

STATE OF MICHIGAN

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HIGHWAYS: Use of rights-of-way for pedestrian pathways

EASEMENTS:

PEDESTRIAN PATHWAYS:

A pedestrian and bicycle pathway may be established within the right-of-way of a county road built on an easement granted for highway purposes, without first obtaining the consent of each owner of property abutting the highway.

Opinion No. 7251

October 21, 2010

Honorable Jason Allen
State Senator
The Capitol
Lansing, MI 48909-7536

You have asked whether a county road commission must obtain consent from the abutting property owners before establishing a pedestrian and bicycle pathway within the right-of-way of a county road built on an easement granted for highway purposes.

The "use of an easement must be strictly confined to the purposes for which it was granted or reserved." *Delaney v Pond*, 350 Mich 685, 687; 86 NW2d 816 (1957).

Determining the purposes to which an easement may be put begins with a review of the text of the instrument conveying that easement. *Little v Kin*, 468 Mich 699, 700; 664 NW2d 749 (2003). Your question refers to an easement granted for "highway purposes,"

a common description of the purposes for which property is acquired or dedicated for use as a highway.¹

The general scope of such an easement has long been settled law. In *People v Eaton*, 100 Mich 208, 211; 59 NW 145 (1894), the Michigan Supreme Court addressed whether the statutory authority of a telegraph company to install telegraph poles along a public highway placed "an additional servitude upon the land of the adjacent proprietor," so as to constitute an unconstitutional taking of private property without just compensation. The Court explained that highway easements are intended to give the general public the largest practicable benefit, and that, absent a restriction, the use of a highway is not restricted to any particular mode of use but is open to all suitable methods of public use:

Public highways are under legislative control. They are for the use of the public in general, for passage and traffic, without distinction. The restrictions upon their use are only such as are calculated to secure to the general public the largest practicable benefit from the enjoyment of the easement. *When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods.* It has been settled in this State that *lands taken or granted for public highways are so taken or granted for all the purposes for which they may be used for the benefit of the public, for the passing and repassing of travelers thereon, and for the transportation of passengers by stage coach, omnibus, or street cars propelled by horses, steam, or electricity, and that the laying of tracks for such street cars is not an additional servitude upon the lands of adjacent proprietors.* [*Eaton*, 100 Mich at 211; citations omitted; emphasis added.]

¹ The description "highway purposes," is generally used to describe the property acquired for use as a highway, whether the property is acquired by voluntary conveyance (*Church v State Highway Dep't*, 254 Mich 666; 236 NW 900 (1931)), dedication (*DeFlyer v Oceana County Rd Comm'rs*, 374 Mich 397, 402; 132 NW2d 92 (1965)), statutory user (*Eager v State Hwy Comm'r*, 376 Mich 148, 155; 136 NW2d 16 (1965)), or condemnation (*State Highway Comm'r v Eilender*, 373 Mich 46; 127 NW2d 890 (1964)).

The Court added that the uses to which highway easements may be put evolve over time, in recognition of technological developments and the changing needs of the public:

When these lands were taken or granted for public highways, they were not taken or granted for such uses only as might then be expected to be made of them, by the common methods of travel then known, or for the transmission of intelligence by the only methods then in use, but for such methods as the improvement of the country, or the discoveries of future times, might demand. [*Eaton*, 100 Mich at 212-213.]

The Legislature has specifically authorized constitutionally dedicated transportation funds to be used for "nonmotorized transportation." MCL 247.660k(2). In fact, the Legislature recently amended the law to encourage the use of highway rights-of-way by pedestrians and bicyclists. 2010 PA 134 and 135 amended the Michigan Planning Enabling Act, 2008 PA 33, MCL 125.3801 *et seq*, and 1951 PA 51, MCL 247.651 *et seq*, to require planning for such use:

2) A master plan shall also include those of the following subjects that reasonably can be considered as pertinent to the future development of the planning jurisdiction:

* * *

(b) The general location, character, and extent of all of the following:

(i) *All components of a transportation system and their interconnectivity including streets and bridges, public transit, bicycle facilities, pedestrian ways, freight facilities and routes, port facilities, railroad facilities, and airports, to provide for the safe and efficient movement of people and goods in a manner that is appropriate to the context of the community and, as applicable, considers all legal users of the public right-of-way.* [MCL 125.3833(2); emphasis added.]

