

OPINION NO. 88-080

Syllabus:

1. Absent a statutory appropriation by a board of county commissioners under R.C. 5553.03-.16, or a formal statutory dedication under R.C. 5553.31, a tract of land within a township may, depending upon the facts and circumstances of the particular case, be established as a public road or highway by common law dedication or by prescription.
2. A tract of land within a township that has been established as a public road or highway by common law dedication or by prescription shall be named, numbered, and mapped by the county engineer in accordance with the procedure set forth in R.C. 5543.04. (1965 Op. Att'y Gen. No. 65-15, followed.)
3. The right-of-way of a public road or highway established by common law dedication or by prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel.

To: Robert L. Herron, Columbiana County Prosecuting Attorney, Lisbon, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, October 13, 1988

You have requested my opinion on several questions addressed to the status of an improved public road within a township that has been used by the general public, and maintained by the township, for many years. You state that you have been unable to locate any information to indicate that the road in question was ever formally established by the board of county commissioners as a public way of travel. Your particular questions, therefore, are as follows:

1. Is a township road, which has been used by the public and maintained by the township for several years, a public road, by prescription or otherwise, even though it was never formally dedicated by the Board of County Commissioners?
2. If such a road is a public road, what is the width of the road right-of-way?
3. What actions should the Board of County Commissioners take to make the portion of the road in question part of the official county road records?

In your first question you ask whether a township road, which has been used by the public and maintained by the township for several years, is a public road, by prescription or otherwise, in the absence of a formal dedication of such road by the board of county commissioners. In 1987 Op. Att'y Gen. No. 87-046, I had occasion to review and discuss, *inter alia*, the various methods and procedures by which a tract of land within a township may be established as a public road or highway. On this point, Op. No. 87-046 states as follows at 2-304 to 2-306:

There are several methods by which a tract of land may be established as a public road or highway. See 1986 Op. Att'y Gen. No. 86-094; Op. No. 84-016. These include: (1) statutory appropriation; (2) statutory dedication; (3) common law dedication; or, (4) prescription. A board of county commissioners may, pursuant to R.C. 5553.03-.16, appropriate land for road purposes, and, by following the procedures enumerated therein, formally establish such land as a public road or highway. See, e.g., *State ex rel. Kerr v. Neitz*, 58 Ohio App. 135, 16 N.E.2d 236 (Lucas County 1937); Op. No. 84-016 at 2-51. A tract of land may also be established as a public road or highway by way of dedication. Dedication occurs when a landowner, having determined that certain lands should be used for road purposes, makes a gift of the land to the state or one of its political subdivisions for such purposes. See, e.g., *Railroad Co. v. Village of Roseville*, 76 Ohio St. 108, 81 N.E. 178 (1907); *Oberhelman v. Allen*, 7 Ohio App. 251 (Hamilton County 1915). R.C. 5553.31, which sets forth the procedure by which land may be statutorily dedicated for use as a public road, provides that, "[a]ny person may, with the approval of the board of county commissioners, dedicate land for road purposes." R.C. 5553.31 further provides that, in order to accomplish such dedication, a definite description of the lands to be dedicated with a plat of the lands attached and signed by the landowner, and with the approval and acceptance of the board endorsed thereon, shall be placed upon the proper road records of the county in which the prospective road is situated. Thereafter, "the proposal to dedicate lands for road purposes, together with the acceptance of the grant by the board, constitutes the lands so dedicated a public road." *Id.* See Op. No. 86-094 at 2-533 ("[u]nder R.C. 5553.31, the board of county commissioners must indorse its approval and acceptance of the dedication on the plat showing the lands to be dedicated" before the dedication will be effective to establish the land in question as a public road or highway). See also R.C. 711.041 (no plat certifying land outside a municipal corporation may be recorded without the approval of the county commissioners, but such approval by the board shall not be deemed to be an acceptance of the dedication of any public street, road, or highway dedicated on such plat); *Krzewinski 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)(that a plat of a subdivision was approved by the boards of county commissioners and township trustees does not make the roads described therein county or township roads); 1976 Op. Att'y Gen. No. 76-014 (same).

A common law dedication of land to public use results in the establishment of a public road or highway when there is a demonstrated "intention to dedicate, and an actual dedication on the part of the owner, and an acceptance [of such dedication] on the part of the public, which may be proved by the circumstances of the case." *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440, 446 (1858). See also *In Re Application of Loose*, 107 Ohio App. 47, 153 N.E.2d 146 (Franklin County 1958)(syllabus, paragraph two)(an intention by the owner of land to dedicate such land for county road purposes and the acceptance thereof by the board of county commissioners on behalf of the public, where such approval and acceptance is signed by the county commissioners, are sufficient to establish a common law dedication); *Oberhelman v. Allen*, 7 Ohio App. at 255. The acceptance of the dedication by a public authority may be express or implied, but in order to imply acceptance by the public, a public authority must take some positive action to indicate that it has taken control of the property, such as improving the street or road that has been dedicated. See, e.g., *State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. at 153, 174 N.E.2d at 243; *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. at 447-48. Further, the dedication of land by the owner may also be express or implied. *State ex rel. Litterst v. Smith*. As the court stated in *Litterst*, the dedication "is express when the *animus dedicandi* is expressly declared; it is implied when it arises by operation of law from the acts of the owner....Anything

which fully demonstrates the intention of the donor, or the acceptance by the public, is effectual." 87 Ohio App. at 517, 94 N.E.2d at 804-05.

