

OPINION NO. 86-005**Syllabus:**

1. A company acting under authority of R.C. 4153.11(B) need not obtain the permit required by R.C. 4153.11(A) in order to conduct the activities authorized by R.C. 4153.11(B), unless such company will also engage in any of the activities described in R.C. 4153.11(A).
2. Pursuant to R.C. 5571.16, the board of township trustees may, by resolution, require a company conducting those activities authorized by R.C. 4153.11(B) to obtain a permit before making any excavation in a township road.
3. R.C. 5553.04 does not require a company to follow the procedures set forth in that section before making an excavation in a township road to conduct those activities authorized by R.C. 4153.11(B).

4. R.C. 5547.04 does not require a company to obtain the approval of the board of county commissioners in order to excavate in a township road for the purpose of conducting those activities authorized by R.C. 4153.11(B).

To: Joseph L. Cain, Gallia County Prosecuting Attorney, Gallipolis, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, February 20, 1986

I have before me your request for my opinion concerning the procedures which a coal company must follow in order to mine coal beneath a township road. You specifically ask: 1) whether R.C. 5553.04 requires the coal company to obtain a permit to excavate the coal, and 2) whether a company acting under R.C. 4153.11(B) must obtain the permit provided for in R.C. 4153.11(A). You also ask whether R.C. 5571.16 is pertinent in determining the procedure required of the coal company seeking to do the excavation. The underlying concern appears to be whether the coal company is required to obtain a permit from the township or the county in order to excavate coal from beneath the township road. Since you have not asked, this opinion will not consider whether the coal company must obtain the approval of any other public body prior to mining the coal. It is my understanding that the coal company is the owner of land over which the township road passes.

For ease of discussion I will first address your second question which concerns the application of R.C. 4153.11 to the situation you present. R.C. 4153.11(A) provides generally that, absent a permit from the public authority charged with the maintenance of the public road and absent approval of the chief of the division of reclamation in the Department of Natural Resources, "no person, firm, or corporation, engaged in mining or quarrying any mineral, coal, stone, or clay, shall: (1) Extend any part of an open pit excavation closer than fifty feet of horizontal distance to any part of a public road; (2) Deposit mine refuse or removed overburden" within specified distances from the road. R.C. 4153.11(A) also sets forth the procedure for applying for "such a permit," which shall be issued by the public authority upon approval of the chief of the division of reclamation and deposit of the necessary surety bond.

R.C. 4153.11(B) states, in pertinent part: "Any person, firm, or corporation owning any land containing mineral, coal, stone, or clay, and over any portion of which any state, county, or township road or public highway passes, may drill, excavate, mine, or quarry through or under such road." R.C. 4153.11(B) further specifies that before such work is started, the person, firm, or corporation must furnish an appropriate bond which "shall be conditioned that while crossing over or mining or quarrying under any such road, a safe and unobstructed passageway or road shall be kept open by such person, firm, or corporation for the public use, and as soon as practicable, such road shall be fully restored to its original safe and passable condition." As specified in R.C. 4153.11(B), the "right to mine or quarry across or under public highways as provided in this section, shall accrue to the owner, lessee, or agent of the land upon or through which such highway passes."

In the situation you present, a coal company seeks to excavate for coal under a township road which passes over land owned by the coal company. The authority for the company to conduct such activity is clearly granted by R.C. 4153.11(B), so

long as the company complies with the conditions set forth in that division. Your question, however, asks whether the permit requirements set forth in division (A) of R.C. 4153.11 also apply to those entities engaging in the activities described in division (B) of that section.

As set forth above, R.C. 4153.11(A) restricts the activities of any person, firm, or corporation while mining or quarrying any mineral, coal, stone, or clay. Unless such entity has obtained a permit from the appropriate public authority and the approval of the chief of the division of reclamation, R.C. 4153.11(A) prohibits such entity from extending an open pit excavation closer than fifty feet to a public road and from depositing mine refuse or removed overburden closer than a certain distance from or higher than a certain distance above a public road. R.C. 4153.11(A) goes on to state: "Any person, firm or corporation desiring such a permit shall apply in writing therefor to the proper public authority, and shall describe in such application the excavating or depositing of mine refuse or removed overburden which it will do and for which it requests a permit" (emphasis added). The fact that the General Assembly used the term "such a permit" in the above-quoted sentence leads me to conclude that the legislature intended to refer to a permit required for the two activities described in the first paragraph of R.C. 4153.11(A), specifically, extending an open pit excavation closer than fifty feet to a public road or the depositing of mine refuse or removed overburden in the manner described therein. Thus, a person, firm, or corporation which desires to conduct those activities described in R.C. 4153.11(B) need not obtain the permit required by R.C. 4153.11(A), unless, of course, such entity will also engage in any of the activities described in R.C. 4153.11(A).

