

OPINION NO. 88-036**Syllabus:**

1. When voters of a township have approved a tax levy for road purposes, the proceeds of that levy accrue to the township, and the township has no obligation to distribute a portion of the proceeds to a municipal corporation that constitutes part of the township. Rather, the township trustees may expend the levy proceeds in such manner as they choose for purposes that are authorized by the levy.
2. A road that has been established as part of the township road system is considered a city street, rather than a township road, whenever it exists within a city. The city is responsible for the maintenance of the road and is authorized to make improvements upon the road.
3. The duty imposed upon a township by R.C. 5535.01, R.C. 5535.08, and R.C. 5571.02 to maintain township roads within its boundaries does not extend to a road that was established as a township road when that road is located within a municipal corporation.
4. The authority granted to a board of township trustees by R.C. 5571.01 to construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction does not extend to a road that was established as a township road when that road is located within a municipal corporation. (1958 Op. Att'y Gen. No. 2696, p. 556, overruled in part; 1917 Op. Att'y Gen. No. 723, vol. II, p. 1956 (syllabus, paragraph 2), overruled.)
5. The authority granted to a township by R.C. 5535.08 to expend any funds available for road construction, improvement, or repair upon roads inside a village does not extend to village streets. (1958 Op. Att'y Gen. No. 2696, p. 556, approved and followed in part; 1917 Op. Att'y Gen. No. 723, p. 1956 (syllabus, paragraph 1), approved and followed.)

6. The authority granted to a board of township trustees by R.C. 5535.08 to expend any funds available for road construction, improvement, or repair upon roads inside a village does not extend to roads inside a city.
7. A board of township trustees is without authority to expend funds derived from a township road levy to improve or maintain a city street or a road that was established as a township road when that road is located within a city.
8. If township boundaries are changed pursuant to R.C. Chapter 503 so that a municipal corporation that was located within a township is no longer located within that township, residents of the municipal corporation are no longer residents of the township and township taxes may not be levied upon property within the municipal corporation.
9. If a township road district is created pursuant to R.C. 5573.21, the district is a subdivision for purposes of R.C. Chapter 5705.01, and the township trustees, as taxing authority of the district, may levy taxes only upon the taxable property of the township road district, and not upon property within the limits of a municipal corporation located in the township. (1969 Op. Att'y Gen. No. 69-055, overruled in part.)

To: Lee C. Falke, Montgomery County Prosecuting Attorney, Dayton, Ohio
By: Anthony J. Celebrezze Jr., Attorney General, June 15, 1988

I have before me your request for an opinion concerning the authority of a township to expend tax levy moneys for the improvement and maintenance of roadways in a city that is located within the township. The situation that you have presented involves a city that is located completely within the township and is included as part of the township. No steps have been taken by the city to adjust its boundaries or detach itself from the township. The road levy in question was placed on the ballot by the trustees of the township, and the levy was submitted to the vote of all residents of the township, including those living in the city. Facts surrounding the current levy and its predecessors indicate that the levies have been supported by the city, with the understanding that certain of the levy moneys would be allocated to the city. In light of these facts, you have raised the following questions:

1. Must the township share the tax levy money with the city, or may the township trustees spend the money for such road purposes as they determine?
2. May the township trustees, if they choose, spend township road levy moneys for the improvement or maintenance of roadways within the city and, if so, is their authority to expend the moneys limited to roads and streets that are thoroughfares leading into and out of the township?

As was discussed in 1985 Op. Att'y Gen. No. 85-033, territory forming a municipal corporation remains part of the township in which it is located unless steps are taken to alter the township boundaries. *See, e.g.,* R.C. 503.07; R.C. 503.09; R.C. 703.22; *State ex rel. Halsey v. Ward*, 17 Ohio St. 543 (1867); 1984 Op. Att'y Gen. No. 84-051; 1977 Op. Att'y Gen. No. 77-031. Residents of the municipality are, thus, also residents of the township and have obligations to both the municipal corporation and the township. *See, e.g.,* Op. No. 85-033 at 2-118 ("[t]axpayers who reside in both the city and the township face extra tax burdens, since they must support the expenses of both the city and the township"); Op. No. 77-031 at 2-114 (inhabitants of a municipality within a township are "residents of both the municipality and the township with all of the benefits and obligations attendant thereto"); 1954 Op. Att'y Gen. No. 4642, p. 648 (overruled in part by 1959 Op. Att'y Gen. No. 91, p. 42). Such residents are able to vote on both municipal and township

issues. They are subject to both municipal and township tax levies. *See, e.g.*, 1959 Op. Att'y Gen. No. 888, p. 584.

When a municipal corporation exists within a township, the legislative authority of the municipal corporation and the board of township trustees are separate taxing authorities, and the proceeds of a tax levied by one of those taxing authorities accrues to the subdivision for which the taxing authority acts. *See* R.C. 5705.01; R.C. 5705.03-.04. The fact that a municipal corporation is located within a township and constitutes part of that township does not entitle the municipal corporation to a portion of the proceeds of a township tax levy for road purposes. *See generally, e.g.*, 1988 Op. Att'y Gen. No. 88-018; 1921 Op. Att'y Gen. No. 1929, vol. I, p. 258 at 261 (discussing a county road levy "for the primary purpose of constructing, improving, maintaining and repairing *county roads*" and stating that "such primary purpose would be defeated if the commissioners were held to be at liberty to turn over to the township trustees an arbitrary portion of said funds"). *See also* 1949 Op. Att'y Gen. No. 948, p. 587; 1928 Op. Att'y Gen. No. 1826, vol. I, p. 627.

