

COUNTY ROAD:
REPAIR A "USE" OF
ROAD:



November 19, 1951

Repair of county roads is "use" under Sec. 392.080, RSMo 1949, authorizing construction and maintenance of telephone and telegraph lines along public roads in such manner as not to incommode the public in the use of such roads. Telephone wires preventing grading of shoulders may be obstructions as much as if placed in traveled portion of roads and may incommode public in use of roads. May be public nuisances, and enjoined as such.

11-20-51

Honorable Charles E. Murrell, Jr.,
Prosecuting Attorney
Edina, Missouri

Dear Sir:

Receipt of your request for a legal opinion of this department is hereby acknowledged, said request reads as follows:

"In reference to Section 392.080, R.S. Mo. 1949, I would like to have the opinion of your office as to whether or not the portion of said statute which states 'in such manner as not to incommode the public in the use of such roads' includes construction, repair and maintenance of roads as a public use of such roads."

Not being certain of the exact nature of your inquiry, we asked you to give further details concerning same. You have complied with our request, and we quote the pertinent part of your last letter as follows:

"In connection with the request for an opinion relative to Section 392.080 R. S. Mo. 1949, we have, on several roads in this county, telephone lines constructed in such a manner as to interfere, because of their low height, with the grading of the roads and maintenance of the same. It would appear, from the above mentioned section of the statutes, that we might be

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able to require the telephone companies to construct their lines of sufficient height above the right-of-way to permit the county to improve and repair the roads, including the grading of the shoulders, on the grounds that such repair and maintenance is a public use of such roads."

Section 392.080, RSMo 1949, to which reference is made reads as follows:

"Companies organized under the provisions of sections 392.010 to 392.170, for the purpose of constructing and maintaining telephone or magnetic telegraph lines are authorized to set their poles, piers, abutments, wires and other fixtures along, across or under any of the public roads, streets, and waters of this state, in such manner as not to incommode the public in the use of such roads, streets and waters; provided, any telegraph or telephone company desiring to place their wires, poles and other fixtures in any city, they shall first obtain consent from said city through the municipal authorities thereof."

It appears that telephone lines have been constructed along the right of ways of several county roads in your county of an insufficient height above the ground to permit the county to grade and maintain the roads. You further state that the county should be able to require the telephone companies to construct their lines a sufficient height above the right of ways to permit the improvement and repair of the roads on the ground that the repair and maintenance is a public use of such roads.

The opinion request based on such facts asks for an interpretation of Section 392.080, RSMo 1949, supra, particularly that portion which provides, "* * *in such manner as not to incommode the public in the use of such roads* * *."

The request makes the further inquiry as to whether or not the construction, repair and maintenance of such roads are to be considered as a "use" thereof, within the meaning of this section.

The primary purpose for which all roads, streets, and highways are constructed and maintained is for the travel and transportation thereover by the public, and for any other use which

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may be incidental to such primary purpose.

The right of the public to use a public road for travel or transportation is a fundamental right which cannot be encroached upon by individuals or corporations. Such roads are for the general use of the public without discrimination, each traveler having the same right to travel, or transport his property thereover as that possessed by every other person. However, we do not mean by this statement that the right is absolute or unqualified, for such is not the case. In the exercise of the police power, the state may make such reasonable rules and regulations effecting the traffic over its roads as may be necessary for the preservation of the safety of the lives and property, as well as for the convenience of all persons traveling over the roads. The state may, by legislative grant allow the use of its roads for other public purposes than travel or transportation, so long as such uses do not unnecessarily or unreasonably impede public travel or transportation. Anything which may constitute an obstruction, or an excessive use of a public road, or which may inconvenience or impede public travel is a public nuisance, and under certain circumstances may be enjoined as such.

In this connection we call attention to the case of State v. Campbell, 80 Mo. App. 110, l. c. 113, the court said:

"* * *Any encroachment upon any part of the highway, whether upon the traveled part thereof or on the sides comes clearly within the idea of nuisance. Every person has a right to go over or upon any part of the highway, and the fact that from the notions of economy, or otherwise, the public authorities having the same in charge have not seen fit to work the whole of it, does not alter or change the right. A traveler has the right to go anywhere on the right of way outside of the beaten track of the highway if he so chooses, and any obstacle placed in the way of his doing so is an infringement and obstruction of a public right, and an annoyance and therefore a public nuisance.

"The obstacle must however, be of such a character and kind as to operate as an obstruction to public travel, or to public rights, or to endanger the safety of persons traveling there, or as to offend and annoy those who come in contact with it.

* * *"

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Referring to the opinion request again, it appears an implication is made that the improvement, maintenance or repair of the public roads of your county might be classified, as a "use" within the meaning of that portion of Section 392.080, last quoted.