Further support for this conclusion is found by comparing divisions (A) and (B) of R.C. 4153.11. I note, initially, that pursuant to R.C. 4153.99, "[w]hoever knowingly violates any section of [R.C. Chapter 4153] is guilty of a minor misdemeanor." Violation of R.C. 4153.11 is, therefore, a criminal action, and, consequently, R.C. 4153.11 must be strictly construed against the state. See R.C. 2901.04(A) ("[s]ections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused"). Applying the rule of strict construction, it is apparent that divisions (A) and (B) of R.C. 4153.11 impose restrictions upon separate classes, division (A) referring to any "person, firm, or corporation, engaged in mining or quarrying any mineral, coal, stone, or clay," division (B) referring to a more limited class, "[a]ny person, firm, or corporation owning any land containing mineral, coal, stone, or clay, and over any portion of which any state, county, or township road passes." Similarly, the activities governed by divisions (A) and (B) are described in distinct terms, division (A) referring to the extension of an open pit excavation and the depositing of mine refuse and removed overburden, division (B) referring to drilling, mining, excavating, or quarrying through or under a public road which passes over land owned by the entity conducting such drilling, excavating, mining or quarrying. Further, division (A) prescribes the necessary steps a person, firm, or corporation must follow in order to obtain a permit to conduct the activities described in that division. In order to obtain such a permit, the entity must obtain the approval of the chief of the division of reclamation and deposit the necessary surety bond. In contrast, division (B) is silent as to whether a

permit is required in order to conduct the activities described therein. Division (B) does, however, specify that before work under that division may be commenced, the person, firm, or corporation must execute and deliver a bond to the appropriate public authority. Since divisions (A) and (B) separately state the necessity of providing a bond, and since only division (A) requires the securing of a permit, it is clear that the General Assembly set forth separate procedures to be followed under each division. Thus, a person, firm, or corporation which intends to engage in the activities described in R.C. 4153.11(B) need not obtain the permit required under R.C. 4153.11(A). As set forth above, however, if the person, firm, or corporation will also engage in any of the activities described in R.C. 4153.11(A), such entity is required to obtain a permit in the manner set forth in that division.

You also ask whether R.C. 5571.16 empowers a board of township trustees to require a permit to conduct the activities described in R.C. 4153.11(B). R.C. 5571.16 states:

The board of township trustees may, by resolution, require any person, firm or corporation to obtain a permit before making any excavation in a public highway within its jurisdiction. The board may, as a condition to the granting of such permit:

(A) Require the applicant to submit plans indicating the location, size, type, and duration of the excavation contemplated;

(B) Specify methods of excavation, refilling, and resurfacing to be followed;

(C) Require the use of such warning devices as it deems necessary to protect travelers on the highway;

(D) Require the applicant to indemnify the township against liability or damage as the result of such excavation;

(E) Require the applicant to post a deposit or bond, with sureties to the satisfaction of the board, conditioned upon the performance of all conditions to such permit.

Applications for permits under this section shall be made to the township clerk upon forms to be furnished by the board. Such applications shall be accompanied by a fee of two dollars, which shall be returned to the applicant if the application is denied.

No person shall make an excavation in any township highway in violation of any resolution adopted pursuant to this section; except that, in the case of an emergency requiring immediate action to protect the public health, safety, and welfare, an excavation may be made without first obtaining a permit, if such application is made at the earliest possible opportunity. (Emphasis added.)

This statute speaks in broad terms and authorizes the board of township trustees to adopt a resolution requiring a permit of "any" person, firm or corporation seeking to excavate in a public highway in its jurisdiction. See generally 1980 Op. Att'y Gen. No. 80-043 (syllabus, paragraph three) ("[a] board of township trustees has the authority pursuant to R.C. 5571.16 to adopt a resolution requiring any person to secure a permit from the board of township trustees before any excavation is made in a township road").

The question arises, however, as to whether those entities described in R.C. 4153.11(B) may be required by R.C. 5571.16 to

obtain a permit from the board of township trustees in order to conduct the activities authorized by R.C. 4153.11(B). I have been unable to find any case law or Attorney General opinions discussing the interplay of R.C. 4153.11(B) and R.C. 5571.16, although two prior opinions do discuss the relation of the permit procedure established by R.C. 5571.16 and various other statutes and may, therefore, be instructive in analyzing your question.