In accordance with the general principles discussed above, it is clear that, when voters of a township have approved a tax levy for road purposes, the proceeds of that levy accrue to the township, and the township has no obligation to distribute a portion of the proceeds to a municipal corporation that constitutes part of the township. Rather, the township trustees may expend the levy proceeds in such manner as they choose for purposes that are authorized by the levy. *See* Ohio Const. art. XII, §5 ("every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied").

You have asked whether township trustees, if they choose, may spend road levy moneys for the improvement or maintenance of roadways within the city and, if so, which roadways are eligible for such expenditures. I am using the word "improvement" to cover construction, reconstruction, resurfacing, alteration, and other projects that constitute more than simple maintenance of a roadway, and the word "maintenance" to cover repairs and maintenance that keep the roadway in usable condition. *See, e.g.*, R.C. 5571.01; R.C. 5571.02; 1972 Op. Att'y Gen. No. 72-080. *See generally* 1915 Op. Att'y Gen. No. 950, vol. III, p. 2042.

The statutes of Ohio divide the public highways of the state into state roads, county roads, and township roads, as follows:

The public highways of the state shall be divided into three classes: state roads, county roads, and township roads.

(A) State roads include the roads and highways on the state highway system.

(B) County roads include all roads which are or may be established as a part of the county system of roads as provided in sections 5541.01 to 5541.03, inclusive, of the Revised Code, which shall be known as the county highway system. Such roads shall be maintained by the board of county commissioners.

(C) Township roads include all public highways other than state or county roads. The board of township trustees shall maintain all such roads within its township. The board of county commissioners may assist the board of township trustees in maintaining all such roads. This section does not prevent the board of township trustees from improving any road within its township.

R.C. 5535.01. Township roads thus include "all public highways other than state or county roads." Municipal corporations are granted the authority to establish roadways within their boundaries, and such roadways are known as "streets." *See, e.g.*, R.C. 711.07; R.C. 715.19; R.C. 717.01(P); R.C. 723.01. |

While it may appear from the language of R.C. 5535.01(C) that all streets and roads in a municipal corporation within a township are township roads, if they are not state or county roads, a clear distinction has been drawn between public highways (including state, county, and township roads) and streets of municipal corporations. For example, 1919 Op. Att'y Gen. No. 397, vol. I, p. 661, states, at 662: "while the word 'road' as a generic term is no doubt broad enough to include

'street,' yet our legislature has for many years past made use of the word 'road' in dealing with improvements outside of municipalities and the word 'street' in dealing with improvements within municipalities. In fact, as a matter of common usage, the word 'street' is understood as referring particularly to public ways within municipalities and the word 'road' to like ways outside of municipalities." *Accord, Sparrow v. City of Columbus*, 40 Ohio App. 2d 453, 458-59, 320 N.E.2d 297, 300-01 (Franklin County 1974). *See also* 1935 Op. Att'y Gen. No. 4039, vol. I, p. 273 at 273 ("[t]he public highways of the state, outside of municipalities, are classified by [G.C. 7464, now R.C. 5535.01], as state roads, county roads and township roads"). This distinction is reflected in various statutory provisions. *See, e.g.,* R.C. 5501.47(B)(1)(b) ("['h]ighway' means those highway systems in section 5535.01 of the Revised Code, highways, streets, and roads within municipalities, and any other highway, street, and road on which the public travels"); R.C. 5511.01 (the Director of Transportation may "abandon a highway on the state highway system...and the abandoned highway shall revert to a county or township road or municipal street"); R.C. 5555.01; R.C. 5557.01.

In general, township roads are established by the board of county commissioners. *See, e.g., State ex rel. Fitzthum v. Turinsky*, 172 Ohio St. 148, 174 N.E.2d 240 (1961); *State ex rel. Kerr v. Neitz*, 58 Ohio App. 135, 16 N.E.2d 236 (Lucas County 1937); 1987 Op. Att'y Gen. No. 87-046; 1982 Op. Att'y Gen. No. 82-012; 1956 Op. Att'y Gen. No. 7136, p. 690; 1956 Op. Att'y Gen. No. 6576, p. 373. *Cf.* R.C. 5571.011 (township trustees may grant a petition for relocation of a public road, filed by the person through whose land the road has been established, and declare the new road a public highway). R.C. 5553.02 grants the following authority to the board of county commissioners:

The board of county commissioners may locate, establish, alter, widen, straighten, vacate, or change the direction of roads as provided in sections 5553.03 to 5553.16 of the Revised Code. This power extends to all roads within the county, except that as to roads on the state highway system the approval of the director of transportation shall be had. However, no public road shall be located or established, by the board of county commissioners, unless the location or establishment begins on a public road and terminates on a public road, or begins on a public road and services a public park, a state supported educational institution, public school, public aviation area, or a public recreation area, or begins on a public road and services at least three private residences or businesses in the first five hundred feet and one private residence or business in each two hundred feet thereafter.

