



**OFFICES OF THE
ATTORNEY GENERAL OF MISSOURI
JEFFERSON CITY**

JOHN C. DANFORTH
ATTORNEY GENERAL

January 26, 1976

OPINION LETTER NO. 5

Honorable Jerold L. Drake
Representative, District 5
c/o House Post Office, Capitol Building
Jefferson City, Missouri 65101

Dear Representative Drake:

This is in response to your request for an opinion from this office as follows:

"Does a township board have power to approve the utilization of a public road as a levee by a private landowner for a private purpose and thereby completely eliminate the ditch beside the road as a waterway contrary to R.S.Mo. section 229.150.

"Certain landowners have erected levees to protect their lands from the flooding 102 river in Nodaway County, Missouri. The levees run from the bluff on the east to a township road on the west. The road itself has been utilized as a levee running north and south and joins up with east-west levees above described. In some instances the road itself was raised. The ditch on the east side of the road has been virtually eliminated and no water can enter it from the lands of adjoining landowners. The effect of the levees will be to aggravate flooding on other lands since water cannot get into the ditch and be carried back to the river. The levee construction has taken place in Grant township (Nodaway County) but the flooding will occur in Polk township (Nodaway County). The levees were constructed with approval of the Grant township governing body."

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Nodaway County is a third class county under township organization.

For the purposes of this opinion, we will assume that the road in question is a public road and under the control and supervision of a township board of directors.

Section 231.150, RSMo 1969, provides that all road laws of this state shall apply to counties under township organization unless otherwise specified.

Section 231.160, RSMo 1969, provides for the township board of directors to appoint a road overseer for each road district.

As we understand the facts of the matter under consideration, private landowners have constructed levees that join up at right angles with the public road by extending their levee onto the public road and thus eliminating the side ditch along the side of the road and preventing the water from escaping from said ditch. You inquire whether the township board has the power and authority to approve such levee under the provisions of Section 229.150, RSMo 1969.

Section 229.150, RSMo, provides as follows:

"1. All driveways or crossings over ditches connecting highways with the private property shall be made under the supervision of the overseer or commissioners of the road districts.

"2. Any person or persons who shall willfully or knowingly obstruct or damage any public road by obstructing the side or cross drainage or ditches thereof, or by turning water upon such road or right-of-way, or by throwing or depositing brush, trees, stumps, logs, or any refuse or debris whatsoever, in said road, or on the sides or in the ditches thereof, or by fencing across or upon the right-of-way of the same, or by planting any hedge or erecting any advertising sign within the lines established for such road, or by changing the location thereof, or shall obstruct said road, highway or drains in any other manner whatsoever, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than five dollars nor more than two hundred dollars, or by imprisonment in the county jail for not exceeding six months, or by both such fine and imprisonment.

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"3. The road overseer of any district, or county highway engineer, who finds any road obstructed as above specified, shall notify the person violating the provisions of this section, verbally or in writing, to remove such obstruction. Within ten days after being notified, he shall pay the sum of five dollars for each and every day after the tenth day if such obstruction is maintained or permitted to remain; such fine to be recovered by suit brought by the road overseer, in the name of the road district, in any court of competent jurisdiction."

We are enclosing herewith Opinion No. 21 issued February 1, 1940, to Donald B. Dawson, in which we considered the above-statutory provision which rules that it is the duty of the road overseer to remove any and all obstructions on any of the public roads in his district in a township organization county.

We are also enclosing Opinion No. 424 issued November 18, 1970, to Lee E. Norbury, to the effect that a county court or a highway officer has no authority to surrender the use of a highway for private purposes such as to permit the flooding of a public road by watershed subdistricts.

We are also enclosing Opinion No. 201 issued May 10, 1974, to Michael L. Shortridge in which we referred to Camden Special Road Dist. of Ray County v. Taylor, 495 S.W.2d 93 (Mo.Ct.App. at K.C. 1973) which held that under the common enemy doctrine landowners have the right to construct levees on their property to ward off surface water from their property even though the indirect result of doing so was to back surface water onto the public road. However, in that case the levee was constructed entirely upon the private property and not upon a public road which distinguishes that case from the facts under consideration.

We are enclosing herewith Opinion No. 58 issued June 2, 1953, to Leon McAnally, to the effect that any person who willfully and knowingly deposits refuse in the side drainage ditches of a public road, which obstructs the flow of water therein regardless of whether the road is damaged or the traveled portion is obstructed, is punishable under Section 229.150, RSMo.

The township board of directors in a county under township organization are public officers and have only such powers and authority as expressly given them by statute and that which is necessary to perform those expressly granted.

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It is our view that when drainage is provided and side ditches are established for public roads the public agency in charge does have the right under Section 229.150, RSMo, to remove any obstruction from the side ditch that obstructs the flow of water in the side ditch.

Yours very truly,



JOHN C. DANFORTH
Attorney General

Enclosures: Op. No. 21
Dawson, 2-1-40

Op. No. 424
Norbury, 11-18-70

Op. No. 201
Shortridge, 5-10-74

Op. No. 58
McAnally, 6-2-53