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FILE NO. S-858

ROADS AND BRIDGES:

**Distinction Between Private and
Public Road and Duty of Sheriff
to Patrol Private Roads**

Honorable Jack Hoogasian
State's Attorney, Lake County
County Building
Waukegan, Illinois 60085

Dear Mr. Hoogasian:

I have your letter in which you state:

"Your opinion is requested in respect to the following questions which were raised by the Sheriff of Lake County regarding the legal definition of private roads in the numerous subdivisions located within the unincorporated areas of Lake County:

1. Does the fact that subdivision roads, privately maintained, constitute them to be private.
2. Should these roads be posted as private roads by the subdivisions to advise motorists of this fact.

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3. If these roads are in fact designated as private roads do motorists, regardless if residents or otherwise, become immune from traffic law enforcement.
4. Should the Sheriff's squads patrol such private roads.
5. May the Sheriff's squads patrol such roads at the invitation of the subdivision or its residents.

This matter has occurred because of the numerous occasions residents have requested patrolling, and yet, residents complain of being unjustly charged for traffic offenses because of the privacy of the roads."

Your first question is whether subdivision roads are private due to the fact that such roads are privately maintained.

While the only fact which you mention in your letter is that the roads in question are privately maintained, a number of factors may be pertinent in determining whether a particular road is private or public.

There are, for example, a number of ways in which a road can become a highway or public road. Since the use of land for public highways or streets is for a public purpose, public highways or streets may be established by dedication.

(Koch v. Mraz, 334 Ill. 67; City of Princeton v. Gustavson,

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241 Ill. 566.) A dedication may be either a common-law dedication or a statutory dedication, depending on whether it is made in accordance with common-law principles or in compliance with statutory principles. Hooper v. Haas, 332 Ill. 561.

Generally, in order to constitute a common-law dedication, it is essential that there be an intention on the part of the owner of the land to donate the same to public use and acceptance thereof by the public. (Woodward v. Schultz, 15 Ill. 2d 476; People ex rel. Markgraff v. Rosenfield, 383 Ill. 468.) In addition, long acquiescence in use by the public may, under certain circumstances, operate as a dedication of land to public use. Village of Benld v. Dorsey, 311 Ill. 192; Dupont v. Miller, 310 Ill. 140.

Section 3 of "AN ACT to revise the law in relation to plats" (Ill. Rev. Stat. 1973, ch. 109, par. 3) provides:

"The acknowledgment and recording of such plat, or the acknowledgment and the filing of the same as aforesaid, shall be held in law and in equity to be a conveyance in fee simple of such portions of the premises platted as are marked or noted on such plat as donated or granted to the public, or any person, religious society, corporation or body politic, and as a general warranty against the donor.

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his heirs and representatives, to such donee or grantee, for their use or for the use and purposes therein named or intended, and for no other use or purpose. And the premises intended for any street, alley, way, common or other public use in any city, village or town, or addition thereto, shall be held in the corporate name thereof in trust to and for the uses and purposes set forth or intended."

Thus, if there is a proper acceptance and a proper compliance with the provisions of the statute relating to plats, a statutory dedication will result. A defective statutory dedication may operate as a common-law dedication where the elements necessary for the accomplishment of the latter type of dedication are present. Farwell v. City of Chicago, 247 Ill. 235; Corning & Co. v. Woolner, 206 Ill. 190.

A highway or public road can also be established by prescription. Under section 2-202 of the Illinois Highway Code (Ill. Rev. Stat. 1973, ch. 121, par. 2-202), any public way for vehicular travel which has been used by the public as a highway for 15 years can become a public highway. While section 2-202 of the Illinois Highway Code, supra, establishes a statutory period, it does not change the common-law requirements for the

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acquisition of a road by prescription. (Doss v. Bunyan, 262 Ill. 101.) In order to establish a public highway by prescription, there must be, in addition to a use by the public for the statutory period, a use by the public which is adverse under claim of right, continuous and uninterrupted, with knowledge of the owner of the estate, and yet without his consent. Palmer v. City of Chicago, 248 Ill. 201; Foeller, for Use of Town of Shiloh Valley v. Griffin, 309 Ill. App. 238.

Another possible way in which a highway or public road may be established is by legislative act or by statutory proceedings. Generally, the General Assembly may establish public highways by statute (People ex rel. Curren v. Schommer, 392 Ill. 17) or it may delegate the power to establish, select, or locate roads or highways to administrative agencies, which it has done in various statutes. See, e.g., Ill. Rev. Stat. 1973, ch. 121, pars. 4-501, 4-505, 8-101, 8-105.