See also R.C. 5541.01-.02; R.C. 5553.31. It has, however, been held that, in granting the commissioners powers over roads within the county, the General Assembly did not grant the commissioners power over streets within municipalities located within the county. *See Sparrow v. City of Columbus*, 40 Ohio App. 2d at 458, 320 N.E.2d at 300 (discussing predecessor to R.C. 5553.02 and stating: "it cannot be argued that the senate intended to give the county power over 'streets' within a municipality").

R.C. 5535.08 discusses the duties and authority of various governmental entities with respect to the improvement and maintenance of roads, as follows:

The state, county, and township shall each maintain its roads, as designated in section 5535.01 of the Revised Code; however, the county or township may, by agreement between the board of county commissioners and the board of township trustees, contribute to the repair and maintenance of the roads under the control of the other. The state, county, or township, or any two or more of them, may, by agreement, expend any funds available for road construction, improvement, or repair upon roads inside a village. A village may expend any funds available for street improvement upon roads outside the village and leading thereto.

It is clear pursuant to R.C. 5535.01 and R.C. 5535.08 that the state is responsible for maintaining state roads, the county is responsible for maintaining county roads, and the township is responsible for maintaining township roads. *See, e.g.,* 1986 Op.

Att'y Gen. No. 86-080; 1981 Op. Att'y Gen. No. 81-039; 1956 Op. No. 7136. See also R.C. 5571.02 ("[t]he board of township trustees shall have control of the township roads of its township and shall keep them in good repair"). Various statutes do, however, authorize governmental bodies to assist in maintaining roads under the control of one another. In particular, under R.C. 5535.08 a township may, by agreement, contribute to the maintenance of roads under the control of the county or expend funds available for road construction, improvement or repair upon roads inside a village. See also, e.g., R.C. 5521.07.

Authority to improve roads is similarly granted, in the case of state roads, to the state, see R.C. 5501.31; in the case of county roads, to the county, see R.C. 5555.02; and in the case of township roads, to the township, see R.C. 5571.01. R.C. 5571.15 authorizes a board of township trustees, without the presentation of a petition, "to construct, reconstruct, resurface, or improve a public road or part thereof," upon the passage of a resolution declaring the necessity therefor. Again, various statutes authorize cooperation among governmental entities. See, e.g., R.C. 5521.07; R.C. 5521.11; R.C. 5535.08; R.C. 5571.01 (with the approval of the county commissioners, a board of township trustees may improve a county road within its township; with the approval of the Director of Transportation, a board of township trustees may improve an intercounty or state highway within its township); 1920 Op. Att'y Gen. No. 1547, vol. II, p. 947. In particular, R.C. 5521.11 indicates that a township may cooperate with a municipal corporation in constructing a part of the state highway system, or the bridges and culverts thereon, with the approval of the Director of Transportation.

Pursuant to statutory provisions governing municipal corporations, and in accordance with constitutional powers of home rule, municipal corporations are given authority over roadways within their boundaries. R.C. 715.19 authorizes a municipal corporation to "lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean, and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within such municipal corporation." R.C. 717.01(P) grants municipal corporations the authority to "[o]pen, construct, widen, extend, improve, resurface, or change the line of any street or public highway." R.C. 723.01 states:

Municipal corporations shall have special power to regulate the use of the streets. The legislative authority of a municipal corporation shall have the care, supervision, and control of the public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts within the municipal corporation, and the municipal corporation shall cause them to be kept open, in repair, and free from nuisance.

The authority of a municipal corporation to establish and regulate roadways within its boundaries has been recognized as a power of local self-government. See Ohio Const. art. XVIII, §3 ("[m]unicipalities shall have authority to exercise all powers of local self-government..."); *Village of Perrysburg v. Ridgway*, 108 Ohio St. 245, 140 N.E. 595 (1923) (syllabus, paragraph 2) ("[t]he power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term 'powers of local self-government'"); *Sparrow v. City of Columbus*.

Municipal corporations have been given the duty of maintaining all roadways within their boundaries, even those that were established as part of the state, county, or township road system, with specific exceptions. See, e.g., R.C. 5511.01 ("[n]o duty of constructing, reconstructing, maintaining, and repairing such state highways within municipal corporations shall attach to or rest upon the director [of transportation]"); R.C. 5557.02; R.C. 5557.08; R.C. 5591.02; *Carney v. McAfee*, 35 Ohio St. 3d 52, __ N.E.2d __ (1988); *State ex rel. City of Cleveland v. Masheter*, 8 Ohio St. 2d 11, 221 N.E.2d 704 (1966) (pursuant to uncodified law and notwithstanding R.C. 5501.14 (now R.C. 5501.41) and R.C. 5511.01, the Ohio Department of Transportation has a duty to maintain interstate highways located within municipal corporations); *O'Neill v. City of Cleveland*, 145 Ohio St. 563, 62 N.E.2d 353 (1945); 1958 Op. Att'y Gen. No. 2696, p. 556. It has, thus, been held that, when a county road is located on territory that is incorporated into a municipal

