

Official Opinion No. 82-45, County Commissioners' Authority to Order Removal of Weeds, Plants, and Trees From Rights of Way of Road Ditches in County Highway System

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County Commissioners' Authority to Order Removal of Weeds, Plants, and Trees From Rights of Way of Road Ditches in County Highway System

Dear Mr. Parker:

You have requested an official opinion from this office based on the following factual situation:

FACTS:

Weeds, brush, and small trees exist in the right of way of road ditches of the county highway system in various places in Douglas County. In addition, planted trees exist in the right of way of road ditches of the county highway system. The county commissioners are considering the removal of the 'volunteer' and 'planted' growths. Adjoining land owners have expressed their disapproval of the proposed action of the county commissioners.

Based on the foregoing facts, you have asked the following questions:

QUESTIONS:

1. Whether a county board of commissioners has power to order the removal of plants growing in the right of way of road ditches of the county highway system.
2. Whether a county board of commissioners has power to order removal of planted trees in the right of way of road ditches of the county highway system.

3. Whether the county board of commissioners has power to order the mowing of weeds growing in the right of way of road ditches of the county highway system even though an adjoining land owner has expressed his opposition to the mowing of the weeds.

4. Whether the county board of commissioners has power to order the removal of the growing weeds and obstructions growing in the right of way of road ditches of the county highway system and seek restitution of the costs from the adjoining owner.

IN RE QUESTION NO. 1:

SDCL 31-31-1 provides that:

It shall be the duty of the Department of Transportation, Board of County Commissioners of the various counties, and highway boards of unorganized counties to cut or remove, or cause to be cut or removed grass, weeds and brush growing within the right of way of all public highways within the respective jurisdiction and over which such department and boards exercise control as to repair and maintenance. A violation of this section is a petty offense.

While 'plants' are not specifically mentioned in the above statute, it is my opinion that their removal from public rights of way is governed and authorized by SDCL 31-31-1. See SDCL 38-28-1(9) regarding the definition of 'weed.' Therefore, a county board of commissioners has the power to order the removal of plants growing in the right of way of road ditches of the county highway system.

IN RE QUESTION NO. 2:

As with question number one above, the controlling statute is SDCL 31-31-1 which, while not specifically referring to trees, authorizes in my opinion, the county board of commissioners to order the removal of planted trees in the right of way of road ditches of the county highway system.

IN RE QUESTION NO. 3:

Once again SDCL 31-31-1 is applicable to the above situation and, in my opinion, authorizes a board of county commissioners to order the mowing of weeds growing in the right of way of road ditches despite the opposition of an adjoining land owner to such mowing.

IN RE QUESTION NO. 4:

The distinction between the county highway system and township highways is set forth in SDCL 31-1-5(2) and (3). Highways designated by the board of _county commissioners in organized counties and the highway board in unorganized counties under the supervision of those bodies that have been approved by the Department of Transportation constitute the 'county highway system.' 'Township highways' are those secondary highways in organized townships that are administered by a board of township supervisors. The above distinctions are pertinent for determination of whether a land owner can be required to make restitution for weed removal on the right of way adjoining his land.

Chapter 31-31 is concerned with weed removal along highways. While SDCL 31-31-1, which has been noted several times above, requires boards of county commissioners to remove weeds within the rights-of-way of public highways, as concerns township roads, however, those owning or occupying land abutting such roads are required to remove weeds growing within the right-of-way and can be taxed for neglecting to do so. See SDCL 31-31-2; 31-31-5, and 31-31-6. As no provision has been made for assessing costs of weed removal against owners and occupiers of land abutting a county highway, it is my opinion that a county board of commissioners has the power to order the removal of the growing weeds and obstructions in the right of way of road ditches of a county highway system, but the board of county commissioners does not have authority to seek restitution from the adjoining landowner. The same principles would apply to any other 'volunteer' growths and obstructions within the right-of-way, i.e., the board of county commissioners could have such obstructions removed from the _right-of-way of ditches of county highways, but could not assess costs against adjoining landowners. This analysis does not apply to 'planted' obstructions.

The following statute is determinative, in my opinion, of whether a board of county commissioners can remove 'planted' obstructions and recover the costs of such removal.

SDCL 31-32-9 states:

Duty of governing body to remove obstructions or repair--Recovery of expense from wrongdoer--Temporary obstruction for building purposes.--The governing body or board having charge of any street, road, or highway shall cause rock, stone, glass, or other obstruction placed in such street, road, or highway, to be removed therefrom, or in the event that the same is flooded by irrigation water, such street, road, or highway shall be

repaired and the city, township, or county, as the case may be, shall be entitled to recover of any person placing such obstruction in such street, road, or highway, or allowing the water to flow upon the same, the amount necessarily expended in the removal or repair thereof and such action may be commenced in any court in the county having jurisdiction thereof. This section shall not apply to the placing of rock or stone in the streets, roads, or highways temporarily for building purposes.

Therefore, it is my opinion that the board of county commissioners can remove, or cause to be removed, pursuant to SDCL 31-32-9, above, _obstructions planted in the right-of-way of ditches of the county highway system and can recover restitution for the costs of removal from the individuals who placed such obstruction in the right-of-way.

Respectfully submitted,

Mark V. Meierhenry
Attorney General