

March 20, 1967



OPINION NO. 150  
Answered by Letter, Ashby

Honorable Albert F. Turner  
Attorney at Law  
William Grove National Bank Building  
Mountain Grove, Missouri

Dear Mr. Turner:

This letter answers your inquiry concerning the authority of a township in maintaining public roads to go upon that property located between the ditch line of the road and the fence line of private property adjacent to such strip of land for purposes of weed control, etc.

You state in your letter that often there is no deed of record to the county to this strip of land lying between the road ditch and the fence marking the boundaries of the private land. You also state that this strip of land between the roadway ditch and the fence of the private land owners has been used by the public for quite a number of years. We assume for the purpose of the question here that the public use of this strip of land has been in excess of ten (10) years.

In Opinion 353, dated March 24, 1965, to the Honorable James Paul (which we attach), we considered a similar question where the roadway involved had been established by prescription and therefore the exact width of the road was not known. We held the road was the "used portion of the highway" and was not limited to the narrow

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travel tracks but to the full extent of any use by the public (as a question of fact) which the public may have exercised such as ditching and public maintenance of the side of the road (State v. Auffart, 180 S.W. 571, 572). We also pointed out in this opinion that it was possible for the owner of land contiguous to the road to dedicate additional land space for such use either by additional dedication in fact or by an implied dedication commonly referred to as an estoppel in pais (McIntosh v. Haworth, 124 S.W. 2d 653,656).

Certainly, if the land between the road ditch and the fence line was in fact public property, we believe there would be no question but that the township could properly maintain this strip.

We would conclude therefore that if the land lying between the road ditch and the fence line of the adjacent privately owned land is either public land in fact or has been dedicated to public use (for such a period in excess of ten (10) years) under Section 516.010 RSMo., 1959, that the township could properly enter upon and maintain the condition of the land lying between the road proper and the fence line of adjacent privately owned land.

In the last paragraph of your letter, you ask us for our "ideas as to the rights of the township and their liability, if any" in taking care of these land strips lying between the ditch line and the fence line of public roads. Without a specific problem accompanied by facts, we are unable to prepare a reply in detail inasmuch as any answer would necessarily depend on the substitution of conjecture for facts.

We do invite your attention to the case of Swineford v. Franklin County, 6 Mo. App. 39, 41 (affirmed in 73 Mo. 279) where the issue of county liability is discussed.

Yours very truly,

NORMAN H. ANDERSON  
Attorney General