

**OPINION NO. 2000-040****Syllabus:**

Pursuant to R.C. 4955.20 and R.C. 4955.21, if a railroad company fails to comply with an order of a board of township trustees to raise the grade of an approach to the company's railroad tracks on a township or county road that crosses the company's tracks at grade outside of a municipal corporation, the board may

raise the grade of the approach and bring a civil action against the company to recover the costs of the repair.

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**To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio**  
**By: Betty D. Montgomery, Attorney General, September 20, 2000**

You have requested an opinion about the payment of the cost of repairing approaches to railroad tracks that traverse county and township roads outside of municipal corporations. By way of background, you explain that many county and township roads are crossed at grade by railroad tracks that are raised by railroad companies two to three inches every three or four years in order to maintain and straighten the tracks. After straightening the tracks, the railroad companies resurface the area lying between the tracks and two to three feet on either side of the tracks. Because of this practice some grade crossings are now elevated six to eight feet above the grade of the road. This has made it difficult, if not impossible, to see oncoming traffic, and in some instances has caused motor vehicles with long chassis and wheel bases (*e.g.*, school buses and emergency vehicles) to become stuck on the tracks.

You have explained further that, if the county or a township does not take legal action against a railroad company that fails to maintain safe approaches to its railroad tracks, the township or county may be subject to liability on the basis that it has failed to keep its roads in repair or to remove obstructions therefrom. Accordingly, you wish to know whether a railroad company is required under R.C. 4955.20 and R.C. 4955.21 to pay the cost of raising the grade of approaches to its railroad tracks on township and county roads that cross the company's tracks at grade outside of municipal corporations.

Pursuant to R.C. 4955.20, a railroad company is required to keep in repair good and sufficient approaches at all points where public roads intersect its railroad tracks.<sup>1</sup> *Accord*

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<sup>1</sup> R.C. 4955.20 states, in pertinent part, that "[c]ompanies operating a railroad in this state shall build and keep in repair good and sufficient crossings over or approaches to such railroad, its tracks, sidetracks, and switches, at all points where any public highway, street, lane, avenue, alley, road, or pike is intersected by such railroad, its tracks, sidetracks, or switches." R.C. 4955.20 thus codifies the common law principle that a railroad company has a duty to afford motorists a safe, easy, and convenient way to cross its railroad tracks. 2000 Op. Att'y Gen. No. 2000-012 at 2-69 n.3. *See generally Matkovich v. Penn Cent. Transp. Co.*, 69 Ohio St. 2d 210, 431 N.E.2d 652 (1982) (syllabus, paragraph one) ("[a] railroad has a duty of ordinary care to protect the safety of motorists"). As explained in 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1575, at 389-90 (3rd ed. 1921):

At every crossing something must be done to make the highway safe for travel, and the duty, as a rule, rests upon the railway company to make such changes and to erect such structures as will make the highway reasonably safe for use. The railway company must erect and maintain such structures as are reasonably necessary to enable the traveler to get on, over and off the crossing in safety. Proper approaches and embankments necessary to enable a traveler to reach and leave the crossing are a part of the crossing and the railway company must construct and maintain them.

*Accord* Annotation, *Part or Extent of Highway Adjoining Railroad Crossing for Condition of Which Railroad Is Responsible*, 105 A.L.R. 547 (1936).

R.C. 4959.03; R.C. 5523.19; see *Brady v. Consolidated Rail Corp.*, 35 Ohio St. 3d 161, 164, 519 N.E.2d 387, 389-90 (1988); *Lent v. New York, Chicago & St. Louis Ry. Co.*, 69 Ohio App. 514, 44 N.E.2d 295 (Lucas County 1942); 2000 Op. Att'y Gen. No. 2000-012 at 2-68 and 2-69. Because no statute defines the term "approaches," this term must be accorded its common and ordinary meaning. R.C. 1.42. *Webster's New World Dictionary* 68 (2nd college ed. 1986) defines "approach," the singular of "approaches," as "a path, road, or other means of reaching a person or place; access." See generally R.C. 1.43(A) (in statutory construction, "the plural includes the singular"). The term "approaches," as used in R.C. 4955.20, thus refers to that portion of a public road necessary to enable motorists to access a crossing over railroad tracks. See generally *State ex rel. Schaefer v. Zangerle*, 43 Ohio App. 30, 36, 182 N.E. 644, 646 (Cuyahoga County 1932) ("[t]he approaches to a bridge comprise the traffic arteries leading to the ends of the bridge proper and such adjustment of the alignments and grades of said arteries in the immediate vicinity of such ends as is necessary to afford the maximum convenience of access and render available to the public the entire capacity of the bridge proper"); *Masheter v. The Ashland Pipe Line Co.*, 2 Ohio Misc. 179, 184, 208 N.E.2d 162, 166 (C.P. Richland County 1965) ("[a]n 'approach' means a road devoted solely to gaining access to a state highway").

