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March 1, 2010

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B. Alan Brubaker
Summit County Engineer
538 East South Street
Akron, Ohio 44311

Re: Ohio's Drainage Laws Policy

Dear Engineer Brubaker,

You have requested our legal opinion clarifying issues regarding drainage and water issues in the local Townships. We hope that this letter addresses your questions.

As you know, townships are creatures of statute and may only do that which is authorized by statute. Ohio Revised Code §5535.08 does require the townships to *maintain and repair* Township roads, including bridges and culverts on township roads.

Ohio Attorney General Opinion 2008-038 restated the definition of *maintain and repair* as follows:

Unless the context of a statute indicates otherwise, as used in the statutes regulating the construction, reconstruction, resurfacing, improvement, repair, and maintenance of state, county, and township roads, "maintenance" means keeping roads in proper condition, while "repair" means restoring roads to their original condition after they have become damaged. See 2006 Op. Att'y Gen. No. 2006-028 at 2-261; 1994 Op. Att'y Gen. No. 94-025 at 2-110 and 2-111; 1987 Op. Att'y Gen. No. 87-059 at 2-359 and 2-360; 1939 Op. Att'y Gen. No. 1494, vol. III, p. 2208, at 2210.

Additionally, this maintenance and repair responsibility requires Townships to clean and repair ditches which run along the side of the road to handle the road's drainage, and to provide for drainage from the roads in general. OAG 81-039. This includes a duty to clean and repair storm sewers which fall along the roads. OAG 94-061. The County may assist the Township with labor, equipment or funds to conduct said repair or maintenance but the County is not required to do so. OAG 81-039.

B. Alan Brubaker
Summit County Engineer
March 1, 2010

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The responsibility to maintain ditches is intended to prevent erosion of the township road surfaces. However, the duty to ameliorate drainage issues does not extend to private property issues. In fact, a Township has no authority to cure drainage impediments on private property. (Prosecutor's Opinion 04-034). Where the property owner has constructed their own drainage system into the Township roads system the Township has no responsibility to correct drainage issues on the property owner's land. OAG 82-025.

Over the years the Prosecutor's Office has addressed a variety of legal issues regarding ditch improvements and drainage repair. (See Attached Legal Opinions 90-029, 91-115, 93-177, 01-005, 04-034). It remains clear that R.C. 6131 sets forth a viable procedure to address flooding or excess collection of surface water on private property. The Ditch Petition process can be initiated by a private property owner or by the Township itself. This process allows for the implementation of a plan and the apportionment of the cost to repair said drainage issue(s). If the improvement is made, the assessment will be imposed upon all property owners who will benefit from the assessment. If the Ditch Petition law process does not apply, the private landowner must utilize the Court to recover for damages caused by upstream or downstream alterations affecting the landowner's property rights.

As such, it is our opinion and you are so advised that the Townships have a duty to maintain the drainage for township roads, but may only repair those ditches and culverts which run along or provide for drainage for the Township roads. Should you wish for us to analyze the facts of a specific situation in light of this law, please do not hesitate to contact the undersigned at your convenience.

Very truly yours,

SHERRI BEVAN WALSH
Prosecuting Attorney



SUSAN BAKER ROSS
Assistant Prosecuting Attorney

Enclosures

1981 Ohio Op. Atty. Gen. 2-154, 1981 Ohio Op. Atty. Gen. No. 81-039, 1981 WL 156189 (Ohio A.G.)

Office of the Attorney General
State of Ohio

Opinion No. 81-039

July 14, 1981

SYLLABUS:

1. Each county and township bears the responsibility for the maintenance and repair of its respective road or highway system, although the various political subdivisions may cooperate in the maintenance and repair of the others' roads.
2. The political subdivision with the responsibility for the repair and maintenance of a particular road must, as a part of that responsibility, clean and maintain the ditches which run along the side of the road for drainage purposes.
3. The political subdivision which is responsible for the repair and maintenance of a road is also responsible for the cleaning, repair, and replacement of a culvert on the road, even though the culvert may pass beneath the driveway of an abutting property owner. (1945 Op. Att'y Gen. No. 603, p. 763; 1925 Op. Att'y Gen. No. 2501, p. 333; 1925 Op. Att'y Gen. No. 2557, p. 389; 1923 Op. Att'y Gen. No. 784, p. 636, approved and followed.)
4. The duty to clean and repair storm sewers falls on the political subdivision responsible for the cleaning and repair of the ditches and culverts which comprise the storm sewer.
5. The costs of cleaning, maintaining, and repairing county and township roads, and the ditches, culverts, and storm sewers appurtenant to the roads, are to be paid as other costs of road maintenance and repair. Absent specific statutory authority, these costs may not be assessed against abutting property owners.

The Honorable Craig S. Albert
Geauga County Prosecuting Attorney

Dear Sir:

I have before me your request for an opinion concerning the responsibilities and procedures to be followed in the cleaning and repair of ditches, storm sewers, and driveway culverts along county and township roads. Specifically, your letter requested my opinion on the following ten questions:

1. Who has the responsibility to clean and repair roadside ditches along county roads?
2. Who has the responsibility to clean and repair roadside ditches along township roads?
3. Who has the responsibility to clean and repair storm sewers along county roads?
4. Who has the responsibility to clean and repair storm sewers along township roads?
5. Who has the responsibility for the repair or replacement of damaged culvert pipes under driveway aprons along county roads?
6. Who has the responsibility for the repair or replacement of damaged culvert pipes under driveway aprons

along township roads?