A number of statutory provisions make reference to private roads. (See, e.g., Ill. Rev. Stat. 1973, ch. 121, par. 6-327; Ill. Rev. Stat. 1973, ch. 94, par. 1; Ill. Rev. Stat. 1973, ch. 134, par. 12.) Outside the context of traffic law enforce-

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ment, a number of cases have recognized the distinction between private and public roads. Generally, courts have indicated that the fact that a road is designated as private or that an individual pays for the right of way does not change its character, provided it is, in fact, a public road. (Road Dist. No. 4 v. Frailey, 313 Ill. 568.) It has also been said that the term "highway" is a generic one and its construction depends on the intent with which it is used, as determined by the context. (People ex rel. Clark v. Village of Wheeling, 24 Ill. 2d 267.) Whether a road is a "highway" is a question of fact. See, e.g., Daniel v. Elgin, J. & E. Ry. Co., 58 Ill. App. 2d 414; Andrews v. City of Springfield, 56 Ill. App. 2d 201.

Section 2-202 of the Illinois Highway Code, supra, defines "highway" for purposes of said Act. Said section provides:

"Highway -- any public way for vehicular travel which has been laid out in pursuance of any law of this State, or of the Territory of Illinois, or which has been established by dedication, or used by the public as a highway for 15 years, or which has been or may be laid out and connect a subdivision or platted land with a public highway and which has been dedicated for the use of the owners of the land included in the

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subdivision or platted land where there has been an acceptance and use under such dedication by such owners, and which has not been vacated in pursuance of law. The term 'highway' includes rights of way, bridges, drainage structures, signs, guard rails, protective structures and all other structures and appurtenances necessary or convenient for vehicular traffic. A highway in a rural area may be called a 'road', while a highway in a municipal area may be called a 'street'."

However, since your question is raised in the context of traffic law enforcement, the most pertinent definitions of private and public roads can be found in the Illinois Vehicle Code. Ill. Rev. Stat. 1973, ch. 95 1/2, par. 1-100 et seq.

Section 1-163 of the Illinois Vehicle Code (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 1-163), which defines "private road or driveway" for purposes of the Act, provides:

"Private road or driveway. Every way or place in private ownership and used for vehicular travel by the owner and those having express or implied permission from the owner, but not by other persons."

The word "highway" is defined in section 1-126 of the Illinois Vehicle Code (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 1-126) which provides:

"Highway. The entire width between the boundary lines of every way publicly maintained

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when any part thereof is open to the use of the public for purposes of vehicular travel."

The above cited definition of "highway" applies throughout the Illinois Vehicle Code except when the context otherwise requires and except where another definition set forth in another chapter of the Act and applicable to that chapter or a designated part thereof is applicable. Ill. Rev. Stat. 1973, ch. 95 1/2, par. 1-101.

However, section 11-100 of the Illinois Vehicle Code (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-100) sets forth a special definition of "highway" for purposes of chapter 11 of the Act, the Illinois Rules of the Road (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-100 et seq.). Said section provides in pertinent part:

"Notwithstanding the definitions set forth in Chapter 1 of this Act, for the purposes of this Chapter, the following words shall have the meanings ascribed to them as follows:

Street or Highway. The entire width between boundary lines of every way or place of whatever nature when any part thereof is open to the use of the public as a matter of right for purposes of vehicular traffic, other than public ways for vehicular traffic

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within a park district for which the park district has maintenance responsibility, excepting the Chicago Park District." (Emphasis added.)

The feature which distinguishes the above definition of "highway" from that contained in section 1-126 of the Act, supra, is the "matter of right" language in the former definition. An explanation of the significance of this distinction can be found in the explanatory provision to section 1-126 (S.B.A., Statutes, ch. 95 1/2, par. 1-126, Source Comment) which provides in pertinent part:

"It is to be noted that the main difference between the definition of the term 'highway' set out in the Uniform Traffic Act and that found in the Illinois Motor Vehicle Law lay in the addition of the phrase 'as a matter of right'. Traffic safety officials preferred the definition in the Illinois Motor Vehicle Law since in their opinion traffic laws should apply if the public was using the highways regardless of whether or not they used the highway as a 'matter of right'."

There is no special definition of "private road" applicable only to chapter 11 of the Act, the Illinois Rules of the Road, supra. However, section 11-210 of said chapter of the Act (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-210) provides:

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"Nothing in this Chapter shall be construed to prevent the owner of real property used by the public for purposes of vehicular travel by permission of the owner and not as matter of right from prohibiting such use, or from requiring other or different or additional conditions than those specified in this Chapter, or otherwise regulating such use as may seem best to such owner."

