

OPINION NO. 82-028**Syllabus:**

A board of township trustees lacks the authority to maintain a lane which has not been established as a township road by the board of county commissioners under R.C. 5553.02 or which has not been clearly established as a township road by prescription.

To: Richard L. Ross, Morgan County Prosecuting Attorney, McConneville, Ohio
By: William J. Brown, Attorney General, May 4, 1982

I have before me your request for my opinion regarding whether a board of township trustees has the authority to maintain a tract of land which may have been established as a township road by prescription. It is my understanding, pursuant to telephone conversations between your office and members of my staff, that a board of township trustees has been servicing a private lane, for an uncertain period of time in excess of twenty-one years, in the mistaken belief the lane was a township road. The road in question is a dead-end lane, between one quarter and one half mile in length, and is used almost exclusively by the adjacent property owner. The land has been identified by a road sign as a township road for an undetermined number of years, although the road was never established by the board of county commissioners as a township road pursuant to R.C. 5553.02, which empowers the board of county commissioners to establish all roads in the county, except roads on the state highway system.

It is a long standing rule of law in Ohio that townships have only those powers expressly or impliedly conferred upon them by statute. Hopple v. Trustees of Brown Township, 13 Ohio St. 311 (1862). While a board of township trustees is expressly empowered to maintain and repair roads, its authority to do so is limited to the maintenance and repair of township roads, and in certain circumstances, county roads, intercounty highways, and state highways. See R.C. 5535.08; R.C. 5571.02. As the lane in question was never established by the board of county commissioners as a township road, it is necessary to consider whether the lane may still have been established as such by prescription. If the lane has been established as a township road by prescription, R.C. 5535.08 and R.C. 5571.02 would authorize the board of township trustees to maintain it.

Roads may be established by prescription where it is shown that the general public has used a tract in a way adverse to the claim of the title holder under some claim of right for an uninterrupted period of twenty-one years. Railroad Co. v. Village of Roseville, 76 Ohio St. 108, 81 N.E. 178 (1907). In Smith v. Krites, 90 Ohio App. 38, 102 N.E.2d 903 (Allen County 1950), the court set out the following rules of law which apply to the establishment of roads by prescription.

1. It is not essential that possession for the full 21 years be continuous in one person, as the doctrine of tacking has been definitely adopted in Ohio. McNeely v. Langan, 22 Ohio St., 32; Zipf v. Dalgarn, 114 Ohio St., 291, 151 N.E., 174.

2. The public may have and attain prescriptive rights, and roads and streets may be established by prescription, and neither an intention to dedicate nor acceptance is necessary. Railroad Co. v. Village of Roseville, 76 Ohio St., 108, at page 117, 81 N.E., 178.

3. In order to create a right by prescription to a public street the user must be under a claim of right by the public, adverse to the owner, and continued without substantial interruption or change for a period equal to the statutory period of limitation in respect to actions for the recovery of real estate. City of Topeka v. Cowee, 48 Kan., 345, quoted with approval in Railroad Co. v. Village of Roseville, supra, at pages 117, 118.

4. Where one uses a way over the land of another, without permission, as an incident to his own land and continues to do so with the knowledge of the owner, such use is, of itself, adverse and constitutes evidence of a claim of right, and where the owner of the servient estate claims that the use was permissive, he has the burden of showing it. Pavey v. Vance, 56 Ohio St., 162, 46 N.E., 898.

Smith, 90 Ohio App. at 42, 102 N.E.2d at 905-06. Thus, given an appropriate set of circumstances, a township road could be established by prescription.

The factual situation set out above, however, appears to fail to meet at least one of the necessary elements for establishing a road by prescription. The fact that the lane has been used almost exclusively by the adjacent property owner suggests that there has not been an adverse use of the lane by the general public. In Oberhelman v. Allen, 7 Ohio App. 251 (Hamilton County 1915), the court held that a road had not been established by prescription, even though street signs had been erected on the road and the alleged street appeared in a street directory maintained by the police department and on a certain tax plat, in light of the fact that use of the road by the general public had been, at best, occasional. In Bauer v. Bush, 118 Ohio App. 151, 193 N.E.2d 529 (Crawford County 1962), the court held that the use of a tract by a small number of people to gain access to a garden and to haul coal and garbage was essentially of a private nature, and did not act to create a prescriptive right in the land or to establish it as a public alley.

Whether there has been sufficient adverse public use to create a prescriptive public right in the present case is ultimately a question of fact which only a court

can decide. However, where the lane has been used almost exclusively by the adjacent landowner, it would seem there has been insufficient public use to give rise to a prescriptive right establishing the lane as a township road.

The fact that it is not clear that the lane in question has been established as a township road by prescription, however, is dispositive of your question as to the authority of the township to maintain such lane in that it requires me to advise against the continued maintenance of this lane by the board of township trustees. As I noted in 1976 Op. Att'y Gen. No. 76-017 at 2-51:

Doubts as to the legality of public expenditures are to be resolved against the expenditures because measures which provide for spending public funds are to be strictly construed. State ex rel. Leis v. Ferguson, 149 Ohio St. 555 (1948). The Ohio Supreme Court has stated: "[I]n case of doubt that doubt is to be resolved not in favor of the grant but against it." State ex rel. Bentley and Sons Co. v. Pierce, 96 Ohio St. 44 (1917).

In this instance it is not clear this lane is a township road, and, therefore, the authority of the board of township trustees to maintain it is in doubt.

Therefore, it is my opinion, and you are advised, that a board of township trustees lacks the authority to maintain a lane which has not been established as a township road by the board of county commissioners under R.C. 5553.02 or which has not been clearly established as a township road by prescription.