corporation, the county road becomes a street of the municipality, so that the municipality has responsibility for its maintenance and supervision. See *City of Steubenville v. King*, 23 Ohio St. 610 (1873) (syllabus, paragraph 2) ("[w]here territory, including a public road connecting with the streets of a city, is annexed to the city, and the road continues to be used as a street or thoroughfare, it thereby becomes a 'public highway' of the city..."). See also *Railroad Company v. Defiance*, 52 Ohio St. 262, 299-301, 40 N.E. 89, 97-98 (1895), *aff'd*, 167 U.S. 88 (1897) (county roads on land brought into a municipality by annexation "were removed from the control which the county commissioners theretofore had over them, and became subject to the control, supervision, and care of the municipal authorities, like other streets and highways of the corporation"; R.S. 4906, as then in effect, required the county commissioners to keep in repair certain roads included within municipal corporations "to points therein where the sidewalks have been curbed and guttered, and no further"); *Heck v. General Telephone Co.*, 72 Ohio Op. 2d 146 (C.P. Montgomery County 1975).

The same rule appears to apply to township roads. *City of Steubenville v. King* concerned a situation involving a county road, but the court's language applies generally to all public roads: "If the road in question was a legal public highway at the time of its annexation to the city, we think the simple fact of annexing it to the city, and its continuous subsequent use as a street, constituted it a 'public highway' of the city...and subjected it to the control and care of the city authorities." 23 Ohio St. at 613-14. As discussed above, municipal corporations have supervision and control of all public highways within their limits, with specific exceptions. See, e.g., *Carney v. McAfee* (certain bridges); *State ex rel. City of Cleveland v. Masheter* (interstate highways). A road that has been established as a township road thus becomes a street of a municipality for purposes of repair when it is located within a municipal corporation. See also R.C. 5579.03 (when a road is part of the boundary line of a township or municipal corporation, the board of township trustees and legislative authority of the municipal corporation shall apportion the road between them as justice and equity require and shall open, improve, and repair their respective portions). It thus appears that a road that has been established as part of the township road system is considered a city street, rather than a township road, whenever it exists within a city. The city is responsible for the maintenance of the road and is authorized to make improvements upon the road. See R.C. 715.19; R.C. 717.01(P); R.C. 723.01.

It has been stated, generally, that "county roads cease to exist as such when they are incorporated into a municipality," *Village of Peninsula v. County of Summit*, 27 Ohio App. 3d 252, 253, 500 N.E.2d 884, 886 (Summit County 1985), *motion to certify overruled*, No. 85-1337 (Ohio Sup. Ct. Oct. 16, 1985), and that "[a] county road loses its character as such as soon as it becomes located within the limits of an incorporated village," *Sroka v. Green Cab Co.*, 35 Ohio App. 438, 441, 172 N.E. 531, 532 (Cuyahoga County 1929), *dismissed on other grounds*, 122 Ohio St. 45, 170 N.E. 637 (1930). See also 1964 Op. Att'y Gen. No. 1274, p. 2-283 (questioned in 1971 Op. Att'y Gen. No. 71-030). Such statements have been made in connection with questions concerning the duty of repair and maintenance of such roadways, and possible liability for negligence in failing to perform that duty. It has, however, been indicated that a county may reestablish the street of a city as a county road by appropriate procedures. See R.C. Chapter 5557. As was stated in *Village of Peninsula v. County of Summit*, 27 Ohio App. 3d at 254, 500 N.E.2d at 886:

Having held that the county roads lose their character when incorporated into a municipality, it necessarily follows that they become municipal streets and their repair and maintenance is the responsibility of the municipality under R.C. 723.01.

However, in so holding we do not preclude those streets from thereafter becoming part of the county road system by voluntary action of the county council pursuant to statutory authority and with the consent of the municipality. (See R.C. 5557.02.) Once the improvement is done, it may be maintained in the same manner, see R.C. 5557.08.

See generally 1971 Op. Att'y Gen. No. 71-030; 1964 Op. No. 1274; 1963 Op. Att'y

Gen. No. 338, p. 371; 1962 Op. Att'y Gen. No. 3546, p. 1085. No analogous provision authorizes a township to reestablish the street of a city as a township road.