Finally, a tract of land may be established as a public road or highway by way of prescription. *Railroad Co. v. Village of Roseville*, 76 Ohio St. at 117, 81 N.E. at 180; *Oberhelman v. Allen*, 7 Ohio App. at 259. See also *Smith v. Krites*, 90 Ohio App. 38, 102 N.E.2d 903 (Allen County 1950)(discussing the principles of law that apply to the establishment of public roads by prescription); Op. No. 82-028 at 2-83. As a general matter, a public road may be established by prescription where it is shown that the general public has used a tract of land in a way adverse to the claim thereto of the title holder of record under some claim of right for an uninterrupted period of at least twenty-one years. *Smith v. Krites* (syllabus, paragraph two).

See also 1986 Op. Att'y Gen. No. 86-094 at 2-534 and 2-535 (discussing common law dedication as a method of establishing certain land as a public road or highway); 1982 Op. Att'y Gen. 82-028 at 2-83 (setting forth the factors to be considered in determining whether a road may have been established as a public way of travel by prescription). Thus, in the absence of a statutory appropriation by the board of county commissioners under R.C. 5553.03-16, or a formal statutory dedication under R.C. 5553.31, a tract of land within a township may, depending upon the facts and circumstances of the particular case, be established as a public road or highway either by common law dedication or by prescription.

In your third question you ask about the actions the board of county commissioners should take to make the road in question a part of the official county road records. The answer to this question is provided by the terms of R.C. 5543.04, which addresses the role of the county engineer in naming, numbering, and mapping all public roads and highways within the county, other than intercounty and state highways. R.C. 5543.04 provides as follows:

The county engineer, under the direction and supervision of the director of transportation, shall name and number all the public roads of his county, other than intercounty and state highways and shall number all the bridges and culverts on such roads. All such roads shall be divided into sections where they are of sufficient length to warrant it. Such sections shall not exceed three miles in length and shall be numbered consecutively. This section shall extend to all roads on the north and east lines of each county. A map of such roads shall be made by the engineer, which shall show and identify by number, location, and length each such road and section thereof and all bridges and culverts. Such map shall show the location of public recreational trails preserved by the board of county commissioners under section 5553.044 of the Revised Code, municipal corporations, schoolhouses, churches, lakes, and rivers, and shall be made in township units.

As rapidly as the roads, bridges, and culverts of each township are located and numbered, the engineer shall enter in a book in his office, to be kept for that purpose, a description or identification thereof. A copy of such map shall be submitted to the director together with a report showing plainly and definitely the exact location of such numbered roads and sections thereof, bridges, and culverts and such other and further information as the director requires. All the duties required by this section shall be performed in accordance with the instructions of the director, who shall prescribe such forms and issue such instructions as he deems proper. Upon the approval by the director of each map and report, copies shall be filed by the engineer in his office and in the office of the board of county commissioners, and a copy of the map of each township shall be filed with the board of township trustees of such township. The road names, numbers, and section designations, and the bridge and culvert numbers shall be the official terms by which they are known. When a new road is established it shall be assigned a name and number by the engineer and if necessary divided into sections, or it may be added to an existing road, and the engineer shall note such new road, together with its official designation, on the copy of the map on file in his office and

report it to the director and board of county commissioners. (Emphasis added.)

In applying this section with respect to township roads presumably established by way of common law dedication, an opinion of one of my predecessors notes that under R.C. 5543.04, "it is the responsibility of the county engineer to make a map showing and identifying every public road within the county," 1965 Op. Att'y Gen. No. 65-15 at 2-38, and concludes that roads established by way of a common law dedication are to be numbered and mapped by the county engineer in accordance with the procedures set forth in that section, *id.* (syllabus, paragraph one) (roads may become public roads entitled to be put upon a county engineer's map, by virtue of continued public use for more than twenty-one years and maintenance of the surfaces and bridges during such period by township and county officials, which results in a conclusive presumption of common law dedication and acceptance as public roads). Subsequent opinions have neither overruled nor modified the reasoning or conclusions set forth in Op. No. 65-15. I am persuaded, therefore, that Op. No. 65-15 represents a correct interpretation of R.C. 5543.04 as applied to roads or highways that have been established either by common law dedication or by prescription. Thus, a road or highway that has been established by way of common law dedication or prescription shall be numbered and mapped by the county engineer in the manner described in R.C. 5543.04. Further, no other action need be taken in this regard by the board of county commissioners. Op. No. 65-15 (syllabus, paragraph two) ("[o]nce a road has become a public road by common law dedication and acceptance there is no necessity for such road to be thereafter officially dedicated as a public road").