7. Who has the responsibility for the cleaning of culvert pipes under driveway aprons along county roads?
8. Who has the responsibility for the cleaning of culvert pipes under driveway aprons along township roads?
9. How are the costs of the preceding responsibilities to be paid?
10. May any of the costs be assessed against the abutting property owner?

In responding to your questions, I deem it prudent to generally start with the premise that all roads in Ohio are classified as state, county, or township roads pursuant to R.C. 5535.01, which reads as follows:

*2 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. (Emphasis added.)

Further, R.C. 5535.08 is a generalized mandate that state, county, and township each maintain its own respective road system as designated in R.C. 5535.01. R.C. 5535.08 reads:

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.

See R.C. 5543.02; R.C. 5571.01; R.C. 5571.02; 1977 Op. Atty Gen. No. 77-028. Hence, the general statutory scheme is that the state, county, and township, each as to its respective jurisdiction, bears the responsibility for maintenance and repair of its respective road or highway system, although the various subdivisions may cooperate in the maintenance and repair of the others' roads. See, e.g., R.C. 5535.01; R.C. 5571.01. As a further point, I note that the term 'road or highway' encompasses more than the roadbed itself. See R.C. 5501.01(C) ("Road' or 'highway' includes bridges, viaducts, grade separations, appurtenances, and approaches on or to such road or highway").

With this general scheme in mind, I turn now to a consideration of your questions concerning the cleaning and repairing of roadside ditches. There is no statute which specifically places the responsibility for roadside ditches upon a particular subdivision. R.C. 5501.31 states in part: '[t]he director [of transportation] . . . may purchase or appropriate, for such length of time as is necessary and desirable, such additional property as is required for the construction and maintenance of . . . drainage systems incident to any highway improvement, which he is or may be authorized to locate or construct.' R.C. 5501.31 continues to read: '[t]he director [of transportation] may aid the board of county commissioners in establishing, creating, and repairing suitable systems of drainage for all highways within its jurisdiction or control and advise with it as to the establishment, construction, improvement, maintenance, and repair of such highways.' The county engineer must prepare the plans, specifications, details, and estimates of cost, and submit forms of contracts for the construction, maintenance, and repair of ditches. R.C. 315.08 R.C. 5543.12 provides in part:

*3 The county engineer or anyone acting under his authority, when authorized by the board of county commissioners or board of township trustees, may enter immediately:

(A) Upon any lands adjacent to any of the highways in the county for the purpose of opening an existing ditch or drain, or for digging a new ditch or drain for the free passage of water for the drainage of highways.

R.C. 5571.09 authorizes the board of township trustees to 'bring and maintain all suits involving an injury to any

township road, ditch, drain, or watercourse under the jurisdiction of such board and for the prevention of injury thereto.' County commissioners have the same authority with regard to ditches established by the county. R.C. 305.12. The township trustees must also prevent the wrongful obstruction of any ditch along, upon, or across a public highway, pursuant to R.C. 5589.06.

Reading the above provisions together, it is apparent that when a political subdivision undertakes to establish a road or highway, it must also provide for the drainage of that highway. Roadside ditches which handle the road drainage must be deemed to be part of the highway system. Thus, the political subdivision with the responsibility for the repair and maintenance of a particular road must, as a part of that responsibility, clean and maintain the ditches which run along the side of the road. Generally, a county must clean and maintain ditches which run along the county's roads, and a township must clean and maintain the ditches which run along its roads.

In your letter, you suggest the possible applicability of R.C. Chapter 6121. However, R.C. Chapter 6121, concerning the Ohio Water Development Authority, is not directly relevant to your questions. It would appear that reference should be made instead to R.C. Chapter 6141, which set out a specific statutory scheme for cleaning and repairing ditches. I note that R.C. Chapter 6141 was repealed by Am. Sub. H.B. 268, 113th Gen. A. (1980) (eff. April 9, 1981) and portions of that chapter have been incorporated into other provisions of R.C. Title 61. Even if R.C. Chapter 6141 were still in full effect, however, it would have no application to your questions concerning roadside ditches. R.C. Chapters 6131, 6141, and other related chapters pertain to a system of ditches used to provide drainage for land in a particular watershed. Ditches which were constructed pursuant to R.C. Chapter 6131, and which were maintained pursuant to R.C. Chapter 6141 before its repeal, do not necessarily run along a public road, but, rather, run cross-country in order to provide controlled drainage for the land in the county. See R.C. 6131.02. The above-cited sections of R.C. Title 55 are specific in nature as to ditches within the right-of-way of, and appurtenant to, the public roads and highways, while R.C. Chapter 6131 and R.C. Chapter 6141 refer only in general terms to ditches, drains, and watercourses. When there is a generalized statutory reference to a particular subject, and a specific statutory reference to the same subject, the usual rule of statutory application is that the specific statute controls the statute of general import. See R.C. 1.12; Gibson v. Summers Construction Co., 163 Ohio St. 220, 126 N.E.2d 326 (1955).

*4 In response to your questions concerning ditches, I conclude that the county or township responsible for a road or highway is also responsible for the cleaning and repair of a ditch which runs along the side of the road in order to handle the road's drainage.

I turn now to your questions concerning the repair, replacement, and cleaning of culvert pipes. A former Attorney General, citing Bouvier's Law Dictionary, defined 'culvert' as "[a] waterway or water passage, whether of wood or stone, square or arched; a covered drain under a road designed for the passage of water from one side of the road to the other." 1945 Op. Atty Gen. No. 603, p. 763, 765. There are no statutory provisions which expressly place the responsibility for culverts on county and township roads on any particular subdivision. However, reading several statutes together, it appears that culverts on a public highway are, like roadside ditches, part of that road, so that each county and township is responsible for the repair, cleaning, and replacement of the culverts on its respective highway system.