Similarly, MCL 247.660p(1), which requires the development of a "complete streets" model for use by cities and counties, sets forth the following definitions:

(a) "Complete streets" means *roadways planned, designed, and constructed to provide appropriate access to all legal users* in a manner that promotes safe and efficient movement of people and goods whether by car, truck, transit, assistive device, *foot, or bicycle*.

(b) "Complete streets policy" means a document that provides guidance for the planning, design, and construction of roadways or an interconnected network of transportation facilities being constructed or reconstructed and designated for a transportation purpose that promotes complete streets [MCL 247.660p(1)(a) and (b); emphasis added.]

Various other statutes recognize that highways may be used by pedestrians and bicyclists. For example, under the Governmental Tort Liability Act, MCL 691.1401 *et seq.*, "[h]ighway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(e). Section 60 of the Michigan Vehicle Code, MCL 257.1 *et seq.*, defines "[s]idewalk" to mean, "that portion of a street between the curb lines, or the lateral lines of roadway, and the adjacent property lines intended for the use of pedestrians." MCL 257.60. Section 655 of the Code requires that: "Where sidewalks are provided, a pedestrian shall not walk upon the main traveled portion of the highway." MCL 257.655. With regard to bicyclists using sidewalks, section 660c(1) provides: "An individual operating a bicycle upon a sidewalk or a pedestrian crosswalk shall yield the right-of-way to pedestrians and shall give an audible signal before overtaking and passing a pedestrian." MCL 257.660c(1). Section 656(3) recognizes that paths may be set aside for bicycle use: "The regulations applicable to bicycles under sections 656 to 662 shall apply when a bicycle is operated upon a highway or upon a path set aside for the

exclusive use of bicycles, subject to those exceptions stated in sections 656 to 662."
MCL 257.656(3).

This Attorney General has opined that nonmotorized facilities that are "reasonably appurtenant" to the portion of a highway designed for motorized vehicles can enhance highway safety by separating the motorized vehicles from bicyclists, hikers, cross-country skiers, and other pedestrians. See OAG, 1979-1980, No 5723, p 837 (June 19, 1980). And in *In re Petition of Carson*, 362 Mich 409, 412; 107 NW2d 902 (1961), the Michigan Supreme Court ruled that a footpath was a contemplated use of a roadway, quoting and adopting the following definition of "highway" from a decision of the Georgia Supreme Court, "[a] highway is a public way open and free to any one who has occasion to pass along it on foot or with any kind of vehicle."²

In light of these statutory provisions and precedents, a path for use by pedestrians and bicyclists is a proper use of an easement granted for highway purposes.³ Because it is a proper use within the scope of an easement granted for highway purposes, a county road commission need not obtain the consent of property owners abutting the easement before establishing a pedestrian and bicycle pathway within the right-of-way.

² *Schlesinger v City of Atlanta*, 161 Ga 148, 159; 129 SE 861 (1925); *Eyde v Eaton County Drain Comm'r*, 427 Mich 271, 283; 398 NW2d 297 (1986) ("A highway easement is in the public and cannot be limited by individual perceptions of what the scope of that easement should be").

³ Among the other proper uses of highway rights of way are: snowmobiling (MCL 324.82119); parking (*Cleveland v Detroit*, 324 Mich 527, 536; 37 NW2d 625 (1949)); and, above- and below-ground public utilities (Const 1963, art 7, § 29; MCL 247.183; OAG, 1979-1980, No 5746, p 892 (July 25, 1980); *Eyde*, 427 Mich at 286.

It is my opinion, therefore, that a pedestrian and bicycle pathway may be established within the right-of-way of a county road built on an easement granted for highway purposes, without first obtaining the consent of each owner of property abutting the highway.

MIKE COX
Attorney General