

**OPINION NO. 1517**

**Syllabus:**

1. A street is "abandoned" within the meaning of Section 5553.042, Revised Code, when the township fails to exercise control over it and otherwise manifests an intent to surrender its right to maintain it as a public way.

2. A street is "not in use" as that term is used in Section 5553.042, Revised Code, when it is not used as a way which is open to the public at large for transportation or travel.

3. The use of a street by the abutting owners, their guests, milk trucks, meter readers and the like does not prevent a board of county commissioners from determining under Section 5553.042, Revised Code, that such street has been abandoned and is not in use.

4. If a board of county commissioners acting pursuant to Section 5553.042, Revised Code, finds that a public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years, it must, by resolution, order such road, highway, street, or alley vacated.

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**To: Paul R. Young, Montgomery County Pros. Atty., Dayton, Ohio**  
**By: William B. Saxbe, Attorney General, November 3, 1964**

I have before me your request for my opinion which reads as follows:

"A petition has been filed with the Board

of County Commissioners pursuant to Section 5553.042 for vacation of a street in Harrison Township. The evidence shows that this street was dedicated in a plat filed for record in 1904 but that this street has never been accepted, improved, repaired or maintained as a street by the Township. Apparently all maintenance has been provided by the abutting property owners one of whom has constructed a private swimming pool on a portion thereof. There is also a fence, trees and lawn on portions of the street.

"I would appreciate your opinion on the following:

"1. What constitutes "abandoned and not used under the statute? Does the use of the street by the abutting owners, their guests, milk trucks, meter readers and the like constitute a non abandonment and use?

"2. Assuming the street has been abandoned and not used within the meaning of the statute, is the vacation thereof mandatory on the Board of County Commissioners?

The questions which you have presented for my determination require a consideration of Section 5553.042, Revised Code, for their answer. That Section reads in part as follows:

"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; and upon petition for vacation of such road highway, street, or alley filed with the board of county commissioners by any abutting landowners, if the board finds that said public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years as alleged in such petition, the board of county commissioners shall, by resolution, order the road, highway, street, or alley vacated \* \* \*"

According to the provisions of the above quoted statute, if there have been no formal proceedings for vacation as provided in Section 5553.04, Revised Code, any abutting land owner may file a petition with the board of county commissioners to vacate a public road, highway, street, or alley which has been abandoned and not used for a period of twenty-one years. After such a petition is filed, the board is to determine whether or not the public road, highway, street, or alley has been "abandoned and not used" for such period of time.

In order to determine whether or not a public road, highway, street, or alley has been "abandoned", it is necessary

to look to the meaning given to that word by the courts.

The Supreme Court of Virginia stated in Southern Ry. v. Commonwealth 128 Va. 176, 184, 105 S.E. 65, 67, that to "abandon" means: "to give up or to cease to use." In State ex rel. v. Seneca County Bank, 5 Ohio St., 171, the following definition of "abandon" is found at page 176:

"To forsake entirely, to renounce, to leave with a view never to return, to give up or resign without control, to yield, to relinquish or give over entirely; surrender; abdicate."

These definitions are in accord with the commonly understood meaning of the word "abandon" and in my opinion it is this meaning that was intended by the usage of this word, and its derivatives, in Section 5553.042, Revised Code.

When a board of county commissioners is seeking to determine whether or not a township has "abandoned" a particular road, highway, street, or alley, it must examine the actions of the board of trustees of the township with respect to such road, highway, street, or alley. If the board finds, upon consideration of the facts involved, that the board of trustees of the township has acted in a manner consistent with the definitions set out above in its treatment of such road, it should determine that such road, highway, street, or alley has been "abandoned", as that term is used in Section 5553.042, Revised Code.

In addition to finding that a public road, highway, street, or alley has been "abandoned", the board of county commissioners must also find that such road is "not in use" before it can be ordered vacated. It is my opinion that the term "not in use", as it appears in Section 5553.042, Revised Code, means not in use as a public road, highway, street, or alley. In order for the land in question to be considered so used, it must be used as a way which is open to the public at large for travel or transportation. Therefore, if land formally dedicated as such is used in some other capacity, but is not used as a way which is open to the public at large for travel or transportation, it is "not in use" as that term is used in Section 5553.042, Revised Code.

I am of further opinion that the use of the land dedicated for street purposes by the abutting owners, their guests, milk trucks, meter readers, etc., does not prevent a board of county commissioners from arriving at the conclusion that the street has been abandoned and is not used. When the statute here under consideration speaks of a public road, highway, street, or alley which has been abandoned and is not used, it is referring to land dedicated for such purposes which has been abandoned by the township and which is not used as a public road, highway, street or alley. The fact that the right of way in question has been put to a private use from time to time by certain citizens of the township does not preclude a board of county commissioners from determining that such right of way has been abandoned by the township, and that it is not used as a public road, highway, street, or alley.

In order to answer your second question, it is again neces-

sary to look to the language of the statute. This section of the Code provides that after a board of county commissioners has determined that the public road, highway, street, or alley in question has been abandoned and not used for twenty-one years, the board "shall", by resolution, order the road vacated. The word "shall" is usually interpreted to make the provision in which it is contained mandatory. State ex rel., v. Brown, 108 Ohio St., 454. Dennison v. Dennison, 165 Ohio St., 146. "Shall" is also generally construed to be mandatory when the right of the public or of third persons depends on the exercise of a power or the performance of a duty to which it refers. In Re Estate of Heimberger, 6 O. O. 51; Heid v. Hartline, 79 Ohio App. 323. Therefore, once it has been determined by the board that a road, highway, street, or alley has been abandoned and is not in use, Section 5553.042, Revised Code, makes it mandatory that the board, by resolution, order such road vacated.

In conclusion, it is my opinion and you are hereby advised that:

1. A street is abandoned within the meaning of Section 5553.042, Revised Code, when the township fails to exercise control over it and otherwise manifests an intent to surrender its right to maintain it as a public way.
2. A street is "not in use" as that term is used in Section 5553.042, Revised Code, when it is not used as a way which is open to the public at large for transportation or travel.
3. The use of a street by the abutting owners, their guests, milk trucks, meter readers and the like does not prevent a board of county commissioners from determining under Section 5553.042, Revised Code, that such street has been abandoned and is not in use.
4. If a board of county commissioners acting pursuant to Section 5553.042, Revised Code, finds that a public road, highway, street, or alley has been abandoned and not used for a period of twenty-one years, it must, by resolution, order such road, highway, street, or alley vacated.