

**OPINION NO. 88-054****Syllabus:**

A board of county commissioners does not have authority under R.C. Chapter 711 to enjoin deviation from the roadway access scheme depicted on a previously approved and recorded plat unless that deviation violates a subdivision regulation passed by the board pursuant to R.C. 711.101.

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**To: Robert P. DeSanto, Ashland County Prosecuting Attorney, Ashland, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, August 25, 1988**

I have before me your request for my opinion in which you ask:

Can a county force property owners to close their private driveways onto a county road...if the driveways were constructed in contravention of a plat which calls for a service drive with only two access points onto the county road?

A member of your staff has provided additional background information. The county road lies along a winding river bank and the curves in the road obstruct the line of sight of through traffic and the vehicles using the private driveway. There have been a number of accidents and near misses on the road. The county road has not been designated as a limited access highway. See R.C. 5535.02-.04; R.C. 4511.01(CC). However, the county does hold a fee simple title to the 60 foot wide strip of land on which the road is located, having purchased an old railroad bed in order to build the road. The driveways which cause your concern provide direct

access to the county road from individual lots of a platted subdivision which abuts the county road. The subdivision was platted in 1975 by a corporate owner. A notation at the bottom of the recorded plat indicates that ingress and egress to each lot would be only by a service road along the front of the lots, as indicated by a twenty-five foot easement accessing the county road at two points. The service road was to be maintained by the individual lot owners. The recorded plat also shows approval by the county engineer, regional planning commission, and county commissioners. The service road shown on the plat was used for a time but was never paved. It fell into disuse as the individual lot owners constructed their own driveways, directly accessing the county road. It is my understanding that the rules and regulations governing plats and subdivisions in your county, *see* R.C. 711.05; 711.10; 711.101 (statutory authorizations to promulgate rules), do not require or authorize the county commissioners to require service roads, restricted subdivision access to county roads or any assurance of construction of same as a precondition of subdivision plat approval, either as a general matter or in specific situations.<sup>1</sup> I further understand that you are not asserting that the service road designated on the plat is a public road.

In light of the above facts, you ask whether the board of county commissioners can enforce the plat provisions against the property owners. I note that my discussion and conclusions are limited to the narrow issue posed by your question, i.e., whether the county may enforce the plat directly. I specifically make no determination regarding the county's ability to curb or deny direct access to a county road pursuant to its authority over highways or by exercise of its property rights as fee simple titleholder of the land on which the county road is located. For discussion of the law related to these issues, *see generally State ex rel. Noga v. Masheter*, 42 Ohio St. 2d 471, 330 N.E.2d 439 (1975); *Richley v. Jones*, 38 Ohio St. 2d 64, 310 N.E.2d 236 (1974); *In re Appropriation of Lands for Highway Purposes: Masheter v. Diver*, 20 Ohio St. 2d 74, 253 N.E.2d 780 (1969); *State ex rel. Merritt v. Linzell*, 163 Ohio St. 97, 126 N.E.2d 53 (1955); *Circle Investment Co. v. City of Toledo*, 46 Ohio App. 2d 51, 345 N.E.2d 442 (Lucas County 1975), *motion to certify overruled* (S.Ct. Sept. 18, 1975); *In re Appropriation of Property for Highway Purposes: Director of Highways v. Kramer*, 23 Ohio App. 2d 219, 262 N.E.2d 561 (Trumbull County 1970).

R.C. Chapter 711 governs the platting of subdivisions. A plat must indicate streets, alleys, and roads. R.C. 711.02. I presume that the regional planning commission and the board of county commissioners granted their approval of the plat pursuant to R.C. 711.10 and R.C. 711.101. R.C. 711.10 states, in pertinent part:

Whenever...a regional planning commission adopts a plan for the major streets or highways of the county or region, then no plat of a subdivision of land within the county or region, other than land within a municipal corporation or land within three miles of a city or one and one-half miles of a village as provided in section 711.09 of the Revised Code, shall be recorded until it is approved by the...regional planning commission and the approval is endorsed in writing on the plat....The ground of refusal of approval of any plat submitted, including citation of or reference to the rule violated by the plat, shall be stated upon the record of the commission....

