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March 15, 2018

Jay M. Leibel
Ipswich Township Attorney
113 Egan Avenue South
P.O. Box 6
Madison, SD 57042

OFFICIAL OPINION No. 18-01

**Re: Farming, Altering, Fencing, or Otherwise Obstructing or Altering
Section-Line Highways**

Dear Mr. Leibel,

You have requested an official opinion from the Attorney General's Office based on the questions listed below.

QUESTIONS:

1. Whether SDCL 31-31-2 requires the removal of vegetation only from the shoulder of a public highway right-of-way?
2. Whether the farming, fencing, or altering the grade of any portion of a section-line highway violates SDCL 31-18-1 in that it denies the general public access to the section-line highway?
3. Whether SDCL 31-32-7 prohibits farming of an unimproved section-line highway?
4. If landowners and occupants of land adjoining and abutting section-line highways are authorized to farm unimproved section-line highways, then

may they farm those section-line highways designated as full maintenance, minimum maintenance, and no maintenance?

5. If a landowner is allowed to farm a section-line highway, does this alter a township's obligation to provide signage on the section-line highway?

ANSWERS:

1. SDCL 31-31-2 requires removal of vegetation from the entire right-of-way to the extent that vegetation left in the right-of-way can be cut with a mower.
2. The answer to your question depends on a factual determination regarding whether farming or altering the grade of a section-line highway is an obstruction under SDCL 31-32-9, or whether a fence was erected in accord with SDCL ch. 31-25.
3. The answer to your question depends on a factual determination as to whether farming of an unimproved section-line highway violates SDCL 31-32-7.
4. A section-line highway's statutory maintenance level does not factor into the factual determination as to whether farming constitutes an obstruction or injury to a section-line highway under applicable statutes.
5. Nothing in state law indicates a township's obligation to provide signage transfers to landowners or occupants of land adjoining or abutting section-line highways if they are permitted to farm a section-line highway

FACTS:

The Board of Supervisors for Ipswich Township, in Edmunds County, observed that some landowners and occupants of land adjoining section-line highways under the township's jurisdiction were farming in the right-of-way of those highways. The Board also observed that some of those section-line highways were overgrown with vegetation.

IN RE QUESTION 1:

The South Dakota Supreme Court has continually reiterated the purpose of statutory construction is to discover a statute's true intent primarily through an analysis of its language. *In re Estate of Ricard*, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755-56. As a result, "[w]ords and phrases in a statute must be

given their plain meaning and effect.” *In re Taliaferro*, 2014 S.D. 82, ¶ 6, 856 N.W.2d 805, 806-07 (citations omitted). A statute that has clear, certain, and unambiguous language does not need interpretation; a court need only declare the Legislature’s clearly expressed intentions. *Id.* The clearly expressed intentions “must be determined from the statute as a whole, as well as enactments relating to the same subject.” *Id.* When construing statutes together, “it is presumed that the [L]egislature did not intend an absurd or unreasonable result.” *Id.* (alteration in original).

According to SDCL 31-31-2, the owners and occupants of land abutting or adjoining township roads must “cut, remove, or destroy or cause to be cut, removed, or destroyed, grass, weeds, trees, and brush growing on or in the *right-of-way* of such roads, provided that such roads are left in such condition that any and all undergrowth thereby or thereon can be cut with a mower” (emphasis added). You have asked whether the duty imposed by this statute applies only to the shoulder of a township highway right-of-way.

In South Dakota, any public highway dedicated to the public through continuous use “shall be sixty-six feet wide and shall be taken equally from each side of the road bed center line.” SDCL 31-3-1. Further, any public highway located by operation of SDCL “§§ 31-3-6 to 31-3-3, inclusive, shall be not less than four rods in width...” SDCL 31-3-18. Four rods is equivalent to sixty-six feet. *Rod*, Black’s Law Dictionary (10th Ed. 2014). Also, there is, by operation of law, a public highway along every section line, unless lawfully vacated or moved, that is at least “sixty-six feet wide and taken equally from each side of the section line[.]” SDCL 31-18-1, and 31-18-2; AGO 87-42 (citing *Thormodsgard v. Wayne Twp. Bd. of Supervisors*, 310 N.W.2d 157 159 (S.D. 1981)).