Op. No. 80-043 involved a situation where a corporation engaged in oil and gas drilling sought to install gas transmission lines within the right-of-way of a township road. The opinion concluded that, in order to install its gas transmission lines, the company had to obtain the approval of the county commissioners pursuant to R.C. 5547.04.¹ Concerning the approval of such installation by the board of township trustees, the opinion noted that, pursuant to R.C. 1723.02,² a board of township trustees could grant the right to lay pipes in township roads, subject to the regulations and restrictions prescribed by the board. Further, the opinion states at 2-182 to 2-183: "In addition to the above-cited sections that give townships express authority to approve the installation of certain facilities, there is other authority in Title 55 that would enable the township to require a company to seek its approval before placing any facilities in the township road right-of-way." After setting forth the provisions of R.C. 5571.16, the opinion continues:

Hence, the township trustees may, by resolution, require any corporation to obtain a permit before making any excavation in a public highway within the township's jurisdiction. If such a resolution is in effect, it would appear to apply to a company undertaking a project of the sort you have described as some excavation would of necessity take place in order to install the pipes and conduits in the township road. The use of the word "may" in R.C. 5571.16 makes clear that the township's authority to become involved in the process under this section is permissive. Thus, if the township desires to become involved in the approval process for installation of any sort of facilities in a township road, R.C. 5571.16 provides the township the authority to do so. See also R.C. 5571.09 (authorizing trustees to maintain any suit involving any injury to any township road); R.C. 5571.10 (imposing upon township trustees in their official capacities liability for their failure to carry out their official duties).

Id. Op. No. 80-043 thus concludes that, pursuant to R.C. 5571.16, a board of township trustees may require a permit for any excavation in a public highway within the township's jurisdiction, even though other sections of the Revised Code address the same subject.

¹ R.C. 5547.04 provides, in part, that no person, partnership, or corporation shall erect any obstruction within the bounds of a highway, other than a state highway, without first obtaining the approval of the board of county commissioners.

² R.C. 1723.02 states, in pertinent part, that the board of township trustees may grant certain companies the right to lay pipes within a township road, subject to such regulations and restrictions as the officials may prescribe.

The township trustees' authority to require a permit under R.C. 5571.16 was also discussed in 1980 Op. Att'y Gen. No. 80-039. In that opinion my predecessor concluded that the abutting landowners could authorize a company to conduct geophysical exploration along a township road right-of-way, so long as such exploration did not interfere with the public way or the township's duty to keep the same in repair. The opinion then states, at 2-167: "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."

From the analysis set forth in Op. No. 80-043 and Op. No. 80-039, it appears that R.C. 5571.16 authorizes a board of township trustees to require a permit for excavation in any road within the township's jurisdiction, even though the entity may be authorized by statute or otherwise, as in Op. No. 80-039, to conduct such excavation. Thus, in the situation you pose, although R.C. 4153.11(B) authorizes the coal company to excavate under the township road, the board of township trustees may, by resolution, require the company to obtain a permit in accordance with R.C. 5571.16 in order to conduct such excavation.

You also ask whether R.C. 5553.04 requires the coal company to obtain a permit from the board of county commissioners, since the company proposes to close the township road for a period of three years. R.C. 5553.04 states:

When the board of county commissioners is of the opinion that it will be for the public convenience or welfare to locate, establish, alter, widen, straighten, vacate, or change the direction of a public road, it shall so declare by resolution, which resolution shall set forth the general route and termini of the road, or part thereof, to be located, established, or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed.

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 locate, establish, alter, widen, straighten, vacate, or change the direction of a public road, such 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 such improvement, it may proceed to make such improvement as provided in sections 5553.04 to 5553.16, inclusive, of the Revised Code. Such petition shall set forth the general route and termini of the road, or part thereof, to be located, established or vacated, or the general manner in which such road is to be altered, widened, straightened, or the direction thereof changed. When the board declares by resolution its intention to proceed with the improvement, it may also provide in such resolution for the establishment of an appropriate detour route or for the temporary closing of the road to be improved. When the petition presented to the board for a proposed improvement as provided in this

section, is a petition signed by the owner of the right to mine coal lying under or adjacent to the proposed improvement, such petitioner shall pay the costs and expenses incurred by such board in connection with the proceedings initiated by such petition, and the costs and expenses of making such improvement including compensation and damages, and including the cost of relocation of any conduits, cables, wires, towers, poles, or other equipment or appliances of any public utility, located on, over, or under the portion of the road affected by such improvement, and, on demand by the board, shall give bond to the satisfaction of the board in such amount as the board determines, to secure the payment of all such costs and expenses.