Any such...regional planning commission shall adopt general rules, of uniform application, governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the proper arrangement of streets or other highways in relation to existing or planned streets or highways or to the county or regional plan, for adequate and convenient open spaces for traffic,.... The rules may

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<sup>1</sup> I note, as an example of such a requirement, the regulations governing mobile home parks. O.A.C. 3701-27-09 (D)-(E) ("[n]o mobile home lot shall have a direct accessway for vehicles to a public thoroughfare....[t]he street system in a mobile home park shall have unobstructed access to a public thoroughfare").

provide for the modification thereof by the...regional planning commission in specific cases where unusual topographical and other exceptional conditions require such modification.

...However, no...regional planning commission shall adopt any rules requiring actual construction of streets or other improvements or facilities or assurance of such construction as a condition precedent to the approval of a plat of a subdivision unless such requirements have first been adopted by the board of county commissioners after a public hearing.<sup>2</sup>

R.C. 711.101 states, in pertinent part:

As to land falling within its jurisdiction or the jurisdiction of its planning commission,...the board of county commissioners, may adopt *general rules and regulations setting standards and requiring and securing the construction of improvements shown on the plats* and plans required by sections 711.05, 711.09 and 711.10 of the Revised Code.

Such rules and regulations may establish standards and specifications for the construction of streets, curbs...and other facilities, may require complete or partial installation of such improvements, and may make such installations a condition precedent to the sale or lease of lots in a subdivision or the issuance of a building permit for the improvement of a lot, and may require in lieu of actual construction a performance agreement and the furnishing of a performance bond or other guarantee or security for the purpose of assuring the installation of such improvements deemed necessary or appropriate in the public interest....under such conditions and time limitations as it may determine....

*Such rules and regulations may require the submission of plans and specifications for the improvements set forth in this section for approval as a condition precedent to the approval of a plat required by sections 711.05, 711.09, and 711.10 of the Revised Code, and may require the actual construction or agreement or assurance of such construction as a condition precedent to the approval required under said sections.* (Emphasis added.)

R.C. 711.102 states:

Whoever willfully violates any rule or regulation adopted by the legislative authority of a municipal corporation or a board of county commissioners pursuant to section 711.101 of the Revised Code or fails to comply with any order issued pursuant thereto, shall forfeit and pay not less than ten nor more than one thousand dollars.

Such sum may be recovered with costs in a civil action brought in the court of common pleas of the county in which the land lies....

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<sup>2</sup> I note that R.C. 711.05 gives the board of county commissioners similar regulatory authority over plats in areas solely under the jurisdiction of the board. R.C. 711.05 states, in pertinent part:

The board may adopt general rules governing plats and subdivisions of land falling within its jurisdiction, to secure and provide for the coordination of the streets within the subdivision with existing streets and roads or with existing county highways, for the proper amount of open spaces for traffic.... Where under the provisions of section 711.101 of the Revised Code the board of county commissioners has set up standards and specifications for the construction of streets, utilities, and other improvements for common use, such general rules may require the submission of appropriate plans and specifications for approval.

See also 1972 Op. Att'y Gen. No. 72-020 (syllabus, paragraph two) ("[w]here court action is necessary to enforce the subdivision regulations of a regional planning commission, the county prosecutor shall institute the action for any violation occurring in the county").

