

July 12, 2021

The Honorable Jeffrey D. Forbes
Symmes Township Law Director
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202

SYLLABUS: 2021-016

1. For purposes of R.C. 5553.04(B), a township road is an established public road if it satisfies the requirements of R.C. 5535.01(C).
2. For a road to be established through the process of dedication, there must be both a dedication of the road and a showing of acceptance of the dedication on behalf of the public.
3. A road that has not been constructed or improved might, but will not always, constitute a township road for purposes of R.C. 5553.04(B).
4. Whether a particular road in a township qualifies as an established public road is dependent on both the specific facts of the case and upon the laws in effect at that time—the question entails a case-by-case analysis.



DAVE YOST

OHIO ATTORNEY GENERAL

Opinions Section
Office (614) 752-6417
Fax (614) 466-0013

30 East Broad Street, 25th Floor
Columbus, Ohio 43215
www.ohioattorneygeneral.gov

July 12, 2021

OPINION NO. 2021-016

The Honorable Jeffrey D. Forbes
Symmes Township Law Director
600 Vine Street, Suite 2500
Cincinnati, Ohio 45202

Dear Law Director Forbes:

You requested an opinion regarding a portion of an unimproved right-of-way, commonly known as a “paper street.” Your question involves the applicability of R.C. 5553.04(B). You state that an owner of nearby land petitioned Hamilton County to vacate a portion of an unimproved right-of-way known as Willow Road. (I will use “the Road” when referring to the relevant portion of Willow Road.) Upon examining the Road, you are uncertain if the Road constitutes a township road for purposes of R.C. 5553.04(B). Specifically, you ask:

Can a portion of unimproved right-of-way, often referred to as a paper street, constitute a “township road” for purposes of R.C. 5553.04(B)?

Though you ask a single question, I find that the answer has four parts. First, I find that a township road, as used in R.C. 5553.04(B), is an established public road that satisfies the requirements of R.C. 5535.01(C). Second, establishment of a public road by the process of dedication requires acceptance on behalf of the public. Third, a currently undeveloped or unimproved road might, but will not always, constitute a township road for purposes of R.C. 5553.04(B).

Lastly, whether a particular road in a township qualifies as an established public road is dependent on both the specific facts of the case and upon the laws relating to establishment in effect at the relevant time—a determination that must be made on a case-by-case basis.

Before moving on, it is important to note a caveat. While this office is empowered to provide legal opinions on questions of law, the office is unable to resolve factual disputes. *See, e.g.*, 2001 Op. Att’y Gen. No. 2001-026, at 2-144. Because the question whether the Road is a township road for purposes of R.C. 5553.04(B) will turn to some extent on factual questions, therefore, a definitive answer cannot be provided.

I

A

I begin with the background necessary to answer your question. Here are the relevant facts, which I will assume true for purposes of this opinion. You state that, on its face, the Road is a “paper street,” which means that the Road is neither constructed, improved, nor maintained by Symmes Township. In addition, Symmes Township collects no gasoline tax in relation to the Road. You also state that the Road exists only on a plat showing the proposed location of a future public road. An initial review by the Hamilton County Engineer’s office indicated that the Road is considered “dedicated but not accepted.” This means that the Road was dedicated for a public road but that the Hamilton County Board of Commissioners did not accept the dedication. (More on the “dedication” requirement below.) Your review of other property records revealed that a 1947 resolution states that the Symmes Township Board of Trustees and the Hamilton County Board of Commissioners accepted the dedication of multiple roads set forth in the resolution as township roads. The Road is not

specifically addressed in the 1947 resolution, but another portion of Willow Road—a portion not petitioned for vacation—is stated in the resolution.

B

That was the relevant factual background. Here is the relevant legal background. While some of this gets convoluted, the bottom line is this: whether the Road qualifies as a “township road” for purposes of R.C. 5553.04(B) will depend on whether it was “established.”

Start by defining “township road.” “Before a highway may be opened and designated as a street, state road, county road, or township road, providing a way for public travel, it must first be ‘*established*’ as a public highway.” 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 3; 2-61 (Emphasis added). Once established, a public highway falls within one of three classes: state roads, county roads, or township roads. R.C. 5535.01; *see, e.g.*, 2002 Op. Att’y Gen. No. 2002-009, at 2-50. And one provision in particular R.C. 5535.01(C)—call it the (“Definitional Provision”)—defines “township roads” to “include all public highways other than state or county roads.”

Now consider the relevant laws governing vacation of a township road. R.C. 5553.04 provides the general procedure for how a board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of a public road. As noted in your request, R.C. 5553.04(B), enacted in 2019, states: “A board of county commissioners shall not adopt a resolution to vacate a *public road* that is a *township road* ... unless the applicable board of township trustees has adopted a resolution approving the vacation.” (Emphasis added). Breaking this down, R.C. 5553.04(B) applies only to “public roads” that are “township roads.” A “public road” is a public highway—in other words, an *established* road. *See* R.C. 5535.01 (public highways of the state are divided

into three classes of road); *see also* 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 3; 2-61 (“Establishment is an essential first step in providing the public with a highway”). And a “township road,” as the Definitional Provision makes clear, is any established road that is *not* a state or county road. Putting all this together, R.C. 5553.04(B) dictates the process for vacating an established road that is neither a county road nor a state road.

There are four ways in which a public road may be established. 1994 Op. Att’y Gen. No. 94-032, at 2-146; 1988 Op. Att’y Gen. No. 88-080, at 2-396; 1987 Op. Att’y Gen. No. 87-046, at 2-304. Before I set forth the methods, I must note that “[w]hether a particular tract of land has been established as a public road will depend, in part, upon the laws in effect at the time the establishment was attempted, and, in part, upon the factual circumstances of the particular case.” *E.g.*, 2000 Op. Att’y Gen. No. 2000-012, at 2-67. As such, a potential establishment that took place prior to the current law, such as the matter at hand, requires an examination of the pertinent laws in effect at that time.