Several cases dealing with the distinction between private road and highway are particularly pertinent to your question. In Cihal v. Carver, 334 Ill. App. 234, a personal injury action, an issue was whether the plaintiff, when injured by plaintiff's automobile, was in a "crosswalk" within the meaning of the Uniform Act Regulating Traffic on Highways. (Ill. Rev. Stat. 1947, ch. 95 1/2, par. 111.) The court noted that "crosswalk", as defined by the pertinent statute, referred to crosswalks at highway intersections and therefore excluded crosswalks at the intersection of a highway and a private road. Thus, concluded the court, plaintiff was not in a "crosswalk" within the meaning of the Act.

In connection with the determination that one of the intersecting roads was a private road and not a highway, the Cihal court indicated that the phrase "open to the public as

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a matter of right" contained in section 109(a) of the Act (Ill. Rev. Stat. 1947, ch. 95 1/2, par. 109(a)) meant a "street or highway" given to the public for a public use and one which every citizen has a right to use. The evidence as to the road in question indicated that on each side thereof brick pillars were imbedded in stone slabs which bore inscriptions reading "private way". In addition, attached to the brick pillars and facing the private way were metal brackets from which a sign was suspended bearing the words "Clearing Industrial District". Consequently, the evidence appeared to support the court's conclusion that the road in question was in fact a private road.

In People v. Kyle, 341 Ill. 31, the defendant was charged with driving an automobile on a public highway while intoxicated. The alleged violation occurred on Irving Park boulevard in the city of Chicago. One of defendant's allegations was that there was no proof supporting the allegation that Irving Park boulevard was a public highway as defined by law. The court indicated that whether a street or road is a public highway may be proved by parol evidence and held that the record established that Irving Park boulevard was a public highway.

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People v. Tadd, 12 Ill. App. 3d 391, involved a speeding charge pursuant to section 11-601 of the Illinois Vehicle Code. (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-601.) The alleged offense occurred on Circle and Graham Drives on the campus of Northern Illinois University. The issue was whether the offense took place on a "highway" within the meaning of section 11-100 of the Act, supra.

The roads in question were owned by the Board of Regents, pursuant to its power to acquire and hold property under section 7 of the Regency Universities Act. (Ill. Rev. Stat. 1973, ch. 144, par. 307.) Although under the Act the Board held the roads for the use of Northern Illinois University, the State of Illinois remained the beneficial owner. The court indicated, however, that the fact of ownership was not decisive since the ultimate question was whether the public could use the roads "as a matter of right".

The court noted that, while the Board of Regents could, in furtherance of particular needs and uses of the university, deny use of the roads to the general public "as a matter of right", there was no evidence in the record directed to the

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question whether the right to use the roads located on the campus had in fact been qualified or denied except as a matter of permission under proper grant of authority. Consequently, the court reversed and remanded the case for a determination on this question.

The rule which emerges from Cihal, Kyle, and Tadd is that the question of whether a particular road is a "private road" or a "highway" must be determined on the facts of each case. Tadd, which is particularly relevant to your question since it involved a violation under chapter 11 of the Illinois Vehicle Code, further indicates that a number of factors must be considered in determining whether the public "as a matter of right" can use a particular road. According to Tadd, a factor to be considered is whether a controlling authority has the authority to qualify or deny the use of a particular road to the public and whether said controlling authority has in fact exercised such authority. Thus, in answer to your first question, it is my opinion that the fact that a particular road is privately maintained does not necessarily make such road a "private road".

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I express no opinion as to your second question. This is a matter which the private owners must decide and is of no concern to the state's attorney or sheriff.

As to your third question, even if the roads in question are in fact private roads, motorists may not be completely immune from traffic law enforcement. Section 11-201 of chapter 11 of the Illinois Vehicle Code (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-201) provides:

"The provisions of this Chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except:

1. Where a different place is specifically referred to in a given section.
2. The provisions of Articles IV and V of this Chapter shall apply upon highways and elsewhere throughout the State."

The effect of the above cited provision is demonstrated by two cases. In People v. Erickson, 108 Ill. App. 2d 142, the defendant was charged with driving a vehicle while under the influence of intoxicating liquor. The alleged violation took place in a privately owned parking lot. The pertinent statute contained language identical to that in the present section 11-201 of the Illinois Vehicle Code, supra, such that the violation for

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which the defendant was charged applied "upon highways and elsewhere throughout the State". Thus, the question was whether the offense charged was applicable to the defendant when he was upon private property. The court held that the alleged offense applied to defendant by stating at page 145:

"The Illinois Legislature, unlike the New Jersey Legislature, expressly and specifically provided that the offense of driving a vehicle while under the influence of intoxicating liquor would apply, not only if it occurred upon highways, but 'elsewhere throughout the State.' Since the legislature used the word 'elsewhere' instead of 'anywhere,' we interpret the intent to include private areas that are devoted to a semipublic use as contrasted to areas that are strictly private in use. The parking lot involved herein was devoted to a semipublic use and therefore the statute applied."