The board of county commissioners is a creature of statute and has only those powers conferred upon it by statute or necessarily implied therefrom. See, e.g., *State ex rel. Shriver v. Board of Commissioners*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraph two). The language of R.C. 711.05 relative to the regulatory authority of the board of county commissioners over plats and subdivisions is a broad grant of power, 1953 Op. Att'y Gen. No. 3285, p. 654, at 662, which includes the authority to require and regulate private roads in a subdivision, see R.C. 711.13 (sale of lots from plat of subdivision on which streets are private is not exempt from R.C. Chapter 711); 1963 Op. Att'y Gen. No. 398, p. 437 (syllabus, paragraphs two, three), and to coordinate subdivision traffic with existing highways. See R.C. 711.10, *supra*. However nothing in R.C. Chapter 711 gives the board of county commissioners authority to enforce every representation made on a plat solely on the basis that the board has approved the plat as drawn. The enforcement authority given to the board of county commissioners in R.C. Chapter 711 derives from the regulations the board chooses to pass.<sup>3</sup> The board may, in the first instance, withhold approval from a plat which does not conform to specific regulatory requirements. See, e.g., 1987 Op. Att'y Gen. No. 87-110, at p. 2-731 (board of county commissioners may not withhold approval of an inaccurate plat absent a regulation requiring accuracy); 1953 Op. Att'y Gen. No. 3343, p. 688 (syllabus, paragraph six) (approval or disapproval of a plat must be based on its compliance with standards set by rule). Pursuant to regulations passed under R.C. 711.101, the board of commissioners may require a performance bond or other assurance of construction improvements shown on a plat and pursue whatever legal

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<sup>3</sup> I recognize that the service road described on the plat may create an enforceable private right of easement in the individual lot owners in the subdivision. "An easement may be created by specific grant, prescription, or implication which may arise from the particular set of facts or circumstances." *Campbell v. Great Miami Aerie No. 2309*, 15 Ohio St. 3d 79, 80, 472 N.E.2d 711, 713 (1984). An easement may be implied from a conveyance with reference to a plat. *Trattar v. Rausch*, 154 Ohio St. 286, 95 N.E.2d 685 (1950). See also *Finlaw v. Hunter*, 87 Ohio App. 543, 96 N.E.2d 319 (Hamilton County 1949) (if a deed references a plat showing a street, non-acceptance of the street by the public does not affect the right of a grantee to use the street shown). Two courts have held that purchasers of lots in a subdivision whose deeds of conveyance describe the lots by reference to the recorded plat may compel the vendor-owner of the subdivision to open the streets shown on the plat, even though the streets are not dedicated to the public. *Beechler v. Winkel*, 59 Ohio App.2d 65, 392 N.E.2d 889 (Erie County 1978); *Kzrewinski v. Eaton Homes, Inc.*, 108 Ohio App. 175, 161 N.E.2d 88 (Lorain County 1958), *appeal dismissed* 169 Ohio St. 86, 157 N.E.2d 339 (1959) (no debatable constitutional question). Whether an easement in the service road was created by incorporation of the plat into individual deeds or some other means and whether such an easement continues to exist, given the lapse in usage, is dependent on facts not before me and is a question for determination by a court. However, assuming *arguendo* that an easement in the service road exists, it is a right which devolves only upon the owners of the lot and cannot be enforced by the board of county commissioners. *Bonebrake v. City of Columbus*, 6 Ohio N.P. (n.s.) 41, at 46, 18 Ohio Dec. 367, at 373 (C.P. Franklin County 1907) ("if it is a private way then the owners are the only persons who can complain [against encroachments upon their easement] and they are not complaining....the city can not take refuge behind the claim which some person else might make...."), *aff'd without opinion* 81 Ohio St. 545 91 N.E. 1125-26 (1910). See also *Beechler*, 59 Ohio App. 2d at 73, 392 N.E.2d at 894 (sale of a lot with reference to subdivision plat showing streets creates easements and rights in private owners separate from rights of the general public).

remedies the assurance provides for non-performance. Pursuant to R.C. 711.102, the board may bring a forfeiture action if failure to maintain the improvements shown on the plat violates any regulation passed under R.C. 711.101.

Therefore it is my opinion and you are hereby advised that a board of county commissioners does not have authority under R.C. Chapter 711 to enjoin deviation from the roadway access scheme depicted on a previously approved and recorded plat unless that deviation violates a subdivision regulation passed by the board pursuant to R.C. 711.101.