R.C. 5501.11 sets out the functions of the Department of Transportation, one of which is to 'construct, reconstruct, widen, resurface, maintain, and repair the state system of highways and the bridges and culverts thereon.' This section demonstrates a legislative intent that culverts are to be treated as the highway is treated for maintenance and repair purposes. While there is no such explicit language assigning the responsibility for the maintenance and repair of culverts on the county and township highway system, there are, nonetheless, statutory provisions which indicate that culverts under and along county and township roads are part of those respective highway systems for repair and maintenance purposes. R.C. 5549.01 authorizes the board of county commissioners to purchase 'such machinery, tools, or other equipment . . . for the construction, improvement, maintenance, or repair of the highways, bridges, and culverts under its jurisdiction as it deems necessary.' Such expenditures are paid out of available county road funds. R.C. 315.18 requires the county engineer to prepare the plans, specifications, details, and estimates of cost,

and submit forms for the construction, maintenance, and repair of all culverts constructed for the county. R.C. 5543.19(B) authorizes the county engineer to 'employ such laborers and vehicles, use such county employees and property, lease such implements and tools, and purchase such materials as are necessary in the construction, reconstruction, improvement, maintenance, or repair of bridges and culverts by force account' when not required to use competitive bidding. R.C. 5543.02 requires the county engineer to report to the county commissioners the condition of the county roads, bridges, and culverts, and to estimate the amount of funds needed to maintain, repair, or construct any new roads, bridges, or culverts within the county. See also R.C. 5543.05; R.C. 5549.04; R.C. 5591.36.

*5 There are similar provisions governing the duties of township trustees. Township roads may be maintained and repaired by one or more trustees, or by a township highway superintendent. R.C. 5571.02. As demonstrated by R.C. 5571.03, such responsibility includes the maintenance and repair of culverts. R.C. 5549.21 authorizes the trustees to 'purchase or lease such machinery and tools as are necessary for use in constructing, reconstructing, maintaining, and repairing roads and culverts within the township.' R.C. 5549.21 also provides that payments for such purposes are made from the township road fund. R.C. 5571.13 requires the board of township trustees to report to the engineer in relation to the highways, bridges, and culverts within the township. See R.C. 5549.04.

Reading the above statutes together, it is apparent that culverts on the highway system are to be treated as roads and bridges are treated. Whichever political subdivision has the responsibility for repairing and maintaining the highway on which a particular culvert is located has the responsibility for maintaining and repairing that culvert. As discussed above, each county generally has the responsibility for its own roads, and each township must maintain its own system of roads. In similar fashion, the county must maintain the culverts which are on the county's roads, and the township must maintain the culverts which are on the township's roads.

The above conclusion is supported by several opinions from this office. In 1945 Op. Atty Gen. No. 603, p. 763, my predecessor concluded, citing the forerunner of R.C. 5549.21, that culverts were part of the road, and thus the responsibility for culverts fell on the political subdivisions responsible for the various classes of roads. 1925 Op. Atty Gen. No. 2501, p. 333, 1925 Op. Atty Gen. No. 2557, p. 389, and 1923 Op. Atty Gen. No. 784, p. 636 also concluded that culverts were part of a road or highway for construction, maintenance, and repair purposes. See 1959 Op Atty Gen. No. 781, p. 496, See also 1960 Op. Atty Gen. No. 1371, p. 350; 1946 Op. Atty Gen. No. 925, p. 303.

While the above discussion concerns the responsibility for culverts in general, your specific questions address the responsibility for culverts under driveway aprons of abutting property owners. Clearly, if a culvert were located upon private property, and that property were unencumbered by a county's or township's road easement, [FNI] the owner of the property would alone be responsible for that culvert. See R.C. 6131.47. However, where a culvert has been constructed on the county's or township's easement, or right-of-way, in order to provide drainage for the road, that culvert is considered part of the highway system for purposes of maintenance and repair, even though it may be located under a property owner's approach or driveway.

R.C. 5543.16 provides in part: '[t]he owners of land shall construct and keep in repair all approaches or driveways from the public roads, under the direction of the county engineer.' It could be argued that a culvert pipe under a driveway apron is part of the driveway, so that the property owner would be responsible for the culvert. However, R.C. 5543.16 represents an exception to the general rule placing the responsibility for highway maintenance and repair on the various governmental entities (an approach is part of the highway pursuant to R.C. 5501.01(C)), and, as such, must be strictly construed. See State ex rel. Keller v. Forney, 108 Ohio St. 463, 467, 141 N.E. 16, 17 (1923) ('the presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law'). An approach clearly refers to the surface of the road. See R.C. 5555.021; R.C. 5571.01(B). I decline to stretch the concept of approach to include culverts beneath the approach or driveway which serve the governmental purpose of road drainage, and which are generally considered part of the road itself.

*6 The second paragraph of R.C. 5543.16 reads:

In the construction of a road improvement the director of transportation or engineer may, in all case where the

approaches of the owners of abutting real estate are unsuitable to a projected improvement or so constructed as not to afford proper drainage after its completion, include in the plans for such improvement plans for proper approaches. The entire cost of constructing such approaches may be assessed against the lands along which they are constructed. (Emphasis added.)