The first method for establishing a road is “statutory appropriation.” Statutory appropriation “occurs where a board of county commissioners, in accordance with the procedures set forth in R.C. 5553.02-16, appropriates land for road purposes and formally establishes such land as a public road or highway.” *E.g.*, 1994 Op. Att’y Gen. No. 94-032, at 2-146; *see* 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 5, fn. 6; 2-63, fn. 6 (in addition to county commissioners’ authority to establish roads, *see* R.C. 5553.02-16, municipal corporations and the Director of Transportation also have authority to establish streets and state roads and, if necessary, appropriate land thereof).

The second method is appropriation by prescription. Appropriation by prescription occurs “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.” 1994 Op. Att’y Gen. No. 94-032, at 2-147, quoting 1987 Op. Att’y Gen. No. 87-046, at 2-306; 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 5; 2-63.

The final two methods involve different forms of “dedication,” which “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 purpose.” *E.g.*, 1988 Op. Att’y Gen. No. 88-080, at 2-396. Dedication comes in two forms: statutory dedication and common-law dedication. 1999 Op. Att’y Gen. No. 99-005, at 2-28; 1994 Op. Att’y Gen. No. 032, at 2-147. “In order to establish a public road by either dedication procedure, there *must be acceptance of such grant on behalf of the public.*” 1994 Op. Att’y Gen. No. 94-032, at 2-147; 1999 Op. Att’y Gen. No. 99-005, at 2-28 to 2-29; 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 4; 2-62. (Emphasis added).

Regarding statutory dedication, “R.C. 5553.31 requires the landowner to provide ‘[a] definite description of the lands to be dedicated with a plat of such lands thereto attached and signed by the party dedicating such lands, with the approval and acceptance of the board [of county commissioners] indorsed thereon.’” 1994 Op. Att’y Gen. No. 94-032, at 2-147, quoting 1987 Op. Att’y Gen. No. 87-046, at 2-305; R.C. 5553.31. “Thereafter, ‘the proposal to dedicate lands for road purposes, together with the acceptance of the grant by the board, constitutes the land so dedicated a public road.’” 1988 Op. Att’y Gen. No. 88-080, at 2-396, quoting R.C. 5553.31; *see* 1999 Op. Att’y Gen. No. 99-005, at 2-29 (describing the process for dedicating land under the platting procedure set forth in R.C. Chapter 711).

“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 proven by the circumstance of the case.” 1987 Op. Att’y Gen. No. 87-046, 2-305, quoting *Lessee of Village of Fulton v. Mehrenfeld*, 8 Ohio St. 440, 446, (1858); see 1999 Op. Att’y Gen. No. 99-005, at 2-28, fn. 2. The public authority’s acceptance of the dedication may be express or implied, but implied acceptance requires that the public authority take some positive action that indicates that it has taken control of the property. *E.g.*, 1987 Op. Att’y Gen. No. 87-046, at 2-305.

II

The foregoing points the way to a resolution of your question. Nothing in your letter suggests that the Road is a state or county road. Therefore, if it is a public road at all, it is a township road. And it qualifies as a public road if it was properly established.

In answering the establishment question, it would appear that you can disregard the possibility of statutory appropriation or appropriation by prescription—neither occurred under the facts you have described. Instead, the Road is “established,” and thus a township road subject to R.C. 5553.04(B), only if it was established by statutory or common-law dedication. Your request states that the road was dedicated but *not* accepted. The question you ask turns on whether that is true. Both types of dedication *require* acceptance. So R.C. 5553.04(B) applies *only if* the Road was properly accepted. As noted, I cannot answer that factual question. But the foregoing lays out the legal principles that ought to guide the analysis.

I can, however, tell you this: the fact that the Road was never developed or improved *does not* prevent it from qualifying as an “established” road. Establishment occurs via the four processes laid out above. A road need not be developed after being established to qualify

as an established road. To the contrary, a road must be established *before* any construction or improvement may occur. 2015 Op. Att’y Gen. No. 2015-006, Slip Op. at 4; 2-62. Thus, if it is shown that a particular road was established at some point, the particular road could, in theory, be a public road.

A road that is now unimproved may qualify as an established road based on what occurred in the past. For instance, if a road was established and then later left unimproved and subsequently placed on “nonmaintained status” by the board of township trustees, pursuant to R.C. 5571.20, that road is still a township road. In addition, if facts show that a road located in a township was established but subsequently abandoned, R.C. 5553.042(B) states that “[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, after formal proceedings for vacation as provided in sections 5553.04 to 5553.11 of the Revised Code have been taken.” And, depending on the specific facts, R.C. 5553.10 may apply in a particular case. R.C. 5553.10 states that “[a] road, or part thereof, *which remains unopened for seven years after the order establishing it* was made or authority granted for opening it shall be vacated, and the right to build it pursuant to the establishment in the original proceedings thereof shall be barred.” (Emphasis added).

In sum, the fact that a road is unconstructed and or unimproved may impact the determination of whether the road is a public road.

Conclusion

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

1. For purposes of R.C. 5553.04(B), a township road is an established public

road if it satisfies the requirements of R.C. 5535.01(C).

2. For a road to be established through the process of dedication, there must be both a dedication of the road and a showing of acceptance of the dedication on behalf of the public.
3. A road that has not been constructed or improved might, but will not always, constitute a township road for purposes of R.C. 5553.04(B).
4. Whether a particular road in a township qualifies as an established public road is dependent on both the specific facts of the case and upon the laws in effect at that time—the question entails a case-by-case analysis.

Respectfully,



DAVE YOST
Ohio Attorney General