Whenever a road that has been a county or township road exists within a municipal corporation, that road has a sort of dual status, in that it is a municipal street and is also, in some sense, a part of the county or township road system. *See, e.g.*, 1971 Op. No. 71-030 (rejecting the proposition that a county road loses its identity as such when the territory through which it runs has been annexed by a municipal corporation); 1935 Op. Att'y Gen. No. 4078, vol. I, p. 322 (concluding that when a state or county road becomes a city street by reason of annexation of territory to a city, the street continues to exist as a state or county road for purposes of statutes governing bridge repair). The fact that parts of a township road may lie within the boundaries of a municipal corporation is reflected, for example, in R.C. 4957.01, which states: "The board of county commissioners of a county has the same powers with respect to that part of a state, county, or township road which lies within the limits of a municipal corporation as are conferred upon municipal corporations to alter...any railroad crossings...and to apportion the cost..." *See also* R.C. 5591.02 ("[t]he board of county commissioners shall construct and keep in repair all necessary bridges in municipal corporations on all state and county roads and improved roads which are of general and public utility, running into or through such municipal corporation"). *See generally* *Lewis v. Laylin*, 46 Ohio St. 663, 671-72, 23 N.E. 283, 291 (1889) ("[t]hat a state or county road is not extinguished by becoming a street of a municipal corporation is clear. It retains its character of a state or county road, even as to such portions of it as may chance to fall within the limits of a municipal corporation, that may be subsequently organized; nor is this character changed because the municipal authorities call it a street...and are invested by law with its general control. Should the municipality cease to exist, the highway would at the same time cease to be a street, but it would not cease to be the state or county road which it was originally"). Various Attorney General opinions have similarly recognized the dual status of a state, county, or township road located within a municipal corporation. *See, e.g.*, Op. No. 82-012 at 2-40 n. 1; 1940 Op. Att'y Gen. No. 2224, vol. I, p. 400 at 402 ("the highway in question may have a dual status in that it in all probability is a village street and at the same time is a state highway for certain purposes"); 1917 Op. Att'y Gen. No. 723, vol. II, p. 1956 at 1956 ("the term 'public highway' is broad enough to include the streets of a municipality which have been laid out by the municipality as streets as well as to include those streets which are also state, county or township roads").

Whether a roadway that has been established as a township road but is located within a municipal corporation may be designated as a township road, or whether it may be called only a street of the municipality, is not clear and is, in any event, only a matter of semantics. It is clear that such a roadway is under the jurisdiction of the municipal corporation for purposes of maintenance and repair. *See, e.g.*, R.C. 723.01; *O'Neill v. City of Cleveland*. It is, further, clear that the municipal corporation is authorized to improve the roadway. *See, e.g.*, R.C. 715.19.

It follows that, in the situation with which you are concerned, the city is, in general, responsible for the maintenance of roadways within its boundaries. The township may spend road levy moneys for the maintenance of roadways within the city only if it has statutory authority to expend such moneys. Pursuant to R.C. 5535.01, R.C. 5535.08, and R.C. 5571.02, a township is responsible for maintaining township roads within its boundaries. I find, in accordance with *City of Steubenville v. King*, *Village of Peninsula v. County of Summit*, and *Sroka v. Green Cab Co.*, that a city is responsible for maintaining such roads when they are located within the city, and that the general provisions of R.C. 5535.01, R.C. 5535.08, and R.C. 5571.02 do not impose upon a township the duty of maintaining a road that was established as a township road when that road is located within a municipal corporation.

I turn now to the question whether a township has authority to expend road levy funds for the maintenance or improvement of roadways within a municipal corporation, even though it is not required to do so. No statutory provisions expressly authorize a township to expend its road levy funds for the improvement or maintenance of streets or roads within a city. *Cf. Village of Peninsula v. County of Summit* (a county may, pursuant to R.C. Chapter 5557, reestablish the street of a

city as a county road). R.C. 5535.08 expressly authorizes "[t]he state, county, or township, or any two or more of them..., by agreement, [to] expend any funds available for road construction, improvement, or repair upon roads inside a village." The absence of a comparable provision authorizing the expenditure of funds upon roads inside a city suggests that no such expenditure is authorized.

R.C. 5571.02 authorizes a board of township trustees to make road repairs, as follows:

The board of township trustees shall have control of the township roads of its township and shall keep them in good repair. The board of township trustees may, with the approval of the board of county commissioners or the director of transportation, maintain or repair a county road, or intercounty highway, or state highway within the limits of its township.

As discussed above, township roads located within cities are considered to be city streets for purposes of maintenance and repair. Even as it has been concluded that R.C. 5571.02 does not impose upon a township the duty to repair township roads that are located within a city, it must be concluded that R.C. 5571.02 does not grant the township the authority to expend its road levy moneys for the repair of township roads that are located within a city. The fact that statutory provision is made for a township to seek county approval for repair of a county road, state approval for repair of a state highway, and village approval for repair of a road inside a village, *see* R.C. 5535.08, but that no provision is made for seeking approval for repair of a road inside a city, indicates that there is no authority for a township to make such repair.¹

R.C. 5571.01(A) authorizes a board of township trustees to make road improvements, as follows:

The board of township trustees may construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction or any county road, intercounty highway, or state highway within its township. In the case of a county road the plans and specifications for the proposed improvement shall first be submitted to the board of county commissioners of the county and receive its approval, and in the case of an intercounty or state highway, plans and specifications shall first be submitted to the director of transportation and receive his approval. The board of township trustees may widen, straighten, or change the direction of any part of a road in connection with the proceedings for its improvement.

See also R.C. 5571.15. The question whether a roadway that was established as a township road is under the jurisdiction of the township for purposes of R.C. 5571.01 when it is located within a city is not directly addressed by the statute. The general legislative scheme indicates, however, that it is not. A township may not improve a county or state road without obtaining appropriate approval. In contrast, no statutory procedure is established by which a township may seek the approval of a city for road improvements made within the city's boundaries, thereby indicating that a township has no authority to make such improvements.