In the limited situation where a property owner's approach does not provide proper drainage for a road improvement, [FN2] and the county engineer must provide for proper drainage, then the cost of constructing an adequate approach may be assessed against an abutting property owner. The placement of an adequate culvert pipe beneath an approach fits within this provision. However, the last sentence of R.C. 5543.16 indicates that a property owner's liability is limited to the initial construction costs of a proper approach. As the language of R.C. 5543.16 demonstrates, the legislature considers construction to be a distinct concept from that of maintenance and repair. By referring only to construction costs being assessed, the General Assembly has indicated that maintenance and repair costs are not to be assessed. If maintenance and repair costs were to be assessed, they would have been specifically mentioned. Thus, once a culvert has been constructed to provide proper drainage for a road improvement, its subsequent maintenance and repair must be assumed by the proper political subdivision, and the costs thereof may not be assessed against the abutting property owner. I note that R.C. 5543.16 also provides that if an approach or driveway is destroyed in the construction, improvement, maintenance, and repair of any road, then the appropriate authority must compensate the property owner or reconstruct the driveway at public expense.

In response to your questions concerning culverts, I conclude that culverts on a highway are part of the highway for purposes of cleaning, repair, and replacement, and thus the political subdivision responsible for the road is responsible for the culverts thereon. Abutting property owners are not responsible for the repair and maintenance of a culvert along a highway right-of-way, even though such culvert runs under the owner's driveway apron, although the property owner may be assessed the original costs of constructing an approach which provides proper drainage for a road improvement.

You have also asked about the allocation of responsibility for storm sewers. It is my understanding that the purpose of the storm sewers with which you are concerned is to carry off drainage from the roads and highways. There are no specific statutory provisions concerning the cleaning and repairing of storm sewers. However, as noted above, a storm sewer's function is to operate as a drain for the highway system. I understand that the sewer accomplishes this function through a series of ditches. Thus, breaking the sewer system down into its component parts—ditches—it becomes apparent that the duty to clean and repair storm sewers falls on the entity responsible for cleaning and repairing ditches. As discussed above, this responsibility falls on the political subdivision responsible for the road along which the ditch runs. If the storm sewer must transport drainage under or along a highway by means of a culvert, then, as discussed above, the duty to clean and repair the culvert would also fall on the political subdivision responsible for the highway upon which the culvert is constructed.

*7 You have posed the question as to how the costs of cleaning, maintaining, and repairing ditches, culverts, and storm sewers are to be paid. Because ditches, culverts, and storm sewers are repaired and maintained as part of a county's or township's duty to repair and maintain roads, the costs of working on ditches, culverts, and storm sewers should be paid in the same manner in which road maintenance and repair costs are paid. Absent specific statutory authority, e.g., R.C. 5555.03 (concerning improvements and repairs made pursuant to petition by landowners), these costs cannot be assessed against property owners.

In conclusion, it is my opinion, and you are advised, that:

1. Each county and township bears the responsibility for the maintenance and repair of its respective road or highway system, although the various political subdivisions may cooperate in the maintenance and repair of the others' roads.
2. The political subdivision with the responsibility for the repair and maintenance of a particular road must, as a part of that responsibility, clean and maintain the ditches which run along the side of the road for drainage purposes.
3. The political subdivision which is responsible for the repair and maintenance of a road is also responsible for

the cleaning, repair, and replacement of a culvert on the road, even though the culvert may pass beneath the driveway of an abutting property owner. (1945 Op. Att'y Gen. No. 603, p. 763; 1925 Op. Att'y Gen. No. 2501, p. 333; 1925 Op. Att'y Gen. No. 2557, p. 389; 1923 Op. Att'y Gen. No. 784, p. 636, approved and followed.)

4. The duty to clean and repair storm sewers falls on the political subdivision responsible for the cleaning and repair of the ditches and culverts which comprise the storm sewer.

5. The costs of cleaning, maintaining, and repairing county and township roads, and the ditches, culverts, and storm sewers appurtenant to the roads, are to be paid as other costs of road maintenance and repair. Absent specific statutory authority, these costs may not be assessed against abutting property owners.

Respectfully,
William J. Brown
Attorney General

[FN1] An abutting property owner outside a municipality holds the land in fee to the center of the road subject to an easement or right-of-way by a governmental entity for highway purposes. Taylor v. Carpenter, 45 Ohio St.2d 137, 341 N.E.2d 843 (1976).

[FN2] See R.C. 5553.01 for a definition of 'improvement.'

1981 Ohio Op. Atty. Gen. 2-154, 1981 Ohio Op. Atty. Gen. No. 81-039, 1981 WL 156189 (Ohio A.G.)
END OF DOCUMENT



LYNN C. SLABY



Prosecuting Attorney
County of Summit

OPINION NUMBER: 90-029

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Child Support Enforcement Agency
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March 19, 1990

*TYPICAL
PRIVATE PROPERTY
DRAINAGE*

Marianne Faircloth, Clerk-Treasurer
Northfield Center Township
P.O. Box 274
Northfield Center, OH 44067

SYLLABUS:

Powers of Townships are statutory and in the absence of a duty to maintain a public road, watercourse, or supply system, a township is not authorized to enter upon private property to control or direct the flow of surface waters.

Re: [REDACTED] - [REDACTED] Drainage Problem

Dear Ms. Faircloth:

We have before us your request for a legal opinion concerning the drainage problem of two citizens in Northfield Center Township. You state in your request that the lower property owner has put a barrier against the water coming from the upper owner. Your question is whether or not the township or county are involved in any way and have authority to control the drainage on private property.