R.C. 4955.20, therefore, imposes a duty upon a railroad company to keep in repair good and sufficient access to crossings over its railroad tracks. The discharge of this duty requires that a railroad company exercise its discretion in determining what constitutes good and sufficient access to crossings over its railroad tracks. See generally *Lake Shore & Mich. S. Ry. Co. v. Brazzill*, 6 Ohio Cir. Dec. 363, 13 Ohio C.C. 622 (Cir. Ct. Lucas County 1895) (where the incline of an approach constructed by a railroad company is safe and sufficient for all ordinary and regular purposes of travel, the company has complied with R.S. 3324, now R.C. 4959.03<sup>2</sup>). A railroad company's exercise of discretion in this regard is not conclusive, however. R.C. 4955.20 grants a board of township trustees the "power to fix and determine the kind and extent, and the time and manner of constructing ... approaches outside of municipal corporations." *Accord Hull v. Baltimore & Ohio R.R. Co.*, 37 Ohio App. 3d 94, 97, 524 N.E.2d 175, 178 (Franklin County 1987); see also R.C. 4955.21. If a board of township trustees chooses to exercise this power, the board must notify a railroad company that an approach to its railroad tracks must be repaired. R.C. 4955.21. The approach must then be repaired by the railroad company as so ordered by the board of township trustees. R.C. 4955.20; see R.C. 4955.21. If a railroad company fails to comply with the notice setting forth the manner in which the approach is to be repaired, the board of township trustees may perform the necessary repairs and bring a civil action against the company to recover the costs of the repair. R.C. 4955.21; see *Hull v. Baltimore & Ohio R.R. Co.*, 37 Ohio App. 3d at 97, 524 N.E.2d at 178; 2000 Op. Att'y Gen. No. 2000-012 at 2-72 n.6.

Pursuant to R.C. 4955.20 and R.C. 4955.21, therefore, a board of township trustees is vested with the authority to determine which repairs are reasonably necessary to ensure that motorists have good and sufficient approaches to crossings over railroad tracks that intersect a township or county road at grade. The determination whether a repair is reasonably necessary to make an approach good and sufficient is a question of fact. See generally *State ex rel. Schaefer v. Zangerle*, 43 Ohio App. at 37, 182 N.E. at 647 ("[i]n order to determine what are good and 'sufficient approaches or ways [to a bridge],' the county

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<sup>2</sup>R.C. 4959.03, which is substantially similar to R.S. 3324, provides, in relevant part, that "[b]efore operating a railroad, the company or person having control or management of such railroad shall maintain at every point where a public road, street, lane, or highway used by the public crosses such railroad, safe and sufficient crossings."

commissioners have to consider the nature and character of the bridge proper, the general territory to be served by such bridge, and the existing arteries in the immediate vicinity of the bridge"); 3 Byron K. Elliott & William F. Elliott, *A Treatise on the Law of Railroads* § 1575, at 391 (3rd ed. 1921) (because each particular kind of railroad crossing presents different conditions, it is impossible to set forth any rule defining just what kind of approach should be used at a particular crossing to ensure the safety and convenience of travelers using that crossing).

Because the opinion-rendering function of the Attorney General is not suited to resolving questions of fact, 1987 Op. Att'y Gen. No. 87-082 (syllabus, paragraph three), we are unable to determine conclusively whether, in a particular instance, a repair is reasonably necessary to make an approach good and sufficient to enable motorists to safely and conveniently access a crossing over railroad tracks. Rather, this determination must be made in each case by the township trustees, because they may more precisely determine the nature and character of a railroad grade crossing and the topography of the land in the immediate vicinity of a crossing. See *State ex rel. Schaefer v. Zangerle*, 43 Ohio App. at 37, 182 N.E. at 647.

Accordingly, if a board of township trustees determines that, in order to make an approach to a railroad company's tracks good and sufficient, it is necessary to raise the grade of a county or township road at the point where the road crosses over the tracks, the board, pursuant to R.C. 4955.20 and R.C. 4955.21, may order the railroad company to raise the grade of the road. If the railroad company fails to raise the grade of the road as ordered by the board of township trustees, the board may raise the grade of the road and bring a civil action against the company to recover the costs of the repair. R.C. 4955.21.

As a final matter, you state in your letter that railroad officials contend that they are responsible for paving only that portion of a road lying between the outside ends of the wooden ties. This contention is based upon the language of R.C. 5561.16, which states, in relevant part:

Any person, firm, or corporation operating a railroad for the transportation of passengers, freight, or express, crossing at grade any street or road, shall ... maintain, and repair that portion of the highway at such crossing and lying between the outside ends of the ties ..., and the cost and expense of this ... maintenance, or repair shall be borne by said individual, firm, or corporation.

While the specific language of R.C. 5561.16 controls over the general language of R.C. 4955.20 with respect to that portion of a road lying between the outside ends of the ties, see *City of Springdale v. CSX Ry. Corp.*, 68 Ohio St. 3d 371, 627 N.E.2d 534 (1994), R.C. 5561.16 does not address the repair of approaches to crossings over railroad tracks. R.C. 5561.16 thus does not govern the repair of such approaches. Instead, the repair of these approaches is governed by R.C. 4955.20.

Based upon the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 4955.20 and R.C. 4955.21, if a railroad company fails to comply with an order of a board of township trustees to raise the grade of an approach to the company's railroad tracks on a township or county road that crosses the company's tracks at grade outside of a municipal corporation, the board may raise the grade of the approach and bring a civil action against the company to recover the costs of the repair.