

**OPINION NO. 82-012****Syllabus:**

County commissioners may remove a road from the county highway system pursuant to the statutory requirements of R.C. 5541.02 and in compliance with the provisions of R.C. 5553.02, and through such statutory procedure establish a township road from an already existing county road regardless of objections of township trustees.

**To: Ronald L. Collins, Tuscarawas County Prosecuting Attorney, New Philadelphia, Ohio**  
**By: William J. Brown, Attorney General, March 4, 1982**

I have before me your request for an opinion of the Attorney General regarding the following questions:

1. Is there any lawful procedure whereby [county commissioners] can unilaterally transfer established [county roads] to [townships] over the objection of township trustees?
2. Would it make any difference in your answer to the first question if the roads are dead-end rather than through roads?

In resolving the above stated questions, it is necessary to examine both the county commissioners' and township trustees' statutory powers and duties with regard to road systems within their respective jurisdictions.

R.C. 5535.01 divides the public highway system of the State of Ohio into three classes. There are state roads, which "include the roads and highways on the state highway system"; county roads, which are "established as a part of the county system of roads as provided in sections 5541.01 to 5541.03, inclusive, of the Revised Code. . ."; and township roads, which "include all public highways other than state or county roads." R.C. 5535.01(A)-(C) (emphasis added). Because of the emphasis of your questions, it is necessary to examine only the duties of county commissioners and township trustees in relation to county and township roads.

The county commissioners are specifically granted the power to locate, establish, alter or vacate roads by R.C. 5553.02, which states, in pertinent part:

The board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of roads as provided in sections 5553.03 to 5553.16 of the Revised Code. This power extends to all roads within the county, except that as to roads

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<sup>1</sup>It should be noted that while a city or village street is sometimes also a state, county, or township road, such street may also exist apart from the public highway system as provided for in R.C. 5535.01 and, in that situation, is entirely under the control of the municipal corporation in which it is located. R.C. 723.01. The State of Ohio has placed the streets of a municipal corporation under the control of local authorities and it is the municipal corporation which holds the deeds to such lands and is responsible for the establishment, improvement, maintenance and repair of the streets. This power has been long established and recognized as a "power of local self-government." Raynolds v. City of Cleveland, 2 Ohio C. C. (n.s.) 139 (Cuyahoga County 1902); Village of Perrysburg v. Ridgway, 108 Ohio St. 245, 140 N.E. 595 (1923). See Ohio Const. art. XVIII, §3 ("[m]unicipalities shall have authority to exercise all powers of local self-government. . .").

on the state highway system the approval of the director of transportation shall be had. (Emphasis added.)

This power extends to and includes all roads, even roads which will become township roads. There is, however, a limitation on the power of the county commissioners in that, as to roads on the state highway system, the approval of the Director of Transportation is required.<sup>2</sup> No corresponding approval by a township is required prior to the establishment by the county commissioners of township roads. 1956 Op. Att'y Gen. No. 6576, p. 373. See R.C. 5553.04 (procedure for establishing, altering, or vacating a public road).

Pursuant to R.C. 5535.01(C), any road which is not a county or state road is a township road and "[t]he board of township trustees shall maintain all such roads within its township." R.C. 5535.01(C); R.C. 5535.08 ("[t]he state, county, and township shall each maintain its roads, as designated in [R.C. 5535.01]"); R.C. 5571.02 ("[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair").

As noted in R.C. 5535.01(B), designation of a road as a county road is accomplished as provided in R.C. 5541.01 to 5541.03. R.C. 5541.01 provides for township trustees to make reports to the county commissioners "setting forth the relative value of each road in the township in consecutive order as a used highway, the kind of traffic over such road, its length and present condition, together with such other information as may be desired and requested by the board of county commissioners." See 1945 Op. Att'y Gen. No. 208, p. 181 (syllabus, third paragraph) (the same procedure "should be substantially followed by the county commissioners in a proceeding to add a township road to the system"). R.C. 5541.02 requires the commissioners, after considering the information furnished by the townships, to:

select and designate a connected system of county highways, of such mileage as it deems proper and expedient, connecting with the intercounty and state highways of such county all of the villages and centers of rural population within the county. Such system of highways, when selected and designated by the board of county commissioners, shall be known as the system of county highways of the county, and all of the roads composing such system shall be known and designated as county roads.

R.C. 5541.02 also provides that, after designating the system of county roads, the board of county commissioners shall require the county engineer to make a map of the roads and shall submit this map, with the mileage of the roads and a brief statement of the reasons for the selection made, to the Director of Transportation. R.C. 5541.02 continues:

If the director finds that the system has been designated in substantial compliance with this section and section 5541.03 of the Revised Code, and that all portions of the system of county highways connect with either a state or intercounty highway, or another county

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<sup>2</sup> R.C. 5553.02 also limits the places where a public road may be located or established.

