through non-user and abandonment, township trustees have no duty and no authority to improve or maintain such roads.

To: Gary F. McKinley, Union County Pros. Atty., Marysville, Ohio
By: William J. Brown, Attorney General, June 9, 1976

I have before me your request for my opinion concerning the abandonment of township roads. Your question concerns an unimproved lane which you indicate was a part of a township road system a number of years ago. It is my understanding that a portion of this lane was formally vacated a number of years ago. The section of the lane in question was not formally vacated, but has not been maintained by the township or traveled or used by the public in general for the past 45 years. The section of the lane in question begins at the point where formal vacation occurred and extends to a cemetery. It has been used by property owners for ingress and egress and by area farmers driving farm machinery. Your questions are whether this section of the lane, although not formally vacated, has been abandoned by the township and whether the township trustees have any duty or authority to maintain or improve the section of land in question.

R.C. 5553.042 defines abandonment of township roads in the following terms:

"A township shall lose all rights in and to any public road, highway, street, or alley which has been abandoned and not used for a period of twenty-one years, formal proceedings for vacation as provided in section 5553.04 of the Revised Code not having been taken.
 . . ."

There are essentially three methods by which the public may divest itself of public streets, roads and ways when they are no longer of use to the public: first, through statutory procedures for vacation; second, through non-user and abandonment; third, through adverse possession. For discussion of

these concepts, see Fondriest v. Dennison, 8 Ohio Misc 75 (Ct. of Common Pleas, Tuscarawas County, 1966).

In considering whether non-user of a public road was sufficient to constitute abandonment, the Supreme Court of Ohio, in Nail & Iron Co. v. Furnace Co., 46 Ohio St. 544 (1899), held that where non-user by the public of a street within a city is relied upon as proving abandonment, such non-user must be shown to have continued for a period of 21 years. This conclusion rested on analogy to principles which control adverse possession and easements arising by prescription. The requirement that non-user be for a period of 21 years was codified into the language quoted above from R.C. 5553.042 in 1961.

One of my predecessors had occasion to consider the matter of when a public road, highway or street is "not in use", as this term is used in R.C. 5553.042, in 1964 Op. Att'y Gen. No. 1517. His conclusion in that opinion was that the term "not in use" means not in use by the public at large and that the use of a street by the abutting owners, their guests, milk trucks, etc., is not, alone, use by the public at large. I approve and follow this reasoning, particularly since, under the provisions of R.C. 5553.04, the location, establishment, alteration or vacation of a public road is to be for the public welfare or convenience. Under these provisions, a county or a township may not properly undertake the responsibility of expense of maintaining a road which is not used for the public welfare and convenience. R.C. 5553.02 further specifies requirements for the location of public roads in terms of public destinations and private residences or businesses served.

The language of R.C. 5553.042 is not permissive; it specifies that a township shall lose all interest in and right to public roads, highways, streets, or alleys which have been abandoned and not used for a period of twenty-one years where formal vacation proceedings have not occurred. It follows that the township trustees have no duty and, indeed, no authority to maintain a township road which has been subject to non-use and abandonment for a period in excess of twenty-one years.

It is, therefore, my opinion, and you are so advised that:

1. Where an unmaintained, unimproved township road has been used solely by abutting land owners, their guests, their service suppliers, etc., for a period in excess of twenty-one years, such road has been "not in use", as this term is employed in R.C. 5553.042.

2. Under the terms of R.C. 5553.042, in the absence of formal vacation a township loses all interest in and right to township road, streets, highways and alleys abandoned and not in use for a period in excess of twenty-one years. Where township rights to and in such roads have been lost through non-user and abandonment, township trustees have no duty and no authority to improve or maintain such roads.