R.C. 5553.04 establishes the procedure which must be followed in order to "locate, establish, alter, widen, straighten, vacate, or change the direction of a public road." In the situation you pose, R.C. 5553.04 would apply only if the proposed excavation is considered to be an alteration, vacation or change in the direction of the road. After reading the scheme set forth in R.C. Chapter 5553, however, it appears that the coal company's actions do not fall within the provisions of R.C. 5553.04. Although not expressly stated in R.C. Chapter 5553, the improvements authorized by that chapter appear to be of a permanent nature. For example, R.C. 5553.10 states, in pertinent part:

If the proceeding is for the location or establishment of a road, the board shall open up the road as established and such road shall be a public road, and shall be kept open, maintained, and improved as provided by law. If the proceeding is for the vacation of a road, the board shall order the road vacated and it shall cease to be a public road. The board shall furnish the director of natural resources with a full and accurate description or map of any right of way retained for public nonmotorized vehicular recreational use. If the proceeding is for the alteration, widening, straightening, or change in the direction of a road, the board shall make the necessary order to accomplish such purpose. Any part of the road made unnecessary by any change or alteration shall be ordered vacated.

See generally McQuigg v. Cullins, 56 Ohio St. 649, 47 N.E. 595 (1897) (vacation of a township road relieves the public of any duty to keep it in repair).

In the situation you pose, where the company is acting under authority of R.C. 4153.11(B), the bond required of the company "shall be conditioned that while crossing over or mining or quarrying under any such road, a safe and unobstructed passageway or road shall be kept open by such person, firm, or corporation for the public use, and as soon as practicable, such road shall be fully restored to its original safe and passable condition." Clearly, the activities authorized by R.C. 4153.11(B) effect only a temporary alteration or change in the road, and compliance with the procedure set forth in R.C. 5553.04 is not required.

Although you have not specifically asked about the possible application of R.C. 5547.04 to the circumstances you describe,

I feel it is necessary to discuss the requirements of that statute which states, in pertinent part:

The owner or occupant of lands situated along the highways shall remove all obstructions within the bounds of the highways, which have been placed there by them or their agents, or with their consent.

....
No person, partnership, or corporation shall erect, within the bounds of any highway or on the bridges or culverts thereon, any obstruction without first obtaining the approval of the board [of county commissioners] in case of highways other than roads and highways on the state highway system and the bridges and culverts thereon.

....
The board shall enforce this section and, in so doing, may avail itself of section 5547.03 of the Revised Code.

See R.C. 5547.03 (removal or relocation of objects deemed by the board of county commissioners to be obstructions in a highway). The provisions of R.C. 5547.04 were interpreted in Op. No. 80-039, discussed above, concerning the use of a county or township road in geophysical exploration. Op. No. 80-039 concluded in paragraph three of the syllabus that, "[p]rior 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." Similarly, Op. No. 80-043, discussed above, addressed the question "whether pipes or conduits in a township road are obstructions within the bounds of a highway for purposes of R.C. 5547.04." Op. No. 80-043 at 2-180. The opinion then concluded that, "an 'obstruction' is any object that has the potential of interfering with the highway easement. An object could interfere with the easement without hindering the flow of traffic or the construction or maintenance of the highway. Whether an object interferes with the easement will depend upon the nature of the object, its size, and its precise location." Op. No. 80-043 at 2-181. The opinion then reasoned that since pipes have the potential of interfering with future construction and maintenance of the road, unless laid in a manner approved by the board of county commissioners, R.C. 5547.04 requires approval by the board before such pipes may be laid. The opinion then states, concerning the laying of pipes in a road other than a state road, that:

No restrictions have been imposed upon the authority of the county to grant or deny such approval. Hence, it is clear that the county has the authority to prescribe whatever conditions are reasonably necessary with regard to the maintenance or restoration of the roadway in granting approval for the erection of an obstruction pursuant to R.C. 5547.04.

Op. No. 80-043 at 2-184. Unlike the circumstances addressed in Op. No. 80-043, however, where a person, firm, or corporation is operating under R.C. 4153.11(B), the legislature has expressly provided for the maintenance of a "safe and unobstructed passageway or road" for the public use while the person, firm, or corporation is "crossing over or mining or quarrying under" the road, and for the full restoration of the road to its original safe and passable condition as soon as practicable. Thus, it appears that the activities authorized

by R.C. 4153.11(B) do not constitute obstructions and are not, therefore, encompassed within the provisions of R.C. 5547.04.

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

1. A company acting under authority of R.C. 4153.11(B) need not obtain the permit required by R.C. 4153.11(A) in order to conduct the activities authorized by R.C. 4153.11(B), unless such company will also engage in any of the activities described in R.C. 4153.11(A).
2. Pursuant to R.C. 5571.16, the board of township trustees may, by resolution, require a company conducting those activities authorized by R.C. 4153.11(B) to obtain a permit before making any excavation in a township road.
3. R.C. 5553.04 does not require a company to follow the procedures set forth in that section before making an excavation in a township road to conduct those activities authorized by R.C. 4153.11(B).
4. R.C. 5547.04 does not require a company to obtain the approval of the board of county commissioners in order to excavate in a township road for the purpose of conducting those activities authorized by R.C. 4153.11(B).