Under the facts that you have given us, this would not be a township or county matter. It has been held by many Supreme Court cases that townships possess only the powers that are expressly conferred upon them by statute. No statute authorizes the trustees of the township to enter upon private property and control the water management thereon. This dispute is between two citizens who are adjacent property owners and would be a civil matter which, if they cannot resolve it between them, would have to be resolved by the Common Pleas Court in a proper civil action.

We deduce from reading your opinion request, that the facts do not involve a public water supply system. Neither do the facts involve a single county ditch. The facts do not indicate either that the township or the county has done anything with relation to township or county roads or property or facilities to cause the drainage problem. Accordingly, this is a civil matter between the adjacent landowners.

The Supreme Court of Ohio in the cases of Caldwell, et al. v. Goldberg, et al., (43 Ohio St.2d 48) (1975), specifically decided that a drainage ditch located on private property does not become a public watercourse unless it was established or improved pursuant to the provisions R.C. §6131. The court held that the mere flow of the natural water on the surface does not qualify as a public watercourse unless there is evidence that it had been established as such or evidence that it was a stream bed or watercourse of some sort.

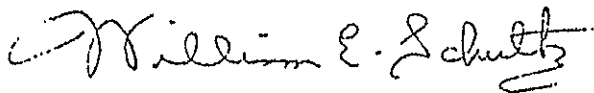
The question of whether the surface water is being drained naturally, is one to be determined between two parties concerned.

We might add that the provisions of R.C. §6131.04 authorize a filing of a petition with the County Council to construct an improvement, however, this would be at the cost of the landowners who are benefited and would be assessed against them.

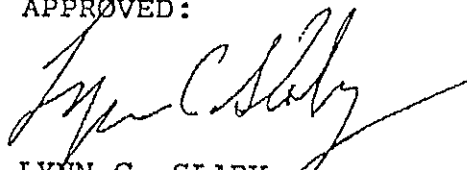
Accordingly, we conclude from the facts in your letter of March 4, 1990, that there is no involvement here either by the township or the county and that the matter involves a civil dispute to be resolved between the two landowners.

Very truly yours,

LYNN C. SLABY
Prosecuting Attorney


WILLIAM E. SCHULTZ
Assistant Prosecuting Attorney

APPROVED:


LYNN C. SLABY
Prosecuting Attorney

WES/rc



LYNN C. SLABY

Prosecuting Attorney
County of Summit



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July 15, 1991

OPINION NUMBER 91-115

Paul G. Swanson, P.E., P.S.
Summit County Engineer
538 E. South Street
Akron, Ohio 44311

RE: Mark M. Biars, Brunswick Lane

Syllabus:

R.C. §6131 and following sections establishes the procedure for drainage improvements and maintenance for ditches in Ohio.

Dear Mr. Swanson:

We have your request concerning the ultimate responsibility for the drainage ditch in question in the Winterberry Heights Subdivision. This opinion may also be applicable to other drainage ditches in Hudson Township.

In your opinion request, you refer to the Opinion by Evan Palik of our office with regard to the duty to clean and maintain storm sewers in Green Township. This opinion however, is limited to the situation where there is involved a culvert or drain connected with the Township road. This particular township responsibility is the sole exception to the new legislation enacted under Chapter 6131 of the Revised Code.

House Bill 268, 1980, effective April 9, 1981, removed from the law any responsibility on the part of the Township government to improve, clean or repair township ditches, drains and watercourses. This was done by a repeal of Chapter 6139 and 6141 of the Revised Code.

The current law in effect now codified in R.C. §6131 covers single county ditches and the procedure for establishing a drainage improvement district. It also sets up a system of owner petitions for the construction of a drainage improvement (R.C. §6131.05 to R.C. §6131.36). In these sections the authority of the Board of County Commissioners in regard to the petition, bid, contract and construction procedures is codified. There is also

established a county ditch maintenance fund under R.C. §6137 which is the fund to be maintained for drainage improvements which have been initiated under R.C. §6131. The County Engineer has general charge and supervision of the repair and maintenance of drainage improvements (R.C. §6131.06).

Any owner having an interest in real property may file a petition with the Clerk of the Board of County Commissioners under R.C. §6131.04. There then follows a series of sections setting forth the hearing notice and procedures which must take place after the petition is filed.

The legislature has provided two different methods by which an owner may achieve construction of the desired improvement. The owner may enter into an agreement with other owners willing to pay the cost of construction of the proposed improvement (R.C. §6131.63). Alternatively, the owner may petition the Board of County Commissioners for the construction of the desired improvement (R.C. §6131.04). If the latter method is pursued then all owners of land believed to be benefited by the proposed improvement may be assessed for the costs of the construction of such improvement. (R.C. §6131.15).

Once the improvement is constructed under either of the methods described above, it is to be maintained in accordance with R.C. §6137. This fund established under R.C. §6137.02 for the repair, upkeep and permanent maintenance of the improvement needs to be financed by an assessment levy not more often than once annually upon the benefited owners as defined in R.C. §6131.01. Sub House Bill 268, which was effective April 9, 1981, changed the entire procedure and the methods for drainage laws in Ohio. All of the previous drainage statutes were either amended or repealed. The provisions of §6131.01 and following are the exclusive method now provided for "improvements." In R.C. §6131.01 improvements are defined. This definition states that improvements consist of the location, construction, reconstruction, reconditioning, widening, deepening, straightening, altering, boxing, tiling, filling, walling, arching or any change in the course, location or terminus of any ditch, drain, watercourse or flood way. The specific duties of the County Engineer are defined in R.C. §6131.14. After a copy of the findings from the Board of County Commissioners has been sent to the Engineer, the Engineer is required to make the necessary survey for the proposed improvement. Also, to make the plans for structures and the maps showing the location of the land proposed to be assessed. We are enclosing a copy of R.C. §6131.14 which is in great detail for your perusal.