SDCL 31-31-2 contains no language that limits the duty it imposes to only the shoulder of a right-of-way. It is my opinion that “right-of-way,” as used in SDCL 31-31-2, includes all the land comprising the full width of the right-of-way of any township highway. This would be, at the very least and unless widened by further action by a public body, the sixty-six feet of land that comprises the right-of-way of a public highway in South Dakota. *See Douville v. Christensen*, 2002 S.D. 33, ¶ 11, 641 N.W.2d 651, 654 (citations omitted). The statute, therefore, mandates the landowner or occupant of any land abutting a highway under a township’s jurisdiction must remove “grass, weeds, trees, and brush growing on or in the” entire width of the right-of-way to the extent that the vegetation remaining in the right-of-way may be cut with a mower. SDCL 31-32-2.¹

¹ Regarding the control and removal of weeds under SDCL 31-31-2, I have previously opined that a township must remove all noxious weeds from

IN RE QUESTION 2:

As recited above, the purpose of statutory construction is to discover a statute's intent through an analysis of its text. *Taliaferro*, 2014 S.D. 82, ¶ 6. As such, "[w]ords and phrases in a statute must be given their plain meaning and effect." *Id.* No interpretation is needed when a statute's language is clear, certain, and unambiguous. *Id.*

A public highway exists along every section line in the state unless it has been lawfully vacated or moved. SDCL 31-18-1. Those section-line highways are open to travel by the public and may not "be lawfully obstructed by private citizens absent legal authority to do so." *Douville*, 2002 S.D. 33, ¶¶ 11-12 (citations and footnote omitted); AGO 85-40 (quoting 1947-48 AGR 140). You have requested my opinion as to whether farming, fencing, or altering the grade of any portion of a section-line highway denies the general public access to the highway and thereby violates SDCL 31-18-1.

To ensure all streets, roads, and highways remain free of obstruction the Legislature enacted SDCL 31-32-9. This statute provides:

[t]he governing body or board having charge of any street, road, or highway shall cause rock, stone, glass, or other obstruction placed in the street, road, or highway, to be removed, or in the event that the same is flooded by irrigation water, the street, road, or highway shall be repaired. The municipality, township, county, or other public corporation is entitled to recover from any person placing the obstruction in the street, road, or highway, or allowing the water to flow upon the same, the amount necessarily expended in the removal or repair, including a reasonable amount for attorney's fees, and the action may be commenced in any court in the county having jurisdiction. This section does not apply to the placing of rock or stone in the streets, roads, or highways temporarily for building purposes.

township roads, while the abutting or adjoining landowner is responsible for the control and removal of all other weeds on or in the township road right-of-way. See AGO 16-01.

SDCL 31-32-9.

One of my predecessors previously reviewed the requirements of SDCL 31-32-9. Applying the principles of statutory construction, Attorney General Meierhenry observed that, while the statute “enumerated rocks, stones, and glass as obstructions [that] must be removed,” it did not define farming as an obstruction requiring removal. AGO 85-40. Attorney General Meierhenry concluded the governing authority had a duty to make a factual determination as to whether farming obstructed the section-line highway. *Id.*

The definition of what constitutes an obstruction in SDCL 31-32-9 has not been amended since AGO 85-40 was issued. I find that Attorney General Meierhenry’s interpretation of the statute remains persuasive today. A township must undertake a factual determination, on a case-by-case basis, to decide whether farming or altering the grade of a section-line highway constitutes an obstruction that denies the public access to the highway. AGO 85-40.

Turning to your question regarding whether fencing a portion of section-line highway violates SDCL 31-18-1, the Legislature has provided limited legal authority for the placement of fences on section-line highways. SDCL 31-25-1 & 31-25-1.1. First, SDCL 31-25-1 grants a board of county commissioners the power to authorize the erection of fences across a public highway under certain circumstances. *Alto Twp. v. Mendenhall*, 2011 S.D. 54, ¶ 4 n.3, 803 N.W.2d 839, 841 n.3. Second, SDCL 31-25-1.1 allows a landowner to erect a fence across a section-line highway “that has not been ‘altered from its natural state in any way for the purpose of facilitating vehicular passage,’ so long as gates are present to permit suitable public access[.]” *Douville*, 2002 S.D. 33, ¶ 11 (quoting SDCL 31-25-1.1). Put differently, a landowner may put up a fence across an unimproved section-line highway so long as a gate allows the public access to the highway. SDCL 31-25-1.1. Both of these statutes contain language that preserves the general public’s right of access to a public highway.

A township must make a factual determination as to whether farming or altering the grade of a section-line highway obstructs the highway such to deprive the public access to the highway. The fencing of a public highway is statutorily allowed in limited circumstances. If carried out under the

provisions of the applicable statutes, erecting a fence on a section-line highway would not deprive the public access to the highway.

