

HIGHWAY: Abutting owner can build drain along unused part of highway.

May 8, 1936.

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Honorable Vane C. Thurlo
Prosecuting Attorney
Linn County
Linneus, Missouri

Dear Sir:

We have received your letter of April 22, 1936, which reads as follows:

"I respectfully request the opinion of your department upon the following proposition: The Metropolitan Life Insurance Company owns a large body of land in this County, and they desire to erect around this land a levy and drain the levied land by running an open ditch on the right-of-way of a public road for a distance of about sixty feet, the ditch to be an open ditch running on the right-of-way of the road, but not crossing the travelled portion of the road.

"The Township Board is willing to permit the construction of this ditch if they have the authority. This ditch will empty into a creek upon which is maintained a County bridge, the mouth of the ditch to be on the road right-of-way, and the levy that the ditch drains will be constructed on the company's farm.

"My question is, does the Township Board have the authority under the law to permit the construction and the maintenance of the ditch on the right-of-way, as the levy and the ditch will be erected and maintained for the sole benefit of the company in draining their farm, but it will, it is felt, be a benefit to the road,

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inasmuch as it will assist in draining off overflow as well as surface water from the road proper."

It is a well settled rule in Missouri that the owner of land adjoining on a public highway, owns the fee to the center thereof, subject to an easement in the public.

57 Mo. 583; 86 Mo. 419; 135 Mo. 366.

Where this rule obtains it is as well settled that the owner of the abutting property may make such use of the land within the highway as will not interfere with its use for public travel.

15 Am. and Eng. Enc. Law (2d) Ed.
p. 416; 29 C. J. p. 548; Elliott's
Road and Street, Par. 876.1.

The use which the abutting owner may make of the highway includes the right to maintain ditches and drains for the benefit of his land, providing he maintains no nuisance in so doing, nor interferes with its use as a highway.

56 Mo. App. 599; 43 Mo. App. 176;
29 C. J. p. 550.

In *Holm v. Montgomery*, 62 Wash. 398 it was held that an abutting owner having the fee of the highway may use the untraveled portion as a ditch to carry water to his premises for irrigation purposes so long as he does not create a nuisance or interfere with public use of the way.

We have taken it from your letter that the ditch is run entirely along the property of the person who is to benefit by it. If it is to run along the abutting property of someone else, their permission must be obtained.

CONCLUSION.

It is, therefore, our conclusion that an abutting property owner can build a ditch along the unused part of the highway as a drain for his land.

APPROVED:

Respectfully submitted

JOHN W. HOFFMAN, Jr.
(Acting) Attorney General.

J. E. TAYLOR
Assistant Attorney General.