Support for the conclusion that a township has no jurisdiction over any roadway located within a city, even though the roadway may have been established

¹ There may be some question as to whether the various statutory provisions that authorize a township to cooperate with the state or with a county in road maintenance or improvement, or to assist in the maintenance or improvement of state or county roads, permit township funds to be used for road projects within cities. *See, e.g.*, R.C. 5521.11; R.C. 5535.08; R.C. Chapter 5557; R.C. 5571.01; R.C. 5571.02. *See generally* 1979 Op. Att'y Gen. No. 79-045; 1940 Op. Att'y Gen. No. 2224, p. 400. I do not, however, consider this to be an issue raised in your request, and I am not considering it at this time.

as a township road, is found in the statutory scheme authorizing the state or a county to make repairs or improvements within a municipal corporation. R.C. Chapter 5557 authorizes a county to make certain road or street improvements within a municipal corporation, if municipal approval is obtained. R.C. 5557.01 defines "road," for purposes of R.C. 5557.02-.07, as including "any state or county roads, or the streets of any municipal corporation, or any part of such roads or streets, which forms a continuous road improvement." R.C. 5557.02 authorizes a board of county commissioners to "construct a proposed road improvement into, within, or through a municipal corporation, when the consent of the legislative authority of such municipal corporation has been first obtained." R.C. 5557.08 authorizes a board of county commissioners to "repair that portion of a county road extending into or through a municipal corporation, or a part of a county road and a municipal corporation's streets extending into or through a municipal corporation and forming a continuous road improvement, when the consent of the legislative authority of said municipal corporation has been first obtained...." See, e.g., 1964 Op. No. 1274 (syllabus) (R.C. 5557.02 "does not authorize a board of county commissioners to undertake the improvement or to join with a municipality in undertaking the improvement of a municipal street forming no part of a state or county highway"). Similarly, the state is, in general, required to seek municipal approval before improving or repairing roads within municipal boundaries. See, e.g., R.C. 5511.01 (the Director of Transportation "may enter upon...state highways within any municipal corporation and construct, reconstruct, widen, improve, maintain, and repair the same provided the municipal corporation first consents thereto by resolution of its legislative authority," except that no consent is required "if the existing highway being changed or the location of an additional highway being established was not within the corporate limits of the municipal corporation at the time such establishment or change was journalized by the director"); R.C. 5521.01; *City of Lakewood v. Thormyer*, 171 Ohio St. 135, 168 N.E.2d 289 (1960). The fact that no analogous provision authorizes a township to seek approval by a city of improvements or repairs on roadways within the city suggests that there is no authority for a township to make such improvements or repairs.

The statutory scheme governing the construction, improvement, and repair of streets and roads within Ohio is complex and confusing. See, e.g., *Frevort v. Finfrock*, 31 Ohio St. 621, 623 (1887) ("[r]oad cases, as a class, are attended with difficulty. The statutes relating to roads are and have been for years in much confusion..."). Statutory provisions governing streets and roads must, nonetheless, be construed in accordance with the general principle that a township, as a creature of statute, has only such authority as it is granted by statute. See, e.g., *Trustees of New London Township v. Miner*, 26 Ohio St. 452 (1875); *Hopple v. Trustees of Brown Township*, 13 Ohio St. 311 (1862); 1982 Op. Att'y Gen. No. 82-028. A township is required to maintain its township roads, and is authorized to improve its township roads. See R.C. 5535.01; R.C. 5535.08; R.C. 5571.01; R.C. 5571.02; R.C. 5571.15. A township is authorized to contribute to the repair and maintenance of roads under the control of the county and to expend funds upon roads inside a village. See R.C. 5535.08. A township is authorized, with appropriate state or county approval, to improve or maintain a state or intercounty highway or a county road within its limits. See R.C. 5571.01; R.C. 5571.02. A township is, however, not statutorily authorized to improve, maintain, or expend funds upon city streets. It must, accordingly, be concluded that no such authority exists.

Even if a municipal street may, in some sense, also be considered a township road, it does not follow that a township has authority to improve or maintain the street. Townships are expressly authorized by R.C. 5535.08 to expend funds available for road construction, improvement, or repair upon roads inside a village. They have no analogous authority to expend such funds upon roads inside a city. The existence of R.C. 5535.08 indicates that a township's general authority to improve and maintain township roads does not extend to roads within municipal corporations. A township road within a municipal corporation is under the jurisdiction of the municipality, rather than the township. See generally R.C. 5571.01. Thus, a township has no authority to expend funds derived from a township road levy to improve or maintain a road that was established as a township road when that road is located within a city. See generally note 1, *supra*.