It is common knowledge that the shoulders and ditch lines are a part of every public road, and that their repair and improvement are indispensable to keeping a road in proper condition for the use for which it was constructed. It follows as a matter of course that when obstructions are placed on the right of way of a public road which prevents the improvement and repair of the shoulders or ditch lines of the road, so that it cannot adequately serve the public, the public will be inconvenienced in the use of such road, and the obstruction will be as much an obstruction and an inconvenience to the public as if it had been placed in the traveled portion of the road.

From the facts in the case of County Court v. White, 91 S. E. 350, it appears that a county road was being reconstructed. Telephone lines located on the right of way interfered with the machinery being used to widen the road, and it was necessary to remove the poles and wire before the construction work could be resumed.

In the State of West Virginia, where the road was being reconstructed, a statute in effect provided that where the telephone or other poles and wires constituted an obstruction in a public highway, the owner of such line was required to remove the same at his own expense. The controversy which developed in the case was whether the telephone company should remove its line or whether the contractor reconstructing the road should do so.

We have no statute in Missouri requiring the owner of telephone or other lines to remove them at his own expense when the lines on the right of way of public roads interfere with the construction or improvement of the roads and we are not here concerned with the controversy mentioned. We cite the case for other important reasons, since we believe that if an obstruction on the right of way is of such nature as to prevent the improvement or repair of the road, including the grading of the shoulders, it is as much an obstruction of the road as if it had been placed in the traveled portion of said road, and that the public will be inconvenienced in its use of the road by reason of said obstruction.

We quote from that part of the opinion of said case found at l. c. 351, as follows:

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"* * *The right of the public in the highway for the purpose of travel in the ordinary modes is a primary and fundamental right, and is not limited to that portion only of the right of way heretofore traveled. Respondents have a permissive and subordinate right only, which exists only so long as it does not interfere with the primary and superior rights of the traveling public. Such primary right to occupy any and all parts of the right of way for the purpose of a roadway necessarily implies the right to widen and improve the traveled portion of the road, whenever it becomes necessary for the better accommodation of the public. This principle was not controverted in the argument. But it was contended that the poles did not interfere with travel in the roadway, and that, being in the way only of the work of improving the highway, it was therefore the duty either of the county court or of their contractors to remove them in a careful manner, at their own expense. This is certainly not the law. Section 56a(77), c 43, Barnes' Code (Code 1913, Sec. 1844) reads as follows:

"It shall be the duty of all telephone, telegraph, electric railway or other electrical companies, to remove and reset, telephone, telegraph, trolley and other poles and the wires connected therewith, when the same constitute obstructions to the use of the public road by the traveling public."

"This statute imposes the duty upon a telephone company to remove its poles and wires when they constitute obstructions to the use of the public road either for travel or for the purpose of repair. The widening and permanently improving the road now being done is for the benefit of the traveling public, and the interference by the poles and wires with this work, while not within the letter of the statute, is clearly within its spirit and intendment, and the duty to remove the poles is as imperative upon respondents as if they stood in the old roadbed and did actually hinder travel thereon. It is clearly such an interference as is

contemplated by the statute. Interference with the work of improving a highway for better traveling is necessarily an incidental interference with public travel. It is not shown that the contractors were under any contractual obligation to remove the poles, and the law certainly imposes no such duty as an incident to their undertaking."

(Underscoring ours.)

In view of the foregoing, it is our thought that telephone lines located on the right of ways of the roads of your county, and maintained in such a manner as to prevent the grading of the shoulders may constitute obstructions (and public nuisances) of said roads as much so as if placed in the traveled portion of same. While it may be proper for the county court to request the owner to raise their telephone lines a sufficient height to permit the grading of the shoulders of the county roads, it appears that the more effective remedy, particularly in the event the lines should not be raised, would be an action to enjoin the public nuisance under such circumstances.

The county roads cannot adequately serve the public in carrying the traffic for which they were constructed unless they are continually improved and repaired, and anything which prevents such improvement or repair work will surely incommode the public in the use of said roads. It is our further thought that such improvement and repair, including the grading of the shoulders might properly be classified as a "use" of such roads, within the meaning of Section 392.080, supra.

CONCLUSION

It is the opinion of this department that telephone and magnetic telegraph companies may construct and maintain their lines along, across, or under any of the public roads of the state under the provisions of Section 392.080, RSMo 1949, in such a manner as not to incommode the public in the use of such roads, but where a telephone company constructs and maintains its lines an insufficient height above the right of way of certain county roads to permit the improvement, and grading of the shoulders, thereby allowing said roads to become in disrepair and travel hindered, or made impossible, the public will become incommoded in the use of such roads, and the repair, and grading of the shoulders will constitute a "use", within the meaning of Section 392.080,

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supra. Under such circumstances the telephone lines may become as much an obstruction as if placed in the traveled portion of such roads, and may be enjoined as public nuisances.

Respectfully submitted,

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APPROVED:



J. E. TAYLOR
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