Another section, R.C. §6131.46, provides for supervision of the work by the County Engineer.

The Attorney General in his Ohio Atty. Gen. Ops. No. 84-101 and also Ohio Atty. Gen. Ops. No. 89-036, has analyzed specific procedures involved which we have summarized above.

We assumed after reading through the material that you furnished, along with your opinion request, that the County Engineer did not establish and has not improved any of the ditches mentioned in the Hudson Township correspondence pursuant to R.C. §6131. Therefore, the procedure as to the improvement of these ditches is governed entirely by R.C. §6131.02 and following, starting from the petition which is filed with the Board of County Commissioners.

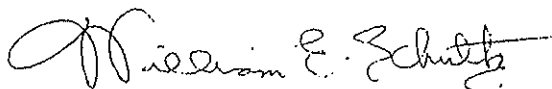
It should be noted that under R.C. §6131.01 in the definitions, an owner is defined as any owner of any right, title, estate or interest in any real property. If the Board of Township Trustees owns any property involved, affected by the drainage ditch, then the Board of Township Trustees would qualify as an owner capable of filing such a petition. It should be noted that in R.C. §6131.04 the petition may be filed by "any owner." Of course, this may not be applicable to the specific question you ask concerning the Winterberry ditch. In reading through the various documents which you attached with your opinion request, we note that there are several other ditches with which the Hudson Township Trustees are concerned. The nature of the petition, of course, would be determined by the facts in each case, but if several single county ditches are involved, and are connected with the drainage problem, it is possible that joint petitions of more than one owner of land could be filed. This will, of course, depend upon a view of the entire site and a determination as to whether or not the owners of the land affected could join in a single petition.

This is a matter in which the owner or owners involved should consult their own attorney because there is involved a determination of assessments by the County Council, (R.C. §6131.22), a possible dismissal at final hearing (R.C. §6131.21) and a procedure for appeal in the Common Pleas Court de novo if the owners are dissatisfied with the decisions made (R.C. §6131.30).

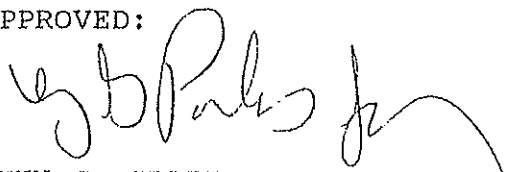
We trust that this answers your inquiry concerning the Winterberry ditch and the procedures applicable thereto.

Very truly yours,

LYNN C. SLABY
Prosecuting Attorney


WILLIAM E. SCHULTZ
Assistant Prosecuting Attorney

APPROVED:


LYNN C. SLABY
Prosecuting Attorney

WES/rlc
Enclosure



LYNN C. SLABY

Prosecuting Attorney
County of Summit



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Child Support Enforcement Agency
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September 29, 1993

OPINION NUMBER 93-177

John E. Peltier
Zoning Inspector
Bath Township
3864 W. Bath Road
P.O. Box 1188
Bath, Ohio 44210-1188

RE: Drainage on Road Right-of-Way and
Drainage Easements on Private Property

Syllabus:

Under R.C. §5535.01, a township has a duty to maintain drainage for township roads. The diversion of water upon a township road by an abutting owner may in some cases constitute an obstruction under R.C. §5589.06.

Dear Mr. Peltier:

We have before us your request for an opinion concerning a matter involving the responsibility to maintain drainage facilities located in a township road right-of-way. You also ask about recorded drainage easements in a recorded plat development and the drainage therefrom.

From our telephone conversation, we assume that the main problem here is storm water drainage into a township roadside drain which abuts the private property.

In so far as the township's responsibility is concerned, R.C. §5535.08 controls this. The township shall maintain its roads as designated in R.C. §5535.01 and this applies to the duty to clean and repair storm sewers. This question was addressed in Attorney General's Opinion No. 81-039. The Attorney General held

that the political subdivision, with the responsibility for the repair and maintenance of a particular road must as a part of that responsibility clean and maintain the ditches which run along the side of the road for drainage purposes. The costs are paid as other costs of road maintenance and repair. They may not be assessed against abutting property owners.

This same opinion addressed the question of the responsibility of culverts under driveway aprons of abutting property owners. The Court held that if a culvert were located upon private property, the owner of the property would alone be responsible for that culvert. However, the Court said, "where a culvert has been constructed on a county's or township's easement or right-of-way, in order to provide drainage for the road that culvert is considered part of the highway system for purposes of maintenance and repair even though it may be located under a property owner's approach or driveway. We do not know whether or not the problem you are encountering includes this type of fact situation. Generally, of course, the owner of the property is responsible for the maintenance of all drainage facilities upon his property.

There is another Attorney General's Opinion which addresses a specific situation. This opinion states that a property owner who in order to provide an approach to his property places a culvert in a pre-existing ditch which is part of a public highway is responsible for maintenance of that culvert. This opinion was to clarify Opinion No. 81-039. The Court further went on to say that "R.C. §5589.06 imposes a duty on a property owner who builds an approach to his land to do so in a manner which does not obstruct an existing ditch along, upon, or across a public highway". This Opinion also held that should a culvert be installed by a property owner become an obstruction in a highway, it would be the property owner's duty to remedy that situation. The mere discharge of water is not in and of itself an obstruction provided that there is not an artificial increase in volume to the extent that it is impossible to maintain proper drainage of the township road. This is another matter which involves a recent case which we will discuss.