I am aware that in 1917 Op. No. 723, at 1959, one of my predecessors concluded that G.C. 3298-1, now R.C. 5571.01, authorized a board of township

trustees "to enter into a municipality and construct or build the public highways thereof which are not only streets but also township roads." That conclusion was based upon the analysis that the language of G.C. 6949 (now R.C. 5557.02) stating that a board of county commissioners may construct a proposed road improvement into, within, or through a municipality, when the consent of the legislative authority of the municipal corporation has first been obtained, constituted a limitation on the powers of the board of county commissioners, rather than a grant of such powers. In support of that analysis, the opinion cited a number of cases stating that county commissioners were authorized, without municipal approval, to establish roads within municipal corporations. Those cases, however, predated both the adoption of Ohio Const. art. XVIII, §3 in 1912 and the enactment of statutory provisions requiring counties to obtain municipal approval of road construction within a municipality, *see* 1914-1915 Ohio Laws 574, 608 (Am. S.B. 125, passed May 17, 1915) (enacting G.C. 6949).² *See generally* *Sparrow v. City of Columbus*, 1917 Op. No. 723 notes, at 1958, that "the township trustees are given no particular power and authority under the highway laws of the state" with respect to the improvement of roads within municipal corporations, and applies to township trustees the same powers given to county commissioners in that regard. I am constrained to reject that argument and to overrule the second paragraph of the syllabus of 1917 Op. No. 723. I opine, instead, that the authority granted to a board of township trustees by R.C. 5571.01 to construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction does not extend to a road that was established as a township road but is located within a municipal corporation.

1917 Op. No. 723 was approved and followed in 1958 Op. No. 2696. 1958 Op. No. 2696 considered a question involving a village and concluded that, under R.C. 5535.08 and R.C. 5571.01, a board of township trustees could expend funds available for highway purposes and cooperate with a village authority for the repair, reconstruction, maintenance or improvement of a village street that constitutes part of a township road. This conclusion follows from the language of R.C. 5535.08, and I am in agreement with it. I am, however, unable to accept the application of the analysis contained in that opinion to cities as well as villages,³ and I overrule 1958 Op. No. 2696 to the extent that it makes such application.

It is apparent from your request that there is concern that some unfairness results from the fact that the tax in question is levied upon all property within the township, including property within the city, but the proceeds may not be spent upon roadways within the city. As discussed above, however, where a municipal corporation is part of a township, residents of the municipal corporation are subject to township taxes and, as township residents, receive the benefits of township expenditures. *See, e.g.*, Op. No. 77-031; 1954 Op. No. 4642. Even though proceeds from the tax in question may not be spent upon roadways within the city, they may be spent upon roads in the unincorporated portion of the township. Residents of the city in question, as residents of a township that is larger than their city, must, by their taxes, support some operations of the township that do not accrue directly to

² An earlier statute, *see* 1904 Ohio Laws 550 (H.B. 67, passed Apr. 22, 1904) (section I), authorized township trustees, upon presentation of a petition praying for "the improvement of the public roads within such township and including any road running into or through any village or city," to submit to the electors the question whether the township's public roads should be improved by general taxation. The purpose of H.B. 67 was stated as follows: "To authorize the improvement of public roads of townships including streets of cities or villages therein...." The absence of similar language in subsequent legislation suggests that roads within villages and cities are not included as township roads.

³ I note that villages are treated differently from cities in a number of matters involving road construction and maintenance. *See, e.g.*, R.C. 5521.01; 1974 Op. Att'y Gen. No. 74-007 (modified by 1981 Op. Att'y Gen. No. 81-007).

their portion of the township. A similar situation, involving a village rather than a city, was discussed in 1959 Op. No. 888, at 586-87, as follows:

Since the village...lies entirely within [the township], but does not cover the entire township, it must be concluded that [the township] continues to exist and that all electors residing within its boundaries are privileged to vote at its township elections.

....

The fact that electors within the village...have little or no interest in the township road system outside of their corporation is immaterial. As a matter of fact, their interest may be greater than first thought when it is realized that ingress and egress to and from the village may be over township roads. In any event, they are township electors whose property will be subject to the levy, if made.

Similarly, the residents of the city in question do have some interest in the improvement and repair of roads in the unincorporated area of the township.

In addition, it should be noted that there are means by which the existing situation may be changed. R.C. Chapter 503 authorizes the alteration of township boundaries to remove a municipal corporation from the township in which it has been located. *See, e.g.*, Op. No. 85-033. In particular, R.C. 503.07 authorizes the legislative authority of a municipal corporation to petition the board of county commissioners for a change of township lines in order to make the township lines identical with the limits of the municipal corporation or to erect a new township out of the portion of the township included within the limits of the municipal corporation. *See, e.g.*, 1954 Op. No. 4642. R.C. 503.07 specifies that, when the request comes from a city, the board of county commissioners is required to make the requested change. Through such a procedure, the city may cause the creation of a township that has the same boundaries as the city. When the boundaries of a city and a township become identical, the functions of the township are supplanted by those of the city. *See* R.C. 703.22; 1954 Op. No. 4642. Hence, the city is no longer part of a larger township and its residents are not subject to taxes imposed by that township. *See, e.g.*, Op. No. 77-031; 1959 Op. No. 888. *See generally Franklin Township v. Village of Marble Cliff*, 4 Ohio App. 3d 213, 447 N.E.2d 765 (Franklin County 1982). *See also* R.C. 503.08.

A similar result may be brought about by action of the electors of a township who live outside the limits of a municipal corporation within the township. R.C. 503.09 authorizes such electors to petition the board of county commissioners to have the territory outside the municipal corporation erected into a new township excluding the territory within the municipal corporation, and requires the commissioners to enter an order taking such action. The territory within the limits of the municipal corporation shall then "be considered as not being located in any township," R.C. 503.09, and shall not be subject to any township tax levies. *See also* R.C. 503.02-.03; R.C. 503.10-11.