<sup>3</sup> I note that, at the present date, there is a bill (if.B. No. 682) before the General Assembly which proposes an amendment to R.C. 5553.31 which would make the prior approval of township trustees mandatory when county commissioners accept for dedication roads that will become part of the township road system. However, since H.B. No. 682 has not been enacted, it remains that county commissioners may accept the dedication of township roads without approval by the township trustees. See generally 1960 Op. Att'y Gen. No. 1789, p. 655 (concerning establishment of a road by dedication under R.C. 5553.31).

road, he shall within sixty days approve such system and certify his approval to the board of county commissioners, which shall cause a copy of such map, approved by it, to be made a part of its records and shall cause a copy thereof to be filed in the office of the county engineer and of the clerk of each township within the county. The system of roads designated upon such map shall then become the system of county roads of the county.

Hence, the county commissioners have clear authority, with approval of the Director of Transportation, to designate which roads shall be county roads. As discussed above, a road which is not a state or county road is a township road, and the township in which it is located is responsible for its maintenance and repair.

Your request centers around the question of how established county roads may be changed to township roads. On this point, R.C. 5541.02 states: "The board of county commissioners may make changes in or additions to the county system as in the manner provided by this section." Thus, the county commissioners have authority to modify their determination of which roads should be county roads and to request the approval of the Director of Transportation for such modification. While R.C. 5541.02 does not state expressly that certain roads previously designated as county roads may have that designation changed so that they become township roads, such a conclusion is implicit in the language authorizing the commissioners to make "changes in" the county system. Even as there is no provision for township approval upon the dedication of a road or upon the initial designation of county roads, there is no provision for township approval of changes in the county road system. There is, however, a requirement that, before changes in the county road system become final, they must be approved by the Director of Transportation. R.C. 5541.02.

Since townships are creatures of statute, township trustees may exercise only those powers conferred by statute or such others as are necessarily to be implied from those granted, in order to enable them to perform their duties. Trustees of New London Township v. Miner, 26 Ohio St. 452 (1875). Prior to a 1915 revision of the highway laws of Ohio, 1914-1915 Ohio Laws 574, township trustees had the power to create township roads. Since such revision, however, as discussed earlier, the power has been exclusively vested in the county commissioners. See 1956 Op. No. 6576; 1930 Op. Att'y Gen. No. 2121, vol. II, p. 1170. The only express grants of power currently delegated to township trustees with respect to roads are those concerning road maintenance and repair. R.C. 5535.01(C) states that a 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." Further, R.C. 5571.02 provides that the board of township trustees "shall have control of the township roads of its township and shall keep them in good repair." See R.C. 5571.01. Township trustees may enter into an agreement with the county commissioners, pursuant to R.C. 5535.08, for "the repair and maintenance of the roads under the control of the other." However, such an agreement is explicitly limited by statute to the repair and maintenance of roads. No statute authorizes a township and county to agree to transfer the ultimate responsibility for their roads. See generally State ex rel. Kerr v. Neitz, 58 Ohio App. 135, 16 N.E.2d 236 (Lucas County 1937) (power of county commissioners to establish roads within a county is exclusive and cannot be transferred to board of township trustees).

I conclude, therefore, that township trustees do not have any discretion in the creation, alteration, or vacation of roads, and that county commissioners may create or establish a township road from an already existing county road if all statutory requirements are met and, thus, effectively transfer such road to the township trustees regardless of their objections.

Your second question refers to the fact that the roads in question are dead-

end rather than through roads. It appears that your question arises from the following language of R.C. 5553.02:

[N]o public road shall be located or established, by the board of county commissioners, unless the location or establishment begins on a public road and terminates on a public road, or begins on a public road and services a public park, a state supported educational institution, public school, public aviation area, or a public recreation area, or begins on a public road and services at least three private residences or businesses in the first five hundred feet and one private residence or business in each two hundred feet thereafter.

This provision states that the county commissioners may not locate or establish a public road which does not begin and terminate on a public road, unless the location or establishment begins on a public road and services one of the designated areas or facilities, or the necessary businesses or residences. This portion of R.C. 5553.02 was added to the statute "to insure that a road is established only upon need." 1976 Op. Att'y Gen. No. 76-051 at 2-172. See generally R.C. 5553.10 ("[a]ny part of the road made unnecessary by any change or alteration shall be ordered vacated").<sup>4</sup> Therefore, so long as a dead-end road begins on a public road and meets one of the other conditions set forth in R.C. 5553.02, the fact that the road is dead-end does not alter the county commissioners' authority with respect to the location or establishment of that road.

Therefore, it is my opinion, and you are so advised, that county commissioners may remove a road from the county highway system pursuant to the statutory requirements of R.C. 5541.02 and in compliance with the provisions of R.C. 5553.02, and through such statutory procedure establish a township road from an already existing county road regardless of objections by township trustees.

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<sup>4</sup>The procedure for vacation of roads is set forth in R.C. 5553.04 through .10.