The case of Becker v. Shaul (1992), 62 Ohio St. 3d 480, is a case in which the Supreme Court considered the application of R.C. §5589.06 as it related to liability for the diversion of water from adjacent lands to or upon a public highway. The Court held that in order to hold the diverter responsible he must be found negligent in failing to act as a reasonably prudent person under the circumstances. Therefore the test for diverting water upon a public highway which causes damage or an obstruction is

proof of negligence. This case held more specifically that where an individual has altered or graded his premises so as to cause a diversion of water onto a public highway, this does not result in automatic negligence per se but to be liable under R.C. §5589.06, the person must be found negligent by a trier of fact for failing to act as a reasonably prudent person under the circumstances.

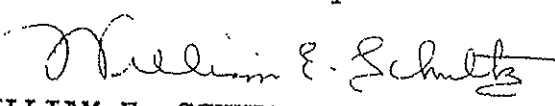
Thus, in conclusion, the township has the obligation to maintain its own drainage along the highway. The developer has the obligation to maintain his own system of drainage upon his property. If the developer acts unreasonably and throws the burden upon the township road by diverting water, then there may be liability. Finally, if a culvert is installed by a property owner and becomes an obstruction, it would be the property owner's duty to remedy the situation, otherwise it would be a violation of R.C. §5589.06.

Without seeing the actual problem, we can go no further in defining the obligations of the township and the property owner since each case is somewhat dependent upon the facts that exist in each situation.

As always, should you have any further questions or concerns, please do not hesitate to contact our office.

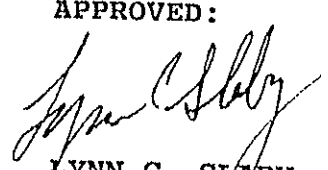
Very truly yours,

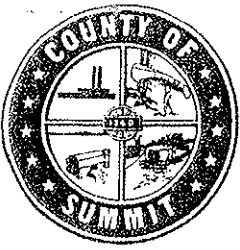
LYNN C. SLABY
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WES/clf

APPROVED:


LYNN C. SLABY
Prosecuting Attorney



SHERRI BEVAN WALSH

Prosecuting Attorney
County of Summit

JOHN P. QUINN
Chief Counsel, Civil Division

February 15, 2001

OPINION NUMBER: 01-005

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David L. Gravis
Administrative Assistant
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RE: Bath Township Drainage Problem

Syllabus:

Unless Bath Township interfered with the riparian rights of the homeowners on Spring Valley Road in Bath Township, the Township is not required to repair storm sewer pipes installed by homeowners to carry water from their property to a township storm water system. It is the responsibility of the homeowner to correct and maintain storm water drainage problems affecting their property, which are not due to the actions of a township.

JUVENILE DIVISION

650 Dan Street
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(330) 379-3647 Fax

TAX DIVISION

906 Key Building
159 South Main Street
Akron, OH 44308-1317
(330) 643-2617
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Dear Mr. Gravis:

This opinion is in response to your letter dated June 12, 2000, requesting the guidance of this office pertaining to the drainage issue located on Spring Valley Road in Bath Township. You have provided us with correspondence dated May 18, 2000; May 9, 2000; May 3, 2000; March 20, 2000; March 14, 2000; and June 22, 2000.

In a telephone conversation of January 23, 2001, I had spoke with the Township Service Director, requesting any file pictures, drawings, and further explanation of the work performed by the Township along the roadway or adjacent to the roadway and the extent of any work previously completed on the private property.

Nonetheless, it is our understanding that a property owner is requesting that your Township complete "remedial work" by removing the drainage pipe which presently leads from a catch basin installed by the Township or, in the alternative, a demonstration that the catch basin will, in fact, prevent further discharge from a partial drainage pipe under her property. It is our further understanding that in November, 1999, Township workers, by agreement with and at the suggestions of the property owners, collapsed a drainage pipe on the property of one property owner and left a drainage pipe on the neighbor's property intact. It is also our understanding that the neighbor's drainage pipe leads to the catch basin installed by the Township for the purpose of alleviating drainage problems in the area of Spring Valley Road.

The Attorney General for the State of Ohio in 1994 Ohio Opinion Attorney General No. 94-061, discussed in great detail the responsibilities of a township for storm sewer pipes installed by homeowners on private property. This opinion set forth various legal principles which defined the responsibilities of a township and private landowner. Of particular note were the following:

1. Since the township is a creature of statute, it may proceed with the repair of a storm sewer pipe installed by a homeowner to carry water from his property to a township storm sewer pipe only if it is so authorized by statute;
2. The duty to clean and repair storm sewers fall on the political subdivision responsible for the cleaning and repair of the ditches and culverts which comprise the storm sewer (citing Atty. Gen. Op. No. 81-039);
3. Since storm sewers that handle road drainage are part of the highway system, a township must clean and repair the storm sewers that run along its roads and that a township's duty to clean and repair storm sewers is concomitant to its duty to maintain its road system;
4. The township is not required to repair a storm sewer pipe installed by a homeowner to carry water from his property to his township storm sewer pipe;
5. A township is not responsible if storm water backs up onto the property of homeowners unless the township has abridged the riparian rights of homeowners who have installed a storm sewer pipe to carry water from their property to a township storm sewer pipe;
6. A township is legally privileged to make a reasonable use of its property and incurs liability only when its interference with the flow of surface water is unreasonable;

7. When a municipality superimposes its storm sewer system upon a natural watercourse, it must do so in a manner consistent with the riparian rights of adjoining landowners, and the defense of sovereign immunity does not preclude liability for damages caused by any attendant abridgement of riparian rights.