In People v. Kozak, 130 Ill. App. 2d 334, the defendant was charged with driving a motor vehicle while his driver's license was suspended in violation of section 6-303(a) of the Illinois Vehicle Code. (Ill. Rev. Stat. 1967, ch. 95 1/2, par. 6-303(a).) The violation took place in a private parking lot. One of the defendant's contentions was that the statute under which he was charged was not applicable to the facts of the case since said statute only applied, by its terms, when a person is

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driving a motor vehicle on a highway of the State. The court, in holding that the alleged offense did not apply to the facts of the case, distinguished the Erickson case by stating at page 336:

"However, in the present case the statute makes it a punishable offense to drive without a license on a highway without expanding the prohibition to 'elsewhere throughout the state.' Therefore, the prohibition does not extend to operation of a motor vehicle in a privately-owned parking lot."

Consequently, in answer to your third question, whether motorists on private roads are immune from traffic law enforcement depends upon the particular violation in question. The statute under which an alleged violation occurs must be examined to determine where it applies. As section 11-201 of the Illinois Vehicle Code, supra, clearly indicates, motorists, even though traveling on private roads, may not be completely immune from traffic law enforcement.

As to your fourth question, no opinion is expressed. Whether the sheriff shall patrol such private roads is a matter for his discretion.

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In regard to your fifth question, section 11-209.1 of the Illinois Vehicle Code (Ill. Rev. Stat. 1973, ch. 95 1/2, par. 11-209.1) provides:

"Upon the filing of the written request by an individual, by the board of directors of any corporation, or by the board of directors of any association, owning, operating or representing a residential subdivision, development, apartment house or apartment project containing 10 or more apartments or single family residences, with the corporate authorities of any municipality or county within which the property is situated, that the police department of the subject municipality or county regulate traffic and access to the semipublic or private roads, streets, driveways, trails, terraces, bridle paths, parkways, parking areas or other roadways open to or used by the public, tenants, owners and employees for the purposes of vehicular traffic by permission of such individuals, corporations or associations and not as a matter of public right, the corporate authorities of that county or municipality may establish and enforce regulations applicable to traffic on and access to such private roads and areas. A written request under this Section must contain the name and post-office address of the individual, corporation or association making it and designate with reasonable accuracy the semipublic or private roads, streets, driveways, trails, terraces, bridle paths, parkways, parking areas, or other roadway open to or used by vehicular traffic to be regulated.

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All regulations adopted and traffic control devices employed by a municipality or county in the regulation of traffic on private roads and within private areas pursuant to this Section shall be consistent with the provisions of Chapter 11 of the 'Illinois Vehicle Code', approved September 29, 1969, as now or hereafter amended, and shall conform to the State Manual and Specifications.

Any individual, corporation or association which has filed a request under this Section may rescind that request by filing with the corporate authorities of the municipality or county in which the original request was filed a written rescission of the request. These corporate authorities shall then direct that the regulation of traffic shall cease to be applicable to the road, street, driveway, trail, terrace, bridle path, parkway or other roadway used by vehicular traffic, set forth in the rescission, effective as of the first day of January in the year next following the filing of the rescission. No rescission may, however, be filed within 12 months of the date when the request was filed under this Section.

The filing of a written request under this Section in no way constitutes a dedication to public use of any such roads, streets, driveways, trails, terraces, bridle paths, parkways, parking areas, or other roadways open to or used by vehicular traffic nor does it prevent such individuals, corporations or associations as owners of such property open to or used by the public for purposes of vehicular traffic by permission of such individuals, corporations or associations and not as a matter of public right, from prohibiting

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such use or from requiring other or different or additional regulations than those specified by the corporate authorities or otherwise regulating such use as may seem best to such individuals, corporations or associations.

This amendatory act of 1972 is not a prohibition upon the contractual and associational powers granted by Article VII, Section 10 of the Illinois Constitution."

Thus, if the roads in question are in fact private roads, the sheriff's squad could patrol said roads upon the filing of a written request with the county pursuant to section 11-209.1 of the Act, supra.

Very truly yours,

A T T O R N E Y G E N E R A L