Another means for changing the situation presented in your question would be by the creation of a township road district. R.C. 5573.21 authorizes the board of trustees of a township in which a municipal corporation is located to:

erect that portion of the township not included within the corporate limits of such municipal corporation into a road district, whenever in its opinion it is expedient and necessary and for the public convenience and welfare, for the purpose of constructing, reconstructing, resurfacing, or improving, the public roads within such district.

A township road district is a subdivision for purposes of R.C. Chapter 5705, and the board of township trustees is the taxing authority for the district. *See* R.C. 5705.01(A), (C). As taxing authority, the board of trustees may levy a tax, within the ten-mill limitation, upon "the taxable property of [the] township road district." R.C. 5573.211. *See generally* Ohio Const. art. XII, §2; R.C. 5705.02; R.C. 5705.32; 1988 Op. Att'y Gen. No. 88-011. The board may also submit a levy to the electors of the district. *See* R.C. 5705.19. It is, however, clear that any tax imposed by a township road district is levied only upon property included in the district, and not

upon property located in a municipal corporation.⁴ Accordingly, residents of a city located within a township are not subject to a levy of the township road district, but are subject to any taxes levied by the township as a whole. *See generally* 1920 Op. No. 1547.

Even without the creation of a township road district, R.C. 5575.10 authorizes a board of township trustees to impose a certain tax, within the ten-mill limitation, "upon all the taxable property of the township outside of any municipal corporation or part thereof." *See* 1969 Op. Att'y Gen. No. 69-055. The fact that R.C. 5575.10 authorizes the expenditure of proceeds from such levy for the maintenance and repair of township roads provides support for the conclusion that township roads do not include roadways within a municipal corporation. *See generally* 1931 Op. Att'y Gen. No. 2890, vol. I, p. 135.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. When voters of a township have approved a tax levy for road purposes, the proceeds of that levy accrue to the township, and the township has no obligation to distribute a portion of the proceeds to a municipal corporation that constitutes part of the township. Rather, the township trustees may expend the levy proceeds in such manner as they choose for purposes that are authorized by the levy.
2. A road that has been established as part of the township road system is considered a city street, rather than a township road, whenever it exists within a city. The city is responsible for the maintenance of the road and is authorized to make improvements upon the road.
3. The duty imposed upon a township by R.C. 5535.01, R.C. 5535.08, and R.C. 5571.02 to maintain township roads within its boundaries does not extend to a road that was established as a township road when that road is located within a municipal corporation.
4. The authority granted to a board of township trustees by R.C. 5571.01 to construct, reconstruct, resurface, or improve any public road or part thereof under its jurisdiction does not extend to a road that was established as a township road when that road is located within a municipal corporation. (1958 Op. Att'y Gen. No. 2696, p. 556, overruled in part; 1917 Op. Att'y Gen. No. 723, vol. II, p. 1956 (syllabus, paragraph 2), overruled.)
5. The authority granted to a township by R.C. 5535.08 to expend any funds available for road construction, improvement, or repair upon roads inside a village does not extend to village streets. (1958 Op. Att'y Gen. No. 2696, p. 556, approved and followed in

⁴ I am aware that 1969 Op. Att'y Gen. No. 69-055 concluded that tax levies made under authority of R.C. 5573.21 "are to be made upon all the taxable property within the township, including the taxable property within any municipal corporations within such township." Op. No. 69-055 (syllabus, paragraph 1). Since the issuance of that opinion, the General Assembly enacted R.C. 5573.211 and amended R.C. 5705.01 to make it clear that a township road district is a subdivision, the board of township trustees is its taxing authority, and the district is authorized to levy taxes only upon the taxable property of the township road district. 1971-1972 Ohio Laws, Part I, 657-61 (Am. S.B. 391, eff. Aug. 31, 1972). The conclusion of Op. No. 69-055 set forth above is, accordingly, no longer valid, and is hereby overruled. *See also* 1920 Op. Att'y Gen. No. 1547, p. 947 at 950 (finding, under statutes similar to those currently in effect, that road district levies "are upon only the taxable property of the township outside of municipal corporations in such township").

part; 1917 Op. Att'y Gen. No. 723, p. 1956 (syllabus, paragraph 1), approved and followed.)

6. The authority granted to a board of township trustees by R.C. 5535.08 to expend any funds available for road construction, improvement, or repair upon roads inside a village does not extend to roads inside a city.
7. A board of township trustees is without authority to expend funds derived from a township road levy to improve or maintain a city street or a road that was established as a township road when that road is located within a city.
8. If township boundaries are changed pursuant to R.C. Chapter 503 so that a municipal corporation that was located within a township is no longer located within that township, residents of the municipal corporation are no longer residents of the township and township taxes may not be levied upon property within the municipal corporation.
9. If a township road district is created pursuant to R.C. 5573.21, the district is a subdivision for purposes of R.C. Chapter 5705.01, and the township trustees, as taxing authority of the district, may levy taxes only upon the taxable property of the township road district, and not upon property within the limits of a municipal corporation located in the township. (1969 Op. Att'y Gen. No. 69-055, overruled in part.)