In tying these various legal conclusions set forth in the Attorney General Opinion No. 94-061 to the facts of this case, one could argue that the Township from the onset had no duty to the homeowners whose properties were adjacent to the roadway on Spring Valley Road in curing surface water drainage problems or in any way maintaining drainage tiles leading from their properties to the Township's storm water management and roadway runoff system. It would also appear that the Township may have exceeded the scope of its responsibilities in attempting to accommodate the property owners, unless the improvements by Bath Township to the roadway or its concomitant storm water management affected the riparian rights of those homeowners. See also Prosecutor Opinion 85-157, wherein this office has determined that Township Trustees have no authority to expend funds for drainage purposes on private property.

If the work done by agreement with the Township and the homeowners resolved a surface water drainage problem but has not added to the current surface water drainage problem of another homeowner, or in any way impeded the flow of surface water from the homeowner's property, then it is our opinion that the Township would have no further responsibility towards correcting surface water drainage problems of the homeowner.

We would suggest; however, that the Township ask the Summit County Engineer to look at the situation to determine whether the work which has been completed by the Township to date has affected the riparian rights of the homeowners on Spring Valley Road.

Should you wish to provide this office with additional facts, documents, drawings, or photographs for further analysis, we would be happy to review the same in light of Ohio Attorney General Opinion 94-061.

Accordingly, it is our opinion and you are so advised, that unless Bath Township interfered with the riparian rights of the homeowners on Spring Valley Road in Bath Township, the Township is not required to repair storm sewer pipes installed by homeowners to carry water from their property to a township storm water system. It is the responsibility of the homeowner to correct and maintain storm water drainage problems affecting their property, which are not due to the actions of a township.

We trust this answers your inquiry, and should you have any further questions or concerns, please do not hesitate to contact our office.

Very truly yours,

SHERRI BEVAN WALSH
Prosecuting Attorney



SANDY J. RUBINO
Assistant Prosecuting Attorney

SJR/cal

APPROVED:



JOHN P. QUINN
Chief Counsel, Civil Division



SHERRI BEVAN WALSH

Prosecuting Attorney
County of Summit

April 23, 2004

Prosecutor Opinion Number 04-034

MARY ANN KOVACH
Chief Counsel, Criminal Division

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William E. Snow, Township Administrator
Bath Township
3864 West Bath Road
P.O. Box 1188
Bath, Ohio 44210-1188

**Re: Drainage Issues on Harvest Drive/Impediment
on Private Property**

**Syllabus: A Township has no authority to cure drainage
impediments on private property.**

Dear Mr. Snow:

You have requested a legal opinion concerning drainage issues on Harvest Drive -- Impediment on private property. In your request dated April 12, 2004, you state the following:

We recently met with several residents of Harvest Drive concerning flooding that is occurring on their property. The Township has an easement on the property that terminates to a natural drainage area but is not accepting the flow of water because of an undersized culvert and debris.

I have enclosed assorted reports and opinions that have been a part of the discussions on the issues over the years, and I would request that you review the situation and detail what the township under, statutory authority of the Ohio Revised Code, can undertake to improve the flow of water.

It would be most helpful, after your review of this current situation, if you could examine the whole area for a more detailed review as the drainage problems from the easement are increasing. I have also asked the Summit County Engineer to update their review of the situation and I will forward that to your office as soon as it is completed.

William E. Snow, Township Administrator
Bath Township
April 23, 2004
Page 2

Please be advised that consistent with Prosecutor Opinion Numbers 01-005 and 85-157, a copy of which are attached hereto, the Township cannot undertake to improve the flow of water on private property and expend public funds to ameliorate drainage issues on private property where the Township's easement is not creating the flooding problem. It is our understanding from the materials you have enclosed which set forth the history of Harvest Drive flooding that the Township easement is not creating the problem with the flow of water, but instead, flow problems are being created by an undersized culvert and debris located on private property, the maintenance of which is not the responsibility of the Township.

Accordingly, it is our opinion and you are so advised that a Township has no authority to cure drainage impediments on private property.

We trust this answers your inquiry, and should you have any further questions or concerns, please do not hesitate to contact our office.

Very truly yours,

SHERRI BEVAN WALSH
Prosecuting Attorney



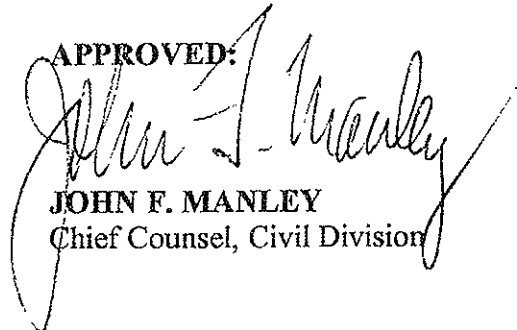
SANDY J. RUBINO
Chief Assistant Prosecutor, Civil Division

SJR/tld

Enclosure

cc: Bath Township Trustees

APPROVED:



JOHN F. MANLEY
Chief Counsel, Civil Division