Finally, you have inquired about the width of the right-of-way of a public road that has been established by way of common law dedication or prescription. Although several provisions in R.C. Title 55 (roads; highways; bridges) refer, in varying contexts, to a "right-of-way," *see, e.g.*, R.C. 5501.18 (employment of persons or firms by the Director of Transportation for the purpose, *inter alia*, of "negotiating the purchase of real estate, or negotiating the acquisition of easements in real estate, necessary for rights of way for state highways"); R.C. 5515.07 (the Director of Transportation shall promulgate rules and regulations consistent with the safety of the traveling public and consistent with the national policy "to govern the use and control of rest areas within the limits of the right-of-way of interstate highways and other state highways and in other areas within the limits of the right-of-way of interstate highways"); R.C. 5519.05 ("[t]he director of transportation, when he acquires property for highway purposes, either by purchase or appropriation, shall promptly monument the right-of-way line of the property acquired"); R.C. 5521.12 (advance purchase of road or highway right-of-way by a municipal corporation that is cooperating with the state in undertaking particular road or highway projects); R.C. 5529.03 (the Director of Transportation may acquire any interest, estate, or right in and to real property adjacent to the highways of the state for, *inter alia*, the "establishment of publicly owned and controlled rest and recreation areas and sanitary and other facilities within or adjacent to the right-of-way of said highways to accommodate the traveling public"); R.C. 5537.06 ("[t]he Ohio turnpike commission may acquire by appropriation any land, rights, rights of way, franchises, easements, or other property necessary for the construction or the efficient operation of any turnpike project"), there is no section within R.C. Title 55 that specifically defines that term. Nonetheless, the term is generally understood as referring to the easement acquired by the public in that portion of the land of the owner thereof over which a road or highway passes, with all the powers and privileges that are necessarily incident to such easement. *See, e.g., Ohio Bell Telephone Co. v. The Watson Co.*, 112 Ohio St. 385, 389, 147 N.E. 907, 908 (1925) ("outside the limits of a municipality, the fee to the land in the rural highway rests in the abutting landowner, subject only to such rights as are incident to and necessary for public passage, in other words, the right of the public to improvement, maintenance and uninterrupted travel"); *Dibella v. Village of Ontario*, 4 Ohio Misc. 120, 122, 212 N.E.2d 679, 681 (C.P. Richland County 1965) ("[i]n Ohio an abutting property owner in the country holds fee title to the middle of the highway or street subject to an easement for highway or street uses and purposes"); 1980 Op. Att'y Gen. No. 80-039 at 2-164 ("I am assuming, for the purposes of this opinion, that by county or township road right-of-way, you refer to the easement for road purposes granted to the county or township, the fee to such lands to the middle of the road remaining in the abutting landowners"). *See*

generally Masheter v. Diver, 20 Ohio St. 2d 74, 253 N.E.2d 780 (1969); *In Re Appropriation for Highway Purposes*, 12 Ohio App. 2d 169, 231 N.E.2d 498 (Trumbull County 1967). Thus, it appears that a road or highway right-of-way includes not only that portion of improved road surface that is actually used for travel by motor vehicles or other conveyances, but also so much of the land immediately adjacent thereto, and the use thereof, as facilitates such travel in a safe and efficient manner. Accordingly, in the case of a road or highway established by way of common law dedication or prescription, the road right-of-way includes both the improved road surface used for travel and as much of the land immediately adjacent thereto as is necessarily incident to the safe and efficient use of such road surface for actual travel. Depending upon the circumstances of the particular situation, the board of county commissioners, acting in concert with the county engineer, may determine the actual width of such right-of-way by following the appropriate procedures set forth in either R.C. Chapter 5553 (county roads; establishment; alteration; vacation), *see* R.C. 5553.18 (determining true line of road); R.C. 5553.20 (civil action to establish true line of road); R.C. 5553.21 (establishing true line of road by agreement) or R.C. Chapter 5555 (county road improvement), *see* R.C. 5555.02 (road improvements by board of county commissioners); R.C. 5555.06 (resolution by board; survey and plans to be prepared by county engineer). *See generally* 1964 Op. Att'y Gen. No. 1198, p. 2-253.

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

1. Absent a statutory appropriation by a board of county commissioners under R.C. 5553.03-.16, or a formal statutory dedication under R.C. 5553.31, a tract of land within a township may, depending upon the facts and circumstances of the particular case, be established as a public road or highway by common law dedication or by prescription.
2. A tract of land within a township that has been established as a public road or highway by common law dedication or by prescription shall be named, numbered, and mapped by the county engineer in accordance with the procedure set forth in R.C. 5543.04. (1965 Op. Att'y Gen. No. 65-15, followed.)
3. The right-of-way of a public road or highway established by common law dedication or by prescription includes both the improved road surface used for travel and as much of the land immediately adjacent thereto, and the use thereof, as is necessarily incident to the safe and efficient use of such road surface for actual travel.