IN RE QUESTION 3:

According to SDCL 31-32-7, “[n]o unauthorized person may injure any highway by removing, destroying, or otherwise altering the grade constructed for such highway or by filling, obstructing, or otherwise altering the ditch [that] drains the grade of such highway or otherwise injures such highway in any manner.” A violation of the statute may result in liability to the alleged perpetrator—either criminal or civil. *Id.*; SDCL 31-32-8. The statute’s plain language evinces the Legislature’s intent to prevent activity that may have a deleterious effect upon a highway’s grade, or otherwise alter the ditch that drains the highway. SDCL 31-32-7.

You have asked whether SDCL 31-32-7 prohibits farming on unimproved section-line highways. As discussed above, Attorney General Meierhenry has already opined that a public body must make a factual determination as to whether farming constitutes an obstruction of a public highway. I conclude, similarly, that for a violation of SDCL 31-32-7 to lie, there needs to be evidence that farming of the unimproved section-line resulted in an injury to the highway as contemplated by the statute. A factual determination must be reached, on a case-by-case basis, as to whether farming on a particular section-line resulted in any of the harmful effects prohibited by the SDCL 31-32-7. *See* AGO 85-40. If a township determines the section-line highway has been injured in a manner proscribed by the statute, the township may seek relief in circuit court in accordance with SDCL 31-32-8.

IN RE QUESTION 4:

A township is responsible for the maintenance of all section-line highways under its jurisdiction. SDCL 31-13-1. It may determine the level of maintenance for each section-line highway by designating the highway as full, minimum, or no maintenance. SDCL 31-13-1.1, -1.3, and -1.4. Section-line highways designated as full maintenance require a township to “construct, repair, and maintain” the highways. *See* SDCL 31-13-1. Those highways designated as minimum maintenance “may be maintained at a level less than the minimum standards for full maintenance roads, but shall be maintained at the level required to serve the occasional or intermittent traffic.” SDCL 31-13-

1.1. Section-line highways designated as no maintenance do not require a township to “construct, repair, and maintain” the highway—except to remove manmade obstructions. SDCL 31-13-1, and -1.4. Regardless of designation, a township must still act as a trustee in ensuring the public has access to the section-line highway. *Douville*, 2002 S.D. 33, ¶ 12.

Based on the principles of statutory construction recited above, it is evident that SDCL 31-13-1.1, 31-13-1.3, and 31-13-1.4 only contemplate the level of maintenance required for section-line highways under a township’s jurisdiction. These statutes have no bearing on whether a landowner or occupant of land adjoining or abutting a section-line highway may farm a portion of the highway. Whether a landowner or occupant of land adjoining or abutting a section-line highway may farm a section-line highway necessitates a factual determination as to whether the section-line has been obstructed or its grade altered or damaged. *See supra* Answers 2 and 3.

IN RE QUESTION 5:²

Finally, you have asked whether townships are responsible for signage if landowners or occupants of land adjoining or abutting section-line highways are authorized to use section-line highways for farming. After reviewing the applicable statutes, nothing indicates a township’s responsibility to post signage transfers to landowners or occupants of land adjoining or abutting section-line highways if they are permitted to farm a section-line. *See* SDCL 31-13-1.2, -1.5, -1.7, 31-25-10, -11, 31-28-6, -7, -13, & -21.

CONCLUSION

² You have also asked whether a landowner loses the liability protection provided by SDCL 31-18-5 if the landowner farms or fences an unimproved section-line highway. SDCL 31-18-5 states that no landowner owes a duty of care to keep an unimproved section line highway safe for entry or use by a person entering for an outdoor recreational purpose or tourism activity. Official Opinions of the Attorney General are issued only on questions of law related to the official duties of the requesting officer or public entity. The individual legal liability of landowner is not a question of law related to the duties of a township or its board of supervisors.

It is my opinion that SDCL 31-31-2 requires removal of vegetation from the entire sixty-six foot right-of-way that comprises a public highway. Further, a factual determination must be made as to whether farming a section-line highway constitutes an injury as contemplated by SDCL 31-32-7; and whether farming, fencing, or altering the grade of any portion of a section-line highway is an obstruction within the meaning of SDCL 31-32-9. The level of maintenance assigned to section-line highways does not have, in my opinion, any bearing on the above-referenced factual determinations. Finally, nothing in state law indicates that a township's responsibility to post signage transfers to a landowner or occupant of land abutting a section-line highway if that person is permitted to farm the section-line highway. The opinions issued herein are based upon existing law, and it's important to recognize that the Legislature is free to provide greater clarification of these issues through its statutory enactments.

Sincerely,

A handwritten signature in black ink, appearing to read "Marty J. Jackley", with a long, sweeping horizontal stroke extending to the right.

Marty J. Jackley
ATTORNEY GENERAL

MJJ/CPM/SRB/lde